universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

„Human Rights Violations and Accountability Gap: Addressing SEA committed within the framework of UN peacekeeping operations “

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2021 / Vienna 2021

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	A 992 628
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	International Legal Studies
Betreut von / Supervisor:	Univ.-Prof. MMag. Dr. August Reinisch

Table of contents

Table of Abbreviations:

AIDS	Acquired Immunodeficiency Syndrome
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPIUN	Convention on Privileges and Immunities
DRC	Democratic Republic of Congo
FINUL	Interim Force of the UN in Lebanon
HIV	Human Immunodeficiency Virus
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
ILA	Committee of the International Law Association
ILC	International Law Commission
KFOR	Kosovo Force
MINUSTAH	United Nations Stabilization Mission in Haiti
MINUJUSTH	United Nations Mission for Justice Support in Haiti
MIPONUH	United Nations Civilian Police Mission in Haiti
MONUC	Mission in the Democratic Republic of Congo
MOU	Memorandum of Understanding
PKO	Peacekeeping Operation
RNNDH	Haitian National Network for the Defense of Human Rights
ROE	Rules of Engagement
SEA	Sexual abuse and exploitation
SOFA	Status of Forces Agreement
TCN	Troop-Contributing Nation
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIH	United Nations Mission in Haiti
UNMIK	United Nations Interim Administration Mission in Kosovo
UNOSUM	United Nations Operation in Somalia
UNSC	United Nations Security Council
UNSMIH	United Nations Support Mission in Haiti
UNTMIH	United Nations Transition Mission in Haiti
WHO	World Health Organization

Introduction

The chosen topic raises the question of the effectiveness of the mechanisms used by the United Nations (UN) to promote human rights and focuses on the problematic of the attribution of violations committed by the respective UN institutions themselves.
It is a fact that the UN is not a party to any Human Rights treaty, the international organization is nevertheless subject to the protection and promotion of these rights, bringing it in a position of obligation to repair the damage caused by its agents.

Indeed, one of the principal objectives of the UN Charter is the maintenance of international peace and security. Violations of human rights lead to conflict and insecurity, which in turn invariably lead to further human rights violations.
While the prevention of human rights violations is a general condition of the maintenance of peace, it is paradoxical and unfortunate to note that the actions of certain UN peacekeepers in countries in conflict are discrediting the UN with the violation of the rights that they should reinforce. However, it is an alarming reality that in one of the activities of the UN, the peacekeeping operations (PKOs), during which the international organization can directly affect the civilian population, the number of claims against the UN is increasing in respect to human rights violations since the end of the Cold War, especially when it comes to sexual abuses and exploitations.

Considering this growing number of incidents, the question of the accountability of the UN is becoming increasingly important.
Indeed, there is a need for international organizations, as the UN, to enjoy certain privileges and immunities so as to remain independent in the completion of their functions. However, this approach does not take into account that such an immunity may lead to an inability of individual claimants to make use of their right of access to a court as guaranteed by Article 6 of the European Convention on Human Rights (ECHR), the individuals finding themselves in a position where they are not able to file a complaint against any international organization before national courts.
The failure so far of finding a balance between the right of access to a court for potential individual claimants and a grant of immunity for international organizations, has led to a so-called ‘accountability gap’, which urgently needs to be closed in order to end impunity, especially when it comes to human right violations.

Although there appears to be a recognition of a certain responsibility for PKOs by the UN on the basis of an autonomy of responsibility for its own acts, it is its implementation that will prove to be delicate due to the absence of pre-established settlement procedures.
While the case law is extensive in this regard, the jurisprudence is not very consistent, and expert opinions are differing widely, since no real principle of attribution of wrongful conduct by peacekeeping troops has yet been developed and generally accepted by the international community.

- **Outline and methodology**

In a first step, the paper is going to address the origins of occurrence of sexual exploitation and abuse within the context of peacekeeping missions by UN personnel, by primarily briefly presenting the problematic by means of the latest allegations, by explaining what kinds of sexual assaults are existing and by trying to touch upon a few reasons of why cases of SEA keep happening.

Furthermore, this paper will focus both on the civil responsibility of the UN and its reparation mechanisms and on the individual responsibility of the different members of UN personnel.
In order to do so, the paper will undertake a presentation on the special legal situation existing in the context of UN peacekeeping missions in which it will first touch upon the backgrounds of this particular legal framework and then proceed to an examination of how and why awareness to fill this gap of accountability in cases of active misconduct by UN peacekeepers through sexual exploitation and assault has arisen.

In its further research approach, the study will turn towards an illustration of the reparation systems available in such cases, beginning with a discussion upon the accountability mechanisms available for the individual peacekeepers committing acts of sexual abuse and exploitation (SEA), and continuing with the representation of the mechanisms in place for the UN to be held accountable by victims that have been sexually abused and exploited by UN Peacekeepers. Within the debate on how and why to hold the UN accountable for the actions of their personnel, an analysis will be made upon the legal basis of this obligation to repair the victims' damages, followed by a discussion upon the applicability of International

Humanitarian Law, Human Rights Law and jus cogens when it comes to peacekeeping missions.

A disposal of the reactions of the international community concerning the recent incidents of sexual abuse and exploitation will be illustrated at the end of the paper. How was the pressing problematic addressed and what are the propositions in order to encounter this inacceptable reality? This examination will in a first time concentrate on the suggestions and general reactions of the international community as a whole and then encounter the responses of the UN itself.

- **Research questions**

How effective are the UN mechanisms when it comes to human rights violations under the form of SEA committed within the context of their own missions and by their own personnel? What are the mechanisms available?

Whom should the acts of SEA be attributed to and to what extent? In which cases should the misconduct be attributed to the troop-contributing states instead of the UN and what are the exact criteria of determination, if there exist any? What are the responses of both, the UN and the rest of the international community in regard to the severe allegations?

- **Object of study**

In order to better understand the problematic of the paper, it is necessary to specify the definitions of the main terms of the subject.

To begin with it is important to explain the term 'human rights', which the UN uses to refer to the universal, indivisible, interdependent and inalienable rights that it recognizes for every human being regardless of nationality, ethnic origin, skin color or any other condition. This definition is to be found in the Universal Declaration of Human Rights (UDHR), Article 2 of which states that every human being "*is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind,*

such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." [1]

In addition, knowing that the paper focusses on violations committed within the framework of PKOs, it is essential to define the term 'peacekeeping operation', which belongs to the non-coercive and temporary measures that can be decided by the UN Security Council or the General Assembly. However, it is the Security Council that has made most use of this means, in the exercise of its primary responsibility for the maintenance of international peace and security A PKO is not directed against a particular state, but rather aims to create conditions conducive to the preservation or return to peace. Its deployment must therefore be accepted by all parties concerned. Thus, an agreement must be concluded between the State on whose territory such an operation is deployed in and the UN Secretary-General, who will then monitor it.[2]

By virtue of the current research subject, which, in order to determine the responsible of the respective human rights violation, concentrates on the relationship between the UN, troop-contributing states, and the host state in a peacekeeping mission, this paper primarily discusses peacekeeping operations involving military force.

Due to the broadness of the subject, the paper will address the more specific problematic of sexual assault and exploitation committed by UN peacekeepers within the context of the operation. As already mentioned, the number of these incidents has been taking a rising course throughout the last years, making it an issue that has been provoking a myriad of international reactions and that needs to be resolved urgently.

It is a fact that the majority of the acts of sexual exploitation and abuse by UN peacekeepers are taking place in states already seriously affected by systematic sexual violence. In these regions, UN peacekeepers are often the last hope of civilian populations and women. Undeniably, the latter suffer greatly during armed conflicts and particularly in intra-state conflicts, women and their children being the most numerous victims.

[1] United Nations General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) article 2.

[2] United Nations Peacekeeping, 'Terminology', <https://peacekeeping.un.org/en/terminology> accessed 10 June 2021.

The study of the issue of this, for a long time invisible, suffering has only in the last decades been added to the agenda of International Relations, an addition which is mainly due to the work of feminist analytical approaches.[3]

Subsequently, two essential terms have to be clarified. In its report 'Sexual Exploitation and Abuse- Prevention and Response', the World Health Organization (WHO), which is a specialized agency of the UN, defines 'sexual exploitation' as "*any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, threatening or profiting monetarily, socially or politically from the sexual exploitation of another*."[4]

Furthermore, 'sexual abuse' is defined as "*the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions*."[5]

In the cases of sexual violence analyzed in this paper, the abuse or exploitation generally takes place between military or civilian personnel or police of the peacekeeping mission who impose an unwanted sexual relation on a local civilian through a highly unfavorable power relationship for the victim.

As the main group of victims of sexual assault or exploitation are women and children,[6] one should also touch upon the reality of women's and children's lives during conflicts and the roles that they are playing during an armed conflict, an ongoing peacekeeping mission, or in the respective countries in which peacekeeping missions are taking place.

[3]Simon Longpré, 'Violences sexuelles des Casques bleus: Défis et réalisations pour les Nations Unies' (Mémoire présenté dans le cadre de l'obtention du Certificat de formation sur les missions d'appui de l'Institut de formation aux opérations de maintien de la paix, Peace Operations Training Institute 2008), p. 39.
[4]World Health Organization, *WHO Sexual Exploitation and Abuse Prevention and Response*, 2017, p. 4.
[5] Ibid., p. 4.
[6] UN General Assembly, Report of the Secretary-General A/71/818, *Special measures for protection from sexual exploitation and abuse : a new approach,* 28 February 2017, p.5.

Part I: How does it come to Sexual abuse and exploitation?

- Chapter 1: Overview of the latest data on allegations

UN peacekeeping operations regularly make headlines, but not always for their benefit. With the commission of sexual exploitation and abuse acts by UN personnel, the very legitimacy of the peace mission in which they are participating is called into question. Given the highly complex nature of PKOs, and the growing number of deployments of PKOs by the UN Security Council, it is not surprising that an increase in the number of sexual offences in host states can be observed. Nevertheless, it is surely an ultimate paradox that UN personnel take advantage of their position of authority by exploiting local women and children when their mandate is to protect them.

Being aware of the extremely damaging effects of the allegations on the UN's and the PKO's reputation, the former UN Secretary-General, Kofi Annan, noted that "*sexual exploitation and abuse by humanitarian staff cannot be tolerated. It violates everything the United Nations stands for. Men, women and children displaced by conflict or other disasters are among the most vulnerable people on earth. They look to the United Nations and its humanitarian partners for shelter and protection.*"[7]

The first official accusations of sexual assault by peacekeepers were made during the UN mission in Cambodia in 1992, and reports from Bosnia and Herzegovina, Haiti, the Democratic Republic of Congo (DRC), and East Timor followed shortly after.[8]

In order to address more recent incidents, a total of 99 new cases of alleged sexual exploitation and abuse were referred to the departments and offices of the Secretariat and agencies, funds and programmes of the United Nations system in 2015, compared to 80 cases in 2014.[9]

Unfortunately, this trend of an increasing number of allegations continued in 2016, a year which was particularly marked by accusations of sexual exploitation and abuse of women and young children, both female and male, by members of PKOs, and especially peacekeepers. According to a report by the UN Secretary-General, 65 allegations of sexual exploitation and abuse were

[7] UN General Assembly, Report of the Secretary-General on the activities of the Office of Internal Oversight Services A/57/465, *Investigation into sexual exploitation of refugees by aid workers in West Africa,* 11 October 2002.

[8] Olivera Simić and MO' Brin, 'Peacekeeper babies: an unintended legacy of United Nations peace support operations', (2014), International Peacekeeping *21*(3), p 346.

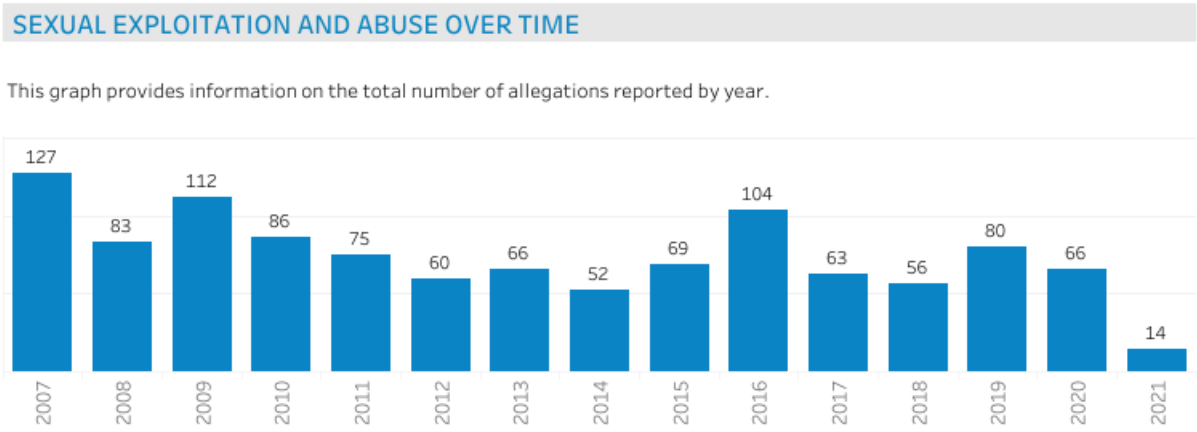
[9] UN General Assembly, Report of the Secretary-General A/70/729, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, 16 February 2016.

made against UN civilian staff and 80 against uniformed personnel involving a total of 311 victims.[10]

Sadly, the numbers have not decreased yet, the Report of the Secretary-General of 2021 mentioning 387 allegations of sexual exploitation and abuse during 2020. 66 of the claims involved peacekeeping and special political missions, compared to 80 in 2019.[11]

According to the UN, the fact that the numbers are not decreasing, despite the establishment of a 'Zero-Tolerance-Policy, is partly to be rationalized by the strengthening of mechanisms for the victims and witnesses to come forward and file a complaint.[12]

The 'Zero-Tolerance-Policy' against SEA, which the UN committed itself to and which is embodied in the Secretary-General's Bulletin of 2003, is a means to respond to the SEA scandals committed by peacekeepers in order to reclaim the UN's reputation.[13]



Statistic by the UN, stand 19th April 2021, found under: https://conduct.unmissions.org/sea-overview

[10] See A/71/818, supra note 6, p.5.
[11] UN General Assembly, Report of the Secretary-General A/75/754, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, 15 February 2021.
[12] See A/71/818, supra note 6, p.5.
[13] UN Secretariat, Secretary-General's Bulletin ST/SGB/2003/13, *Special measures for protection from sexual exploitation and sexual abuse*, 9 October 2003.

- **Chapter 2: Types of sexual violence**

As already indicated, there occur different kinds of sexual violence and not every type can be approached in the same way. Sexual violence is a form of sexual abuse committed without a person's consent. This includes several different crimes like rape, sexual mutilation, sexual humiliation, forced prostitution, forced abortion and forced pregnancy.[14]

It is to be mentioned that the UN in its different areas makes use of different terms and vocabulary in order to define and refer to different forms of sexual violence, leading to a lot of confusion and a lack of general overview.
In addition to these differentiations in the understanding of what sexual abuse and exploitation means within the various groups of UN personnel, this problematic knows a continuation in the context of the annual Secretary-General reports on SEA. Indeed, the different classifications of sexual violence that are published in the annual reports of the UN are on a constant change from nearly one year to another: taxonomies created one year are abandoned the next, without any justification.

In order to illustrate with more recent data, when comparing the report of the Secretary-General of 2014 to the one published in 2015, we notice that while in 2014 the allegations were divided into the three categories of 'abuse, 'exploitation' and 'exploitation (paternity)', in 2015 was added a further category of 'abuse (paternity)'. Though there is no problem with the addition of a new category itself, the issue consists within the fact that no explanation was given to the sudden appearance of this new type of classification, leaving it unknown whether the absence of this category in the previous year was simply an indication that there were no allegations of this sort, or whether this new category represented a new way of organizing the various types of allegations.

While a possible and generous interpretation of the UN's year-to-year revisions to this data reporting may be attributed to a motivation of 'improvement' of the reporting, such unjustified changes clearly impede the possibility of comparison from one year to the next.[15]

[14] UN Women, *Women2000: Sexual Violence and Armed Conflict: United Nations Response* (Published to Promote the Goals of the Beijing Declaration and the Platform for Action, 1998), p. 3.
[15] Kate Grady, 'Sex, Statistics, Peacekeepers and Power: UN Data on Sexual Exploitation and Abuse and 'the Quest for Legal Reform'' (2016) The Modern Law Review 79, 931-960 <https://onlinelibrary-wiley-com.uaccess.univie.ac.at/doi/10.1111/1468-2230.12225> accessed 27 April 2021.

These inconsistencies are very problematic, knowing that understanding the factors that cause various types of sexual abuse and exploitation is essential in order to comprehend why policy solutions have been unsuccessful in the past and so as to be able to develop better responses in the future. However, it is nearly impossible to draw patterns or to use the data delivered by the annual UN reports.[16]

Indeed, it is shocking to notice that nearly every PKO since the end of the Cold War has been associated with cases of SEA, acts ranging from opportunistic sexual abuse to planned, sadistic violence, also encompassing networked sexual exploitation and transactional sex.[17]
They involve different levels of violence, coercion, and consent and are not all criminal despite being prohibited by UN and humanitarian codes of conduct.

For statistical purposes, the UN continues with categorizing different types of sexual violence. Again, these classifications unfortunately do not coincide with the previously established taxonomies: neither with those used in the reports of the same year, nor with any of the categorizations used in the statistics of the previous years.

Nevertheless, there are a few classifications that are appearing recurrently within the statistics of the UN on SEA when it comes to peacekeeping missions. First of all, there is a differentiation between SEA of a child or SEA of an adult, a minor being considered to be a person under the age of 18 by the UN.

Another classification, which is referred to in nearly every report, is the term of 'rape'. Due to the need of a better coordination of the UN system when it comes to SEA, the Task Team on the SEA Glossary for the Special Coordinator on improving the United Nations response to SEA gathered the existing terminology related to SEA and clarified these key terms. The Task Team defined 'rape' as "*[p]enetration, even if slightly, of any body part of a person who does not consent with a sexual organ and/or the invasion of the genital or anal opening of a person who does not consent with any object or body part."*[18]

[16] Jasmine-Kim Westendorf and Louise Searle, 'Sexual exploitation and abuse in peace operations: trends, policy responses and future directions' (2017*)* International Affairs*,* Volume 93, Issue 2, 365-387, p. 368.
[17] Ibid., p. 368.
[18] UN, *Glossary on Sexual Exploitation and Abuse- Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations,* Second Edition, 24th July 2017, p.5.

Even though rape is not one of the most numerous incidents of sexual violence, when taking a look at the statistics, the raping of women and children is a highly common practice in the regions where peacekeeping missions are needed to be established. In addition to the terrible atrocities that these women and children already had to endure through their local militia groups, soldiers with the mandate of bringing back peace are now inflicting the same sufferings upon them.

To only give one example of such an incident, in a displaced persons camp in Bunia a twelve-year-old girl from the DRC was lured closer to a UN peacekeeper by means of a glass of milk, a hardly affordable product for the majority of the Congolese population, and has after having drunk the milk, been raped by him.[19]

Furthermore, the UN's Glossary on SEA' defined 'transactional sex' as a *"sexual activity with another person who does not consent. It is a violation of bodily integrity and sexual autonomy and is broader than narrower conceptions of "rape", especially because (a) it may be committed by other means than force or violence, and (b) it does not necessarily entail penetration."*[20]

Under this category also falls the practice of so-called 'rapes disguised as prostitution'. Indeed, several girls claimed to have been victims of these 'disguised rapes', meaning that they were first raped and then given money or food to give it the appearance of a consensual encounter.[21]

One more key term, which has to be explained is the one of "*exploitative relationship*", *"a relationship that constitutes sexual exploitation, i.e. 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."*[22]

A problematic related to this expression is the common practice amongst peacekeepers to enter into relationships with local women and girls, taking them as a temporary 'girlfriends' or 'wives' and giving them food, money and protection. It is very unclear to which degree these kinds of relationships are exploitative or non-exploitative, due to the extreme imbalance of power, peacekeepers earning a lot more than the local population, the indifference not limiting

[19] Marc Lacey, 'ln Congo War, Even Peacekeepers Add to Horror' *New York Times* (New York, 18 December 2004).
[20] See Glossary in SEA, supra note 18, p. 5.
[21] UN General Assembly, Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly A/59/710, *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, (Zeid report), 24 March 2005.
[22] See Glossary in SEA, supra note 18, p. 5.

itself to an economic factor. However, it is clear that within the context of a PKO, this practice which is of particular use in the Democratic Republic of Congo (DRC) and in other African states,[23] such a relationship can fall under the definition of a SEA according to the Secretary-General's Bulletin of 2003.[24]

Another reality is the issue of the so-called 'peace babies' and the consequential paternity disputes arising with them, an issue that this paper will extensively present during its illustration by means of a recent case decision in Haiti.

- Chapter 3: Causes of sexual abuse and exploitation

In a peace mission environment, the situation is usually volatile and conflictual. The PKOs often take place in the poorest states in the world and in regions where civilians have already suffered enormously and have been directly targeted by the conflicting parties. As already mentioned above, UN peacekeepers are therefore often the last hope of the civilian population, especially of women, making it from a human perspective even more crucial for them to not contribute in any way to their suffering.[25]

There are some elements specific to the peacekeeping context that help explain the occurrence of sexual exploitation and abuse by UN personnel. More specifically, these explanatory elements are threefold: the specific context of a peace mission, the protections and immunities of UN personnel, and the asymmetric power relations between men and women in the host country of a peace mission.

All these explanatory factors have two important impacts. Firstly, they contribute to the establishment of a climate of impunity by somehow allowing a window of opportunity for illicit acts. Secondly, the economic precariousness experienced by local women and children, resulting both from a post-conflict context and, above all, from unequal gender relations in the host society of a PKO, makes it understandable that they have a limited range of means of

[23]Fanny Rudén and Mats Utas. *Sexual exploitation and abuse by peacekeeping operations in contemporary Africa* (Nordiska Afrikainstitutet, Uppsala, Policy Notes 2009/02), p. 2.
[24]See ST/SGB/2003/13, supra note 13.
[25] See Longpré, supra note 3, p. 7.

subsistence; recourse to sexual encounters therefore proves to be a means of survival for a large group of these women.[26]

The importance of the emphasis on the unequal balance of power between the civilian population and the UN personnel is not to be neglected at any point. Indeed, the civilian population, as demonstrated before, is in a position of extreme vulnerability. In contrast, despite being under threat, UN personnel, military, as well as police or civilian, are in a position of strength, and if only by the simple fact that they have far more material, financial, and military resources than the local civilian population.[27]

In these situations, all sexual relations, not just those committed with brute force or the threat of force, may fall under the category of sexual harassment and violence. Even though a distinction could be drawn between cases involving direct physical force or the threat of it and cases which are based on an exchange, the inequality of power in the relationship between UN personnel and civilians is too profound for such a distinction to be relevant. It is for instance questionable whether a woman trading sex for food or a ridiculously small amount of money in the context of the explained circumstances really has a choice and to what degree she is doing so on behalf of her free will.[28]

Due to a lack of economic opportunities, it is a fact that these women are finding themselves in the obligation to sell their bodies in return for food, a small sum of money, or protection. Especially in the Democratic Republic of Congo, this practice of so-called 'survival sex' has been widely documented, referring to the UN Mission in the Democratic Republic of Congo (MONUC), however it is regretfully a worldwide practice in the context of PKOs.[29]

Indeed, in his 'Four Preconditions Model', David Finkelhor and others in their constant research on sexual violence developed a model indicating the preconditions in which child rape is likely to occur, those preconditions also being applicable for rape in general. First, there needs to be (1) an offender with a predisposition to sexually abuse; (2) factors allowing it to overcome any internal inhibitions against acting on that predisposition; (3) the ability to overcome external

[26] Sandra Le Courtois, 'Exploitation et abus sexuels par du personnel du maintien de la paix: quand les Nations Unies faillissent à la tâche' (Mémoire, Montréal, Université du Québec à Montréal, Maîtrise en science politique, 2009), p. 21.
[27] See Longpré, supra note 3, p. 91.
[28] Brianna Nicole Hernandez, 'Sexual Abuse in UN Peacekeeping: The Problem of Viewing Women as a 'Quick Fix'' (*E-International Relations*, 20 February 2020) <https://www.e-ir.info/2020/02/20/sexual-abuse-in-un-peacekeeping-the-problem-of-viewing-women-as-a-quick-fix/> accessed 12 April 2021.
[29] See Rudén and Utas, supra note 23, p. 2.

barriers; and (4) the ability to overcome any resistance or reluctance on the part of the victim. Taking this model into consideration, a peacekeeping context seems to be an environment in which rape is prone to occur easily.[30]

Another hypothesis to explain the increase of brothel districts, sex trafficking and HIV rates in the already vulnerable regions after the arrival of peacekeepers, is the toxic military culture in which the soldiers find themselves. Feminist scholars of international relations, which have long been concerned with the gendered implications of military operations and peacekeeping, has perhaps produced the most established body of work in this concern. Indeed, they have established explanations of masculinities, including military masculinities, that have been critical to our understanding of the causes of sexual exploitation and abuse committed by military peacekeepers in particular. As lenses through which to make sense of peacekeeper abuse, these perspectives have foregrounded evaluations of gender dynamics, the uneven power between peacekeepers and local populations, racism, and colonial legacies.[31]

For instance, various feminist theories criticize that the military is based on patriarchal and heteronormative values, meaning that soldiers are expected to be hyper-masculine and to meet the cliché of the strong protector. This implies a clear hierarchy and role attribution of gender, posing a threat, especially to women and children.
Indeed, the UN peacekeepers are provided by UN member states and these soldiers primarily consists of militaries who have been trained and deployed as such in their respective countries. Most troops are sent mainly from the Global South; one reason for this is that the average salary as a Blue Helmet is usually higher than the national salary of a soldier, implying that idealistic reasons for participating in a peace mission are often only secondary.[32]

Consequently, the UN tried to address the problematic of hyper-masculinity in a PKO context by bringing more women into the deployed troops, arguing that there exists evidence suggesting that "*gender-balanced groups are more likely to take gender into account and that women's inclusion in decision-making results in better policy outcomes for women.*" However, some

[30] David Finkelhor, Carlos A. Cuevas, Dara Drawbridge, 'The Four Preconditions Model' (2016) Wiley Handbook on the Theories, Assessment and Treatment of Sexual Offending, D.P. Boer (Ed.), Abstract.
[31] Jasmin-Kim Westendorf, *Violating Peace- Sex, Aid and Peacekeeping* (Cornell University Press, 2020), p. 3.
[32] Ronya Alev, 'Sexueller Missbrauch: Die UN verletzt ihr eigenes Dekret' (*der/die/dasRespekt,* 20 August 2020) <https://derdiedasrespekt.at/reportagen/2020/08/sexueller-missbrauch-die-un-verletzt-ihr-eigenes-dekret/> accessed 13 June 2021.

experts criticize that this deduction is oversimplified. According to them, viewing the deployment of a larger quota of women in PKOs is only working in theory, inter alia due to the fact studies have revealed that women tend to fit into the military hypermasculine atmosphere rather than change it, whether out of fear or choice.[33]

[33] See Hernandez, supra note 28, p. 3.

Part II: Existing Accountability Mechanisms for SEA committed in the context of Peacekeeping Operations

- **Chapter 4: The legal setting**

4.1 A special legal framework as a result of the historical background

Having analyzed the nature and the causes of the sexual violence women experience through some UN peacekeepers, it is important to examine the legal framework in which PKOs take place in order to be able to understand how such a climate of impunity can establish itself in the underlying legal context and in order to perceive the interconnection between both. Indeed, the question of whom has to be held accountable for the incidents of SEA perpetrated by peacekeepers under a UN mandate is raised more and more often.

The source of all the UN's activities is the UN Charter of 1945. However, although peacekeeping is included in Chapters VI, VII and VIII, the Charter does not explicitly provide for the modalities of PKO's. Nonetheless, they are not formally excluded by the Charter either, even though their practice may have developed on the margins of the Charter, according to some experts.[34] UN PKOs are governed by a specific legal regime, all of them finding their legal basis in the Security Council resolutions.
Indeed, the Security Council has turned to the PKOs as the main means of managing crises concerning international peace and security and has to authorize them through resolutions. Nevertheless, PKOs are situated in a grey area between peace and war, and these ambiguities require the development of a clear and predictable legal framework to ensure greater effectiveness.

The PKOs, according to some authors, were born out of a failure to implement the law of the United Nations Charter due to the paralyzing political context of the Cold War. More precisely, the deep disagreements between the permanent members of the Security Council resulted in a paralysis of the Council during the Cold War, leaving the SC in a situation of impossibility in the application of the written law of the Charter. This stagnation, combined with the conviction

[34] Michel Voelckel, 'Quelques aspects de la conduite des opérations de maintien de la paix' (1993) Annuaire français de droit international, volume 39, 65-85, p. 66.

of the UN that the establishment and reestablishment of peace and security falls under its responsibility, led to the appearance and development of PKOs.
However, the PKOs launched at that time had limited objectives and means. They were implemented under Chapter VI of the Charter, which provides for the peaceful settlement of disputes, thus excluding the use of force, which consequently was not authorized in these kinds of PKOs, except in cases of self-defense.

This conception of PKOs prevailed at a time when such operations consisted solely of the interposition of military forces between the belligerents in an inter-state armed conflict. The physical presence of these forces representative of the international community was likely to lower tension in areas where a recommended and accepted cease-fire remained precarious.[35]
Nevertheless, with the end of the Cold War, the number of the implemented PKOs did dramatically increase, due to the outbreak of many civil wars, especially on the African continent. In order to intervene in this new type of conflicts, where confrontations were still ongoing at the time of the deployment of the peacekeepers, the UN had to set up Chapter VII operations and try to impose peace with an increasingly frequent use of force. Indeed, it is the recent practice of PKOs that shows that they are increasingly anchored in Chapter VII of the Charter, due to this redefinition of their mandate in relation to the missions assigned to peacekeeping forces.[36] Paradoxically, it is the new humanitarian mandate that has in practice been attached onto the traditional missions of these forces that has introduced Chapter VII as the constitutional basis for PKOs.[37]

To recapitulate, the PKOs were initially only a UN practice without a formally defined concept, but a practice that evolved with the transformation of international relations on the one hand, and the nature of the conflicts between the parties on the other. However, the UN's inability to apply the written law as a consequence of the mentioned political reasons led to the conviction amongst some legal experts that the introduction of the PKOs was only a remedy of the failure of the security system.

[35] Maurice Kamto, 'Le cadre juridique des opérations de maintien de la paix des Nations Unies' (2001) Volume 3: Issue 2, 95–104, p.100.
[36] Menent Savas Cazala, 'Le cadre juridique de l'action des Casques bleus » (2015) Après-demain volume 35, numéro 3, 27-28.
[37] See Kamto, supra note 35, p.101.

Another view of the international community upon the legal framework of PKOs was expressed by Dag Hammarskjöld, who spoke of the PKOs falling under 'Chapter 6 and a half' of the UN Charter, due to their situation between the traditional methods of peaceful settlement of disputes such as mediation and fact-finding in Chapter VI, and more forceful measures such as embargoes or military intervention in Chapter VII. [38] However, this expression is criticized by further experts, affirming that by speaking of a 'Chapter 6 and a half' one would be systematically ruling out recourse to Chapter VII as a basis for PKOs. Adding to this, one would seek to provide a single constitutional basis to a wide variety of situations, while most authors share the opinion that the legal foundation of PKOs must be determined on a case-by-case basis.[39]

Peacebuilding, or peacemaking, has thus considerably changed the nature of PKOs without really transforming their legal framework, leading to a myriad of debates about the legal foundations of PKOs.[40]

Precisely, the decisive step towards a new interpretation of PKOs was taken with the adoption, on August 13 and December 2 in 1992, of Security Council resolutions 770 and 794 on Bosnia-Herzegovina and Somalia. In both cases, the Council authorized member states to use "*all necessary means*" in order to deliver humanitarian aid. Indeed, the United Nations Force in Somalia, UNOSOM II, became the first peacekeeping operation to be established explicitly on the basis of Chapter VII.[41]

Given these unusual legal circumstances, it is to note that whatever military operation is conducted, whether it is a unilateral or a multilateral operation, conducted under or without a UN mandate, it must respect the principles of international law, the UN Charter, but also and above all the law of armed conflict.[42] Once in the field, peacekeepers must respect the human rights guaranteed by the treaties representing the corpus juris of this field of law in all circumstances. Their first duty is the protection of the civilians, which is making the occurrence of cases of sexual exploitation and abuse by UN personnel an even more problematic issue in

[38] Anne Rainaud, 'Réflexion sur l'usage de la force, le droit et les opérations de maintien de la paix' (2005) PIE Perspectives Internationales et Européennes, p. 3.
[39] See Kamto, supra note 35, p.101.
[40] See Kamto, supra note 35, p.95.
[41] Olivier Corten, Pierre Klein, 'Action humanitaire et chapitre VII : La redéfinition du mandat et des moyens d'action des Forces des Nations Unies' (1993) Annuaire français de droit international, volume 39, 105-130, p. 126.
[42] See Cazala, supra note 36.

peacekeeping, taken in consideration that when peacekeepers commit such inappropriate acts, the very legitimacy of the peace mission in which they are participating is called into question. Given the highly complex nature of PKOs it is not surprising that such interventions can sometimes lead to a number of unintended consequences. Yet, it is surely the ultimate paradox that UN personnel take advantage of their position of authority by exploiting local women and girls when their mandate is to protect them.[43]

In this context, when carrying out their tasks, first peacekeepers need legal protection from the UN, in their turn. And secondly, due to the fact that the protections and immunities are leading towards a mentality of untouchability amongst the forces and that they are considered one of the reasons for SEA to keep happening, peacekeepers need legal and operational guidelines to avoid any kind of confusion and to ensure that their actions comply with the rules governing their respective mission. These are inter alia assured by rules that are specific to each PKO.

- *SOFA*

Firstly, in peace missions, a Status of Forces Agreement (SOFA) is usually concluded before the start of the operation. The SOFA is an agreement between the host State and the Troop Contributing State that determines the terms of an intervention and regulates the conditions of the presence of armed forces on foreign territory. The agreement focuses on legal issues relating to the conduct and activities of military personnel and the status of their property.
In 1990, the UN Secretary-General released a Model SOFA to serve as a prototype for further Status of Forces Agreements.[44] A SOFA is especially important for military personnel who, in general, are not protected by multilateral treaties that grant protections and immunities to personnel representing foreign organizations. The legal norms outlined in SOFAs are based on the law governing visiting forces, international privileges and immunities, just as diplomatic privileges and immunities.[45]

[43] See Le Courtois, supra note 26, p. 117.
[44] Dieter Fleck, 'The Legal Status of Personnel Involved in United Nations Peace Operations' (2013) 95 International Review of the Red Cross 613, Fleck (2013), p.629
[45] Ola Engdahl, *Protection of Personnel in Peace Operations* (Brill | Nijhoff, 28 Feb. 2007), p.3.

In the case of a UN peace operation, it is essential for the peacekeepers to be familiar with the content of the SOFA prior to their deployment in order to prevent a 'mise en cause' of their responsibility.

- *Memorandum of Understanding*

A Memorandum of Understanding (MOU) is another legal tool for peacekeepers that declares a convergence of intent between the different parties, indicating a common course of action. It is an agreement on the responsibility and standards for the provision of personnel and equipment and, in the field of peacekeeping, it regulates both the obligations and contributions of states participating in an operation and the obligations of the UN as the agent responsible for international peace and security.[46] Just as it is the case with the SOFA, the agreement's content is partly homogenized by using a model MOU that reflects accepted standards.[47]

- *Rules of Engagement*

The Rules of Engagement (ROE) and command guidelines are also considered legal and operational benchmarks. They are a mission-related command and control instrument designed to ensure that the mission is conducted in accordance with military, political and legal objectives. On the legal level, both national and international law are taken into account.[48] Designated according to the mandate of each operation implemented, the ROE determine the conditions for the use of force and are applicable at each level of the chain of command: from the individual soldier in the field to the force commander at headquarters. These rules serve as to prevent wars, isolate conflicts and avoid escalations.[49]

[46] See Cazala, supra note 36.
[47] UNGA, Model Agreement between the Member State Contributing Personnel and Equipment to United Nations Peacekeeping Operations, A/46/185, 23 May 1991.
[48] Stephan Weber, 'Rules of Engagement: Ein Paradigmenwechsel für Einsatz und Ausbildung' (2001) Humanitäres Völkerrecht—Informationsschriften, 76-83, p.80.
[49] Drew A. Bennett and Anne F. MacDonald, *Coalition rules of engagement*. National Defense University of Washington DC Institution For National Strategic Studies, 1995, p. 124.

Indeed, they are intended to avoid abuse and collateral damage by imposing the minimum use of force, the ROE are an essential tool to help peacekeepers master the demands and constraints of their mission as peacekeepers and to preserve the legitimacy of UN activities.[50]

4.2 Increased awareness of the need to tackle impunity

As already explained and laid out throughout the paper, a rise of the UN's complexity, of its importance and of the range of its activities over the years, has led to the necessity of controlling the UN's actions more strictly. With its growing complexity, the UN's work has a rising impact on the lives of individuals,[51] creating a greater risk of human rights violations, especially when it comes to the involvement of the UN in security- and peacekeeping missions. This affirmation is only confirmed by the increasing number of applications by individuals brought against the UN, also when it comes to cases of sexual abuse and exploitation. However, the majority of these complaints has been rejected, leading to a massive problem of impunity regarding breaches of Human Rights. This exact problem is why the question of accountability, that Member States of International Organizations are susceptible to incur in cases of unlawful behavior, has become more and more pressing.

The described issue is rooted in the fact that the dispute settlement mechanisms under a treaty regime are often of a judicial or quasi-judicial nature. This is the reason why individuals, although they usually do not have the capacity to bring claims on the international stage, have been granted instruments to hold states to account for their acts or omissions. One of the areas in which this has been made possible, exactly is in the protection of Human Rights, considered as one of the most vital areas in law. However, International Organizations traditionally aren't parties of Human Rights Treaties and as a result aren't subjected to the corresponding dispute settlement mechanisms, making it almost impossible for individuals to directly hold an international organization accountable on the international stage.[52]

In this context, one must however not forget to mention the difficulty to "*keep the balance between preserving the necessary autonomy in decision-making of International Organizations*

[50] See Cazala, supra note 36.
[51] Marten Coenraad Zwanenburg, *Accountability of peace support operations* (Martinus Nijhoff Publishers, Vol. 9, 2005), p. 61.
[52] Ibid., para. 33.

and guaranteeing that the International Organizations will not be able to avoid accountability." [53] If this balance is not being respected, there is a high chance that the aims of the International Organization will not be respected or that the wrong entity will be held accountable for acts that did not fall under its responsibility.

Since World War II, the protection of Human Rights has become of growing importance, leading to the Signature of the Universal Declaration of Human Rights on 10 December 1948, a milestone in the history of Human Rights. It was proclaimed by the United Nations General Assembly "*as a common standard of achievements for all peoples and all nations*."[54]
Nevertheless, it is considered as "*lofty rhetoric*" and "*merely aspirational'*, the United Nations lacking "*the unity to agree upon a practical, enforceable treaty*." Indeed, inter alia the "*United States vetoed the creation of a right to individual petition*."[55]

It is only two years later that the Council of Europe, in consideration of the UDHR and its aims, established the European Convention on Human Rights (ECHR), signed by all Member States of the Council of Europe.
In contrast to the UDHR, the ECHR creates the right for individuals to form a petition with its Article 13, stating that "*[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*".[56]
This right led to the establishment of the European Court of Human Rights (ECtHR) in Section II of the ECHR, also describing its functions and its scope.
In addition, Article 34 ECHR allows the Court to "*receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto*."[57]

[53] Karel Wellens, 'Accountability of International Organizations: Some Salient Features' (2003) Proceedings of the ASIL Annual Meeting, Volume 97, Cambridge University Press, 241-245, p. 241.
[54] See UDHR, supra note 1, preamble.
[55] Michael Goldhaber, *A people's history of the European Court of Human Rights* (Rutgers University Press, 2007), p. 171.
[56] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), article 13.
[57] Ibid., Article 34.

Another court to which individuals can turn when they have been the victim of a rights' violation is the European Court of Justice (ECJ), situated in Luxembourg. Although the international legal sphere does often not offer the possibility for individuals to sue a State, the ECHR and the ECJ do so, and a lot of individuals have brought cases to them.
However, there exists another issue leading to the frequent impunity of Human Rights breaches. In the cases brought up against the ECHR or ECJ involving the UN, both of the Courts have had the tendency to hold the UN accountable for the reproached acts instead of the State. By doing so, they are not competent *ratione personae* to judge the case.
Indeed, the task of attribution of wrongful conduct is pivotal and considered as extremely delicate. Consequently, the issue has been thoroughly addressed by the UN International Law Commission in their Draft Articles on the Responsibility of International Organizations.

Nonetheless, due to the difficulties encountered in order to obtain reparation for damages occurred in the context of PKOs before international courts, jurisdiction shows that a lot of individuals have resorted to national courts to seek compensation and that this does not constitute a novelty. Yet, a serious increase of the number of cases in this context brought before national courts has been noted throughout the last decade, also as a result of the mentioned expansion of the scope of activities of the UN after the Cold War.
The rising number of cases before tribunals, whether national or international, due to the increased impact of the UN on individual's lives, has led to a growing demand for the UN to be held accountable.

4.3 The term of 'accountability'

Before starting the discussion of whom to hold accountable for the acts of UN peacekeepers during the exercise of their functions the framework of their mission, one needs to clarify where this accountability is coming from and what it exactly is about. An equivalent term for accountability, "*the duty to account for ones exercise*", does not exist in numerous languages, a reflection of the complexity of this multifaceted phenomenon. Indeed, according to the Committee of the International Law Association (ILA), accountability constitutes of three

interconnected levels, one of which being the "*responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law*."[58]

All three levels of accountability are a result of the powers of the international organization and its abuses in this concern. In other words, with power comes the possibility to abuse these powers detained by an international organization and with the abuse of power comes the inevitable obligation to be held accountable for this abuse. Consequently, accountability begins with the comprehension of an organization's aims and objectives and the analyzation of the coherence of the organization's performers with these. It is therefore a necessity for the actors, that can as a result be held accountable, to justify themselves for their performances. This is what happens, when the UN by its actions infringes the rights and interests of individuals.[59] In a situation where a UN peacekeeper, acting under the mandate of the UN, throughout his actions or omissions violates the rights of individuals, the UN must subsequently be held accountable for these violations, due to its responsibility towards those exercising its powers in their name.

All of this led to a greater awareness of the need to create accountability mechanisms and make accessible.[60] Indeed, throughout the last years the international community, especially the International Law Commission (ILC), has put a lot of work in the revision and development of the legal regime regarding the accountability and responsibility of international organizations, a subject of law which always used to be associated with a lot of obscurities.[61]

[58] International Law Association (ILA), Report of the Seventy-first Conference, Berlin 2004 (London, International Law Association 2004), 'Accountability of International Organisations: Final Report', p. 226.
[59] Erika Nakamura, 'Human Rights Treaty Bodies' Monitoring of the Accountability in Peacekeeping Operations: a Crossover between Obligations of the UN and the Member States' (Master of Laws, University of Vienna 2015), p.9.
[60] Jan Klabbers, 'Controlling international organizations: A virtue ethics approach' (2011) International Organizations Law Review 8, 285-289, p. 285.
[61] Paolo Palchetti, 'International Responsibility for Conduct of UN Peacekeeping Forces: the question of attribution' (2015) Sequência (Florianópolis), 19-56, p. 20.

- **Chapter 5: Peacekeepers (accountability of individuals)**

The crisis of accountability for SEA committed by peacekeepers is the result of the previously explained evolution of peacekeeping operations which were not provided for in the initial legislation, together with the ad hoc nature of the laws and rules that are governing peacekeeping activities and its personnel.

Indeed, adding to the problematic of the legal framework in which PKOs take place, there exist a plurality of types of personnel in a PKO, the laws and disciplinary procedures differing from one category to another. In order to provide some comparison between the rules applicable to the various types of personnel, this paper takes a look at the two categories that are most affected by the problematic: civilian and military personnel.

Both of these categories are marked by flaws, resulting in very few prosecutions of individuals who commit SEA.[62]

While the military personnel are falling under the more general legal frameworks, the civilian personnel's legal framework is composed by bilateral and multilateral agreements. The divergence of policies and laws applicable to the peacekeeping personnel, diverging from one category to another, has led to a system marked by extreme complexity. Adding to this, the implementation and operation of these laws are not less problematic.[63]

5.1 Immunities

Undeniably, military and civilian staff from Troop Contributing States serving on the territory of a host state have a special legal status. Peacekeepers require legal protection from the UN in order to carry out their duties, seeking to protect them from malicious interference by the host state.[64] They are granted immunity from legal process in any other state which is not their home state, including the host and transit states. This immunity does not only extend to heads of state or government or secretaries of foreign affairs *ratione personae*, but also to any state organ *ratione materiae*.[65]

[62] Anthony J. Miller, 'Legal aspects of stopping sexual exploitation and abuse in UN peacekeeping operations' (2006) Cornell Int'l LJ, Volume 39, 71, p.75.
[63] Rosa Freedman, 'UNaccountable: a new approach to peacekeepers and sexual abuse' (2018) European Journal of International Law, vol. 29, no 3, 961-985, p. 965.
[64] Ibid., p. 965.
[65] See Fleck, supra note 44, p. 615.

The need in protection for peacekeepers is assured by the Convention on the Safety of UN and Associated Personnel, adopted in 1994 in a context where attacks on UN personnel were becoming alarmingly widespread, and by its 2005 Optional Protocol.[66] The Convention prohibits attacks on UN and associated personnel and their premises, and it places a responsibility on parties to a conflict involving the universal organization to take appropriate measures to ensure their safety and security. [67]

To be more precise, the Convention covers two kinds of personnel that carry out tasks aiming to fulfill the mandate of a UN operation: 'UN personnel', the category including inter alia members of the military, police and civilian component of a PKO, and 'associated personnel'.[68]

However, the Convention does not apply to operations under Chapter VII of the Charter, meaning in cases of authorization of the use of force. In that situation, peacekeepers are considered to be personnel engaged against organized armed forces and the applicable law will be that of armed conflict, which raises the question of the criminal responsibility of peacekeepers. Yet, invoking the responsibility of the UN is delicate, since the UN is endowed with jurisdictional immunity. This leads to the impossibility of any prosecution against it before national courts when there is absence of the international organization's consent.[69]

Nevertheless, peacekeepers can be held accountable before national courts and are consequently subject to an extremely complex accountability regime since responsibility for their actions is shared between national jurisdictions and the UN. Indeed, peacekeepers that commit a crime in the context of a UN mandate can be prosecuted both at the international level (International Criminal Court) and at the national level (military or criminal justice of each country participating in a peacekeeping operation). Whereas the individual criminal responsibility of peacekeepers lies with the sending State of the respective troop, responsibility for misconduct within the exercise of their functions lies with the UN. Indeed, it needs to be mentioned that when peacekeepers participate in PKOs, they do not belong to a UN military corps, as none exists. They are part of contingents provided voluntarily by their state of nationality at the request of the UN Secretary General. In addition, the government of the host

[66] Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999); and the Optional Protocol thereto, 8 December 2005, UN Doc. A/RES/60/42, Annex, Registration No. A-35457 (entered into force 19 August 2010).
[67] Evan T. Bloom, 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel' (1995) 89 American Journal of International Law 621, p. 629.
[68] Ibid., p. 623.
[69] See Cazala, supra note 36.

state, as well as the other party or parties to the conflict directly involved, must give their consent.[70]

While prosecutions before national or international courts are still rare, there is a real awareness within the universal organization of the need to avoid impunity in the conduct of its agents' missions.[71]

5.2 Civilian personnel in PKOs

Although sexual abuse and exploitation by military personnel in missions is more commonly reported, it is not limited to military personnel. For example, in 2000, U.S. civilian personnel employed with UNMIBH were investigated for trafficking young women in Bosnia, some as young as 15 years old.[72]

Civilian peacekeepers are international public servants who are immune from national court jurisdiction. It is under the provisions of Article V of the United Nations Convention on Privileges and Immunities (CPIUN), that UN officials are granted immunity. Immunity protects a person from all legal proceedings, and there are two sorts of immunity available to UN civilian staff: personal and functional immunity.

On the one hand, there is personal immunity, which is granted to the highest level of UN officials, such as the Secretary-General, heads of offices and agencies and the heads of PKOs and others, protects an individual from all legal proceedings at any time.

On the other hand, there is functional immunity, granted to all other civilian employees, protecting them from legal action in relation to any act that falls within their official functions. In other words, they enjoy immunity from jurisdiction for acts performed by them in the course of their official duties. Thus, United Nations officials responsible for criminal offences in the territory of the mission will not face criminal prosecution in the host country of the mission if these acts were committed in the exercise of their official functions. Precisely, the CPIUN states

[70] Charlotte Beaucillon, 'Svetlana Zašova, Le cadre juridique de l'action des casques bleus, 2014 (Coll.«Guerre et paix», vol. 3)' (2014) Annuaire Français de Droit International 60.1, p. 969-970.
[71] See Cazala, supra note 36.
[72] Sarah Martin, 'Must Boys be Boys?: Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions' (2005) Refugees International, p. 5.

in Section 18 a) that officials enjoy immunity "*from legal process in respect of words spoken or written and all acts performed by them in their official capacity*".

It is important to note that the question of whether an act was committed under a civilian's official obligations is not one of whether the person was "*on duty*" at the time, but rather whether the act that led to the crime was part of that person's work. This makes it evident that some crimes, such as driving while intoxicated or unlawful killing, may be covered by functional immunity in some circumstances, whilst others, such as rape, will never fall into that category. Indeed, it will be very rare for an act of sexual abuse or exploitation to be carried out in the exercise of the official functions of a civil servant working in a PKO. Thus, in all other cases, UN officials engaging in acts of sexual abuse or exploitation are, in theory, subject to local law.

Thus, while this may sound easy in theory, there exist severe lacks in the implementation of functional immunity in practice. Indeed, the two main issues arising are first to find out with the help of UN investigations whether functional immunity applies or not, and second, the host states' lack of counterbalance to the UN's power.[73]

According to the SOFA Model, UN officials are subject to the jurisdiction of several States, namely the host State and, subsidiarily, contributing and third States. Thus, like military personnel, civil servants in the United Nations must respect local laws, but like already mentioned above, they enjoy the privileges and immunities set out in the CPIUN.

However, the Secretary General has some discretion in relation to the waiver of immunity. It is possible for officials to invoke this immunity even when their illegal acts go beyond the scope of their functions. Indeed, Section 20 of the CPIUN states that:

"Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the

[73] See Freedman, supra note 63, p. 967.

interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity."[74]

Thus, in the event that the host country does not meet minimum human rights standards, the UN may not have an interest in criminal proceedings being brought in that country. In such cases, immunity may not be waived, and other jurisdictions will have to be considered in order to ensure that immunity does not become impunity.

5.3 Military personnel

For the majority of peacekeeping operations undertaken under the auspices of the UN, the authority to indict a soldier for a crime remains exclusively with the TCN. Indeed, military members do not enjoy the same protections as civilian personnel.
This is due to the fact that the UN does not directly employ its soldiers; instead, the UN contracts with member states that are contributing their troops, which remain under the control of their home country.[75] More precisely, countries contributing peacekeeping troops do so under a Memorandum of Understanding that preserves their right to discipline their troops. Deployed soldiers who are members of a national contingent therefore remain under the exclusive jurisdiction of their country, which grants them immunity from any prosecution that may be initiated by the local government.[76]

In addition, the UN is bound to the receiving country by a SOFA, which areas of application are the status of military personnel, in particular their rights of entry and exit from the country, communication facilities, fiscal, civil and criminal status, and their privileges and immunities. Consequently, it is also the Model SOFA for PKOs that determines the criminal jurisdiction applicable when UN personnel commit a criminal act, and indeed the Model establishes that the troop-contributing countries are responsible for the criminal and disciplinary actions of their military personnel.[77]

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[74] UN General Assembly, *Convention on the Privileges and Immunities of the United Nations* (CPIUN) 13 February 1946, section 20.
[75] See Freedman, supra note 63, p. 968.
[76] Chiyuki Aoi, Cedric de Coning and Ramesh Thakur, *Unintended consequences of peacekeeping operations* (United Nations University Press, 2007), p. 49.
[77] See Miller, supra note 62, p. 83.

This means that the disciplinary action that a troop-contributing country can take against their military personnel depends on its willingness and ability to undertake the necessary legal proceedings. However, many countries are reluctant to take such action against their own troops when the alleged acts occur in foreign countries.[78] In other cases, contributing countries do not have adequate legislation allowing them to prosecute military personnel once they are repatriated. Many of these countries have no laws against several forms of rape or sexual crimes. For example, in many countries, rape between married partners is not a crime, which permits peacekeepers to act with impunity. So far, the UN has been unable to take action against nations that refuse to prosecute military offenders, although there are many examples.

Paragraph 47(b) of the Model SOFA determines that "*military members of the military component of the United Nations peacekeeping mission shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host country or territory].*"[79]
However, under Paragraph 6 of the Model, the peacekeepers are required to *"respect all local laws and regulations*," whilst refraining "*from any action or activity incompatible with the impartial and international nature of their duties or inconsistent with the spirit of the present arrangements."*[80]
Military personnel either participate as members of national contingents or hold a position in the operation in their individual capacities.

In addition to the analyzation of the accountability of UN peacekeepers when they commit acts of SEA during their deployment in a UN PKO, also the question of the accountability of the UN, the PKO being deployed under the mandate of the international organization, is essential. This problematic is treated in the following subsection.

[78] See De Coing, supra note 76, p. 49.
[79] See A/46/185, supra note 47, para. 47(b).
[80] Ibid., para. 6.

- **Chapter 6: The Accountability of the UN**

6. 1 Raising the question of the UN's accountability: a challenge between the attribution of human rights violations committed in the conduct of a PKO to the Troop-Contributing State or to the UN

Having previously discussed the subject of the individual criminal responsibility of peacekeepers and the legal framework of their actions, little has been said about the UN's share of responsibility for the commission of these serious sexual offences. Does the UN accept its share of responsibility? Does the UN compensate the victims? This section of the paper therefore aims to analyze the mechanisms offered by the UN to receive complaints and compensate victims of sexual exploitation and abuse by members of peacekeeping operations. By doing so, two important problems emerge: while there exist some accountability mechanisms, their lack of effectiveness and efficiency together with the UN's refusal to accept its civil responsibility for sexual exploitation and abuse have persisted over the years.[81]

Actually, the responsibility of the UN as an international organization can be directly invoked and it is rightful to make claims for reparation when it comes to sexual abuse and exploitation by peacekeepers. In its advisory opinion on the 'Reparation for injuries suffered in the service of the United Nations' in 1949, the International Court of Justice (ICJ) held that international organizations have a distinct legal personality, so that "*when an infringement occurs, the organization should be able to call upon the responsible state to remedy its default*"[82] On 25th March of 1951, the ICJ found that this applies vice versa, the state should be able to call upon the responsible international organization.[83]
Even though not in the case of sexual offences, the responsibility of the UN has for instance been invoked before a court of the United States in regards of the outbreak of an epidemic of cholera in 2010 in Haiti. Indeed, peacekeepers of the MINUSTAH were accused of being responsible for the eruption of this cholera wave, and due to the fact that they were agents of the UN, the latter was declared to hold a share of responsibility.[84]

[81] Marion Mompontet, 'La responsabilité civile de l'Organisation des Nations Unies. Effectivité et efficacité des mécanismes de réparation offerts pour les personnes privées: le cas des exactions sexuelles commises par les casques bleus' (2017) Revue québécoise de droit international/Quebec Journal of International Law/Revista quebequense de derecho internacional 30.1, 41-63, p. 48.
[82] International Court of Justice (ICJ), Reparation for injuries suffered in the service of the United Nations', Advisory Opinion, 1949, p. 13.
[83] International Court of Justice (ICJ), 'Interpretation of the agreement of 25 March 1951 between the WHO and Egypt', Advisory Opinion, 1980.
[84] District Court (Southern District of New York), *Georges et al. v. UN*, October 2013.

Nevertheless, in most cases involving the commitment of Human Rights violations within the framework of UN PKOs by its agents, the responsibility of the states contributing their troops is being invoked, and not that of the UN. As already explained, when peacekeepers participate in PKOs under Security Council resolutions, they do not belong to a UN military body, as there exists none. Instead, they are part of contingents provided voluntarily by their state of nationality,[85] explaining why it is often the Troop-Contributing States that are being drawn before tribunals. As a matter of facts, under the framework agreement between the UN and troop-contributing countries, the sending country has jurisdiction over the prosecution of soldiers accused of abuses. (SOFA)[86]

Yet, the UN possesses command responsibility for the conduct of the mission.[87] The international organization is thus responsible for acts perpetrated by peacekeepers in the exercise of their duties and which may cause damage to third parties. As such, the UN has the competence to send entire contingents back to their home state and to prohibit them from participating in future peacekeeping operations. Fundamentally, it falls within the jurisdiction of the UN to compensate the victims of SEA, while the jurisdiction to judge the individuals is detained by the troop-contributing States.

But that does not explain why in the majority of these cases the accountability of the TCNs is the one that is being invoked. First, the UN enjoys a far-reaching immunity before national courts according to the Model SOFA[88] and the Convention on Privileges and Immunities of the UN (General Convention).[89] Secondly, as already mentioned, the UN is not party to any human rights treaty, meaning that individuals are not apt to file a complaint against the UN before any human rights tribunal. Even though it is in theory possible to resort to internal mechanisms of the international organization in order to repair the victims of violations committed within the framework of a PKO, such mechanisms only rarely exist. Also, the standing claims commission, which according to any SOFA concluded between the UN and the host state should serve to settle any dispute of a private law character, has never been set up in praxis. These facts considered, victims of Human Rights violations such as sexual abuse and

[85] United Nations (UN), Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI, article 4.
[86] International Court of Justice (ICJ), 'Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal', Advisory Opinion, 1982, p. 360.
[87] Marten Zwanenburg, 'UN peace operations between independence and accountability' (2008) International Organizations Law Review 5, 23-47, p. 30-31.
[88] UNGA, Model Agreement between the Member State Contributing Personnel and Equipment to United Nations Peacekeeping Operations (Model SOFA), A/45/594, 1990, para 51.
[89] See CPIUN, supra note 74, article 2(2).

exploitation are often left with the only possibility of submitting the case against the TCN in order to get compensation. [90]

In most cases however, before even addressing the substance of the case, a judge is engaged to evaluate whether the accusations are to be attributed to the TCN or the UN, since it is usually the prevailing argument of the defendant state that the conduct in question is to be attributed to the international organization.[91] At this point, it is important to repeat that concerning the claims brought before the ECJ or the ECtHR in these regards, both courts have a tendency to hold the UN accountable for the wrongful conduct instead of the TCN, so as to not be competent *ratione personae* and consequently not having to address the substance of the case.

This is exactly what happened in the *Behrami & Behrami v. France* case, one of the most important cases when it comes to the attribution of wrongful conduct between the TCN and the UN, where the ECtHR in its approach did not deal with the possibility of an attribution of the acts to the defendant States which had contributed troops to UNMIK and KFOR. The Court did not consider itself in the position to desist from its decision of its incompetence to judge over the acts and omissions of the contracting parties committed in the name of the UN and covered by UNSC resolutions. Continuing the Court's reasoning in its own words: "*To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself."*[92]

It is exactly the element of attribution mentioned in Paragraph 149 of the Behrami decision that is considered by some to be the most important one: determining whether it was the UN or the TCN that had ultimate authority and control over the troops. As a consequence, one needs to take a closer look on the question of whom exercised "effective control".

[90] See Palchetti, supra note 61, p. 21.
[91] Ibid., p. 22.
[92] European Court of Human Rights, 'Behrami v France and Saramati v France, Germany and Norway Decision (Application No. 71412/01 and 78166/01) (2007), para. 149.

- *The exercise of 'effective control'*

Even though we have seen that the national troops contributed to a UN PKO possess the status of a subsidiary organ of the UN, they still act as organs of their nation. Indeed, it is usually stated in the specific SOFA, what command functions, such as the exercise of disciplinary powers of the forces, remain under the purview of the TCN, while the operational command is detained by the UN. [93] Indeed, the agreement between the state contributing its troops to the PKO and the UN undoubtedly places the national contingent at the disposal and under the command of the organization and makes it an organ of the latter, but does not remove it from the control of the state concerned. In other words, at the very moment when they act as agents of the UN, the peacekeepers remain to all effects organs of the sending States. Their link with the home state is in no way severed for the duration of their engagement under the mandate of the UN: they are not handed over to the organization and removed from the control of their state. Peacekeepers are, so to speak, 'double agents', in the sense that they have a double attachment, a double status as an organ. The fact that they are placed 'under the authority' of the UN does not prevent PKO personnel from also remaining 'under the authority' of their state, to whose direction, control and hierarchy they remain fully subject.

Indeed, it is true that each contributing state, by the very fact of having agreed to contribute a national contingent to the PKO, also accepts that the 'strategic' and 'operational' control of the forces falls within the competence of the UN and is exercised, through the chain of command, by the Security Council, by the Secretary General and by the Commander of each PKO. The TCNs are therefore committed to ensure that the Force Commander's orders and instructions to the Commander of each national contingent, appointed by the sending state, are passed on by the latter to his men. The national contingents are however not under UN command.[94]

In addition, it is to be mentioned that when it comes to the question of attribution, the role of the national contingent commander may have an impact due to its ability to interfere with the chain of command of the UN peacekeeping force. As a matter of fact, the sending state could exercise a certain control over the national contingent by the aptitude of the national contingent

[93] See Palchetti, supra note 61, p. 28.
[94] Ibid.

commander to decide whether to accept the instructions of the Force's Commander given to the troop or not.[95]

All in all, the entire contingent remains a military body of the home state and subject to its authority. The placing of the national contingent at the disposal of the UN by the sending State is not at all a kind of initial act from which it follows that the contingent in question is, so to speak, abandoned to the UN, with the severing of the link with the sending State: it is a continuous act by which the State, without in any way relinquishing its men, uses them by commanding them to do what the organization orders. The dual organic status of the personnel of a PKO must in principle include a dual attribution, since when they carry out acts relating to their UN mission, these personnel are indeed organs or agents of both the organization and their national State and act as such.
This leads to a further complexity of the situation: attribution is generally based upon the status of organ of an international organization or of a state.

In this context, it is interesting to reveal the observations of the UN Secretary General in the Report of the Responsibility of International Organization of 2004 whereby: "*The principle of attribution of the conduct of a peace-keeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In Chapter VII authorized operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, international responsibility lies where effective command and control is vested and practically exercised."*[96]
In the latter situation, the attribution of disputed conduct by a member of the national unit should be assessed on a case-by-case basis, even if, for reasons of military effectiveness, the UN claims exclusive command and control of peacekeeping forces.

[95] See Palchetti, supra note 61, p. 28.
[96] International Law Commission (ILC), 'Responsibility of international organizations -Comments and observations received from international organizations' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/545, p. 18.

So, what to do when there is a dual organic status, as it is the case with the status of a PKO? Is the question of attribution of the wrongful conduct subject of lex specialis or of the general rules contained in the 2001 ILC Draft Articles on the responsibility of states and 2011 ILC Draft Articles on the responsibility of international organizations? Indeed, Palchetti claims that the formal status of UN peacekeeping forces within the UN system is scarcely relevant for attribution purposes. Such a dual status justifies the use of a special attribution rule, such as the *lex specialis* outlined in Article 7 of the Articles on International Organizations' Responsibility, which is based on the effective control exercised over peacekeeping forces rather than the legal status of such forces within the UN system.[97]

To recapitulate, this criterion of *"effective control*" is essential when it comes to determine whether to hold the TCN or the UN accountable for the actions of UN peacekeeping personnel over the prevention of potential misconduct by its mission personnel. In cases of SEA perpetrated by UN peacekeepers, it needs to be found out whom exercised "*effective control*" over the prevention of potential misconduct by the UN's PKO personnel, the UN or the TCN.

6.2 The legal basis of the obligation to repair of the UN

Although, like a lot of international organizations, the UN is not a party to any human rights treaty, it is nevertheless subject to the protection and promotion of human rights.[98] For this reason, it is also obliged to repair the damage caused by its agents. It is therefore appropriate to first determine the basis of the obligation to repair and to focus on the legal texts underlining the prohibition of sexual violence.

The Model MOU states that "*the United Nations will be responsible for dealing with any claims by third parties*," in the case that the damage was caused by any member of its military personnel "*in the performance of services or any other activities or operation under this MOU*."[99]

Additionally, through a Resolution of 2005, the UN General Assembly provides the obligation to ensure that victims of human rights and international humanitarian law violations have

[97] See Palchetti, supra note 61, p. 51.
[98] Marco Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010)
[99] UNGA, Model Memorandum of understanding, A/61/19, 11 June 2007, article 9.

effective access to justice and reparation for the harm they have suffered.[100] Consequently, if States are subject to this obligation, so is the UN;[101] it therefore also has an obligation of compensation, even if the UN's obligation to repair is based upon a different legal foundation.

Indeed, in the context of PKOs, even if it is the states that provide the military contingents and therefore benefit from the privilege of jurisdiction, the UN also holds a share of responsibility due to the fact that PKOs are subsidiary organs of the UN Security Council.[102] For instance, Article 15 of the Model SOFA states that "*[t]he United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations*."[103] As such, the organization has, inter alia, the duty to ensure the adequate training of its personnel as well as to guarantee the proper conduct of the mission and, above all, the protection of civilians.[104]

When it comes to the precise modes of reparation that the UN should put in place, the legislation remains vague. However, one precision was put in the Convention on the Privileges and Immunities of the United Nations: even if the UN is not obliged to provide for jurisdictional mechanisms, it must nevertheless as a consequence provide for alternative methods of settlement.[105]

The absence of a competent jurisdictional body to settle disputes between private persons and the UN does not prevent the UN from taking responsibility for its violations of international law. For this reason, the UN has a duty to compensate victims of violations perpetrated by its personnel, even if these violations are committed outside their duties, such as sexual abuse.

[100] UN General Assembly, Resolution 60/147 adopted by the General Assembly on 16 December 2005.
[101] Pierre Bodeau-Livinec, 'La réforme de l'administration de la justice aux Nations Unies' (2008) Annuaire Français de Droit International 54.1, 305-321, p. 306.
[102] See Resolution A/59/710, supra note 21, para. 38.
[103] See Model SOFA A/45/594, supra note 88, para. 15.
[104] UN Security Council, 'Subsidiary Organs: Overview', (*UNSC*) <https://www.un.org/securitycouncil/content/repertoire/subsidiary-organs-overview> accessed on 4 June 2021.
[105] Jean-Marc Sorel, 'Responsabilité des Nations Unies Dans les Opérations de Maintien de la Paix' (2001) Int'l LFD Int'l vol. 3, 127, p.137.

6.3 UN Peacekeeping Missions and the applicability of International Humanitarian Law (IHL)

There is one characteristic of peacekeeping operations that directly raises the question of the applicability of International Humanitarian Law: the peacekeeping forces are armed. This is for instance underlined by the report from the Security Council for the establishment of the Interim Force of the UN in Lebanon (FINUL):

"*(d) The Force will be provided with weapons of & defensive character. It shall not use force except in self-defense. Self-defense would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council. The Force will proceed on the assumption that the parties to the conflict, will take all the necessary steps for compliance with the decisions of the Security Council.*"[106]

One of the first questions coming to mind in this context, is that of whether this does not constitute a threat for the mission to be involved in an armed conflict. Indeed, this risk is real, as it has been shown by the PKO in Congo in July 1960, where the UN forces have been dragged into a conflict. Thus, the issue of the applicability of IHL to PKOs can be separated into two aspects: the compliance of the peacekeeping forces with IHL; and the role that these forces can play in contributing to compliance with IHL.[107]

Looking at IHL, peacekeeping forces may be subject to it when they are considered parties to the armed conflict, depending on the mandate under which the PKOs were created. Nevertheless, the UN cannot become a party to the founding treaties of IHL.[108]
Indeed, when reflecting upon a possible adherence of the organization to IHL instruments it can be concluded that on a legal level, firstly, certain norms of the Conventions could not be applied to or by the UN. This is for example the case for those relating to occupation or to the repression

[106] UN Security Council, 'Report of the Secretary-General on the implementation of Security Council resolution 425 (l978)', 19 March 1978, p. 2.
[107] Umesh Palwankar, 'Applicabilité Du Droit International Humanitaire Aux Forces Des Nations Unies Pour Le Maintien De La Paix' (1993) 75 Revue Internationale de la Croix-Rouge *75*(801) 245, p.247.
[108] International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31. International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85. International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.
International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

of grave breaches. Secondly, the interpretation of IHL instruments in some contexts of the UN could become problematic due to the absence of a definition, or even the mention, of some essential terms, like for instance the term of 'peacekeeping forces'. It would also be necessary to determine whether or not the UN could be considered a "power" for the purpose of acceding to the Conventions.

Additionally, the simple request for an adherence of the UN to the founding treaties of IHL treaties, or even an attempt to obtain a general declaration of applicability of IHL to PKOs, would risk opening up a delicate debate on the Protocols.[109] Nevertheless, even if the organization itself is not subject to the obligations of conventional IHL, troop-contributing States that have ratified the Geneva Conventions are bound by it.[110]

On the other hand, it should be mentioned that when the necessary criteria for the application of IHL are met, the UN is subject to compliance with customary IHL.[111]
Sexual violence is prohibited by both international treaty law[112] and customary international law.[113] Therefore, when committed by peacekeepers, these crimes could be prosecuted before the International Criminal Court (ICC)[114] or before a special tribunal, if one is constituted. Thus, if it is proven that a State that has recognized the Court's jurisdiction has failed to bring the criminals to justice, either voluntarily or through incapacity, there exists an obligation to repair.

But even though the ICC appears to be a solution in theory, in practice it is not. In addition to the problem of the extent of the immunities enjoyed by peacekeepers and the complex procedure for lifting them,[115] it has already been explained that the UN itself is also protected by immunities. It therefore appears complex, if not impossible, for a court of law to oblige the UN to compensate the victims of the actions of peacekeepers. However, it should be recalled that in the first place PKO soldiers are not meant to take part in the combat, even if deployed

[109] See Palwankar, supra note 107, p 250.
[110] UN Department of Peacekeeping Operations (DPKO), *United Nations Peacekeeping Operations: Principles and Guidelines ("the Capstone Doctrine)*, March 2008, p.14-15.
[111] International Court of Justice (ICJ), 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion, ICJ Reports 1996, p. 226 para. 79.
[112] See Fourth Geneva Convention, supra note 108.
[113] Jean-Marie Henckaerts et Louise Doswald-Beck, *Droit international coutumier* (Bruylant, 2006), p. 427-428.
[114] UN General Assembly, 'Rome Statute of the International Criminal Court' (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, article 5.
[115] See Model SOFA A/45/594, supra note 88, para. 47.

during an armed conflict.[116] Indeed, when a PKO is created by the Security Council on another legal basis as the UN Charter Chapter VII, providing for the use of force, this PKO is not to be viewed as a party to the conflict and thus will not be subject to the rules of IHL, even when deployed during an armed conflict.[117]

Thus, peacekeepers, "*whether police, military or civilian, must comply with the guidelines on International Humanitarian Law for Forces Undertaking UN Peacekeeping Operations and all applicable portions of the Universal Declaration of Human Rights as the fundamental basis of all their standards of action*."[118]
Additionally, sexual violence is a violation of the Code of Conduct for Blue Helmets. According to its Article 4, they "*[d]o not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children*."[119]

6.4 UN Peacekeeping Missions and the applicability of Human Rights and jus cogens

In the event that IHL is not applicable, there are still human rights that apply at all times, whether or not there is a conflict. As the International Court of Justice has recalled, the application of human rights does not cease in wartime and the protection of civilians must remain fundamental.[120]
Thus, even if the protection of civilians through IHL is impossible, PKO personnel remain subject to respect for human rights, both as agents of contributing states and as members of a PKO. These are rights that the UN prides itself on upholding.[121]

Although human rights instruments do not specifically prohibit rape and sexual violence, they do so implicitly through the protection of physical integrity.[122] For example, the UDHR

[116] United Nations Peacekeeping, 'Mandates and the legal basis for peacekeeping', <https://peacekeeping.un.org/en/mandates-and-legal-basis-peacekeeping> accessed 6 June 2021.
[117] UN General Assembly, Report of the Secretary-General A/70/729, Special measures for protection from sexual exploitation and sexual abuse, 16 February 2006, https://undocs.org/A/70/729, para. 75-80.
[118] UN Secretariat, Secretary-General's Bulletin ST/SGB/1999/13, *Observance by United Nations forces of international humanitarian law*, 6 August 1999, https://undocs.org/ST/SGB/1999/13, section 3.
[119] UN, *Ten rules: code of personal conduct for blue helmets*, Conduct and Discipline Unit, (1999), article 4.
[120] See ICJ Advisory Opinion 'Legality of the Threat or Use of Nuclear Weapons', supra note 110, para. 25.
[121] See UN Charter, supra note 85, art. 1(3), 55, al c-56.
[122] International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, 10 December 1998., para. 170.

provides in Article 5 that "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."* [123]

This prohibition of torture has also been recognized as a norm of jus cogens by the International Criminal Tribunal for the former Yugoslavia as "*one of the most fundamental norms of the international community*".[124]

The right to physical integrity is also provided for in Article 7 of the International Covenant on Civil and Political Rights (ICCPR),[125] but also in numerous regional treaties such as the American Convention on Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights.

6.5 Sexual abuse and exploitation in the legal framework of International Humanitarian Law

As mentioned in the first part of the thesis, there exist several forms of sexual violence and abuse. The first question to be asked is whether or not these types of sexual violence and abuse constitute violations of International Humanitarian Law (IHL) as recognized in the Geneva Conventions. Due to the fact that rape is the most prohibited form of sexual violence in IHL, the paper will focus on this particular form, although many others exist, as it has been laid out in the first part of the paper.

To begin with, rape is explicitly prohibited in the Geneva Convention relative to the Protection of Civilian Persons in Time of War in its Article 27: "*Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution and any form of indecent assault.*"[126] It is to be noted that rape is specifically mentioned, however, the Convention is written to protect women from rape, not to prohibit it, which for some feminists indicates a greater emphasis on military necessity than on humanitarian imperative, and also a view of the protection of women that is based solely on elements of their reproductive system.[127]

[123] See UDHR, supra note 1, article 5.
[124] See *Furundzija*, supra note 121, para. 154.
[125] UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, 16 December 1966, article 7.
[126] See Fourth Geneva Convention, supra note 108, article 27(2).
[127] Judith G. Gardam, 'Femmes, Droits De L'homme Et Droit International Humanitaire' (1998) 80 Revue Internationale de la Croix-Rouge 449-462.

Article 27(2) is introduced by the following: *"[protected persons] shall at all times be treated humanely and protected in particular against any act of violence or intimidation, against insults and public curiosity*".[128] Failure to comply with the article would therefore result in inhuman treatment. Inhuman treatment is recognized in Article 147 of the Fourth Geneva Convention, which defines it as a grave breach of the Geneva Conventions. Grave breaches are violations which must be punished by the Contracting Parties. However, in the definition of grave breaches, rape does not appear.

It is considered though, that rape is a serious offence in its effects. Rape is torture, inhuman treatment, intentionally causing great suffering and causing serious bodily harm to a person protected under the Fourth Geneva Convention. It is often used as a weapon.

Another major problem concerning the formulation of the protection of people against rape instead of the prohibition of such act is that consequently rape is associated with the concept of honor and not that of torture. Yet women experience rape as torture, therefore it should be considered a grave breach. Indeed, the International Criminal Tribunal for the former Yugoslavia ruled in the *Delalić* case that rape can constitute torture when the act meets the specific criteria for torture.[129]

By meeting the criteria of suffering, torture and inhuman treatment, the ICRC deduced that it constituted a grave breach of Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War: *" The Fourth Geneva Convention explicitly prohibits rape in article 27. The Commission deems that article 147 of the same Convention on 'grave breaches' includes rape and other sexual assaults as constituting "torture or inhumane treatment" and that they are also prohibited because they are among those acts 'willfully causing great suffering or serious injury to body or health*." [130]

The Protocol Additional to the Geneva Conventions of 12 August 1949 is hardly innovative and repeats word for word the definition in Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War: "*Women shall be the object of particular respect and shall be protected, in particular against rape, forced prostitution and any other form of*

[128] See Fourth Geneva Convention, supra note 108, article 27(2).
[129] See Henckaerts and Doswald-Beck, supra note 113, p. 432.
[130] International Committee of the Red Cross (ICRC), *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780*, 27 May 1994, para. 105.

indecent assault."[131] Indeed, Article 76 of the Additional Protocol uses the same formation of the words "*in particular against rape*" as used in Article 27 of the Fourth Geneva Convention. In other words, rape is the most explicitly prohibited form of sexual violence in international conventions.[132]

Lastly, rape is clearly a major violation of the UN Code of Personal Conduct for Blue Helmets' Article 4, as well as a violation of Article 3(2) of the UN Secretary-General's bulletin ST/SGB/2003/13. Although the term of rape is not specifically used, rape clearly falls into the category of sexual abuse as defined in Article 1 of the Bulletin.[133]

[131] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, article 76.
[132] See Longpré, supra note 3, p. 126.
[133] See ST/SGB/2003/13, supra note 13, section 3(2).

Part III: Case Law

- **Chapter 7: Landmark ruling concerning peacekeeper babies- a shift in the approach?**

7.1 Introduction of the case

A revolutionary step towards justice has been made by a Haitian court for a myriad of women that have been the victim of sexual exploitation and abuse by peacekeepers. The first instance court of Jacmel, a coastal town in Haiti, ordered a previously in Haiti stationed Uruguayan peacekeeper to monthly pay the mother of his child approximately 3.636 Euros of child support.[134]

On 18 December 2017, the mother of the girl had initiated an action for child support and custody against an Uruguayan soldier of MINUSTAH, before the Court of First Instance of Jacmel. The court found that the little girl in question was born on 28 September 2011 as a result of the man's love affair with the plaintiff and that since the man had not fulfilled his responsibility towards his daughter, the mother had been obliged to launch action for child custody and maintenance. In fact, the man had declared himself to be the father of the child on 29 September 2011 by a birth certificate and moreover, following the DNA samples taken in February 2014, it was established and confirmed by the Government of Uruguay on 19 December 2014 that the man is without question the biological father of the girl.
The court ruled that it was therefore appropriate for the court to award custody of the minor child to the mother and to order the father to pay monthly maintenance of 350.000 gourdes to the mother for the education and maintenance of the child.[135]

[134]Anh Nguyen, 'Haitian Court Delivers Landmark « Petits MINUSTAH » Decision: New Light Shed On Decades Of UN Peacekeeper Abuse' (*Human Rights Impulse*, 5 May 2021) <https://www.humanrightspulse.com/mastercontentblog/haitian-court-delivers-landmark-petit-minustah-decision-new-light-shed-on-decades-of-un-peacekeeper-sexual-abuse> accessed 19 July 2021.
[135]Tribunal de première instance de Jacmel, Decision of the Court, 18 December 2020, <http://www.ijdh.org/wp-content/uploads/2021/03/Judgement-.pdf> accessed on 8 July 2021.

7.2 The situation in Haiti

More than 10 million people live in Haiti, most of whom are descendants of the African slaves who revolted against their French colonial masters and gained their independence in 1804. For most of its history, Haiti has been plagued by internal conflict, from economic, political and social problems to natural disasters of catastrophic proportions. This political, social and economic instability enhanced by the military coup of President Aristide's government in September 1991, led to extreme violence and human rights abuses, mostly targeting Aristide supporters.

In light of these events, in September 1993, the UN Security Council authorized a six-month mission (UNMIH) in Haiti. The mission sent almost 1300 civilian police and military construction personnel to help modernize the Haitian armed forces and establish a new police force. This operation was followed by the UNSMIH, the UNTMIH and the MIPONUH operation. The United Nations Stabilization Mission in Haiti (MINUSTAH), including military personnel and civilian police, began on 25 June 2004 and ended in October 2017. It was established with the goal of assisting local Haitian institutions in facing political unrest and organized crime. Its mandate was extended because of natural catastrophes, especially because of the earthquake in 2010 and Hurricane Matthew in 2016, both of which exacerbated the country's political instability. In 2017, it was replaced by the UN Mission for Justice Support in Haiti (MINUJUSTH).[136]

Hence, instead of the expected support, the enumerated missions above were tainted by numerous scandals enticed by the blue helmets. The story of this impregnated and abandoned mother is but one out of plentiful similar fates, the concrete number of the victims remaining undetermined.

Indeed, the statistics published by the UN show that currently 43 “substantiated” allegations of sexual abuse and exploitation by the peacekeepers of MINUSTAH have been officially reported, noting that some of the allegations are still pending.[137]

An academic study, published on Tuesday 17 December 2019 and reported by the New York Times, documents the sexual misconduct of peacekeepers in Haiti, denouncing that when peacekeepers of the MINUSTAH left Haiti, they left behind hundreds of children. The study

[136] Security Council Report, ‘Chronology of Events- Haiti’ (*Security Council Report*, revised on 3 November 2020) <https://www.securitycouncilreport.org/chronology/haiti.php> accessed 4 June 2021.
[137] UN, ‘Sexual Exploitation and Abuse- Investigations’ (Conduct in UN Field Mission, 2021) <https://conduct.unmissions.org/sea-investigations> accessed on 5 May 2021.

went further in demonstrating the extent of the problem than had previously been known. According to the study, it was particularly the contingents from Uruguay and Brazil that were at fault. The so-called "*peace babies*", in the Haitian case also known as "*petits MINUSTAHs*" were left with their mothers who consequently had to confront social stigma, poverty and motherhood alone.

According to the American daily, which states that "*girls as young as 11 were sexually abused*", the peacekeepers left behind "*as many girl-mothers struggling with social shame, poverty and the difficulty of raising a child alone*".
The study, led by Sabine Lee, professor of history at the University of Birmingham (UK), is based on interviews with 2,500 Haitians who were living near peacekeeping bases in the summer of 2017. The testimonies allowed them to assert in their study that "*hundreds of children*" were born as a result of sexual abuse and exploitation of Haitian women by peacekeepers. "*Girls as young as eleven were sexually abused and impregnated*," they also report, and one victim declared that "*they put a few coins in your hands to drop a baby in you*."[138]

While the decision of the court treats the issue of 'peace babies', other types of sexual abuse have taken place within the framework of MINUSTAH. For instance, it has been recognized by the UN that from 2004 to 2007 at least a hundred Sri Lankan MINUSTAH soldiers had been involved in the exploitation of nine children in a sex ring and that besides being sent back to their home state, these men were not disciplined.[139]
In addition to these crimes, a lot of peacekeepers paid "*small amounts of money or food for sex*" with "*women and girls who were often desperately poor*".[140] To what extent does that even count as prostitution or transactional sex, is the question one shall ask in these cases. It is also important to mention that although a lot of local women ignore the fact that any sexual relationship between a peacekeeper and a local is strictly forbidden, the peacekeepers themselves are well aware of that rule.

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[138] Sabine Lee and Susan Bartels, '"They put a few coins in your hands to drop a baby in you" – 265 stories of Haitian children abandoned by UN fathers' (*The Conversation*, 17 December 2019) <https://theconversation.com/they-put-a-few-coins-in-your-hands-to-drop-a-baby-in-you-265-stories-of-haitian-children-abandoned-by-un-fathers-114854> accessed 20 June 2021.
[139] Paisley Dodds, 'AP Exclusive: UN child sex ring left victims but no arrests' (*AP News*, 12 April 2017) <https://apnews.com/article/port-au-prince-only-on-ap-sri-lanka-caribbean-arrests-e6ebc331460345c5abd4f57d77f535c1> accessed 10 July 2021
[140] Elian Peltier, 'U.N. Peacekeepers in Haiti Said to Have Fathered Hundreds of Children' *New York Times* (New York, 18 December 2019).

This decision reflects the willingness of the Haitian judiciary to accede to the request of Haitian families regarding the responsibility for the paternity of UN soldiers of MINUSTAH.
It also marks a step in the right direction in the referral of cases to diplomatic channels concerning Haitian mothers abandoned by UN soldiers and opens the way for considerations of lack of immunity for soldiers who have committed crimes and abuses in the exercise of their mission.

Finally, a court dared to decide upon one of the consequences of violence against women during conflict having a significant impact in peacetime: what to do with abandoned babies conceived during the course of a relationship between a local woman and a foreign peacekeeper, or those conceived by rape? Hence, how is it with health problems? Psychological problems? HIV/AIDS and gynecological diseases? Suicide attempts?
While the judgment in question raises a lot of hope and definitely is a step in the right direction, there still remain a lot of unclarities that urgently need to be addressed.

7.3 The legal discourse

In its ruling, the Haitian court referred inter alia to the Status of Forces Agreement (SOFA) between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti of the 9th July 2014, the UN Convention on the Rights of the Child (UNCRC), the Resolution 2243 (2015) adopted by the Security Council at its 7534th meeting, on 14 October 2015 and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[141] Sexual abuse and exploitation resulting in pregnancy and the abandonment of mother and child constitute severe breaches of the mentioned Conventions and additionally the right to live with dignity is heavily violated.

Moreover, the crimes of forced prosecution, sex trafficking, slavery and abuse of minors bring the offences critically close to jus cogens violations.[142]

The UN does not have jurisdiction upon crimes committed by its peacekeepers, it is the sending states that are responsible for their prosecution, however they frequently do not act amongst

[141] See Jacmel Decision, supra note 135.
[142] See Nguyen, supra note 134.

others because they often do not have the ability to collect the evidence or to have a process, leading to a catastrophic loophole. To this must be added the lack of follow-up by the UN, which is content to dismiss the offending peacekeeper, whereas a coordination strategy between the UN and the contributing State would have made it possible to verify the effectiveness of legal proceedings before the national courts of the peacekeeper's State of origin.
Fortunately, this was not the case in the Western Hemisphere's poorest country in March 2021. Only one other decision recognizing the criminal responsibility of a peacekeeper for sexual crimes or abuse is to be found by a court in a troop-contributing country. Only the French justice system has allowed the conviction of a former official within the United Nations Mission in the Democratic Republic of Congo, for rape and sexual assault of three minor girls committed in the Democratic Republic of Congo and the Central African Republic.[143]

These cases are perfect examples of a national court filling the accountability gap. The question evading from this is to what extent can this gap be addressed by national courts? Legally? Morally? When is it time for the international courts to step up and take over responsibility? While the UN has suggested that it could require to receive formal guarantees from the troop-contributing nations that the latter will exercise jurisdiction over crimes perpetrated by UN soldiers in the mission's host country, what the UN de facto would do in this scenario is deferring to the TCC's state responsibility.[144]

Moreover, neither the TCC nor the UN would be able to be held accountable by the host country's national courts. Even violations of jus cogens would not deprive states of their sovereign immunity in front of national tribunals, as the ICJ affirmed in its Jurisdictional Immunities ruling addressing German war crimes in Italy and Greece.[145] In this context, it needs to be referred to the analyzation made by some scholars concerning the UN's responsibility if it has 'effective control' over the prevention of potential misconduct by its mission personnel, a determining criterion in the attribution of the misconduct which has been explained in the previous part of the paper.

[143] FIDH (Fédération Internationale pour les Droits Humains), 'Un casque bleu condamné par la justice française' (*FIDH*, 15 September 2008) <https://www.fidh.org/fr/regions/afrique/rdc/Un-casque-bleu-condamne-par-la> accessed 20 July 2021.
[144] See Nguyen, surpa note 134.
[145] Ibid.

In order to further underline the extremely complicated legal situation concerning cases of sexual abuse and exploitation by UN peacekeepers, entailing even more complex legal proceedings, this paper is going to analyze an additional sexual assault case that also took place within the MINUSTAH framework in Haiti. The following case perfectly illustrates the different ways of justice that can be chosen in order to hold the individual peacekeepers accountable for their crimes or to obtain compensation, but also shows how difficult it is to firstly be able to encounter these proceedings, especially without assistance, and to secondly get justice, even with the existence of diverse legal proceedings and with massive international media attention.

- Chapter 8: Allegations against Uruguayan Peacekeepers: The Jhony Jean case

8.1 The facts

A scandalous case of rape committed by UN MINUSTAH peacekeepers in Haiti is the one of Jhony Jean. Indeed, this case received tons of media attention, partly due to the existence of a video of the alleged rape of the young Haitian man by four Uruguayan UN soldiers on 28th July 2011, leading to worldwide public outrage. The mobile phone footage showing the four Uruguayans pinning an 18-year-old Haitian man to a mattress and apparently sexually assaulting him was leaked one month after its recording lead to national and international outrage and provoked several voices in Haiti to demand "*justice for Jhony*" and to call for the total withdrawal of the Uruguayan forces.[146]

The alleged victim, Johnny Jean, supported by his mother, Rose Marie Jean, spoke up to several Haitian radio stations about his rape by Uruguayan marines and gave evidence to the local authorities about the assault that he had suffered. As a reaction to the events, Haiti's President Michel Martelly declared that the perpetrators of what he described as " *a collective rape carried out against a young Haitian*" would not go unpunished.[147] Also, the spokesman Kieran

[146] Thomas Vampouille, 'Des casques bleus accuses de viol an Haïti' *Le Figaro* (France, 5 septembre 2011).
[147] Malena Castaldi, 'Uruguay apologizes over alleged rape by UN peacekeepers' (2011) Reuters <https://www.reuters.com/article/us-haiti-uruguay-un-idUSTRE78603I20110907> accessed 17 July 2021.

Dwyer of the UN MINUSTAH announced to take the issue "*very seriously*" and that "*if the facts are proven, the perpetrators will have to be brought to justice*."[148]

8.2 Initiation of military, civil and criminal proceedings

As a follow-up, the victim filed a complaint on 28 July 2011 in Port-Salut, where the alleged events took place, according to local police. Additionally, the UN Mission in Haiti, the Uruguayan Defense Ministry, and Haitian authorities have all launched investigations following the alleged assault.

During an initial investigation, the four soldiers - out of Uruguay's 900 in Haiti - were taken into custody in Port-au-Prince, according to the judge in charge, and shortly after, in September 2011, they were repatriated together with their superior officer. In addition, the head of the Uruguayan Navy's operations in Haiti was dismissed from his position.

Indeed, it is the Uruguayan state that detains the exclusive jurisdiction over its troops when they are contributed to a UN PKO. As already explained throughout the paper, the soldiers contributed to the UN by member state are immune from criminal prosecution by the host state of the peacekeeping mission, in this case meaning that the alleged Uruguayan offenders cannot be prosecuted by the Haitian criminal justice system. The lack of accountability arising in a lot of such cases, inter alia due to the exclusive jurisdiction given to the troop-contributing nation by the SOFA of 2004 concluded between Haiti and Uruguay in this case, lead the Uruguayan President to assure that actions would be taken to hold the alleged perpetrators accountable for their acts. In a letter of apology directed to the Haitian President he stated that "*although the damage is irreparable, have the certainty that we will investigate thoroughly and apply the harshest sanctions against those responsible*."[149]

The military procedure was initiated on 19 September 2011, when the five marines were charged by the military justice system for the "*crimes of disobedience and omissions in the services*", and a few weeks later the military judge added a sixth peacekeeper to the

[148] France24, 'Le chef des Casques bleus uruguayens limogé après un scandale sexuel' *France 24* (France, 5 September 2011).
[149] See Castaldi, supra note 147.

indictments.[150]After being remanded in custody during the pre-trial investigations, the soldiers were provisionally released in December pending the judgement.[151] This release caused a lot of international protest, notably from Mario Joseph, an attorney with the International Lawyers Bureau, who announced that it was "*hard to think of a stronger rape case*." He emphasized that "*the perpetrators documented it on their cellphone. Yet the U.N. still denied it happened at first. Under public pressure, MINUSTAH promised justice, but did not deliver it*."[152]

The accusations of rape by the peacekeepers in 2011 were reaffirmed by the victim during his testimony in the framework of the initiated criminal procedure. As a matter of facts, soldiers can under Uruguayan law be prosecuted under civil, military and criminal law.[153]. The accused militaries were present, when Jhony Jean gave his testimony of over eight hours in a criminal court in Montevideo, Uruguay. He was amongst others accompanied by his mother, a Haitian government envoy and his US lawyers Edwin Marger and Mike Puglise, which told reporters that they had provided evidence of the sexual assault.[154]

However, it is to be noted that the public outrage gained out of the media attention Jhony's case had gotten, definitely was of a big advantage for the teenage boy. It cannot be denied that this public attention forced the authorities to take action and also enabled Jhony to get financial and juridical support. Nevertheless, a lot of victims either do not have the courage or the possibility to speak up in a way that he did. His case is a great example to show that also boys and young men are victims of rape in a peacekeeping context, however in the majority of reported cases it is girls and women that are being sexually abused and exploited. Unfortunately, the latter often do not have the support of their family, like in Jhony's case, but contrarily have to deal with fears of retaliation and negligence, rooting in societal stigmas.

Still, even with the support of the public, the plaintiff encountered difficulties over the course of the proceedings. For instance, due to the fact that the professionals accompanying Jhony

[150] Puglise Law Firm, 'Johny Jean ratificó ante el juez denuncia de violación contra cinco marinos uruguayos en Haití' (*Puglise Law Firm*, 11 May 2011) <http://pugliselawfirm.com/johny-jean-ratifico-ante-el-juez-denuncia-de-violacion-contra-cinco-marinos-uruguayos-en-haiti/> accessed 31 April 2021.
[151] Redress and CRIN, 'Litigating Peacekeeper Child Sexual Abuse Report' (January 2020), p. 33–37.
[152] Al Jazeera News Agencies, 'Uncertainty in Uruguay over Haiti abuse case', (*Al Jazeera News Agencies*, 10 January 2012) <https://www.aljazeera.com/news/2012/1/10/uncertainty-in-uruguay-over-haiti-abuse-case> accessed 2 June 2021.
[153] See Redress and CRIN, supra note 151, p.23.
[154] RNDDH, 'Johnny JEAN auditionné par un Juge d'Instruction Uruguayen : le RNDDH plaide pour une totale implication des autorités haïtiennes' (May 2012).

were not authorized to practice their profession in Uruguay and the victim only being able to speak Creole, a court-appointed translator had to support him during the testimony.[155] However, the latter was not fluent in Creole and concerns were expressed by director of the Haitian National Network for the Defense of Human Rights (RNNDH) that the plaintiff's interests were not defended correctly.[156]

In August 2012, four of the soldiers were finally charged with "private violence" rather than sexual assault, a charge that is considered a lesser offence than rape under Uruguayan law, with also a smaller penalty. The defendants were found guilty of private violence in March 2013 and condemned to two years and one month in jail, a sentence far below the expectations of the victim's lawyers at the time.[157] Moreover, they did not serve any prison time because the suspension of their sentences.[158] One needs to emphasize again that most sexual assault victims involving peacekeepers do not receive the same support in their search for justice, which is why Jhony's position is extraordinary. In addition, despite all assistance and effort, the proceedings did not end in a satisfactory manner.[159]

In regards of the civil procedure, the victim's lawyers in July 2015 filed a claim against the Uruguayan government before the Tribunal de lo Contencioso Administrativo, a tribunal that accepts claims against the government for acts or omissions of state agents with potential damages of more than USD 17,000.[160] The victim, who in the meantime had taken refuge in the USA, claimed three million dollars from the Uruguayan state for the damages he had suffered.

Nevertheless, a dispute arose about the statute of limitations, which under Uruguayan law is not interrupted or suspended by an ongoing procedure. Indeed, the defendants argued that the complaint was filed too late, meaning more than four years after the alleged assault. Johnny's lawyers countered that the deadline had not been exceeded as a response to the tribunal's order to present all pertinent evidence,[161] as the date of the events had occurred within this timeframe,

[155] See Redress and CRIN, supra note 151, p. 24.
[156] See RNDDH, supra note 154.
[157] LOOP News, 'MINUSTAH: après son viol, Johnny Jean réclame 3 millions de dollars' (*LOOP News*, 11 August 2017) <https://haiti.loopnews.com/content/minustah-apres-son-viol-johnny-jean-reclame-3-millions-de-dollars> accessed 7 June 2021.
[158] See Redress and CRIN, supra note 151, p. 24.
[159] Fernanda Cavalcante de Barros, 'Sexual exploitation and abuse by MINUSTAH peacekeepers: A critical assessment of the impact of socio-cultural norms in peacekeeping' (European Master's Programme in Human Rights and Democratisation, Ruhr University Bochum, 2020), p. 71.
[160] See Redress and CRIN, supra note 151, p. 25.
[161] See LOOP News, supra note 157.

as demonstrated by records from the previous criminal and military procedures, and witness statements that the plaintiff presented to the court.[162]

In conclusion, this case is a perfect example of how difficult it is to take measures against soldiers acting within the framework of UN PKOs, even though accountability mechanisms are existing. It also greatly shows that neither public awareness through media attention, clear evidence due to the existence of video footage of the alleged assault, nor financial, familial and judicial support are sufficient to get the accused offenders to serve time in prison. In this case, the public outrage may have led to the provision of minimal financial support in order to cover Jhony's travel expenses to Uruguay for the testimony and to an apology from the Uruguayan president, however, the victim has not adequately been compensated for the suffered damages by the Uruguayan state yet.

Also, the frequently inadequate convictions, like in this case of 'private violence' by the Uruguayan criminal justice system, downplays the gravity of sexual abuse and exploitation cases and fails to provide enough punishment to the offenders, just as it prevents the victims from receiving a formal apology and adds to the stigma surrounding sexual assault. Additionally, it is disappointing to observe that despite the initial international scandal upon Jhony's case, it is nearly impossible to find information on the further course of the proceedings, the latest media article dating from 2017 and no court decisions being accessible.

[162] See Redress and CRIN, supra note 151, p. 25.

Part IV: Reactions of the international community

In the last part of the paper, an analysis of the responses throughout the whole world is going to be made, and the suggested and/or demanded differences in the approach of how to handle incidents of SEA in the context of PKOs are going to be presented. As the high occurrence of documented sexual assault cases in peacekeeping missions and the frequent failure of the mechanisms available to hold the culprits accountable has been tried to be exposed throughout the whole paper, it needs to be shown that there have however been many attempts, by the international community just as by the UN itself, to counteract these incidents, or to at least adequately react when prevention has failed. However, while the UN has taken numerous efforts to address this issue throughout the years, none of these actions have been successful in eliminating the problem, every scandal having led to new planned efforts to reinforce its regime against SEA.

- Chapter 9: Responses and demands of the international community

As already mentioned on several occasions, the international community's reactions to the allegations of sexual violence by peacekeepers upon the people that they have the duty to protect were countless. In this section a few responses are briefly brought to attention and parsimoniously discussed.

One of the main reproaches that is being made lies within the already revealed paradox in which these accusations of sexual abuse and exploitation stand towards the reason why these peacekeepers are stationed in the given countries in the first place: namely to bring peace. A major part of the international community considers this paradox as particularly cruel: the extreme vulnerability of the populations that are affected by conflict, together with the hope and relief peacekeepers are often welcomed with being just some out of numerous other reasons why such incidents are inhuman.[163]

[163] Melanie Cura Daball, 'UN Peacekeeping: blue banner for hope, or red flag for abuse?' (openDemocracy, 15 December 2015) < https://www.opendemocracy.net/en/5050/un-peacekeeping-blue-banner-for-hope-or-red-flag-for-abuse/> accessed on 10 August 2021.

Furthermore, it is called out by many experts that for instance a change of the central focus on the victims instead of concentrating on the perpetrators would be of extreme importance when it comes to such incidents. Indeed, they claim that access to psychosocial and medical care for victims of sexual violence should be improved, especially by clarifying the comprehensiveness of what such care looks like and by whom it is provided, in order to take the built-up mistrust from victims against help provided by the UN.[164]
Indeed, individuals working with victims were particularly disturbed by investigative processes that were not victim-centered and frequently failed to inform victims of the outcomes of their allegations. In addition, they were shocked by systemic victim-blaming in the aftermath of allegations, particularly in cases of transactional sex or prostitution.[165]

- **Chapter 10: Restauration of the UN's Reputation through a new approach**

The UN has in the last years been harshly criticized by the public, in response to the inhuman SEA scandals regularly making the front pages of international media. They have been inter alia accused of inaction, of an evasive attitude towards taking responsibility for the acts of their agents and of failing at establishing functioning mechanisms to hold sexual abusers and exploiters in question accountable. However, it is also important to consider the UN's ongoing efforts to prevent incidents of SEA from happening and to aid the afflicted communities and individuals.

Indeed, it is critical for the UN's reputation and credibility for it to accept some responsibility for the occurrence of such acts within the context of peacekeeping missions established under their mandate and, as a responsible global citizen, to address that duty. The fact that the UN adopted a "*zero tolerance*" rhetoric on acts of SEA committed within the legal framework of PKOs by its agent, but that this discourse has not been effectively applied in practice denotes one of the most common criticisms of the UN's approach towards the problematic.[166] In other words, despite a clear discursive condemnation and the establishment of an institutional framework by high authorities to prevent SEA, cases of SEA continue to occur. In the following

[164] Ibid.
[165] See Westendorf, supra note 31, p.107.
[166] Patricia Martuscelli and Augusto Rinaldi, 'Preventing "Protectors to become predators": Can the United Nations stop sexual abuse and exploitation by UN peacekeepers?' (2017), p.218.

section, the agenda of the UN in regards of addressing the SEA problematic is going to be presented.

It is with the adoption of Security Council Resolution 1325 (Women, Peace, and Security) in 2000, when the protection of women and girls became a priority on the UN agenda, due to the fact that civilians, particularly women and children, are the primary victims of conflict, according to this document. The resolution accentuates the crucial role of women in conflict prevention, resolution, and peacebuilding processes and underlines the importance of ensuring women's equal involvement in PKOs, up to their deployment on the field, though the viewing of a larger representation of women within PKOs as being a sufficient solution is heavily criticized by some authors. [167] Still, the document was essential in introducing gender topics into the UN agenda and in establishing an agenda to raise awareness of gender issues and women's engagement.[168]

Subsequently, as a reaction to complaints of sexual exploitation of refugees by aid workers in the early 2000 in West Africa, the UN Secretary-General Kofi Annan presented his 'Bulletin on Special Measures for Protection From Sexual Exploitation and Abuse' (ST/SGB/2003/13) on 9th October 2003.[169] Together with inter alia defining 'sexual abuse' and 'sexual exploitation', definitions which have been used in all the following UN documents in relation SEA,[170] the Bulletin stipulates that UN personnel committing such acts "*constitute acts of serious misconduct and are therefore grounds for disciplinary measures, including summary dismissal*."[171]

It is in 2005, again as a consequence of several reports of SEA by UN peacekeepers identified by non-governmental human rights organizations and the British newspaper *The Independent*, that another report was commissioned on the matter from a panel led by the Jordanian Ambassador Zeid.[172] Indeed, the UN Secretariat had appointed Zeid Ra'ad Zeid Al-Hussein to conduct investigations in order to verify the allegations, which were in fact confirmed in his report. As UN civilian police and military observers and UN PKOs were not covered by the

[167] See Hernandez, supra note 28.
[168] See Martuscelli and Rinaldi, supra note 166, p. 217.
[169] See ST/SGB/2003/13, supra note 13.
[170] See Martuscelli and Rinaldi, supra note 166, p 218.
[171] See ST/SGB/2003/13, supra note 13, section 3.2(a).
[172] Bruce Rashkow, 'Above The Law? Innovating Legal Response To Build A More Accountable U.N.: Where Is The U.N. Now?' (2017) ILSA Journal of International & Comparative Law Vol. 23, Iss. 2, Article 7, p.20.

Bulletin issued in 2003, which led to an extension of the prohibitions in the Bulletin to them in 2004,[173] the Ambassador precisely noted that the problem of SEA affected both military and civilians and that it was widespread.[174]
The report in question treated a wide range of activities, from the legal soliciting of prostitutes in some host nations to acts that are criminal violations in almost all countries, such as rape and pedophilia.[175]

Furthermore, the issue of 'peacekeeper babies' was addressed for the first time by the UN in this Bulletin, a problematic that is amongst others difficult to handle due to the lack of an adequate legal structure in most host countries,[176] and which, as illustrated by this paper through the case in Jacmel, has only known a sincere step into the right direction recently.

In his report, Zeid Ra'ad Zeid Al-Hussein especially criticized the UN's own investigations into alleged sexual abuse, stating that the reason main offenders often evaded justice was that the UN has no criminal jurisdiction over its peacekeepers. Indeed, the UN is not a sovereign body, at the most the UN can dismiss someone from service, but it could not conduct its own trials. Indeed, that is for the governments themselves to do and if the member state does nothing to punish the individuals or shields them, then impunity exists.
Zeid's Report tried to address this exact issue by recommending for military peacekeepers that Member States hold "*on-site courts martia*" in the country, making it easier to "*access witnesses and evidence*". For civilian peacekeepers, he suggested an international agreement to ensure that those accused of abuse would face criminal prosecution.[177]
But there have been no widespread efforts by UN Member States to adopt the measures. Indeed, the decision-making authority rests with the Member States and it is a fact that the UN Secretariat cannot impose a new judicial system on them. In addition, the United Nations General Assembly did not act on a number of the suggestions made by the Zeid Report, particularly those that would weaken the national troop contingent commanders' exclusive power.[178]

[173] Ibid., p.19.
[174] See Resolution A/59/710, supra note 21, para. 8.
[175] See Resolution A/59/710, supra note 21, para. 3.
[176] See Resolution A/59/710, supra note 21, para. 5-6.
[177] See Resolution A/59/710, supra note 21, para 35.
[178] See Rashkow, supra note 172, p. 20.

However, some measures were still taken by the UN as a follow-up to the Zeid Report, in order to inform the UN peacekeepers, just as the local people on SEA, as well as the UN's role for responding to claims of such misconduct, as well as the UN's role for responding to claims of such misconduct, including complaint procedures and steps to support SEA victims,[179] as for example the UN passed a resolution in 2008 requiring "*criminal accountability of UN officials and experts on mission*." [180]

Despite the UN's attempt to deal with the issue, allegations of SEA continued in PKOs all over the world. Indeed, a 2009 report by the Secretary General mentions difficulties in implementing mechanisms on the ground, notably due to a lack of uniformity in procedures, but also to a lack of adaptation to local cultures for which, very often, sexual assaults are perceived as shameful events that bring disgrace to the victims.[181] Thus, while the UN does have mechanisms in place to receive complaints from alleged victims of sexual assault by members of PKOs, these require commitment, time and significant financial resources to operate.[182]

In addition, the further occurrence of SEA incidents lead towards Ban Ki-moon's expression on 13 August 2015 of his "*distress and shame*" over the reports of SEA committed by UN personnel. He restated his commitment to the organization's "*zero-tolerance policy*" on SEA, calling sexual abuse "*cancer in our system*" that requires severe treatment.[183]

In 2016, as a consequence of the 2015 peacekeeper scandal in the CAR, the independent Kompass Inquiry Panel issued a report, which the UN Human Rights official Anders Kompass passed to French officials after UN authorities across multiple agencies and departments had failed to act on it for nearly a year. In this report, the UN and its handling of SEA in the Central African Republic were heavily criticized. It presented 12 recommendations for how to deal with SEA in the peacekeeping environment in the future.[184]

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[179] See Rashkow, supra note 172, p. 21.
[180] UN General Assembly, Resolution 62/63, *Criminal accountability of United Nations Officials and Experts on Mission*, 8 January 2008, para. 2-3.
[181] UN General Assembly, Resolution 62/214, *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel*, 21 December 2007, p. 2.
[182] Ibid., para. 60.
[183] See Daball, supra note 163.
[184] See Westendorf, supra note 31, p. 116.

Since then, General Assembly and Security Council resolutions have multiplied on the subject, but it is predominately the Secretary-General, as head of the UN personnel, who has implemented particularly extensive reactions to the allegations. He has been responsible for annual reports on the issue, the creation of various committees, a dedicated ethics unit within the office of peacekeeping operations and, most recently, the appointment of a special coordinator for improving the UN's response to sexual exploitation and abuse.[185]

The result of these many initiatives is the existence of a considerable mass of official documents which, in a desire to promote transparency, focus on three areas: prevention, repression and assistance to victims. prevention, repression and assistance to victims. Each of them refers to a responsibility of the UN and TCNs.

When it comes to prevention, the United Nations is promoting various measures, particularly in terms of information and awareness-raising on sexual violence.

In the area of repressive measures, the United Nations calls for a strengthening of the individual responsibility of agents, in particular by encouraging States to modify their legislation to prevent and punish, including when committed extraterritorially, acts of sexual violence perpetrated by their military personnel engaged in a peace operation.

The third component, victim assistance, consists of help and support for complainants, victims and children born as a result of sexual exploitation or assault, and is intended to take the form of medical care, assistance in legal issues, support for the psychological and social consequences of the act and immediate material assistance. It also promotes the establishment of national prevention networks and paternity protocols to enable children born of sexual abuse to be cared for by their parents, through recognition and payments of maintenance.[186]

However, the incentive power of the approach is limited, insofar as the UN institutions could in any case hardly go further than the stage of the investigation, which, supposing that it establishes the responsibility of a peacekeeper, would in any case have to be transmitted to the authorities of his or her sending State for the exercise of disciplinary or criminal proceedings.

[185] UN, 'UN Special Coordinator' (*UN- Preventing Sexual Abuse and Exploitation*) <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/un-special-coordinator-0> accessed 20 June 2021.

[186] Isabelle Fouchard. 'Violences sexuelles commises par les forces de paix des Nations Unies : tolérance-zéro, impunité -un' (2018) in J. Cazala, Y. Lecuyer et B. Taxil (dir.), *Sexualité et droit international des droits de l'homme*, Pedone, 185-206, p. 202.

Consequently, the Secretary-General has tried to evade these disadvantageous circumstances by the adoption of a 'naming and shaming' strategy already mentioned in the Zeid Report in 2005. For the first time, the Secretary-General's 2016 report includes specific information on each case of allegations recorded in 2015, including for example the nationality of the perpetrators in cases where an investigation on the allegations had occurred. [187]

This policy of transparency promoted by the UN Secretary-General and supported by the Security Council, just as the numerous other responses to the serious allegations is undoubtedly a progressive step forward in the fight against the occurrence of SEA incidents. This can be stated regardless of the fact that it is too early to assess the incentive effect of this newly gained transparency on TCN in prosecuting their military, police, civilian experts and other nationals involved in peacekeeping missions.[188]

[187] Rembert Boom, 'Impunity of Military Peacekeepers: Will the UN Start Naming and Shaming Troop Contributing Countries?' (2015) ASIL Insights, n°25, vol. 19.
[188] See Fouchard, p. 203.

Conclusion

Cases of sexual exploitation and abuse by UN personnel are an important issue in peacekeeping due to the fact that when peacekeepers commit such inappropriate acts, the very legitimacy of the peace mission in which they are deployed is called into question. Given the highly complex nature of PKOs, illustrated by the paper, it is not surprising that such interventions can sometimes lead to a number of unintended consequences. Nevertheless, it is surely the ultimate paradox that UN personnel take advantage of their position of authority by exploiting local women and girls, just as men, when their mandate is to protect them.

Unfortunately, the hypothesis can be confirmed that despite the fact that there exist mechanisms through which a private person can seek compensation in cases of SEA perpetrated by peacekeeping personnel, their effectiveness and efficiency are weakened by the non-respect of Human Rights that provide for a right of access to a judge, by the immunities of the UN before national jurisdictions and by the non-use of the mechanisms put in place by the organization itself.

However, it must be acknowledged that the UN has shown good faith in improving the compensation mechanisms available to victims of SEA committed in the context of a PKO. It has been demonstrated in the paper, that the UN indeed is rightfully held accountable for the acts of its peacekeeping personnel, even if committed outside their duties as it is the case for acts of SEA, due to the fact that the UN holds inter alia the responsibility to train and prepare them for the field.

Furthermore, it can conclusively be states that despite the efforts of the UN, they are not sufficient or effective, as the vast number of annual SEA allegations that continues to be counted annually shows. Adding to this, PKOs are often deployed in states where religion and ancestral traditions are strongly present. In this respect, it is important to repeat that victims of SEA are often rejected by their families and husbands: denouncing a rape is proof of immense courage on the part of the victims, resulting in the fact that most prefer to hide it in order to continue living their lives. Consequently, it is self-evident that the number of allegations does not even come close to the real number of SEA incidents actually taking place, even if the UN, in its defense, tried to address this particular issue.

Tackling violations of SEA remains a challenging task, both legally and politically, but one that is not impossible to achieve if the UN decides to fully invest in cooperating with TCNs to ensure that allegations of rape and other sexual assaults are thoroughly and effectively investigated. Only then the prosecution of the accused and the access to the justice that is due to the victims of these abuses can be given. Although it is not self-evident for an international organization to acknowledge its responsibility for a violation of international law, it is up to the UN to set an example to those states to whom it intends to enforce international law. By accepting to acknowledge its civil and moral responsibility, the UN would only gain in credibility and legitimacy, thus silencing its critics.

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Abstract

Peacekeeping missions have been increasingly conducted after the end of the Cold War, and with them has not only come an assistance to countries in politically unstable situations, but unfortunately also repeated scandals of sexual abuse and exploitation committed by the UN personnel itself have arisen in these regions. That's why this paper focusses on analyzing how and why it comes to such incidents, and especially on presenting the possibilities of holding the responsible individuals accountable for these acts, which has proven to not often being the case. With it comes the question on whether it is possible to hold the UN or the Troop-Contributing States accountable for the actions of their agents, namely the soldiers or other UN personnel. After presenting decisions of different courts in the matter and discussing them, this paper really emphasizes on the legal issues when it comes to holding the UN accountable in the context of cases of SEA in peacekeeping missions. In its last part, the paper engages on presenting the general international responses to the numerous headlines of SEA scandals and on introducing the elaborated suggestions by the UN and by the international community as a whole on dealing with the so-called 'accountability gap' that has shown to be a real problem in these concerns.

Zusammenfassung

Nach dem Ende des Kalten Krieges wurden vermehrt Friedensmissionen durchgeführt, die leider nicht nur der Unterstützung von Ländern in politisch instabilen Situationen dienten, sondern bedauerlicherweise auch zu zahlreichen Skandalen sexuellen Missbrauchs und sexueller Ausbeutung durch das UN-Personal selbst in diesen Regionen führten. Deshalb konzentriert sich diese Arbeit auf die Analyse der Fragen wie und warum es zu solchen Vorfällen kommt, und legt ihren Fokus insbesondere auf die Darstellung der Möglichkeiten, die Verantwortlichen für diese Taten zur Rechenschaft zu ziehen, was erwiesenermaßen nicht oft der Fall ist. Darauf folgt sogleich die Analyse der Frage, ob es möglich ist, die Vereinten Nationen oder die truppenstellenden Staaten für die Handlungen ihrer Agenten, d.h. der Soldaten oder anderer UN-Mitarbeiter, zur Verantwortung zu ziehen. Nach der Darstellung und Erörterung von Entscheidungen verschiedener Gerichte in dieser Angelegenheit werden in dieser Arbeit vor allem die rechtlichen Fragen im Zusammenhang mit der Rechenschaftspflicht der Vereinten Nationen in Fällen von sexueller Ausbeutung bei Friedensmissionen behandelt. Im letzten Teil der Arbeit werden die allgemeinen internationalen Reaktionen auf die zahlreichen Schlagzeilen bezüglich der sexuellen Gewalt dargestellt und die Vorschläge von den Vereinten Nationen und der internationalen Gemeinschaft zum Umgang mit dieser Lücke, in Bezug dazu wen man zur Rechenschaft ziehen kann, vorgestellt, eine Lücke, die sich als echtes Problem in diesen Fragen erwiesen hat.