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Responsibility for Violations of Human Rights and International Humanitarian Law by United Nations Peacekeeping Forces

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Preface

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INTRODUCTION

When the United Nations (UN) as an international organization was finally founded in 1945 with the signature and subsequent entry into force of the UN Charter,[1] its constitutive document, one of its main purposes was the maintenance of international peace and security.[2] After the atrocities of the First and Second World War, respectively, the attainment of the world peace was going to be a priority for the world leaders of the time.[3] Similarly, with the two World Wars in mind, respect for human rights and fundamental freedoms without discrimination was introduced as another leading goal of the organization.[4]

In light of the continuous emergence of conflicts in different parts of the globe, the UN had to act. As a response, the UN created what became to be known as 'peacekeeping,' *i.e.* "a type of military action, used as a tool in the UN system of collective security, which is consent based and tries to maintain or preserve peace with no or only a minimal use of force."[5]

Soon thereafter, this type of peace operation was going to be widely acknowledged, and three fundamental principles for the conduct of this traditional way of peacekeeping were consolidated, which are consent of the parties, impartiality and non-use of force except in self-defence and defence of the mandate.[6]

Nevertheless, with the proliferation of conflicts, new forms of peace operations originated. In this vein, UN peace operations have developed from traditional peacekeeping operations to multidimensional peacekeeping operations,[7] and even to peace enforcement operations,[8] also called robust peacekeeping,[9] and operations in partnership with other international and regional organizations, such as the African Union (AU), the European Union (EU) and the North Atlantic Treaty Organization (NATO).[10]

While traditional peacekeeping includes observance and monitoring of hostilities and ceasefires and is more focused on the deployment of unarmed or moderately armed forces, known as "blue helmets" or "blue berets," to address interstate conflicts,[11] multidimensional peacekeeping operations are "composed of a range of components including military, civilian

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[1] *United Nations*, Charter of the United Nations – Introductory Note, https://www.un.org/en/sections/un-charter/introductory-note/index.html (last accessed on 13/04/2020).
[2] Art. 1 para. 1 of the UN Charter.
[3] Preamble of the UN Charter.
[4] Art. 1 para. 3 of the UN Charter.
[5] *Bothe*, in: Simma et al. (eds.), The Charter of the United Nations, Special Section: Peacekeeping, MN 1, pp. 1174-1175.
[6] *United Nations*, United Nations Peacekeeping Operations: Principles and Guidelines (Capstone Doctrine), https://www.un.org/ruleoflaw/files/Capstone_Doctrine_ENG.pdf, pp. 31-34 (last accessed on 13/04/2020).
[7] *Larsen*, Human Rights Treaty Obligations of Peacekeepers, p. 7.
[8] *McCoubrey/White*, p. 6.
[9] *Chesterman/Johnstone/Malone*, p. 333.
[10] *Fleck*, in: Clapham/Gaeta (eds.), Handbook of International Law in Armed Conflict, p. 206, 217.
[11] *McCoubrey/White* (note 8), p. 4; *Doyle/Sambanis*, p. 12.

police, political, civil affairs, rule of law, human rights, humanitarian, reconstruction, public information and gender."[12]

On the other hand, a departure from the founding principles of traditional peacekeeping has taken place in some operations with the establishment of peace enforcement operations, which usually consist of economic sanctions or military enforcement actions,[13] and which may lack the consent, impartiality and non-use of force requirements, as they are "essentially coercive action taken against a state or a faction within a state […] to force compliance with decisions of the Security Council."[14] These operations are highly controversial because in many cases it is difficult to distinguish between purely military enforcement actions, which are mandated armed forces of individual States not under UN command, but under that of their respective States, and peacekeeping which undertakes enforcement action, which is a mixed approach that combines traditional peacekeeping operations with mandated forces.[15]

With all the aforementioned types of operations for worldwide peace, it would seem that there is a well-established system of collective security and that the maintenance of international peace and security, and thus, the protection of human rights and fundamental freedoms is guaranteed thanks to the UN and its Members. However, can all this system be considered an utopia? Because the practice is far from being a reality.

Despite the fact that the development of the system over the years is undisputed, and that there have been many successful peace operations,[16] the number of violations of human rights and International Humanitarian Law (IHL) by UN peacekeeping forces has increased concurrently with the intensification of the missions.[17] As a result, the credibility of the UN as an international organization that stands for the maintenance of international peace and the protection of human rights is at the spotlight but, most importantly: Who will take the responsibility for these violations? Will the participating States or the UN incur responsibility? Or can perhaps other participating international organizations such as NATO, that in several occasions undertakes peace operations authorized by the UN, also assume its responsibility?

The objective of the present Master's Thesis is, therefore, to analyse who can bear the responsibility for these wrongful acts. On this basis, several matters of contention such as the effective control test and the command and control of peace operations will play a decisive role.

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[12] *United Nations*, Handbook on United Nations Multidimensional Peacekeeping Operations, https://peacekeeping.un.org/sites/default/files/peacekeeping-handbook_un_dec2003_0.pdf, p. 1 (last accessed on 13/04/2020).
[13] *McCoubrey/White* (note 8), p. 6.
[14] *Ibid.*, p. 18.
[15] *Ibid.*, pp. 11, 19-20; *Bothe* (note 5), MN 11, p. 1179.
[16] Namely, UNEF and ONUC, among others: See *Bothe* (note 5), MN 7, pp. 1176-1177.
[17] See, *e.g.*, *O'Brien*, p. 3; *Akonor*, p. 35; *Zwanenburg*, LJIL, Vol. 11, 1998, p. 229, 229.

For this aim to be achieved, the Thesis is divided into five sections. In the first place, the legal framework for the practice of UN peace operations[18] will be discussed in order to understand what the power of the UN is to mandate these operations and from whence this power emanates (A). Secondly, it will be briefly exposed how peacekeeping missions work and who the parties to these operations are, as the system is complex with the involvement of several constituents (B). Hereafter, the applicability of International Human Rights Law (IHRL) and IHL in peacekeeping operations will be assessed, though not before a concise examination of the relationship between both fields of law (C). Likewise, selected examples of violations of human rights and IHL, concretely sexual exploitation and abuse and human trafficking and sexual slavery, will be presented in relation to the most widespread breaches perpetrated by the peace forces during the missions (D). Lastly, an evaluation of who can be considered responsible for these violations will take place. Thus, it will be addressed whether the participating States, the UN, or other international organizations, such as NATO, must assume responsibility. This will be pursued through an assessment of the different international and national case law dealing with the issue of attribution of conduct and responsibility in peace operations in order to ascertain which is the prevailing opinion or, in this context, the most supported test and interpretations thereof, to determine the responsibility of the entities involved in a peace operation (E).

In view of the situation, one important question arises: Are UN peacekeepers a protective shield in reality, or an additional threat to those disadvantaged people who have to suffer from the ravages of conflict?

[18] For the sake of clarity, it should be noted that in the Master's Thesis the broader term 'peace operations' will refer to both peacekeeping (operations under UN command) and peace enforcement (mandated or authorized operations, not under UN command). Likewise, the terms 'peacekeepers' and 'peace forces' will be used interchangeably throughout the Thesis. However, when it is essential to distinguish between both types of operations and forces, it will be made plain from the context. Furthermore, the Thesis will focus only on the military component of the peace operations.

A. Legal framework for the practice of United Nations Peace Operations

Peace operations are complex in nature and have been continuously evolving over time since the first UN peace-mandated mission. They comprise "three principal activities: conflict prevention and peacemaking; peacekeeping; and peace-building."[19] However, even if it may seem clear that these are peace-related operations, their substance and driven implications have created a legal framework difficult to discern,[20] due to the character of an international organization as the UN, all the parties and national laws involved, the applicability of rules derived from different branches of international law and the matters at stake.[21]

Be that as it may, "every peace operation conducted by an organization or arrangement must have a legal basis in international law and in the internal law of the organization."[22] Thus, with regard to UN peace operations, they must be regulated under the UN Charter, other applicable rules of international law, and the internal rules and procedures of the UN.[23]

According to *Bothe*[24], there are three different types of provisions in the Charter that allow for the practice of peacekeeping operations, namely "substantive enabling provisions," "formal enabling provisions" and "organizational enabling provisions." Substantive enabling provisions refer to those that authorize the organization and/or a particular organ to address a specific matter or situation, such as international peace and security; formal enabling provisions encompasses those that confer the power to adopt binding decisions to their organs, like the power of the Security Council (SC) under Article 25 of the Charter; organizational enabling provisions are those that entitle an organ to create subsidiary organs, for instance Article 22 for the General Assembly (GA) or Article 29 for the SC.[25]

Nevertheless, concerning the legal basis of peace operations undertaken by international organizations in international law, it must be remembered that generally these organizations are not parties to international treaties.[26] How can then essential rules originated from IHRL and IHL be complied with during the conduct of peacekeeping missions? This is possible owing to the fact that it has been acknowledged that international organizations are bound by rules of customary international law that are related to their field of work,[27] *i.e.* in the case of the UN, with its leading role in the maintenance of international peace and security and the protection

[19] UNGA/UNSC, *Report of the Panel on United Nations Peace Operations (Brahimi Report)* of 21/08/2000, UN Doc. A/55/305–S/2000/809, para. 10.
[20] *Gill et al. (eds.)*, Leuven Manual, p. 6.
[21] *Fleck* (note 10), pp. 228-240.
[22] See Rule 4.I.I in *Gill et al. (eds.)*, (note 20), pp. 34-35.
[23] Rule 4.I.3 in *Gill et al. (eds.)*, (note 20), pp. 35-36.
[24] *Bothe* (note 5), MN 21, p. 1185.
[25] *Ibid*.
[26] *Gill et al. (eds.)*, (note 20), p. 37.
[27] See ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Reports 1980, p. 73, para. 37.

of human rights, IHRL and IHL would be applicable as other rules of international law to be respected during the execution of the missions.[28]

On the other hand, in relation to the legal basis of peace operations in the internal rules and procedures of the international organization, the UN has for instance formulated policies on the structure, planning and deployment of peace operations, which will be reviewed in Section B in order to explain the functioning and course of action of peacekeeping missions.

What is important to understand in this Section is that the SC, as the primary responsible for the maintenance of international peace and security and based on the powers conferred on it,[29] can act under Chapters VI, VII and VIII of the UN Charter depending on the type of peace operation that it deems necessary to be conducted.

I. United Nations Charter: Chapters VI, VII and VIII

Although now it is established that the practice of peace operations is regulated under Chapters VI, VII and VIII of the UN Charter,[30] the reality is that the term 'peacekeeping' as such is nowhere to be found in that legal instrument. That may be due to the fact that the original aim of these peace operations was not "to replace the means of voluntary settlement of disputes which are set out in Chapter VI […], nor the enforcement action envisaged in Chapter VII, but rather seek to supplement the purposes and intent of those two Chapters."[31] Thus, it was even acknowledged by Secretary-General Dag Hammarskjöld that they could form part of a new imaginary "Chapter Six and a Half."[32] However, it is somewhat idealistic and unreliable, at the same time, to have to envisage a completely new chapter in such an international treaty as the UN Charter, simply because those operations need a robust legal basis (even when in practice some mandates have been put in place without determining their legal foundation)[33].

Therefore, those provisions of the UN Charter aimed at the practice of peace operations are the ones stipulated in Chapters VI, VII and VIII.

Under Chapter VI, the SC has the power to act in the form of "recommendations" to parties to a conflict with the aim of settling their dispute by peaceful means.[34] This is enshrined in Article 36 para. 1 of the UN Charter, by which after investigating any "dispute" or "situation which might lead to international friction or give rise to a dispute" (Article 34 of the UN Charter), *i.e.*

[28] See *Zwanenburg* (note 17), pp. 234-237.
[29] Art. 24 paras. 1, 2 of the UN Charter.
[30] *Bothe* (note 5), MN 22, pp. 1185-186; *Fleck* (note 10), p. 209; *Gill et al. (eds.)*, (note 20), p. 8.
[31] *United Nations*, The Blue Helmets, p. 3.
[32] *Ibid.*
[33] The first operations mandated by the SC, *i.e.* ONUC, UNEF II and UNDOF, completely lack any specification about their legal basis: See *Bothe* (note 5), footnote 73, p. 1186.
[34] *McCoubrey/White* (note 8), p. 19; *United Nations* (note 31), The Blue Helmets, p. 5.

once ascertained whether a potential danger to the peace exists,[35] the SC may recommend *ex officio*[36] procedural or methodological measures different from the ones stipulated in Article 33 of the UN Charter in order to resolve a dispute,[37] either an interstate dispute or an internal one.[38] These peaceful means can range from conflict prevention to settlement of conflicts,[39] as well as consisting of the creation of subsidiary organs (Article 29 of the UN Charter), or the deployment of traditional peacekeeping missions.[40] However, these are "measures of a non-coercive nature which possess no legally binding character for the parties to a dispute,"[41] in short, the parties will resolve their conflict voluntarily by those means if they wish to do so.

If not, and the situation reaches the point of a "threat to the peace, breach of the peace, or act of aggression" (Article 39 of the UN Charter), then the SC may resort to its enforcement powers under Chapter VII of the Charter, whereby "it can make recommendations (Article 39 of the UN Charter), order provisional measures (Article 40 of the UN Charter), or take non-military (Article 41 of the UN Charter) or military enforcement (Article 42 of the UN Charter) measures according to the exigencies of the particular situation."[42] In contrast to the recommendations under Chapter VI, "[t]hese measures are binding on member States if the SC so decides."[43] Furthermore, the extensive practice of the SC has shown that they can also be addressed to non-members, international organizations, non-State entities, and individuals.[44]

One of the key provisions in this Chapter VII is Article 42 of the UN Charter, which in conjunction with Article 43 of the UN Charter, would allow the SC to take the necessary military enforcement actions through armed forces of member States at the disposal of the SC.[45] Nevertheless, this centralized system envisaged in the Charter did not succeed, since the required special agreements pursuant to Article 43 of the UN Charter that would enable the provision of the forces were never concluded, and the Military Staff Committee (Article 47 of the UN Charter) created to control the operations under the umbrella of the SC was soon forgotten.[46] For this reason, other forms of military enforcement were needed to be implemented for the development of the system of collective security and the enforcement powers of the SC. This was possible thanks to the establishment of peacekeeping missions, where it is essential to differentiate between "peacekeeping operations under UN command with troops supplied by member States on an *ad hoc* basis, and member States operations

[35] *Giegerich*, in: Simma et al. (eds.), The Charter of the United Nations, Art. 36, MN 31, p. 1130.
[36] *Ibid.*, MN 35, p. 1131.
[37] *Ibid.*, MN 25-26, p. 1128; MN 44, p. 1134.
[38] *Ibid.*, MN 28, p. 1129.
[39] UNSC, *Statement by the President of the Security Council* of 29/06/2010, UN Doc. S/PRST/2010/11, p. 1.
[40] *Bothe* (note 5), MN 21ff, pp. 1185-1187.
[41] *Tomuschat*, in: Simma et al. (eds.), The Charter of the United Nations, Art. 33, MN 2, p. 1070.
[42] *Krisch*, in: Simma et al. (eds.), The Charter of the United Nations, Introduction to Chapter VII: The General Framework, MN 12, p. 1243.
[43] *Ibid.*
[44] *Ibid.*, MN 65-69, p. 1268-1271.
[45] *Krisch*, in: Simma et al. (eds.), The Charter of the United Nations, Art. 42, MN 3, p. 1333, MN 8, p. 1335.
[46] *Ibid.*, MN 8, p. 1335-1336.

authorized, but not conducted, by the SC."[47] Whereas the operations under UN command are centralized, those only authorized by the SC are decentralized, and while now it is practice that both types of operations can resort to the use of force beyond self-defence,[48] they both entail different consequences when it comes to the attribution and responsibility of conduct, even though sometimes it is not so clear.[49] These decentralized operations have become the most widespread course of action under Article 42 of the UN Charter, which must be read together with Article 48 of the UN Charter, since both Articles imply the possibility of taking action by authorized forces of member States.[50]

Nonetheless, these are not the only peace operations that can be undertaken under the Charter, since pursuant to Chapter VIII, regional organizations themselves or in conjunction with the SC can address "matters relating to the maintenance of international peace and security" (Article 52 of the UN Charter). Thus, through Article 52 para. 2 of the UN Charter, member States are encouraged to refer to their regional organizations[51] any interstate or internal disputes[52] that may have arisen between them, in order to be resolved by peaceful means before bringing them to the SC.[53] For this reason, Article 52 of the UN Charter must be read together with Chapter VI of the UN Charter.[54]

By contrast, Article 53 para. 1 of the UN Charter empowers the SC to use these regional organizations for enforcement purposes with its authorization. In this regard, it must be treated jointly with Chapter VII,[55] which in practice has been the recurrent legal basis resorted to in the resolutions of the SC for the authorization of the use of force by regional arrangements or agencies.[56] This authorized use of force by the SC under Article 53 para. 1 or Article 42 of the UN Charter is essential for an action involving enforcement measures to be considered legal or not.[57] A clear example is the NATO intervention in Kosovo in 1999, which, independently of whether NATO can be seen as a regional arrangement or agency within the meaning of Chapter VIII, is said to lack both explicit and implicit authorization by the SC for the use of force.[58] Subsequently, the SC assumed responsibility for Kosovo by virtue of Resolution

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[47] *Ibid.*, MN 3, p. 1333.
[48] *Ibid.*, MN 8-13, pp. 1335-1338.
[49] This is examined in Section E of the Thesis.
[50] *Krisch* (note 45), Art. 42, MN 10-11, pp. 1336-1337.
[51] For a definition and examples of the term "regional arrangements or agencies" used in the Charter, see *Walter*, in: Simma et al. (eds.), The Charter of the United Nations, Art. 52, MN 48-74, pp. 1459-1568.
[52] *Ibid.*, MN 78-79, p. 1469.
[53] This is possible owing to the principle of regional priority, which has been modified in the real practice resulting in a certain form of concurrent jurisdiction between the regional organizations and the UN: See, *Walter* (note 51), Art. 52, MN 80-109, pp. 1470-1477.
[54] *Walter*, in: Simma et al. (eds.), The Charter of the United Nations, Introduction to Chapter VIII, MN 3, p. 1434.
[55] *Ibid.*
[56] *Ibid.*, MN 31-34, pp. 1443-1444.
[57] *Walter*, in: Simma et al. (eds.), The Charter of the United Nations, Art. 53, MN 30, p. 1489.
[58] *Ibid.*, MN 46-47, pp. 1494-1495; *Schreuer*, Is there a Legal Basis for the NATO Intervention in Kosovo?, https://www.univie.ac.at/intlaw/wordpress/pdf/60_kosovo.pdf, pp. 151-153 (last accessed on 14/04/2020); UNSC Res. 1160 of 31/03/1998, UN Doc. S/RES/1160 (1998); UNSC Res. 1199 of 23/09/1998, UN Doc. S/RES/1199 (1998); UNSC Res. 1203 of 24/10/1998, UN Doc. S/RES/1203 (1998).

1244,[59] but without supporting the unilateral military intervention carried out by NATO countries before, probably in violation of international law.[60]

Consequently, clear mandates need to be implemented in order to avoid situations as the aforementioned one in Kosovo. However, this is hardly ever the case, as it will be seen in the subsequent Section.

II. United Nations Mandate

Peace operations performed under the umbrella of the UN require a mandate which provides firstly the legal basis, that can complement the Host State consent for the operation, *i.e.* in traditional peacekeeping operations; and, secondly, the objectives to be achieved by means of the specific mission, including the explicit or implicit parameters for the use of force during the operation.[61] UN mandates are usually issued by the SC, and they take the form of regulations.[62] But also the GA can dictate those mandates under the *Uniting for Peace Resolution*, as it has happened on several occasions due to the *impasse* of the SC and the necessity for action.[63]

Nevertheless, resolutions that authorize the use of force beyond self-defence, *i.e.* those regarding peace enforcement operations, are commonly mandated by the SC under Chapter VII of the Charter. Mandates adopted under this Chapter will prevail over any conditions imposed by the Host State to the peace operation,[64] and even if the Host State has not given consent to the deployment of troops in its territory and/or to the use of force beyond self-defence.[65] In this case, a mandate issued by the SC is a "strict legal requirement […] irrespective of whether the operation is conducted by the UN directly, by a regional organization or arrangement or by individual States operating independently of the UN or any other organization, but with the authorization of the SC."[66]

In view of what was previously stated, mandates need to be free from ambiguity because many factors are at stake. Furthermore, for the legality of a certain peace operation not to be questioned, these resolutions in the form of mandates need to enter into effect.[67] However, the practice has been shown to be different, since the SC does not often issue clear or adequate

[59] UNSC Res. 1244 of 10/06/1999, UN Doc. S/RES/1244 (1999).
[60] *Simma*, EJIL, Vol. 10, 1999, p. 1, 6; *Cassese*, EJIL, Vol. 10, 1999, p. 791, 799.
[61] See Rule 3.1.2 in *Gill et al. (eds.)*, (note 20), pp. 27-28.
[62] *Bothe* (note 5), MN 25, p. 1187.
[63] UNGA Res. 377 (V), *Uniting for Peace Resolution* of 03/11/1950, UN Doc. A/RES/377(V) A, para. 1. An example of a GA mandate is UNEF I, legal after the ICJ acknowledged the power of the GA to mandate peacekeeping operations: See ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] ICJ Reports 1962, p. 151, p. 163.
[64] *Gill et al. (eds.)*, (note 20), Rule 3.2.2, p. 29.
[65] *Ibid.*, Rule 3.3.I, p. 30.
[66] See Rule 3.3, which has the status of *jus cogens*: *Gill et al. (eds.)*, (note 20), p. 30.
[67] *Fleck* (note 10), p. 219.

mandates for the conduct of the operations,[68] and since due to the character of peacekeeping, negotiations between the UN and States willing to provide personnel are a lengthy process,[69] resulting in situations where "the pressure of emergencies overshadows legal considerations."[70] Yet, this cannot be accepted as a justification for the SC not to provide the legal basis under which it authorizes peace missions,[71] even if the process for conducting the missions is complex, as it will be ascertained thereafter in Section B.

B. Conduct and parties to United Nations Peacekeeping Operations

I. United Nations and its Organs

As it has been previously stated, the SC is the main organ with authority to determine whether a UN peacekeeping operation should be deployed in a given country.[72] To this end, it may assess a number of factors[73] for the establishment of the mission. The eventual peacekeeping operation will be considered a subsidiary organ of the UN organ mandating the operation, *i.e.* the SC, or the GA on very rare occasions.[74]

The UN Secretary-General (SG) also plays a decisive role throughout the process of deciding to deploy a peacekeeping operation by means of implementing assessments of the situation, in order to finally issue a proposal for the SC recommending the establishment of an operation.[75] "The Security Council may then pass a resolution authorizing the United Nations peacekeeping operation's deployment and determining its size and mandate."[76]

Once a peacekeeping operation has been decided to take place, the Department of Peacekeeping Operations (DPKO) comes into play. This department constitutes a special division of the UN Secretariat, headed by the Under-Secretary-General for Peacekeeping Operations (USG DPKO).[77] "The overall command is vested in the Secretary-General; day-to-day management of peacekeeping operations is delegated to the […] USG DPKO."[78]

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[68] *Ibid*., pp. 212-213; *McCoubrey/White* (note 8), p. 13.
[69] *Krisch*, in: Simma et al. (eds.), The Charter of the United Nations, Art. 43, MN 13, p. 1356.
[70] *Fleck* (note 10), p. 219.
[71] The SC did not specify the legal basis for the operations ONUC, UNEF II and UNDOF in their respective resolutions: *Bothe* (note 5), footnote 73, p. 1186.
[72] Capstone Doctrine (note 6), p. 47.
[73] See UNSC, *Statement by the President of the Security Council* of 03/05/1994, S/PRST/1994/22, p. 2.
[74] *Bothe* (note 5), MN 17, p. 1183; UNGA, *Summary study of the experience derived from the establishment and operation of the Force: Report of the Secretary-General* of 09/10/1958, UN Doc. A/3943, para. 127.
[75] See "Strategic Assessment" and "Technical Assessment Mission (TAM)" in Capstone Doctrine (note 6), pp. 48-49.
[76] *Ibid*., p. 49.
[77] See *Bothe* (note 5), MN 17, pp. 1183-1184.
[78] *Gill et al. (eds.)*, (note 20), Appendix IV, para. 12, p. 356.

Furthermore, the SC vests "operational authority" for directing the operations in the SG,[79] which in turn delegates "overall responsibility" to the USG DPKO.[80]

There are three different levels of authority in UN peacekeeping operations, namely strategic, operational and tactical, which are not clear-cut[81], since they may overlap.[82] The process above described between the SC, SG, DPKO and USG DPKO is included in the strategic level.

Between the strategic and operational levels is the Head of Mission (HOM), which possesses "overall authority" over the activities performed in the mission area, and delegates "the operational and technical aspects of mandate implementation to the heads of all components of the mission," specifically to the Head of Military Component (HOMC) and Head of Police Component (HOPC).[83] Consequently, both HOMC and HOPC exercise "UN operational control" over military and police personnel and contingents supplied by member States, respectively.[84] This "operational control" is effected among the operational and tactical levels of the mission,[85] and it enables the HOMC and HOPC to divide the tasks among units and subunits within the military and police components in the mission area of responsibility.[86]

However, will this exercised "operational control" be sufficient for the attribution of conduct for wrongful acts by peacekeeping forces (under UN command) to the UN as a whole? In this respect, "UN operational control" is central to the analysis of the Thesis, and it will be further developed in the last Section E regarding the 'Responsibility for the violations by United Nations Peacekeeping Forces.' Now, it is relevant to determine the role of the State where peacekeeping forces are deployed to accomplish a mandate.

II. Host State

The Host State is thus the "State upon whose territory the [peacekeeping] force has been sent."[87] This entails difficulties due to the principle of sovereignty of the nations, recognized as one of the founding principles of the UN.[88] Therefore, the consent of the Host State is important for the conduct of peacekeeping operations, but not essential, since pursuant to Chapter VII of the Charter, the SC can initiate coercive action against any member State without a given previous consent.[89]

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[79] DPKO/DFS, *Policy on Authority, Command and Control in United Nations Peacekeeping Operations* of 15/02/2008, Ref. 2008.4, para. 18, p. 6.
[80] *Ibid.*, para. 19; *Gill et al. (eds.)*, (note 20), Appendix IV, para. 18, p. 358.
[81] See Capstone Doctrine (note 6), p. 66.
[82] To have a clearer understanding, see the figure presented in the *Policy on Authority, Command and Control in United Nations Peacekeeping Operations* (note 79), p. 5.
[83] *Ibid.*, paras. 24-33, pp. 7-9.
[84] *Ibid.* Concerning UN operational control of HOMC go to paras. 29, 44-48 and for HOPC go to paras. 32, 54-58.
[85] *Ibid.*
[86] *Ibid.*, paras. 45 and 54.
[87] *Di Blase*, in: Cassese (ed.), p. 55, 55.
[88] Art. 2 paras. 1 and 4 of the UN Charter.
[89] Art. 2 para. 7 of the UN Charter; *Fleck* (note 10), p. 219.

Nevertheless, traditional peacekeeping practice (without enforcement measures) seeks the consent of the Host State, which can be enshrined in a declaration issued by the State concerned accepting the terms of the resolution.[90] Furthermore, and in relation to the sovereignty of the Host State,[91] a Status of Forces Agreement (SOFA) has to be stipulated in order to consolidate the respect for the law of the Host State by the peacekeeping forces,[92] but with exceptions as to the precedence the mandate acquires over incompatible Host State's laws, or the strict compliance of peacekeeping operations with IHRL and IHL even if the Host State does not observe these branches of international law.[93] In addition, SOFAs further regulate the exclusive jurisdiction of the participating States over their military personnel in regards to criminal prosecution,[94] and more generally, the immunities and privileges the peacekeeping personnel enjoy while acting in their official capacity.[95]

The Host State has, consequently, "[t]he primary responsibility for the security and protection of United Nations peacekeeping personnel and assets,"[96] but what is then the responsibility of the States providing troops and personnel for the peacekeeping missions?

III. Participating States

Due to the fact that the UN does not possess standing military or police forces, it has to resort to its Members for the contribution of the same on a voluntary basis.[97] These States providing personnel and services to the UN for the conduct of peacekeeping operations are the so called participating States,[98] where two predominant categories of States stand out, namely the Troop (TCCs) and Police Contributing Countries (PCCs).

For this relation to be consummated, the UN and TCCs/PCCs enter into international agreements which usually take the form of a Memorandum of Understanding (MOU), *i.e.* an arrangement "to establish the administrative, logistics and financial terms and conditions [which] govern the contribution of personnel, equipment, and services provided by the Government in support of [the peacekeeping operation] and to specify United Nations standards of conduct for personnel provided by the Government."[99] This is a legally binding

[90] See *Bothe* (note 5), MN 17, p. 1183.
[91] *Ibid.*, MN 26, p. 1188; see Rule 9.I ff in *Gill et al. (eds.)*, (note 20), pp. 130-131.
[92] Rule 9.2 in *Gill et al. (eds.)*, (note 20), p. 130.
[93] Rule 9.2.4 in *Gill et al. (eds.)*, (note 20), pp. 133-134.
[94] See UNGA, *Model Status of Forces Agreement for Peacekeeping Operations* of 09/10/1990, UN Doc. A/45/594, para. 47 (b).
[95] *Ibid.*, paras. 3, 4, 15, 24-28, 46: The privileges and immunities are compiled in the Convention on the Privileges and Immunities of the United Nations of 13 February 1946; on the contrary, if the Host State is not a party to the latter, the SOFA will specifically determine those which apply to the peacekeeping operation.
[96] Capstone Doctrine (note 6), p. 79.
[97] *Ibid.*, p. 52.
[98] UNGA, *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations* of 23/05/1991, UN Doc. A/46/185, Annex, para. 1.
[99] UNGA, *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)* of 20/01/2015, UN Doc. A/C.5/69/18, Chapter 9, Article 3, p. 187.

document between the UN and the TCC/PCC,[100] and it acquires special relevance owing to the transfer of command and control powers from the participating State to the UN.[101] However, the participating State retains certain obligations in connection with its national contingents, such as "full and exclusive strategic level command and control,"[102] administrative power,[103] and disciplinary and criminal jurisdiction.[104] Furthermore, it has to obey the rules set forth in the respective SOFA created between the UN and the Host State for the deployment of the mission in the Host State's territory.[105]

By contrast, as it has been previously exposed (A.I.), the forces contributed by participating States for a peacekeeping operation, which are in essence national contingents at the disposal of the UN based on an agreement (UN subsidiary organs)[106], have to be distinguished from mandated forces of States acting with SC authorization under Chapter VII. These mandated forces are not UN organs, but organs of their sending States.[107] Thus, even though it could be obvious to assume that the attribution and responsibility for the conduct of the mandated forces would rest with their respective States (since they are not UN organs), there has already been case law[108] reversing this idea. The different participation of States in peace operations and the attribution of conduct within the command and control structure is, therefore, a complex and controversial problem which will be fully assessed in Section E.

Apart from the already added hurdle of finding countries willing to provide forces for peacekeeping missions, the aforementioned problem in the preceding paragraph is also intensified depending on the personnel contributed to the operation. Peacekeepers, or peace forces, in general, have to show "extraordinary professionalism, dedication and self-restraint."[109] However, on more than one occasion, there have been claims regarding the performance of actions by the personnel contrary to their duties or, more specifically, violations of human rights and humanitarian law that question not only the reputation of the participating States, but also of the UN, and what is worse, that may leave victims without remedy.[110] The UN enjoys jurisdictional immunity everywhere in the world,[111] and who can truly ensure that the contributing States will exercise their disciplinary and criminal jurisdiction over their national contingents?

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[100] *Ibid.*, Chapter 2, para. 6, p. 8.
[101] See UN Model Agreement (note 98), para. 7.
[102] DPKO/DFS, *Policy on Authority, Command and Control in United Nations Peacekeeping Operations* (note 79), para. 21, p. 7.
[103] See UN Model Agreement (note 98), para. 9.
[104] See COE Manual (note 99), Chapter 9, Art. 7 quinquiens, p. 192.
[105] *Ibid.*, Art. 7 ter para. 7.5, pp. 189-190; UN Model Agreement (note 98), para. 5.
[106] See *Bothe* (note 5), MN 18, p. 1184.
[107] *Ibid.*, MN 33, pp. 1192-1193.
[108] ECtHR, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway,* Grand Chamber, Admissibility Decision, App. Nos. 71412/01 & 78166/01, 2 May 2007.
[109] Capstone Doctrine (note 6), p. 78.
[110] See *Bothe* (note 5), MN 19, p. 1185.
[111] *Ibid.*

Consequently, peacekeeping forces have an obligation to protect the civilian population in the territory where the peacekeeping mission takes place, and should refrain from any act in violation of IHRL and IHL. Thus, it is important to determine how these two fields of law are applicable to peace operations.

C. The relationship between International Human Rights Law and International Humanitarian Law: Their applicability to United Nations Peace Operations

Before entering to examine the violations of human rights and humanitarian law norms committed by peace forces, it is necessary to recall how IHRL and IHL apply to peace operations under the umbrella of the UN, and the relationship between these two branches of international law.

Even though traditionally there was a strict division between them, IHRL being considered as the law of peace and IHL as the law of war,[112] today this separation is not so clear since it has been acknowledged that IHRL also applies in situations of armed conflict.[113] It is not surprising bearing in mind that both fields of law pursue the respect for and protection of the lives and human dignity of every person,[114] fundamental rights that should be guaranteed at any time, no matter if during times of peace or war.

By contrast, there might be situations where there are two or more conflicting rules deriving from each branch of law that lead to different results.[115] How to discern which law ought to be respected then? A common approach to resolve this controversy has been to resort to the *lex specialis* principle,[116] according to which the International Court of Justice (ICJ) recognized in the *Nuclear Weapons Advisory Opinion* the applicability of IHRL in armed conflicts, but at the same time, affirmed the prevalence of IHL over IHRL during the conduct of hostilities owing to the specificity that IHL provides in the context of armed conflicts.[117] In other words, the ICJ overrode the protection that IHRL could offer in conflict situations in favour of the IHL as the *lex specialis*. In the *Legal Consequences of the Wall Advisory Opinion* the ICJ also confirmed the applicability of IHL as the *lex specialis*, but it went further to reinforce the idea of IHRL as a complementary aid for interpretation.[118] Furthermore, the ICJ followed this same reasoning

[112] *Sassòli*, MN 9.01, 9.05, pp. 422, 423.
[113] *Droege*, IsLR, Vol. 40, 2007, pp. 310, 320-324.
[114] *Sassòli.*, MN 9.10, p. 425; *Meron*, in: Warner (ed.), p. 97, 100; *Heintze*, in: Kolb/Gaggioli (eds.), p. 53, 53.
[115] *Sassòli*, MN 9.26, p. 433.
[116] *Ibid.*, MN 9.27, p. 433.
[117] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 1996, p. 226, para. 25.
What the ICJ concretely accepted in this Advisory Opinion was the possible applicability of Art. 6 ICCPR (Right to Life) rather than the whole body of IHRL.
[118] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 2004, p. 136, para. 106.

in its subsequent *DRC v. Uganda* case, but avoided to make any reference to the *lex specialis*.[119]

This new approach by the ICJ could be explained due to the fact that the maxim *lex specialis derogat legi generali* is contentious if IHL is always regarded as the *lex specialis* only because it is the law designated for armed conflicts; it is like undervaluing IHRL determining it as "normal" compared to the "special" IHL.[120] Thus, it is now acknowledged that "in situations of conflicts of norms, the most detailed and specific rule should be chosen over the more general rule, on the basis of a case-by-case analysis, irrespective of whether it was a human rights or a humanitarian law norm."[121]

Consequently, the interplay between IHRL and IHL has resulted in three different theories, namely a traditional separation theory[122], a complementarity theory[123], and an integration theory[124]. Irrespective of what approach is more widely accepted,[125] the fact cannot be refuted that both branches of international law possess an essence of non-derogable human rights and of minimum humanitarian rules, respectively, which enjoy *jus cogens* status,[126] *i.e.* which are "peremptory norm[s] of general international law […] from which no derogation is permitted."[127] Those absolute rights and rules are mainly enshrined in Article 4 para. 2 of the International Covenant on Civil and Political Rights (ICCPR) and in Common Article 3[128] of the 1949 Geneva Conventions (GCs). Here is where the principle of humanity acquires significant importance demonstrating that in situations of necessity, what prevails is the human being. Or at least, that should be the case. This is what the UN within its system of collective security tries to achieve with the deployment of its peace operations in situations of conflict. Therefore, after ascertaining that both IHRL and IHL apply in armed conflicts, it is essential to assess now how those two bodies of international law apply during UN peace operations.

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[119] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, [2005] ICJ Reports 2005, p. 168, para. 216.
[120] *Oberleitner*, pp. 96-97.
[121] UN Human Rights Council, *Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict: Report of the United Nations High Commissioner for Human Rights* of 04/06/2009, UN Doc. A/HRC/11/31, para. 13.
[122] *Scobbie*, JCSL, Vol. 14, 2010, p. 449, 456; *Feinstein*, JHR, Vol. 4, 2005, p. 238, 301.
[123] It is backed up by the UN Human Rights Committee (HRC): see *General Comment No. 31 (Article 2) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant* of 26/05/2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 11; also supported by the ICRC: see *Kellenberger*, in: International Institute of Humanitarian Law (ed.), pp. 9, 9-15; and by the ICJ in the *Wall Advisory Opinion* and *DRC v. Uganda* case: See *Gowlland-Debbas/Gaggioli*, in: Kolb/Gaggioli (eds.), pp. 77, 86-87.
[124] For a comprehensive overview of scholars who support this approach see *Oberleitner* (note 120), pp. 122-128.
[125] It seems that the most supported theory regarding the relationship between IHRL and IHL is the one of complementarity. See *supra* note 123.
[126] *Abi-Saab*, in: Warner (ed.), p. 107, 121.
[127] Art. 53 of the Vienna Convention on the Law of Treaties (VCLT). For a further insight on *jus cogens* see the commentary on Art. 40 paras. 4-6 DARSIWA (*infra* note 235).
[128] Recognized by the ICJ in *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986], Reports 1986, p. 14, para. 218.

I. International Human Rights Law

Once it has been determined that IHRL is applicable at all times,[129] either during peace or war times, it can be established that it is a body of law to be applicable to peace operations.[130] In this regard, the importance of human rights obligations during these operations needs to be considered under three aspects, namely through the issuing of a mandate that should expressly lay down the observance of human rights by the parties to the conflict and the peacekeeping forces; whether the request to protect human rights has been expressly introduced in the mandate or not, peacekeeping forces also have a duty to respect the law of the Host State and its obligations under international law; and, finally, it has been acknowledged that the human rights obligations of the participating States apply extraterritorially[131] for acts committed within their jurisdiction.[132]

Therefore, owing to the aforementioned factors that play a part in a UN peace operation, the human rights obligations applicable to the same derive from "the international obligations of the contributing States and/or from those of the international organization undertaking the operation and may be based on treaty and/or customary law provisions."[133] Since the members of a UN peace operation are national contingents at the disposal of the UN and the operation acquires the status of a subsidiary organ, the peacekeeping forces are bound by both the human rights obligations of their respective States and those of the UN.[134] They have a "unique hybrid legal status."[135]

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[129] This has been upheld by the ICJ, according to which "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.": See *Legal Consequences of the Wall Advisory Opinion* (note 118), para. 106. It has also been acknowledged in the *Nuclear Weapons Advisory Opinion* (note 117) and the *DRC v. Uganda* case (note 119).
Furthermore, Art. 15 ECHR expressly specifies that derogation from some obligations is allowed in "time of war" and Art. 15 para. 2 ECHR explicitly alludes to the permissible derogation from the right to life in cases of "lawful acts of war."
Therefore, the derogation clauses in Art. 4 ICCPR and Art. 15 ECHR are evidence of the continual applicability of human rights treaties in time of public emergency, including in armed conflicts.
See also *Kleffner*, in: Gill/Fleck (eds.), Handbook of International Law of Military Operations, Section 3.01, para. 35, p. 35, 53; *Gill et al. (eds.)*, (note 20), p. 76.
[130] *Gill et al. (eds.)*, (note 20), p. 76.
[131] The extraterritorial applicability of human rights treaties has been confirmed by the HRC in its interpretation of Art. 2 para. 1 of the ICCPR when it stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. […] This principle also applies to those […] forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.": See HRC, *General Comment No. 31* (note 123), para. 10.
This has also been acknowledged by the ECtHR: For an insight see ECtHR, *Loizidou v. Turkey*, Preliminary Objections, Judgment, App. No. 15318/89, 23 March 1995, para. 62; ECtHR, *Cyprus v. Turkey*, Judgment, App. No. 25781/94, 10 May 2001, para. 77; ECtHR, *Al-Skeini and Others v. The United Kingdom*, Merits and Just Satisfaction, App. No. 55721/07, 7 July 2011, para. 137.
The ICJ has further sustained this position in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 2004, p. 136, paras. 111-112.
[132] *Klappe*, in: Fleck (ed.), Handbook of International Humanitarian Law, Section 1307, pp. 611, 619-620.
[133] See Rule 5.I in *Gill et al. (eds.)*, (note 20), p. 77.
[134] *Ibid.*
[135] *Dannenbaum*, HarvIntlLJ, Vol. 51, 2010, p. 113, 115.

Another question is, however, how an international organization as the UN can be an addressee of IHRL, when States are the main addressees and international organizations are usually not parties to human rights treaties.[136] This is possible due to the international legal personality of the UN that makes it bound by customary IHRL.[137] Furthermore, the incorporation of the respect for human rights as one of its founding principles in the UN Charter reinforces the role of the UN as a provider of human rights obligations.[138] Even UN human rights obligations may be seen as the prevailing norm by virtue of Article 103 of the UN Charter when it comes to conduct authorized by the SC, but conflicting with the human rights obligations of a respective participating State.[139]

The UN has also developed policies such as the *UN Human Rights Due Diligence Policy*[140] and the *UN Human Rights Screening Policy*[141] which apply to peace operations.[142] In addition, TCCs must guarantee that their contributed forces and military personnel do not commit human rights violations.[143] If that is ensured in reality remains to be seen.

II. International Humanitarian Law

For its part, IHL is the law of armed conflict.[144] As such, it is applicable to a peace operation "when the conditions for the application of this body of law are met, irrespective of the nature of the operation,"[145] in other words, when the prevailing facts on the ground lead one to ascertain that the required threshold for the existence of an armed conflict has been reached. This threshold varies based on "classic" criteria which have to be fulfilled in order to determine whether the conflict in question is an international (IAC) or non-international armed conflict (NIAC) by virtue of IHL.[146]

In this regard, Common Article 2 of the 1949 GCs regulates IACs, *i.e.* any resort to hostile military action between two or more States,[147] including any kind of "foreign military occupation."[148] By contrast, Common Article 3 of the GCs alludes to NIACs, which are said to

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[136] *Kleffner* (note 129), Section 3.01, para. 33, pp. 51-52.
[137] *Ibid.*; The international legal personality of the UN has furthermore been acknowledged by the ICJ: See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Reports 1949, p. 174, pp. 178-179.
[138] ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Reports 1980, p. 73, para. 37; see Art. 1 para. 3 of the UN Charter.
[139] See Rule 5.7.5 in *Gill et al. (eds.)*, (note 20), p. 87.
[140] UNSG, *UN Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces* of 05/03/2013, UN Doc. A/67/775 – S/2013/110, Annex.
[141] *UN*, Human Rights Screening of United Nations Personnel, https://police.un.org/sites/default/files/policy_on_human_rights_screening_of_un_personnel_december_2012.pdf (last accessed on 16/04/2020).
[142] Rule 5.9 in *Gill et al. (eds.)*, (note 20), p. 90.
[143] *Ibid.*
[144] *Sassòli*, MN 9.01, 9.05, pp. 422, 423.
[145] Rule 6.I in *Gill et al. (eds.)*, (note 20), p. 91.
[146] *Ferraro*, IRRC, Vol. 95, 2013, p. 561, 574.
[147] For a detailed insight see, *e.g.*, *ICRC*, Commentary on the First Geneva Convention, 2016, Art. 2: Application of the Convention, para. 209.
[148] *Ibid.*, para. 193.

be taking place when two requirements are satisfied, namely a certain level of organization of the parties to the conflict, and a specific intensity of the violence.[149]

Generally, rules of IHL are binding mainly upon States, organized armed groups and individuals.[150] Nevertheless, owing to the proliferation of conflicts and the subsequent deployment of peace operations, the legal practice and interpretation has evolved to include international organizations in the scope of IHL due to their being subjects with international legal personality and thus, bound by customary IHL.[151] This has enabled them to become parties to armed conflicts.[152]

In this context of international organizations undertaking peace operations, one more matter of controversy has been whether the TCCs that have placed nationals at the international organization's disposal, the international organization or both are parties to the armed conflict. Once again, the matter of command and control comes into play when addressing this question and,[153] particularly, the issue of effective control.[154] Consequently, according to usual UN practice,[155] it is generally submitted that only the UN peace operation, as a subsidiary organ of the UN, should become the party to the armed conflict, and not the UN as a whole or the TCCs.[156] However, it would also be possible that the peace forces "engage in combat operations without being treated as a party to an armed conflict. In such a case, it is accepted that the force[s] [have] a duty to comply with the principles and spirit of the principal conventions on IHL."[157]

Unlike the UN, NATO command and control structures in peace operations differ from that of the UN in a way that TCCs have the main control over their forces in the operations and, therefore, both the TCCs and NATO (but not all NATO member States) are to be considered parties to the armed conflict when the threshold for triggering IHL applicability has been reached.[158] This notion of "dual attribution"[159] will also be crucial for determining the bearer of

[149] *ICRC*, Commentary on the First Geneva Convention, 2016, Art. 3: Conflicts not of an international character, para. 387 ff.
[150] See *Kleffner* (note 129), Section 3.01, paras. 21-25, pp. 45-49.
[151] *Ibid*., para. 23; *Ferraro* (note 146), p. 575.
[152] *Kleffner* (note 129), Section 3.01, para. 23, p. 46; *Greenwood*, YIHL, Vol. 1, 1998, p. 3, 16.
[153] *Ferraro* (note 146), pp. 588-595.
[154] According to *Zwanenburg*, the effective control test proposed by the ILC to analyse the responsibility of international organizations should also be used for determining who is to become a party to an armed conflict within the international organization-TCCs spectrum, since "[i]f we consider international law as one system, it is logical to answer similar questions in a similar way.": See *Zwanenburg*, Collegium N° 42, 2012, p. 23, 26; see also Art. 7 DARIO (*infra* note 236), even though effective control is not defined.
[155] It is not a fixed rule and has to be assessed on a case-by-case basis depending on the military structure of the peace operation deployed.
[156] *Ferraro* (note 146), pp. 592-593; Rule 6.5.4 in *Gill et al. (eds.)*, (note 20), p. 100.
[157] *Greenwood* (note 152), p. 34.
[158] *Ferraro* (note 146), pp. 593-594.
[159] This has been recognized by the ILC in the commentary on DARIO, Chapter II: Attribution of Conduct to an International Organization, para. 4, p. 83 (see *infra* note 236).

responsibility for violations of human rights and IHL by peace forces, in other words, if joint responsibility is possible. This will be examined in Section E.

Apart from all the aforementioned and other contentious issues[160] that cannot be subject to analysis due to the length of the Thesis, it is undisputed that the UN has acknowledged as well the applicability of IHL to its peace forces through internal policies such as the *Secretary-General's 1999 Bulletin on the Observance by United Nations Forces of International Humanitarian Law*.[161] Furthermore, it is established that peace operations "are bound by the obligation to 'respect and ensure respect for' IHL."[162]

In light of the increasing allegations concerning human rights as well as IHL violations, one may call into question whether this duty to observe both IHRL and IHL by the peace forces is only a formality. The factual background about the alleged violations committed by peace forces will be the focus of analysis in the subsequent Section D.

D. Violations of human rights and International Humanitarian Law committed by United Nations Peacekeepers

When peacekeepers are deployed in a conflict zone, one of their main and most important mandates is the protection of the vulnerable population,[163] among other objectives specific to the needs of the country in conflict. Nevertheless, if these peace forces were actually accomplishing their tasks, allegations of violations of human rights and IHL by members of the peacekeeping community would not be coming to light since the 90s.[164] Even though the UN has introduced policies[165], codes of personal conduct[166] and resolutions[167] to tackle this plight, it is still doubtful whether it aims at the complete eradication of the violations or if, instead, the policies are only a cover to improve its public image while concealing the reality of this

[160] Once the applicability of IHL to peace operations has been admitted, other controversial issues are the actual application of IHL to the operations in the personal and geographical scopes. For an in-depth analysis see *Ferraro* (note 146), pp. 599-603, 608-612.
[161] UNSG, *Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law* of 06/08/1999, UN Doc. ST/SGB/1999/13.
[162] Rule 6.5.7 in *Gill et al. (eds.)*, (note 20), p. 101.
[163] See *Johnson*, in: De Coning/Peter, p. 133, 133: "More than 98% of military and police personnel currently deployed in peace operations have a mandate to protect civilians […]." For an insight into missions established with the main objective of protecting civilians see as an example MONUSCO (UNSC Res. 1925 of 28/05/2010, UN Doc. S/RES/1925 (2010), paras. 11, 12 (a) (c)); MINUSCA (UNSC Res. 2149 of 10/04/2014, UN Doc. S/RES/2149 (2014), para. 30 (a)).
[164] *O'Brien*, p. 3.
[165] Policies that should be taken note of are the 'Zero-tolerance policy': UNSG, *Secretary-General's Bulletin on Special measures for protection from sexual exploitation and sexual abuse* of 09/10/2003, UN Doc. ST/SGB/2003/13; OHCHR/DPKO/DPA/DFS, *Policy on Human Rights in United Nations Peace Operations and Political Missions* of 01/09/2011, Ref. 2011.20; DPKO/DFS, *Policy on The Protection of Civilians in United Nations Peacekeeping* of 01/04/2015, Ref. 2015.07; and DPA/DPKO/DFS, *Policy on Accountability for Conduct and Discipline in Field Missions* of 01/08/2015, Ref. 2015.10, among other important documents.
[166] See, *e.g.*, *UN*, Ten Rules/Code of Personal Conduct for Blue Helmets, https://conduct.unmissions.org/ten-rulescode-personal-conduct-blue-helmets (last accessed on 18/04/2020).
[167] UNSC Res. 2272 of 11/03/2016, UN Doc. S/RES/2272 (2016).

egregious problem. These are, in general terms, the rules which prohibit violations in the internal law of the UN applicable to peace forces, without forgetting the norms stemming from the UN Charter and the mandates issued for each particular mission. Conversely, the prohibitions on the reviewed violations that emanate from the external law applicable to the UN and, thus, to its forces, in other words, from customary international law, will be examined with regard to the specific violations.

For the purposes of this Section, a compilation of peace missions where allegations of violations have arisen will be made in order to establish an illustrative factual background that leads us to the difficulty of assigning responsibility in this context of intertwined actors. The assessed missions will be with peace forces under UN command as well as those authorized or mandated by the SC, *i.e.* not under UN command. Consequently, sexual exploitation and abuse and human trafficking and sexual slavery will be addressed as violations of both human rights and IHL by peacekeeping forces during the conduct of their missions.

I. Sexual exploitation and abuse

In UN's parlance, 'sexual exploitation' is defined 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."[168] 'Sexual abuse' is further defined as "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions."[169] Any behaviour of this nature can also qualify as an act of serious misconduct[170].

Allegations of sexual exploitation and abuse committed by peacekeeping forces are prominent in a large number of missions deployed by the UN, including in conflict zones such as the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR),[171] two countries which will be the focus of a brief analysis on the matter in this part of the Thesis.

Starting with the DRC, the SC established two peace operations in the DRC, namely the United Nations Organization Mission in Democratic Republic of the Congo (MONUC)[172] from July 1999 to July 2010, which was subsequently renamed as the United Nations Organization

[168] UNSG, *Secretary-General's Bulletin on Special measures for protection from sexual exploitation and sexual abuse* of 09/10/2003, UN Doc. ST/SGB/2003/13, Section 1.
[169] *Ibid.*
[170] Defined as "misconduct, including criminal acts, that results in, or is likely to result in, serious loss, damage or injury to an individual or to a mission": See *COE Manual* (note 99), Chapter 2, Annex A, p. 20.
[171] For more missions where alleged violations of sexual exploitation and abuse have taken place see *O'Brien*, p. 3; *Akonor*, pp. 35-51.
[172] UNSC Res. 1279 of 30/11/1999, UN Doc. S/RES/1279 (1999).

Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)[173], in force from July 2010 to this day[174].

One possible reason that might have led to the renaming of MONUC as MONUSCO can be due to the discredit that MONUC had fallen into taking into consideration the more than 150 allegations of sexual exploitation and abuse during 2003-2004 involving UN military and civilian personnel deployed in the mission from participating States such as Nepal, Morocco, Tunisia, Uruguay, South Africa, Pakistan, and France.[175] The accusations concerned mainly women and girls, many of whom were refugees, who had been raped and forced into prostitution.[176] In the words of the designated adviser for this problem, Prince Zeid, "it would appear that [in the DRC] sexual exploitation and abuse mostly involves the exchange of sex for money (on average $1-$3 per encounter), for food (for immediate consumption or to barter later) or for jobs (especially affecting daily workers)."[177] These actions were even regarded by the then Secretary-General Kofi Annan as "acts of gross misconduct,"[178] demonstrating that the problem was known by the UN. Furthermore, allegations continued to emerge in 2008 regarding the creation of a child prostitution ring and abuses of Congolese girls by Indian peacekeeping forces, who, instead, were found innocent by the Indian army.[179]

Therefore, there is clear evidence that a culture of silence and impunity was prevalent within the peacekeeping community and,[180] that despite the strengthening of the duty to protect civilians in the MONUSCO's mandate,[181] more allegations surfaced about rapes of young girls,[182] who very likely had to give birth later to the so-called "peacekeeper babies."[183]

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[173] UNSC Res. 1925 of 28/05/2010, UN Doc. S/RES/1925 (2010).
[174] At the present time, MONUSCO's mandate has been extended until December 2020: UNSC Res. 2502 of 19/12/2019, UN Doc. S/RES/2502 (2019), para. 22.
[175] *Gardiner*, The U.N. Peacekeeping Scandal in the Congo: How Congress Should Respond, https://www.heritage.org/report/the-un-peacekeeping-scandal-the-congo-how-congress-should-respond#_ftn3 (last accessed on 16/04/2020); *Lynch*, U.N. Sexual Abuse Alleged in Congo - Peacekeepers Accused in Draft Report, https://www.washingtonpost.com/wp-dyn/articles/A3145-2004Dec15.html? (last accessed on 16/04/2020); *Lacey*, In Congo War, Even Peacekeepers Add to Horror, https://www.nytimes.com/2004/12/18/world/africa/in-congo-war-even-peacekeepers-add-to-horror.html (last accessed on 16/04/2020).
[176] *Ibid*; UNGA, *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations (Zeid Report)* of 24/03/2005, UN Doc. A/59/710, para. 6.
For a review of some case studies see UNGA, *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* of 05/01/2005, UN Doc. A/59/661, paras. 12-18.
[177] See Zeid Report (note 176), para. 6.
[178] *UN*, Annan vows to end sex abuse committed by UN mission staff in DR of Congo, https://news.un.org/en/story/2004/11/121482-annan-vows-end-sex-abuse-committed-un-mission-staff-dr-congo (last accessed on 18/04/2020).
[179] *Caplan*, Peacekeepers gone wild: How much more abuse will the UN ignore in Congo?, https://www.theglobeandmail.com/news/politics/second-reading/peacekeepers-gone-wild-how-much-more-abuse-will-the-un-ignore-in-congo/article4462151/ (last accessed on 18/04/2020).
[180] *Ibid.*; UNGA, *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* (note 176), para. 46.
[181] UNSC Res. 1925 of 28/05/2010, UN Doc. S/RES/1925 (2010), para. 11.
[182] See *Caplan* (note 179), concretely Case 1.
[183] Zeid Report (note 176), para. 6.

In light of the foregoing and taking into consideration the external law surrounding the UN, it is firstly submitted, as it has been ascertained in the previous Section C, that both IHRL and IHL[184] are applicable to UN peace operations. In the second place, sexual exploitation and abuse is prohibited in a number of human rights and IHL treaties,[185] but since the UN is not a party to them, it cannot be bound by their obligations. By contrast, as it is a subject with international legal personality, the UN is bound by customary IHRL and IHL. Both fields of customary international law prohibit it: 1) customary IHRL prohibits sexual exploitation and abuse through the prohibition of torture or cruel, inhuman or degrading treatment or punishment,[186] since rape and other forms of sexual abuse have been recognized to constitute means of torture in the case law of human rights bodies[187] and international criminal tribunals[188], apart from being also considered even *jus cogens* norms owing to the status that the prohibition against torture and other cruel, inhuman or degrading treatment or punishment has acquired;[189] 2) customary IHL also prohibits rape and other forms of sexual violence,[190] including sexual exploitation and abuse, due to the fact that they are considered a form of sexual violence,[191] a prohibition that covers all women, girls, boys and men.[192]

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[184] When the conditions for the application of this body of law are met, *i.e.* there is an armed conflict and the peace forces (if not a party to the conflict) are engaged in hostilities. See *supra* Section C.II.

[185] Sexual exploitation and abuse is not specifically referred to in human rights treaties, but it is submitted that the provisions on torture and cruel, inhuman or degrading treatment or punishment comprise acts of this nature: See *infra* notes 187, 188. They are, furthermore, non-derogable prohibitions: see, *e.g.*, Arts. 4 para. 2, and 7 ICCPR; Arts. 15 para. 2, and 3 ECHR; see also Art. 1 Convention against Torture (UNCAT) and the commentary on Art. 40 para. 5 DARSIWA (*infra* note 235).
For IHL treaties prohibiting sexual exploitation and abuse, see Art. 14 GC III; Art. 27 GC IV; Arts. 75 (2)(a)(b), 76 (1), and 77 (1) AP I. See also Common Art. 3 (1)(a)(c) GCs, and Art. 4 (2)(a)(e) AP II.

[186] See the so-called *Restatement* list of customary IHRL in American Law Institute (ALI), *Restatement of the law, third. The foreign relations law of the United States,* Vol. 2, 1987, para. 702, p. 161.
Furthermore, see *De Schutter*, p. 59: "the growing consensus is that most, if not all, of the rights enumerated in the Universal Declaration of Human Rights have acquired a customary status in international law." Thus, go to Art. 5 of the UNGA Res 217 A (III) *Universal Declaration of Human Rights* of 10/12/1948, UN Doc. A/RES/3/217A.
Meron, pp. 93-94 goes further to ascertain that "those rights which are most crucial to the protection of the human dignity and of the universally accepted values of humanity, and whose violation triggers broad condemnation by the international community" could be considered as customary human rights without necessarily having to fulfilled his two indicators of custom, namely the widespread introduction of the right in human rights treaties and its general acceptance and incorporation in national laws.

[187] IACHR, *Raquel Martín de Mejía v. Perú*, Case 10.970, Report No. 5/96, Annual Report 1995, OEA/Ser.L/V/II.91 Doc. 7 Rev., 1 March 1996: See part 3 "Analysis" of the 2nd point "Questions raised"; ECtHR, *Aydin v. Turkey*, Judgment, App. No. 57/1996/676/866, 25 September 1997, paras. 83-86.
Note also the UN Commission on Human Rights, *Report of the Special Rapporteur, Mr. P. Kboijroans, on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 19/02/1986, UN Doc. E/CN.4/1986/15, para. 119.

[188] See, *e.g.*, ICTY, *Prosecutor v. Dragoljub Kunarac and Others*, Case No. IT-96-23&23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 150; ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras. 687-688.

[189] UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez* of 10/04/2014, UN Doc. A/HRC/25/60, para. 40.

[190] For an extensive assessment see *Henckaerts/Doswald-Beck* (eds.), Customary International Humanitarian Law, Vol. 1: Rules, Rule 93. Moreover, on the practice of this Rule 93 to be considered customary law follow: *ICRC*, Practice Relating to Rule 93. Rape and Other Forms of Sexual Violence, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule93 (last accessed on 18/04/2020).

[191] *Bastick/Grimm/Kunz*, p. 19; *Krug et al.* (eds.), World Report on Violence and Health, World Health Organization (WHO), pp. 149-150.

[192] See *Henckaerts/Doswald-Beck* (eds.), (note 190), Rule 93.

Furthermore, it should be noted that sexual exploitation and abuse amount to war crimes in both international and non-international armed conflicts,[193] and therefore, perpetrators must be prosecuted for these crimes by States.

In addition to this, the UN is implicitly bound by norms related to its field of work, *i.e.* those stemming from its constitutive document, such as the pursuit of the maintenance of international peace and security, whereby its obligation to respect human rights and humanitarian norms arises and it should not be breached.[194]

Now, taking into consideration that the peacekeepers accused of the violations were under UN command and control, without forgetting that they are at the same time national contingents, even though at the disposal of the UN, they are also bound by their respective participating States' human rights and humanitarian norms obligations (as it has been seen in Section C). Therefore, each of them further breached the obligations to which their States had adhered to.

As a result of this, it can be said that sexual exploitation and abuse in the DRC constituted violations of human rights and IHL (if it were ascertained that an armed conflict existed and the UN forces engaged in hostilities) committed by UN peacekeeping forces. Who can then incur responsibility for these egregious acts: the UN for having been in charge of commanding and controlling the operation, or the countries which contributed the accused peacekeeping forces? This will be settled in the next Section after examining the mission in the CAR and in Kosovo.

On the northern border of the DRC lies the CAR. In the CAR, after having previously established other peace operations,[195] the SC finally deployed in 2014 its United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA)[196], which is still ongoing. This was complemented by other parallel authorized missions by the SC, such as the African-led International Support Mission in the Central African Republic (MISCA)[197] and, especially, by authorized foreign military forces like the French Sangaris forces[198], which are of importance in the present case.

The situation in the CAR is similar to that of the DRC, the main difference being that instead of dealing with peacekeeping forces under UN command and control, they were for the most part international peacekeepers authorized or mandated by the SC, *i.e.* not under the direct

[193] See Art. 8 (2) lit. b xxii, lit. c ii, lit. e vi of the Rome Statute.
[194] See ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] ICJ Reports 1980, p. 73, para. 37; *Zwanenburg* (note 17), p. 234.
[195] Namely the United Nations Mission in the Central African Republic (MINURCA): UNSC Res. 1159 of 27/03/1998, UN Doc. S/RES/1159 (1998); the United Nations Peacebuilding Support Office in the Central African Republic (BONUCA): UNSC, *Letter dated 3 December 1999 from the Secretary-General addressed to the President of the Security Council* of 10/12/1999, UN Doc. S/1999/1235; the United Nations Integrated Peacebuilding Office in the Central African Republic (BINUCA): UNSC Res. 2031 of 21/12/2011, UN Doc. S/RES/2031 (2011).
[196] UNSC Res. 2149 of 10/04/2014, UN Doc. S/RES/2149 (2014).
[197] UNSC Res. 2127 of 05/12/2013, UN Doc. S/RES/2127 (2013), para. 28.
[198] *Ibid.*, para. 50; UNSC Res. 2149 of 10/04/2014, UN Doc. S/RES/2149 (2014), para. 47.

command of the UN.[199] Thus, the French Sangaris forces were authorized to "use all necessary means to provide operational support to elements of MINUSCA,"[200] in other words, to protect the civilian population as it had been set out in the MINUSCA's mandate as a top priority.[201] Nevertheless, rather than accomplishing their mandate, it could be said that they acted in a manner contrary to what they had been deployed for, engaging in acts of serious misconduct like sexual exploitation and abuse.

The first set of allegations arose in 2014 and comprised children as young as 9 years of age who had been sexually abused mainly by members of these French Sangaris forces in exchange for food and/or small amounts of money.[202] Particularly, all the interviews carried out by a Human Rights Officer and staff of the United Nations Children's Fund (UNICEF) concerned boys of the M'Poko camp for internally displaces persons,[203] who were lured by the forces trifling with their hunger and vulnerability. Some of the children also reported that they had seen their friends performing fellatios, knowing in return what "[they] had to do"[204] if they wanted to get some food or money. This shows that the problem was widespread and alarming. It was further regarded as conflict-related sexual violence within the meaning of the UN.[205] In the same vein, more sexual exploitation and abuse allegations by UN peacekeepers went public between 2015 and 2016, which involved women and girls having been gang-raped, raped or engaged in transactional sex.[206]

Moreover, it has been claimed that in the CAR "abuse of authority"[207] by UN officials took place due to the inaction and/or wrongdoings of the same in light of what was happening.[208] "[I]nformation about the allegations was passed from desk to desk, inbox to inbox, across multiple United Nations offices, with no one willing to take responsibility to address the serious human rights violations."[209]

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[199] UNGA, *Report of an independent review on sexual exploitation and abuse by international peacekeeping forces in the Central African Republic* of 23/06/2016, UN Doc. A/71/99, p. 2.
[200] UNSC Res. 2149 of 10/04/2014, UN Doc. S/RES/2149 (2014), para. 47.
[201] *Ibid*., para. 30 (a).
[202] For a complete picture of the allegations and the interviews see the *Report of an independent review* (note 199), pp. 30-33.
[203] *Ibid*., para. 44, p. 30.
[204] See Interview 4 of the *Report of an independent review* (note 199), para. 52, p. 32.
[205] *Report of an independent review* (note 199), p. 33, para. 58. For a definition see UNGA/UNSC, *Report of the Secretary-General* on *Conflict-related Sexual Violence* of 13/01/2012, UN Doc. A/66/657–S/2012/33, para. 3.
[206] For an insight, see the cases exposed in *Human Rights Watch*, Central African Republic: Rape by Peacekeepers, https://www.hrw.org/news/2016/02/04/central-african-republic-rape-peacekeepers (last accessed on 19/04/2020).
[207] Abuse of authority has been defined as "the improper use of a position of influence, power or authority against another person." See UNSG, *Secretary-General's Bulletin on the Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority* of 11/02/2008, UN Doc. ST/SGB/2008/5, para. 1.4. It has, furthermore, to fulfilled a two-step evaluation: see *Report of an independent review* (note 199), paras. 142-144, p. 58.
[208] For a comprehensive review in the matter see the *Report of an independent review* (note 199), pp. 56-64 and pp. 76-79.
[209] *Ibid*., p. 2.

Additionally, there are two groups of peacekeeping forces involved in the alleged violations in the CAR, namely the forces authorized by the SC but not under UN command, and the forces under UN command.

In the first place, regarding the forces not under UN command and the external law applicable to the UN, it should be assessed who exercised the effective control over the conduct of the authorized forces in the CAR in order to ascertain whether the conduct is to be attributed to the UN, to the particular TCC, or to both, and thus, whether these forces are bound by the set of customary international laws binding on the UN, in addition to the laws binding on their respective TCC. This effective control test will be plainly addressed in Section E.

Secondly, concerning the second wave of allegations and therefore, turning to the peacekeeping forces under UN command, it should be noted that the same external laws above exposed surrounding the UN and its peacekeeping forces in the peace operations in the DRC, *i.e.* during MONUC and MONUSCO, are applicable to the UN peace forces in the CAR, but with the difference on another SC's mandate, namely MINUSCA's mandate, with similar priorities such as the protection of the civilian population.

II. Human trafficking and sexual slavery

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines 'trafficking in persons' as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[210]

This trafficking in human beings has also been labelled as a form of "modern slavery."[211] For its part, 'sexual slavery' has been defined by the International Criminal Court (ICC) as the exercise of "any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty" combined with the causing of "such person or persons to engage in one or more acts of a sexual nature".[212]

There is evidence supporting a strong correlation between the emergence of a conflict and the occurrence of the practice, or better said, between the conflict, the subsequent deployment of

[210] Art. 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
[211] *Chuang*, AJIL, Vol. 108, 2014, p. 609, 609; see also *Anti-Slavery International*, What is modern slavery?, https://www.antislavery.org/slavery-today/modern-slavery/ (last accessed on 21/04/2020).
[212] See ICC, *Elements of Crimes*, 2011, Definition of sexual slavery (Art. 8 (2)(b)(xxii)-2).

international presences in that region and the rise of human trafficking,[213] especially when it comes to trafficking for sexual purposes as the situation in the former Yugoslavia, particularly in Kosovo, demonstrated. Thus, the peace mission deployed in Kosovo will be the focus of attention in brief in this Section.

Going back in time to 1999 to the peace operation in Kosovo, the SC established the United Nations Interim Administration Mission in Kosovo (UNMIK)[214] as well as an international security presence, the Kosovo Force (KFOR), which would be "under UN auspices" and consist of "substantial NATO participation", but "under unified command and control".[215] In other words, while UNMIK was clearly under direct UN command, KFOR was a NATO-led multinational peacekeeping force whereby the participating NATO and non-NATO countries had not transferred "full command" over their troops, rather only "operational control" and/or "operational command" enabling them to retain certain powers over their troops such as discipline and accountability.[216] Moreover, COMKFOR, the commander of KFOR, was the one who retained "unified command and control".[217]

Apart from the already difficult spectrum of actors in the mission in the Kosovo, the problem further escalates as a result of the allegations involving principally members of both UNMIK police and KFOR troops in the trafficking and use of services of trafficked women and girls.[218] There was growing evidence of "significant organized prostitution in four locations close to major concentrations of KFOR troops. Most of the clients were reported to be members of the international military presence, while some KFOR soldiers were allegedly also involved in the trafficking process itself."[219] The alleged KFOR soldiers implicated appear to be mainly American, German, Italian, Russian and French.[220] Women and girls were trafficked into Kosovo as well as out of it; some were also internally trafficked.[221] By 2003-2004 there were reportedly in Kosovo more than 200 bars, clubs and related places where trafficked women

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[213] Some instances are Cambodia: See *Koyama/Myrttinen*, in: Aoi/De Coning/Thakur (eds.), pp. 23, 32-33; *Martin*, Must boys be boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions, http://www.pseataskforce.org/uploads/tools/mustboysbeboysendingseainunpeacekeepingmissions_refugeesinternational_english.pdf, p. 4, (last accessed on 21/04/2020); East Timor: See also *Koyama/Myrttinen,* pp. 23, 34-35; Bosnia-Herzegovina: See also *Martin*, p. 5 and *Amnesty International*, Kosovo (Serbia & Montenegro) "So does that mean I have rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo, https://www.amnesty.org/en/documents/eur70/010/2004/en/, p. 41, (last accessed on 21/04/2020); for Kosovo it will be examined below.

[214] UNSC Res. 1244 of 10/06/1999, UN Doc. S/RES/1244 (1999), Annex 2, paras. 3, 5.

[215] *Ibid.*, Annex 2, paras. 3, 4.

[216] European Commission for Democracy through Law (Venice Commission), *Opinion on human rights in Kosovo: Possible establishment of review mechanisms*, No. 280/2004, CDL-AD(2004)033, para. 14.

[217] *Ibid.*

[218] *Amnesty International* (note 213), p. 41; *UNICEF/OHCHR/OSCE-ODIHR*, Trafficking in Human Beings in Southeastern Europe, p. 96.

[219] See *Amnesty International* (note 213), p. 7; in the same vein, see *Wareham*, No Safe Place: An Assessment of Violence against Women in Kosovo, http://iknowpolitics.org/sites/default/files/nosafeplace_kosovo.pdf, p. 93, (last accessed on 21/04/2020).

[220] See *Wareham*, (note 219), pp. 94-95.

[221] *Amnesty International* (note 213), p. 1; see also *UNICEF/OHCHR/OSCE-ODIHR* (note 218), pp. 96-97.

and girls were presumably forced into prostitution, and which were ascribed to the "off-limits list" for UNMIK personnel and KFOR forces.[222]

Taking into consideration KFOR troops, since they are the military presence deployed in Kosovo and the focus of the Thesis, it should be noted that the responsibility will be examined on the basis of the effective control exercised over KFOR's conduct by the international organizations or the States contributing troops. Be that as it may, whether KFOR was under the direct command of either the UN or NATO, due to their both being international organizations and subjects with international legal personality, they are both bound by customary IHRL and IHL. Both fields of customary law prohibit human trafficking and sexual slavery: 1) customary IHRL prohibits trafficking in persons through the prohibition of slavery,[223] since it has been considered a form of modern slavery,[224] and sexual slavery, as the name implies, is also slavery and, as such, it has acquired a *jus cogens*[225] status from which no derogations are permitted;[226] 2) in customary IHL human trafficking is also forbidden by the prohibition of slavery and the slave trade, and sexual slavery is also a prohibition of customary IHL,[227] which at the same time, includes trafficking in persons in its concept of conduct amounting to sexual slavery.[228] This shows that both human trafficking and sexual slavery are interrelated and that the nature of trafficking will always give rise to a certain form of slavery. However, it is worth mentioning that even though human trafficking and sexual slavery are

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[222] *Amnesty International* (note 213), pp. 1, 2, 7, 42.

[223] According to the so-called *Restatement* list, the prohibition on slavery constitutes a norm of customary IHRL: ALI, *Restatement of the law, third. The foreign relations law of the United States,* Vol. 2, 1987, para. 702, p. 161. See also the prohibition on slavery in Art. 4 of the UNGA Res 217 A (III) *Universal Declaration of Human Rights* of 10/12/1948, UN Doc. A/RES/3/217A.

[224] It has been claimed that "the *travaux préparatoires* to the Rome Statute indicate that the Statute intended to recognize and prosecute human trafficking as a form of modern day slavery": See *Kim*, Prosecuting Human Trafficking as a Crime against Humanity under the Rome Statute, http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf, p. 7 (last accessed on 21/04/2020).
The ICC has defined "enslavement" in Art. 7 (2)(c) of its Statute as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." Thus, including trafficking in the concept of enslavement.
See, furthermore, ICTY, *Prosecutor v. Dragoljub Kunarac and Others*, Case No. IT-96-23&23/1-T, Judgment (Trial Chamber), 22 February 2001, paras. 539-540.
In the case law of regional human rights bodies, see, *e.g.*, ECtHR, *Rantsev v. Cyprus and Russia*, Judgment, App. No. 25965/04, 7 January 2010, paras. 281, 282.

[225] UN Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur* of 22/06/1998, UN Doc. E/CN.4/Sub.2/1998/13, para. 30.

[226] See, *e.g.*, Arts. 4 para. 2, and 8 ICCPR; Arts. 15 para. 2, and 4 ECHR.

[227] See the information about the ICC and the ICTY on *supra* note 224.
For an extensive assessment see *Henckaerts/Doswald-Beck* (eds.), Customary International Humanitarian Law, Vol. 1: Rules, Rule 94. Moreover, on the practice of this Rule 94 to be considered customary law follow: *ICRC*, Practice Relating to Rule 94. Slavery and Slave Trade, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule94 (last accessed on 21/04/2020).

[228] This is enshrined in footnote 53 of ICC, *Elements of Crimes*, 2011, Definition of sexual slavery (Art. 8 (2)(b)(xxii)-2).

violations of IHL in general terms, the armed conflict in Kosovo ended in June 1999 with the establishment of UNMIK,[229] and thus, IHL ceased to apply.

Likewise, it should be observed that the enslavement of the civilian population amounts to war crimes in both international and non-international armed conflicts,[230] which States have the obligation to prosecute.

Consequently, irrespective of who is the bearer of responsibility in the present case of KFOR, it can be said that human trafficking and sexual slavery constituted violations of human rights in the peace operation in Kosovo by the KFOR troops led by NATO, but authorized by the UN (also by UNMIK personnel, but it does not enter in the scope of the analysis). In order to ascertain whether the UN, NATO or their respective participating States are responsible for the violations the prevailing opinion in this matter of controversy will have to be examined.

E. Responsibility for the violations by United Nations Peacekeeping Forces

Due to the special characteristics of peacekeeping, not only troops under UN command and control will be examined, but also troops mandated or authorized by the SC in conjunction or not with other international organizations such as NATO. This is because there are peace operations where it is difficult, if not almost impossible, to draw the line of what is under the direct command of the UN or, instead, of the respective participating States, resulting in no pure operation with clearly defined constituents and, consequently, in different opinions and case law regarding the bearer of responsibility for violations of human rights and IHL. Thus, is the UN, the particular participating State(s) or NATO responsible? Or, perhaps, can the UN and the participating State(s) be jointly responsible? One of the main criteria that have emerged in order to evaluate this matter of responsibility is the effective control test.

But, first of all, the term 'responsibility' needs to be defined. Originally, States were the only subjects of international responsibility. However, with the development of international law and the recognition of the international legal personality of other subjects of international law, also international organizations and individuals[231] can incur responsibility.[232]

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[229] The armed conflict in Kosovo lasted from 1998 to 1999, and it ended with the deployment of the peace operation in Kosovo in June 1999: see *Nowakowska-Krystman/Żakowska*, Partnership for Peace Consortium of Defense Academies and Security Studies Institutes, Vol. 14, 2015, p. 69, 70.

[230] See Art. 8 (2) lit. b xxii, lit. c ii, lit. e vi of the Rome Statute.

[231] By virtue of the recognition of the international responsibility of individuals, peacekeepers can be held responsible for their violations of human rights and IHL and prosecuted by their domestic courts: See *Fleck* (note 10), pp. 227, 242; Model SOFA (note 92), para. 47 (b).
On the other hand, international criminal prosecution by the ICC or any international tribunal created *ad hoc* could also be feasible should they have jurisdiction: see *Fleck* (note 10), p. 242; *Pellet*, in: Crawford/Pellet/Olleson (eds.), p. 4, 8; *Fenrick*, in: Gill/Fleck (eds.), Handbook of International Law of Military Operations, Chapter 29, pp. 546-558.

[232] *Pellet* (note 231), pp. 6-8.

Responsibility has been said to stem from the notion of "responding," in order words, "[t]he response at issue here is the one a subject owes to other subjects when it has breached a legal obligation incumbent upon it."[233] In this respect, it has been described as "a mechanism having as its function the condemnation of breaches by subjects of international law of their legal obligations and the restoration of international legality, respect for international law being a matter in which the international community as a whole has an interest."[234]

The International Law Commission (ILC) has played a fundamental role in the codification of responsibility, first through the creation in 2001 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA)[235] and, thereafter with the adoption in 2011 of the Draft Articles on the Responsibility of International Organizations (DARIO)[236]. It is in this latter document where the effective control test can be found. Therefore, the subsequent analysis will help to understand the dimension of the notion, together with the explanation of the command and control structures in order to discern what effective control could mean. After this, the different case law will be presented to illustrate the evolution of the concept and the *status quo* leading in the direction of the UN, the participating State(s) or both being internationally responsible.

I. A question of attribution of conduct: the effective control test

According to the ILC, an internationally wrongful act of a State or international organization exists when two conditions are met, namely the conduct consisting of the particular action or omission 1) is attributable to the State/international organization under international law; and 2) the conduct constitutes a breach of an international obligation of the State/international organization.[237]

Having ascertained in previous sections that both the UN and the participating States in a peacekeeping operation are bound by human rights as well as humanitarian law norms, *i.e.* by international obligations, and that peacekeepers could violate both fields of international law engaging in acts of sexual exploitation and abuse and human trafficking and sexual slavery, the question now might be how to attribute the conduct of these peacekeeping forces to the UN, the TCCs or other international organizations participating in the peace operation. Given their status as national contingents at the disposal of the UN, the ILC has codified a rule of attribution for this special peacekeeping situation in its Article 7 DARIO, which reads as follows:

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[233] *Kolb*, The International Law of State Responsibility, p. 1.
[234] See *Pellet* (note 231), p. 15.
[235] UNGA/ILC, *Report of the International Law Commission on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001)*, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10, UN Doc. A/56/10, Chapter IV, Section E (hereinafter DARSIWA).
[236] UNGA/ILC, *Report of the of the International Law Commission on the Work of its Sixty-third Session (26 April-3 June and 4 July-12 August 2011)*, Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10, UN Doc. A/66/10, Chapter V, Section E (hereinafter DARIO).
[237] See Art. 2 DARSIWA and Art. 4 DARIO.

> 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.[238]

As explained by the ILC, this Article would be applicable in the context of peacekeeping operations, owing to the fact that the military contingents placed at the disposal of the UN still act "to a certain extent" as organs or agents of their sending States or organization,[239] since the States "[retain] disciplinary powers and criminal jurisdiction over the members of the national contingent."[240] In the words of *Salerno*, this is the "organic link" that remains between the TCCs and its military forces.[241]

Thus, as it can be deduced from the reading of Article 7 DARIO, the focus of the attribution of the specific conduct is going to be based on the effective control criterion. However, the ILC did not provide any definition of the concept. Therefore, the different interpretations and practice related to this standard have to be resorted to, without forgetting that it is a test which is still in development.

One of the first international cases in which this standard was upheld was the *Nicaragua* case, where the ICJ sustained that the State had to exercise "effective control" over the alleged conduct of the individual groups in order to be held responsible, seemingly signifying directing or enforcing the commission of the acts.[242] This standard was further reaffirmed in the *Genocide* case, but with a different meaning to that of giving instructions or providing directions.[243] However, the International Criminal Tribunal for the former Yugoslavia (ICTY) opted in the *Tadić* case for the "overall control" criterion, holding that the attribution of conduct of organized groups to the State required that the former were under the overall control of the State.[244] Even though these cases introduced different standards, they did not address peacekeeping operations and they may still seem confusing.

Thus, in the peacekeeping context, one source of interpretation is the ILC's commentary on the Articles. There the ILC specifies that the effective control criterion is based on the "factual control" exercised over the conduct in question, and that the "full factual circumstances and particular context" should also be considered when examining the particular conduct.[245] It is, furthermore, a criterion that is certainly interrelated with the notion of "command and control"

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[238] Art. 7 DARIO.
[239] Commentary on Art. 7 DARIO, para. 1, p. 87.
[240] *Ibid.*; UNGA, *Comprehensive Review of the Whole Question of Peace-keeping operations in All their Aspects: Secretary-General's Report on Command and control of United Nations peace-keeping operations* of 21/11/1994, UN Doc. A/49/681, para. 6.
[241] *Salerno*, in: Ragazzi (ed.), p. 415, 417.
[242] *Nicaragua* case (note 128), para. 115.
[243] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] ICJ Reports 2007, p. 43, para. 406.
[244] ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 120.
[245] Commentary on Art. 7 DARIO, para. 4, pp. 87-88.

in peacekeeping operations.[246] Consequently, it is crucial to understand the command and control structures in these operations.

1. Command and control of a Peacekeeping Operation

Command and control, commonly known as C2 in the military field, has been said to be related to "the authority vested in certain individuals (or bodies) to direct the actions and exercise authority over (elements of) assigned resources, such as members of […] the armed forces."[247] They are both terms which are "closely linked and complement each other;"[248] command refers to the authority itself of a commander,[249] and control to the exercise of that authority.[250]

As expressed in Section B.I., there are different levels of authority, command and control that come into play and interact with each other in a UN peacekeeping operation, namely strategic, operational and tactical. The interaction between these shape the command and control structure in a peace operation and, therefore, account must be taken of the following notions which are included in the aforementioned levels: "full or national command", "operational command and control", "tactical command and control" and "administrative control."

While "full or national command" and "administrative control" are powers retained by the TCCs owing to the existent "organic link" between the States and its military forces,[251] "operational command and control" are generally transferred to the UN or to the organization undertaking the operation,[252] and "tactical command and control", although retained to a great extent by the TCCs, are exercised in coordination with "operational command and control".[253]

Firstly, with regard to the powers normally retained by the participating States, "full or national command" comprises "strategic level command," which is an expression of national sovereignty and cannot be delegated, and is linked with the authority to decide the participation of a given State's armed forces in the peace mission or the withdrawal of the same;[254] "administrative control" involves the authority of the participating States to exercise administrative, disciplinary powers and criminal jurisdiction over their national contingents, but the organization conducting the operation may also adopt administrative measures regarding

[246] *Ibid.*, para. 9, p. 90.
[247] See Rule 4.2.I.I in *Gill et al. (eds.)*, (note 20), p. 41.
[248] *Voetelink*, p. 209.
[249] See NATO, *Glossary of Terms and Definitions*, AAP-06 (2019), p. 29: "The authority vested in a member of the armed forces for the direction, coordination, and control of military forces."
[250] *Ibid.*, p. 32: "The authority exercised by a commander over part of the activities of subordinate organizations, or other organizations not normally under his command, that encompasses the responsibility for implementing orders or directives."
[251] Rule 4.2.I.2 in *Gill et al. (eds.)*, (note 20), pp. 41-42.
[252] Rule 4.2.I in in *Gill et al. (eds.)*, (note 20), p. 41.
[253] *Gill*, in: Dekker/Hey (eds.), Netherlands Yearbook of International Law, p. 37, 49.
[254] *Ibid.*, p. 46.

the misconduct of the personnel, such as orders of repatriation;[255] and, "tactical command and control" entail the authority delegated to subordinate commanders to assign tasks to other units and subunits in order to carry out the objectives of the mission, and it implies the appointment of a contingent commander by the TCC who will exercise tactical command and control over the deployed national contingent.[256]

In terms of "operational command and control", they deserve a separate Section due to the implications and importance assigned to this level for the purpose of attributing the conduct for the wrongdoing of the peacekeeping forces to the UN or the TCCs.

2. "Effective operational control" of a Peacekeeping Operation

As previously introduced, "operational command and/or operational control" are the level of authority which will normally be transferred to the UN by the TCCs in a UN peacekeeping operation.[257] By contrast, in mandated or authorized peace operations, this level of authority will be delegated by the SC to the regional or international organization conducting the operation, such as NATO, or to a leading nation participating in the operation.[258]

Operational command is, thus, "the authority vested in an individual or body to assign specific tasks or missions to subordinate commanders, to deploy units within the area of operations, to reassign forces, and to retain or delegate elements of operational or tactical level command […] or control,"[259] and operational control "the authority of a commander over part of the activities of subordinate level commanders or other persons placed temporarily under his control and is normally an attribute of operational level command."[260]

In a UN peacekeeping operation, the transfer of these elements of operational authority to the UN is done through a Transfer of Authority Agreement (TOA) or a MOU,[261] and it consists of a chain of command which involves several main actors possessing operational level authority, command and control responsibilities, namely a HOM, which can be at the same time the Special Representative of the Secretary-General (SRSG), a HOMC, a HOPC and a Director of Mission Support (DMS).[262] The HOM shall report and be responsible to the SG through the USG DPKO, has overall authority over the activities implemented during the mission and regulates the delegation of authority for the fulfilment of the mandate's objectives to the heads

[255] Rule 4.2.I.7 in *Gill et al. (eds.)*, (note 20), p. 41; DPKO/DFS, *Policy on Authority, Command and Control in United Nations Peacekeeping Operations* (note 79), para. 49, p. 11; *Cammaert/Flappe*, in: Gill/Fleck (eds.), Handbook of International Law of Military Operations, Section 6.16, para. 2, pp. 181, 182-183.
[256] See DPKO/DFS, *Policy on Authority, Command and Control* (note 79), paras. 10, 11, p. 4, para. 39, p. 10; *Gill* (note 248), p. 49.
[257] Rule 4.2.I in *Gill et al. (eds.)*, (note 20), p. 41; *Gill* (note 253), p. 48.
[258] *Gill* (note 253), p. 47.
[259] *Ibid.*, pp. 46-47.
[260] *Ibid.*
[261] *Ibid.*, p. 48; Rule 4.2.I in *Gill et al. (eds.)*, (note 20), p. 46.
[262] See DPKO/DFS, *Policy on Authority, Command and Control* (note 79), para. 22, p. 7.

of all components of the mission.[263] For its part, the HOMC shall report and be responsible to the HOM and is the one who exercises operational control over all military personnel, setting up the military operational chain of command in the field.[264]

As a result of the retention of powers by the TCCs (full or national command, administrative control and tactical command and control) over their armed forces, and the transfer of some authority to the organization undertaking the peace operation (operational command and control), the question now might be: On which command and control powers the attribution of the particular acts or omissions of the peace forces to either the UN, or another organization such as NATO or the TCC shall be based?

Whereas the UN claims its "exclusive command and control over peacekeeping forces," the ILC states that the attribution of conduct should be subject to a factual control examination or, in other words, be based on the effective control over the conduct.[265] In this vein, in its commentary on Article 7 DARIO, the ILC suggests that "operational control" would be a correct interpretation of the effective control criterion.[266] This view had been previously endorsed by the International Law Association (ILA), which held that the responsibility of an international organization for organs placed at its disposal was dependent upon "the [organization's] authority to exercise effective control (operational command and control) over the activities of that organ."[267] Furthermore, the SG had also supported this position maintaining that "the international responsibility of the United Nations will be limited to the extent of its effective operational control."[268]

Thus, with operational command and control on the focus of the interpretations, *Milanović* and *Papić* suggest that the question to identify the holder of effective control should be "who is giving the orders – the state or the organization?"[269] On the other hand, *Dannenbaum* conceives that not only the command and control structures in place and the factual circumstances are indicators for the attribution of conduct, but rather the ability to prevent an act in question is a safer proof of the effective control exercised either by the UN or the TCC,[270] especially for *ultra vires* abuses, *i.e.* "[when] peacekeepers act beyond the authority granted them by the UN."[271]

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[263] See UN Model Agreement (note 98), para. 7; DPKO/DFS, *Policy on Authority, Command and Control* (note 79), paras. 24-26, p. 7; *Cammaert/Flappe* (note 255), Section 6.17, para. 1, p. 183.
[264] See DPKO/DFS, *Policy on Authority, Command and Control* (note 79), paras. 29-30, p. 8; *Cammaert/Flappe* (note 255), Section 6.17, paras. 2, 5, pp. 183-184.
[265] Commentary on Art. 7 DARIO, para. 9, p. 90, para. 4, pp. 87-88.
[266] *Ibid.*, para. 10, pp. 90-91.
[267] ILA, *Report of the Seventy-First Conference* held in Berlin of 16-21/08/2004, p. 200.
[268] UNSC, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* of 12/06/2008, UN Doc. S/2008/354, para. 16.
[269] *Milanović/Papić*, ICLQ, Vol. 58, 2009, p. 18.
[270] *Dannenbaum* (note 135), p. 157.
[271] *Ibid.*, p. 158.

The interpretations of the effective control test and other tests applied by international and national courts will be subsequently reviewed in order to ascertain which is the prevailing opinion leading to the responsibility of the UN, the TCC or other organizations like NATO.

II. Is the United Nations responsible for the violations?

A controversial decision leading in the direction of the responsibility of the UN has been the joined cases *Behrami and Saramati*[272] handed down by the ECtHR in 2007, where it dealt with an admissibility decision. Concretely, the *Behrami* case concerned the death of a boy and serious injury of his brother, in Kosovo in March 2000, caused by the detonation of a cluster bomb that had been dropped on the site by NATO during its bombardment in 1999.[273] The applicants' complaint against France was based on Article 2 of the European Convention on Human Rights (ECHR), accusing French KFOR troops of their failure to mark or defuse the undetonated bombs on the site, and their awareness thereof.[274]

The *Saramati* case comprised the arrest of the applicant by UNMIK police from April to June 2001, and his new detention by order of a KFOR Commander (first a Norwegian officer, replaced by a French general) in July 2001.[275] He claimed a violation by Norway and France of Article 5 of the ECHR alone, and in conjunction with Article 13 of the ECHR in terms of his extra-judicial detention in July 2001, and of Article 6 para. 1 on account of his lack of access to court, alleging also that the respondent States infringed their positive obligations to guarantee the Convention rights vis-à-vis the people of Kosovo.[276]

As it has already been introduced, the ECtHR ruled that the impugned acts and omissions of KFOR and UNMIK were attributable only to the UN and, thus, that it was incompetent *ratione personae* to review the alleged violations, declaring the case inadmissible.[277] However, the Court has received fierce criticism for its judgment.

In a clear attempt to avoid to decide on the issues of norm conflict and state jurisdiction,[278] *Milanović* and *Papić* maintain that the ruling of the ECtHR is rather incongruous since the main question raised before the Court was about the extraterritorial applicability of the ECHR, *i.e.* whether the applicants fell within the jurisdiction of the respondent States within the meaning of Article 1 of the ECHR and, instead, the Court solved the cases by means of dealing with the issue of attribution of conduct, but in a misleading manner linking attribution with delegation of

[272] ECtHR, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway,* Grand Chamber, Admissibility Decision, App. Nos. 71412/01 & 78166/01, 2 May 2007 (hereinafter *Behrami and Saramati*).
[273] *Ibid.*, paras. 5-7.
[274] *Ibid.*, para. 61.
[275] *Ibid.*, paras. 8-17.
[276] *Ibid.*, para. 62; The applicant had also filed a complaint against Germany, but decided to withdraw it since he could not prove the involvement of German soldiers in his detention, and the Court accepted it (see paras. 64, 65).
[277] *Ibid.*, paras. 151, 152.
[278] See *Milanović/Papić* (note 269), p. 31; *Sari*, HRLR, Vol. 8, 2008, p. 9.

powers rather than with international responsibility.[279] As stated by these scholars, the "delegation-means-attribution rationale"[280] introduced by the Court is inappropriate because there is a significant difference between the rules of attribution and international responsibility, and the issue of delegation, which is a part of the institutional law of international organizations related to the ability of their organs to entrust powers to other entities and, therefore, it cannot determine the responsibility of a State or international organization for its acts or omissions.[281]

Furthermore, the ECtHR not only was unsatisfactory in terms of the aforementioned reasoning to solve the joined cases, but also presented a new test for attribution (delegation in the Court's opinion) of conduct in peace operations, namely the "ultimate authority and control"[282] test, whereby it based its assumption on the fact that "Resolution 1244 constituted a lawful delegation of powers by the [SC] within the limits of Chapter VII of the UN Charter"[283] in order to attribute the conduct to the UN. Thus, it sustained that "the UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO […] the power to establish, as well as the operational command of, the international presence, KFOR."[284]

Be that as it may, the rationale followed by the Court together with the test are proof of the inconsistence of the judgment and of the unfeasibility of applying a criterion that is scarcely supported in the legal literature and practice.[285] The most supported criterion for the attribution of conduct in peace operations is the effective control test seemingly meaning operational command or control,[286] or, in other words, the ability to give orders.[287] It is argued that this is the test that should have been applied by the ECtHR to examine the attribution of the acts or omissions of both UNMIK and KFOR.[288] Even though the Court did refer to "effective control" and to the ILC and Article 5 DARIO (now Article 7),[289] it seems dubious that the Court actually implemented it. For its part, the ILC expressly reacted to this decision of the ECtHR in its commentary on Article 7, para. 10 DARIO, showing its disagreement with the judgment and upholding its "effective control" criterion.[290]

That the conduct of UNMIK was attributable to the UN would not be contested by the UN itself, since UNMIK was a subsidiary organ of the UN,[291] and the practice of this international

[279] *Milanović/Papić* (note 269), pp. 6-16.
[280] *Ibid.*, p. 20.
[281] *Ibid.*, p. 16.
[282] *Behrami and Saramati*, para. 133.
[283] *Milanović/Papić* (note 269), p. 19.
[284] *Behrami and Saramati*, para. 135.
[285] According to *Milanović/Papić* (note 269), pp. 15, 20, and *Sari* (note 278), p. 18, the Court based its rationale only on the work of *Sarooshi*, pp. 163-166.
[286] This has already been addressed in *supra* Section E.I.2. See, in addition, *Shraga*, JIP, Vol. 5, 1998, p. 64, 71; *Schmalenbach*, p. 249.
[287] See *Milanović/Papić* (note 269), p. 18.
[288] *Ibid.*, p. 18; *Sari* (note 278), p. 14; *Larsen*, EJIL, Vol. 19, 2008, p. 509, 520.
[289] *Behrami and Saramati*, paras. 30-31, 138.
[290] Commentary on Art. 7 DARIO, para. 10, pp. 90-91.
[291] *Behrami and Saramati*, para. 142.

organization is to claim “exclusive command and control” over national contingents in its peacekeeping operations (under UN command).[292] Yet, as mentioned above in Section E.I.2., for the ILC this also shall be based on a “factual criterion”.[293]

On the other hand, regarding the conduct of KFOR (authorized forces), it is even less undisputed that the effective control test had to be applied by the ECtHR in order to attribute the acts or omissions of KFOR to either NATO and/or the TCCs, but not to the UN, since operational command or control not only was delegated by the SC to NATO, but it was also effectively exercised by the TCCs and NATO.[294] Therefore, some scholars[295] suggest that the ECtHR should have examined as well the possibility of dual attribution of conduct of KFOR troops to both the accused TCCs and NATO. Another step that the Court forgot to assess.

It may well be that the reason for this decision of the ECtHR to shift responsibility from the TCCs solely to the UN was that States might be discouraged from participating in and contributing troops to future peace operations if they are compelled to observe human rights standards even more carefully.[296]

Despite this unfortunate ruling, perhaps the most concerning of all is the “message of unaccountability sent by a court of human rights.”[297] The ECtHR has reaffirmed its decision of *Behrami and Saramati* to dismiss other complaints brought before it relating to alleged human rights violations in Kosovo.[298] Furthermore, with judgments such as those of *Behrami and Saramati*, the immunity that the UN enjoys from civil process in any court was also reiterated.[299]

III. Is the participating State responsible?

A judgment that is frequently contrasted to the *Behrami and Saramati* joined cases is the *Al-Jedda*[300] case. Unlike the former cases, *Al-Jedda* leads in the direction of the responsibility of the TCCs participating in a peace operation. The case concerned the detention of the applicant, Mr Al-Jedda, by British forces operating within the framework of the Multinational Force (MNF) in Iraq,[301] which was a coalition of forces authorized under several SC

[292] Commentary on Art. 7 DARIO, para. 9, p. 90.
[293] *Ibid.*
[294] European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo: Possible establishment of review mechanisms of 11/10/2004, No. 280/2004, CDL-AD(2004)033, para. 79, p. 18; *Sari* (note 278), p. 15.
[295] *Sari* (note 278), p. 16; *Larsen* (note 288), p. 517; *Milanović/Papić* (note 269), p. 25.
[296] *Dannenbaum* (note 135), p. 153.
[297] *Milanović/Papić* (note 269), p. 25.
[298] See ECtHR, *Kasumaj v. Greece*, Admissibility Decision, App. No. 6974/05, 5 July 2007; *Gajic v. Germany*, Admissibility Decision, App. No. 31446/02, 28 August 2007; *Berić and Others v. Bosnia and Herzegovina*, Admissibility Decision, App. Nos. 36357/04 (etc.), 16 October 2007.
[299] See *Behrami and Saramati*, para. 151; Art. 105 para. 1 of the UN Charter; Art. II, Section 2 Convention on the Privileges and Immunities of the United Nations of 13/02/1946; ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, [1999] ICJ Reports 1999, p. 62, para. 66.
[300] ECtHR, *Al-Jedda v. United Kingdom*, Grand Chamber, Judgment, App. No. 27021/08, 7 July 2011 (hereinafter *Al-Jedda*).
[301] *Ibid.*, paras. 9-15.

Resolutions[302] to "take all necessary measures to contribute to the maintenance of security and stability in Iraq,"[303] including preventive detention as argued by the United Kingdom (UK) Government.[304] He brought the case before UK domestic courts, but his claims were rejected in favour of the Government.[305] He then filed a complaint against the UK before the ECtHR claiming a violation of Article 5 para. 1 of the ECHR, since he alleged to have been unlawfully held in internment by British armed forces between 2004 and 2007.[306]

Consequently, the ECtHR was compelled to decide on the issue of state jurisdiction, *i.e.* whether the applicant fell within the jurisdiction of the UK by virtue of Article 1 of the ECHR.[307] In doing so, the Court touched upon other important questions relating to norm conflict, dual attribution of conduct and the law of international responsibility, and the relationship between the ECHR and other branches of public international law,[308] such as IHL[309].

Detaching itself from its previous judgment in the *Behrami and Saramati* joined cases, the ECtHR held in the *Al-Jedda* case that the conduct of the British forces (the internment) was attributable to the UK and, therefore, that the applicant fell within the UK's jurisdiction.[310] However, instead of overruling *Behrami and Saramati* and its "delegation-means-attribution rationale,"[311] what the Court did was to follow the reasoning of the House of Lords differentiating *Behrami and Saramati* from *Al-Jedda* on the facts, [312] (even though essentially KFOR and MNF were both SC authorized operations, but deployed in different settings).

Firstly, with regard to the attribution of conduct and claiming factual differences between *Behrami and Saramati* and *Al-Jedda*, the Court determined that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations."[313] The Court alludes then to the above mentioned effective control test proposed by the ILC and supported by legal scholars, but still does not recognize either the applicability of this criterion or its own test or the test which is actually implementing, if any, for determining to whom the conduct of the British forces is attributable

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[302] See, *e.g.*, UNSC Res. 1511 of 16/10/2003, UN Doc. S/RES/1511 (2003), para. 13; UNSC Res. 1546 of 08/06/2004, UN Doc. S/RES/1546 (2004), para. 10.
[303] *Ibid.*
[304] The UK Government based its position on the letters annexed to Resolution 1546 which explicitly mentioned "internment where this is necessary for imperative reasons of security": See p. 11 in the Annex and para. 10 of UNSC Res. 1546 (note 302).
[305] R. (Al-Jedda) v. Secretary of State for Defence [2005] EWHC 1809 (Administrative Court); R. (Al-Jedda) v. Secretary of State for Defence [2006] EWCA Civ 327 (Court of Appeal); R (Al -Jedda) v. Secretary of State for Defence [2007] UKHL 58 (House of Lords).
[306] *Al-Jedda*, para. 59.
[307] *Ibid.*, para. 63.
[308] *Milanović*, EJIL, Vol. 23, 2012, p. 121, 121-122.
[309] For a commentary, see, *e.g.*, *Pejic*, IRRC, Vol. 93, 2011, p. 837.
[310] *Al-Jedda*, para. 86.
[311] *Milanović/Papić* (note 269), p. 20.
[312] See Al-Jedda UKHL (note 305), paras. 22-24 (per Lord Bingham).
[313] *Al-Jedda*, para. 84.

and, thus, who is responsible.[314] This gives rise to uncertainties as to whether the Court will finally abandon its ultimate authority and control test, and launches again a debate on whether the effective control test is "the sole or even the most appropriate principle of attribution during international military operations."[315] By contrast, the Court introduced a positive development by implicitly opening the door to the possibility of dual or multiple attribution of conduct to the UN and TCCs.[316]

Secondly, concerning norm conflict, the House of Lords and the ECtHR did not arrive at the same conclusion. The House of Lords ruled that Article 5 of the ECHR had not been breached, since SC resolutions displaced Article 5 para. 1 insofar as a conflict arose between them by virtue of Articles 25 and 103 of the UN Charter.[317] For its part, the ECtHR took a step forward in the protection of human rights with the following interpretative presumption that it created, *i.e.* the Court considered that where the SC prescribes member States to take measures which would conflict with their IHRL's obligations, the language used by the SC must be free from ambiguity, otherwise the Court would opt for "the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations."[318] In this respect, the ECtHR compared the non-binding obligation of internment as a security measure that States could make use of, but were not obliged to use, with their binding obligation under Article 5 para. 1 of the ECHR, to say that there was no conflict between the UK's obligations under the UN Charter and its obligations under Article 5 para. 1 of the ECHR and, therefore, it held that the latter provision applied and Mr Al-Jedda had been unlawfully held in internment.[319]

Nevertheless, *Milanović* sustains that despite the successful contribution of the Court, the prevalence of Resolution 1546 over the ECHR in the given case remains still unsettled, as well as whether Article 103 of the UN Charter can cover authorizations, and not only obligations as the same Article explicitly refers to.[320]

Turning now to the case law of domestic courts and the issue of attribution and responsibility for wrongful acts, the judgment that the Dutch Court of Appeal of The Hague delivered in the *Nuhanović*[321] case is very promising as for the development of the effective control standard,

[314] *Milanović* (note 308), p. 137.
[315] *Sari*, in: Dekker et al. (eds.), p. 1, 11.
[316] See *Al-Jedda*, para. 80; *Milanović* (note 308), p. 136.
[317] See Al-Jedda UKHL (note 305), paras. 39, 117, 118, 135, 136, 151, 152.
[318] *Al-Jedda*, para. 102.
[319] *Ibid.*, paras. 105-106, 108-110.
[320] *Milanović* (note 308), p. 138.
[321] Hasan Nuhanović v. The State of the Netherlands, The Hague Court of Appeal, Civil Law Section ECLI:NL:GHSGR:2011:BR5388, 5 July 2011, English translation available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2011:BR5388&showbutton=true (hereinafter *Nuhanović*).

the recognition of the possibility of dual or multiple attribution of conduct and the opportunity for the victims to obtain redress for the peacekeepers' wrongdoings.[322]

Briefly, in the *Nuhanović* case the Court of Appeal held the Netherlands responsible for the death of Nuhanović's relatives, who in July 1995 had been forced by Dutchbat to leave the compound in Srebrenica where they had sought refuge,[323] once the mission had failed[324] and the civilian refugees were going to be evacuated by the Bosnian Serb Army,[325] even when Dutchbat was aware of the atrocities these forces were committing with the refugees.[326] Dutchbat was a Dutch battalion of peacekeepers operating in the area of Srebrenica for the United Nations Protection Force (UNPROFOR) under UN command during the conflict in the former Yugoslavia.[327]

The attribution of the conduct of Dutchbat to the Netherlands was based on a revolutionary interpretation of the effective control test, as the Court accepted and affirmed the applicability of this criterion for the attribution of conduct of the peacekeepers and, at the same time, introduced the notion of the "power to prevent" for acts that had not been directly ordered, in the Court's own words: "[S]ignificance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned."[328] In doing so, it followed the interpretation of this standard already made by *Dannenbaum* when it raised the question: "[W]hich entity was positioned to have acted differently in a way that would have prevented the impugned conduct?"[329]

On another note, it is said that maybe the most important contribution of the Court of Appeal was to explicitly acknowledge "the possibility that more than one party has 'effective control,'"[330] *i.e.* the recognition of dual or multiple attribution of conduct of peacekeeping forces to the UN, TCCs and/or other participating entities, such as NATO. Even though the Court did not examine the conditions that would enable this attribution of conduct to more than one entity, the *Nuhanović* case is the first judicial decision where that possibility is actually addressed (the case was rendered some days before the *Al-Jedda*[331] case, which implicitly touches upon this

[322] *Boutin*, LJIL, Vol. 25, 2012, pp. 15-16.
[323] *Nuhanović*, para. 6.20.
[324] *Ibid.*, para. 5.11.
[325] *Ibid.*, para. 2.18.
[326] *Ibid.*, para. 6.7.
[327] *Ibid.*, paras. 2.11, 2.13.
[328] *Ibid.*, para. 5.9.
[329] *Dannenbaum* (note 135), p. 157.
[330] *Nuhanović*, para. 5.9.
[331] See *Al-Jedda*, para. 80; *Milanović* (note 308), p. 136.

possibility).[332] The possibility of dual or multiple attribution in the peacekeeping framework has also been advanced in academic writings[333] and in the work of the ILC[334].

In the same vein, the Dutch Court of Appeal reaffirmed the effective control test in the *Mothers of Srebrenica*[335] case, stating that effective control was related to the "factual control" over instructions,[336] and thus, that the Netherlands was responsible for the conduct of Dutchbat only from the moment it was clear that the mission had failed and the evacuation of the refuges from the compound was decided, since it was then when the Netherlands exercised its effective control over the acts of Dutchbat.[337]

Therefore, having determined that the UN as well as TCCs can incur responsibility for the conduct of peace forces, one more question should be added: What is the likelihood of NATO being held responsible for violations when it takes part in peace operations? Here the possibility of dual or multiple attribution of conduct also plays a fundamental role that should not be underestimated.

IV. Could other participating international organizations such as NATO assume responsibility?

As is well-known, NATO is a political and military alliance of States founded in 1949 by the North Atlantic Treaty with the main purpose of the maintenance of peace and security through collective defence.[338] The participation of NATO in UN mandated or authorized peace operations is well-established due to NATO's significant military capabilities,[339] which have positioned it as "the UN's enforcement arm to ensure the effective implementation of UN Security Council Resolutions."[340] However, this participation is not free from controversy as the issue of responsibility in authorized operations comes often into question.

For NATO to be held responsible for internationally wrongful acts, it must first meet the requirement of having international legal personality.[341] Just like the UN, it has already been submitted that NATO is an international organization which possesses international legal

[332] *Kleffner*, Collegium N° 42, 2012, pp. 118, 124-125.
[333] See, *e.g.*, *Bell*, NYUJILP, Vol. 42, 2010, pp. 501, 518-519; *Kondoch/Zwanenburg*, in: Gill/Fleck (eds.), Handbook of International Law of Military Operations, Section 30.05, p. 559, 569; *Larsen* (note 288), p. 517; *Leck*, MJIL, Vol. 10, 2009, http://classic.austlii.edu.au/au/journals/MelbJIL/2009/16.html#fn67 (last accessed on 25/04/2020).
[334] Commentary on DARIO, Chapter II: Attribution of Conduct to an International Organization, para. 4, p. 83; see also Art. 48 DARIO for joint responsibility.
[335] Mothers of Srebrenica v. The State of the Netherlands, The Hague Court of Appeal, Civil Law Section, ECLI:NL:GHDHA:2017:3376, 27 June 2017, English translation available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2017:3376.
[336] *Ibid.*, para. 26.1.
[337] *Ibid.*, para. 38.2.
[338] See Rule 4.5.I.I in *Gill et al. (eds.)*, (note 20), p. 65; *Zwanenburg*, Accountability under International Humanitarian Law, p. 67; Preamble and Art. 5 of the North Atlantic Treaty.
[339] *Gill et al. (eds.)*, (note 20), pp. 65, 67.
[340] *Zwanenburg*, IOLR, Vol. 13, 2016, p. 100, 108.
[341] *Ibid.*, p. 103.

personality.[342] Once this has been ascertained, who should then incur responsibility in authorized operations when NATO takes part: the UN, the participating States or NATO? The answer is to be found in the work of the ILC, concretely in the above introduced Article 7 DARIO and its effective control test.[343]

"The question is if the UN, through the Security Council […] authorizations […], has effective control over the conduct of states and/or international organizations that implement those authorizations."[344] As already mentioned, this authorization was enough for the ECtHR in its *Behrami and Saramati* decision to determine that the UN was alone responsible for the conduct of UNMIK and KFOR. Yet, as argued by scholars, instead of its highly criticized ultimate authority and control test, it should have applied the effective control test and thus, attribute the conduct of KFOR to NATO and hold it internationally responsible.[345]

Consequently, it is established that NATO should be held responsible whenever it exercises effective control over the particular alleged misconduct of the forces during its participation in authorized peace operations, *i.e.* when there is evidence that suggests it has been vested with the operational command and/or control that empowers it to effectively give orders and instructions to the troops.

[342] *NATO*, Note by the Secretary-General, Strategic Airlift Capability (SAC) – Initiative Adoption of the NAMO Charter, https://www.nato.int/cps/en/natohq/official_texts_56625.htm (last accessed on 25/04/2020); ILC, Responsibility of international organizations – Comments and observations received from international organizations of 14/02/2011, UN Doc. A/CN.4/637, para. 2, p. 11; ECtHR, *Gasparini v. Italy and Belgium*, Admissibility Decision, App. No. 10750/03, 12 May 2009, p. 7; ICTY, *Prosecutor v. Simic et al.*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be Provided by SFOR and others, 18 October 2000, para. 48.
[343] *Blokker*, in: Weller (ed.), p. 202, 220.
[344] *Ibid*.
[345] *Ibid.*, pp. 223-224; *Grütters*, IOLR, Vol. 13, 2016, p. 211, 224; see also *Larsen* (note 288), p. 520; *Milanović/Papić* (note 269), p. 18.

CONCLUSION

The prevailing opinion in the legal literature as well as in the international and national case law is that the effective control test is the most suitable in order to attribute peacekeepers' conduct to either the UN, or the TCCs or other participating organizations such as NATO and, thus, to determine the international responsibility of one of these subjects with legal personality. Furthermore, the door has been opened to the possibility of dual or multiple attribution of conduct in peace operations. This is perhaps the most reasonable way of attributing conduct not only in peacekeeping, but especially in peace enforcement (authorized) operations since the several parties involved retain different levels of command and control powers and there can be situations where more than one party has effective control over the acts or omissions in question.

Once ascertained that the effective control test is the most accepted standard of attribution, the question might be: What does effective control actually mean? Although there is not a definition of the same, it has been said to mean the power to give orders and instructions in peace operations. This is certainly related with the level of operational command and/or control, which is the closer layer to the field level where orders are given and implemented. Furthermore, the ILC maintains that significant consideration should also be given to the factual circumstances in each particular situation.

However, the interpretation of effective control as the power to give orders is not the most appropriate in our context of violations of human rights and IHL committed by peacekeepers, since these forces do not receive orders to commit sexual exploitation and abuse and human trafficking and sexual slavery, or at least, that is to be expected. For this reason, effective control as the power to prevent the wrongful conduct introduced by *Dannenbaum* and subsequently acknowledged by the Dutch Court of Appeal in the *Nuhanović* case would be more adequate when the particular conduct involves violations of human rights and IHL committed *ultra vires*. The party which was in a better position to have prevented the alleged violations is the one that should be held internationally responsible.

Whereas the ultimate authority and control test introduced by the ECtHR in *Behrami and Saramati* is unsatisfactory and would allow States to escape responsibility,[346] it is also claimed that the "full command"[347] that States retain at all times over their forces could be detrimental if the conduct were to be attributed always to States on the basis of this broad power.[348] Conversely, it would bring about positive implications in the eradication of the problem of

[346] *Palchetti*, Collegium N° 42, 2012, p. 96, 104.
[347] The ECtHR held the Netherlands responsible for the action of its military personnel in Iraq based on this full command it retained over the contingent, see: ECtHR, *Jaloud v. The Netherlands*, Grand Chamber, Judgment, App. No. 47708/08, 20 November 2014, paras. 143, 149.
[348] *Gill et al. (eds.)*, (note 20), p. 286.

sexual exploitation and abuse and human trafficking and sexual slavery in peace operations owing to the fact that States would strengthen their control over their forces and would definitely send competent and trained troops to the missions. That is, after all, our purpose: That peace forces stop committing violations of human rights and IHL, that they protect the civilian population they are sent to safeguard, instead of abusing them. Therefore, some middle ground has to be reached where neither the UN, nor TCCs or NATO can circumvent responsibility for the violations committed by the forces. A possible solution for this is dual or multiple attribution of conduct.

On the other hand, with regard to the second element for an internationally wrongful act to exist, *i.e.* a breach of an international obligation of the State or international organization, it is submitted that they both have rights and duties by virtue of their international legal personality. While States have treaty obligations and are also bound by customary international law, international organizations are only bound by the latter, since they are not parties to treaties. Be that as it may, sexual exploitation and abuse and human trafficking and sexual slavery constitute violations of both IHRL and IHL in treaty law, as well as being prohibited in customary international law, and some have even acquired *jus cogens* status.

The UN Charter was concluded "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[349] Apart from being undisputed that this is obsolete and utopic since wars are still happening in our world, the untold sorrow of the victims of human rights and IHL violations by UN peacekeeping forces and the inaction both by the UN and TCCs is sometimes even more gruesome than the mere fact of wars occurring, since it has been proved that humanity is unable to live without conflicts and blood. When peace forces are sent to a zone that is in desperate need of their help and, instead, they keep practicing the egregious acts they were sent to prevent, the only thing that is plain from all this is that we, humans, have failed as species. No one deserves to live in conflict but, above all, no one deserves to be sexually exploited or abused, trafficked or held in slavery, among other hideous abuses and atrocities added to the already disaster of war. Neither children, nor women or men.

[349] Preamble of the UN Charter.

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