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Reparations for Human rights violations committed by peacekeepers in the scope of the UN peacekeeping operations

Master's Thesis

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I hereby declare that this Master's Thesis on the topic of *Reparations for Human rights violations committed by UN peacekeepers in the scope of the UN peacekeeping operations*, is my original work and I have acknowledged all sources used.

In Olomouc, Signature,

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«L'insignifiance, mon ami, c'est l'essence de l'existence. Elle est avec nous partout et toujours. Elle est présente même là où personne ne veut la voir : dans les horreurs, dans les luttes sanglantes, dans les pires malheurs. Cela exige souvent du courage pour la reconnaître dans des conditions aussi dramatiques et pour l'appeler par son nom. Mais il ne s'agit pas seulement de la reconnaître, il faut l'aimer, l'insignifiance, il faut apprendre à l'aimer. Ici dans ce parc, devant nous, regardez, mon ami, elle est présente avec toute son évidence, avec toute son innocence, avec toute sa beauté. Oui, sa beauté.»

Milan Kundera, *La fête de l'Insignifiance*, 2013.

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Introduction

The concept of Human rights comes from very far in the human history. This concept can be found in the ancient Greece and ancient Rome[1]. From a legal point of view, it can be considered that the concept of Human rights is more recent[2]. The first mark, very limited, appears inside the English Magna Carta in 1215, and later through a wider form inside the Bill of Rights in 1689. Most historians agree that the current conception of Human Rights finds its source inside the Bill of rights of the State of Virginia (USA), promulgated in 1776[3]. The French "*Déclaration des Droits de l'Homme et du Citoyen*" of 1789 is the logical following of all the previous texts mentioned but enjoyed an important impact in History.

The question of the reparation of the Human rights violation started to be extremely relevant just after the two World Wars and the atrocities committed during so. The Universal declaration of Human rights, even if not legally binding, was adopted three years after the end of the Second World War. This marks the starting point of the internationalisation of Human rights.

Indeed, this non-binding declaration became the bedrock of numerous treaties and conventions which are legally binding. We can mention for instance the European Convention of Human Rights (1950), the International Covenant on Civil and Political Rights (1966), the Rome Status (2002), the Charter of Fundamental Rights of the European Union (2009) and many more. The States themselves, inside their Constitution, are protecting the Fundamental Rights of human beings[4].

The United Nations Peacekeeping Operations appeared at the same time of the internationalization of Human rights. Indeed, in 1948, the United Nations deployed the

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[1] Winston L. Frost, The Developing Human Rights Discourse: A History of the Human Rights Movement, 10 Trinity L. Rev. 1 (2000).

[2] B.Pusca, Acta Universitatis Danubius, Nr. 1/2005, « *Les droits de l'Homme – Question cruciale des Relations Internationales* », 2005, p.26.

[3] Le Monde, *« Historique des droits de l'Homme »*, 8th August 2003, http://www.lemonde.fr/international/article/2003/08/14/historique-des-droits-de-l-homme_330502_3210.html

[4] French Constitution of 4th October 1958, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html

UNTSO (United Nations Truce Supervision Organization) in the Middle East to monitor the peace agreement between Israel and its Arab neighbours[5]. It was the very first UN peacekeeping operation, decided by the General Assembly, with the consent of the parties.

Since then, seventy UN Peacekeeping missions had been deployed all over the world. The mandates of UN missions have evolved, but the same main objectives are visible from the beginning : peace-keeping, protection of civilians, strengthening the rule of law, the promotion of Human rights and democracy as political system[6].

During all those years, the promotion of Human rights has been a priority in the mandate of the UN peacekeeping operations[7]. Nevertheless, the respect of Human rights by the UN personal itself has become a sensitive topic after several scandals and situations which had been reported that some soldiers of the UN were committing violations of Human rights such as acts of torture, sexual aggression, rape and so on.

Naturally, the question of reparations appears essential and necessary[8]. But this issue is full of obstacles which need to be lightened. Before talking about reparations, the exact facts of the violations have to be determined as well as the existence of a right for individuals to ask for reparations. Then, the legal responsibility has to be identified. Finally the question of the accurate judicial system to start investigations and possibly provide reparations can be analysed.

Firstly, there is a need to analyse how the question of Human rights is treated by the United Nations in its own organization. There is a huge difference between organizing the promotion of Human rights in the countries where the UN deploys operations and regulating the Human rights within its own institution; ensuring the effectiveness of

[5] UNTSO, background; https://untso.unmissions.org/background

[6] United Nations Peacekeeping, « *Our history* », http://peacekeeping.un.org/en/our-history

[7] United Nations Peacekeeping, « *Promoting Human rights »* ; https://peacekeeping.un.org/en/promoting-human-rights

[8] Md. Kamal Uddin, Human Rights Violations by UN Peacekeepers: An End to Impunity, 25 Sec. & Hum. Rts, 2014, p.131.

mechanisms of sanction, of reparation, in order to avoid that Human rights violations do not remain without answer.

Secondly, the question of responsibility is probably the most sensitive legal question since it is involving States and the UN itself. Indeed, legal issues appear when the violations of Human rights take place during the UN peacekeeping operations and committed by the UN personal. The personal is provided by the Member States, but the mission is under the control of the UN. The junction of participation is making the responsibility unclear.

Thirdly, the question of reparation can finally have some answers. It is a basic legal principle that an individual victim of violation of his rights can ask for reparation. But inside the international community, where States and International Organizations are seen as actors, the answer for the violation of individual's rights is not easy to fulfil.
Inside a national order, in a democratic system, an individual is a direct subject of right who sue a wrongdoer before a court to ask for reparation at any moment. Even when the wrongdoer is the State itself.

From the international point of view, the individual is a subject of law. However, the mechanisms to get reparation are then complex. The States have mechanisms and judicial courts at their disposal in order to settle disputes with other international actors. In the case of individuals, except few exceptions as the European Court of Human Rights or the Inter-American Court of Human Rights, they cannot go before an international court from their own initiative.

This is why it seems relevant to centre this work around two main interrogations. In order to know which are the means to get reparations for Human rights violations in the scope of the UN peacekeeping operations, the problematic of the responsibility has to enlightened to know which actor is supposed to provide remedies for such violations.

For the purpose to provide an accurate work with a deep knowledge, this work will be limited to the actions of the military personal of the UN peacekeeping missions since they are the main actors to be blamed by such accusations.

Chapter I - The Human Rights inside the United Nations system

A - Basis and sources of HR obligations towards the UN

1. Legal sources of Human rights

There are many sources of Human rights' obligations for international organizations and specifically the UN. Therefore it is relevant to identify and analyse them.

1.1 International conventions

The first source which comes to mind is the international treaties. Even if most of them are not open to the participation of international organizations, international treaties have a special status since it is the "*dominant source of international human rights law*"[9]. In this way, it seems desirable that international organizations could contract and be bound directly by international Human rights treaties.

There is currently a legal weakness concerning treaties and international organizations[10]. According to the Vienna Convention on the Law of Treaties (1969), article 34; "*a treaty does not create either obligations or rights for a third State without its consent*". As an analogy, the Vienna Convention on the law of Treaties between States and International Organizations or between International Organizations (1980) provides; "*A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization*". Yet, this treaty suffers from legal strength since it did not gathered enough ratification to enter into force[11].

Another thing to mention is that most the Human rights treaties are not open for accession and ratification of international organizations but only for States[12]. But this is a matter of choices, Human rights treaties could be open to international organizations if the States

[9] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations ?* », p.280.
[10] K.Daugirdas, " *How and why International Law Binds International Organizations "*, Harvard international Law Journal, Vol 57, n°2, Spring 2016, p.335.
[11] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations ?* », p.280.
[12] Ibidem.

would decide to do so in the same way they did it in the situation of the European Convention on Human Rights with the protocol 14 which open the accession to the European Union.

There is no reason why international organizations could not be part of international treaty. Indeed, international organizations usually possess the treaty making capacity. The legal limit would be the principle of speciality which implies that an international organisation has to act according to its material competences which is concluded in the founding treaty of the organization[13].
Concerning the United Nations, which is promoting peace, democracy and Human rights, it seems totally appropriate that it could be part of international Human rights treaties without violating its principle of speciality. The defence of Human rights is one of its purpose. The reasons why international organizations cannot be part of International human rights treaty seem to be mostly politic[14].

One really interesting question is to know if international organizations are bound only by contractual obligations contracted by themselves or also by those binding by their Member States. There is an important movement in the literature which would recognise the Member States' obligations as part of the obligations of the International organization, considered as a transfer of obligations. However the debate about the consent of the international organization is still in process[15]. This is for now theoretical, international law does not provide yet any legal basis for such consequences[16].

Obviously, the basis of international organizations' obligations is their founding documents, written by their Member States. The articles 1(3) and 55(c) of the UN Charter seem to mean that the UN is bound by Human rights[17]. But there is no specification of

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[13] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations ?* », p.281.
[14] M.Darrow & L.Arbour, The American Journal of International Law, Vol 103, n°3, « *The Pillar of glass ; Human rights in the development operations of the United Nations,* 2009, p.449.
[15] K. Daugirdas, " *How and why International Law Binds International Organizations "*, Harvard international Law Journal, Vol 57, n°2, Spring 2016, p.335.
[16] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations* », p.283.
[17] Ibidem, p.284.

what promoting Human rights means concretely[18]. Currently, Human rights treaties are not the accurate source of legality regarding the international organizations but might become one of the political wills which grows in that directions and open those treaty ratification to international organizations.

1.2 Unilateral act

International organizations possess the competence to adopt their own binding rules, unilateral acts. Those decisions can bind themselves internally, inside their own system, but also in their external relations, with a third State or another international organizations. If the UN decides to create its own binding rules concerning Human rights, it would be one of its sources of obligations[19].

According to some scholars, there is an internal conception of the UN being bound by Human rights[20]. According to this conception, the UN would be bound by Human rights obligations only because of its aim to promote them, which is contained in the founding document of the organization[21].

1.3 Customary law

Concerning the international customary law, here again there is a lack of clarity because of its nature; it is not provided by legal texts. Nonetheless the scholars seem to share one dominant theory[22]. Customary law, as part of general international law, should be a source of international organizations' obligations. As bearer of the legal personality, international organizations are in theory legally equal to States. That position was confirmed by the International Court of Justice in its *Advisory Opinion on the WHO – Egypt Agreement* of 1951. The ICJ said that international organizations, as subjects of

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[18] UN Charter, Art.1(3) : «*The Purposes of the United Nations are : 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion»* and 55(c) : «*the United Nations shall promote : c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion».*

[19] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations* », p.289.

[20] F.Mégret & F.Hoffman, The John Hopkins university Press, Vol 25, n°2, *« The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities* », 2003 p.317.

[21] Ibidem.

[22] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations* », p.285.

international law, are bound by any obligation coming from the general rules of international law[23].

Customary rules can be considered as source of obligations towards international organizations[24]. However some questions remain problematical; whether there is a general practice and an *opinio iuris* specifically coming from international organizations but also which customary rules can apply to the UN regarding its principle of speciality[25]. The creation of customary rules by international organization's practice will not be developed in this work, but one interesting information can be mentioned; the International Law Commission stated in its Draft Conclusions on Customary International Law (2016), conclusion 4, paragraph 2; "*in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law*"[26].

As the report on *Accountability of International organizations for human rights violations* published by the Council of Europe demonstrates, in order to analyse the relationship between the UN and the Human rights, the UN has to be considered as a subject of international Human rights obligations. Because the International organizations are generally not parties to Human rights treaties, they are not directly bound by Human rights[27].

Nonetheless, the report reminds that International organizations are "*bound by any obligations upon them under general rules of international law*"[28]. The question of Human rights as part of the general rules of international law, through the customary law or general principle, for instance, is still in debate. In some cases when the legal texts are

[23] ICJ, overview of the case *Interpretation of the Agreement of 25th March 1951 between the WHO and the Egypt*; http://www.icj-cij.org/en/case/65
[24] F.Mégret & F.Hoffman, The John Hopkins university Press, Vol 25, n°2, *« The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities* », 2003 p.317.
[25] N.Blokker, International organizations Law review 14, « *International Organizations and Customary international Law* », 2017, p.3&4.
[26] Ibidem, p.4.
[27] Council of Europe, Report on Accountability of International organizations for human rights violations, doc.13370, December 2013, p.5-6.
[28] Ibidem, p.7.

clear, the UN can apply Human rights treaties. It was the case for the European Convention on Human Rights in the mission in Kosovo, the UNMIK[29].

2. Fundamental Human rights as *jus cogens*

The most fundamental Human rights, as prohibition of torture and slavery, are considered by most scholars as part of *jus* cogens[30]. The norms of *jus cogens* are part of the international law and must be respected by all the subjects of international law, including the International organizations and a fortiori the United Nations. Consequently, the UN is at least bound by the most fundamental Human rights which points out the specific nature of human rights law. Human rights were strongly brought into international concern through concepts of *jus cogens* and *erga omnes* obligations[31]. A progressive "*humanization of international legal obligation*" can be observed for few years[32].

For more clarity, it is desirable that international organizations could be parties to Human rights' treaties from their own will[33]. The EU is trying to be part of the European Convention of Human Rights, which is a difficult task because of legal and technical elements[34]. One of them, brought into light by the Court of Justice of the European Union is that it would make International organizations behave like States, which is a legal problem since international organizations are secondary actors of public international law.

A movement of international organizations towards Human rights concerns is visible since the second part of the 20th century. The human rights' aspect became at the top of the agenda in many international organizations and was even translated into practice in

[29] Council of Europe, Report on Accountability of International organizations for human rights violations, doc.13370, December 2013, p.7 : " *For example, the advisory panels created to monitor the actions of the United Nations and European Union in Kosovo, which have set up and operate the United Nations Interim Administration Mission in Kosovo (UNMIK) and the European Union Rule of Law Mission in Kosovo (EULEX) respectively, are authorised to apply most major global human rights treaties, and in particular the European Convention on Human Rights, although their findings are non-binding*."

[30] P.Zenovic, *Human rights enforcement via peremptory norms-a challenge to state sovereignty*, RGSL Research Papers, p.30-34.

[31] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations* », p.271.

[32] ICTY in Kupreskic judgment, quoted by M.Faix in Are International organizations bound by Human rights obligations, p.271.

[33] Council of Europe, Report on Accountability of International organizations for human rights violations, doc.13370, December 2013, p.7.

[34] Avis 2/13, Cour de Justice de l'Union européenne, 18 Décembre 2014, http://curia.europa.eu/juris/document/document.jsf?docid=160882

some cases. For instance, the EU's European Council conditioned the admission of Central and Eastern Countries to the Copenhagen criteria in 1993[35]. Those criteria are stipulating "*stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*".

The Human rights law had known a huge development during the 20th century until nowadays. But the whole body of Human rights cannot be considered *as jus cogens*. It is suffering of the fact that Human rights are the expression of a moralisation of human relationship, which represents an ideal concept, confronted with the sovereignty of States, and, for that reason, hard to incorporate into the international legal normativity[36]. States dwell the main actors able to impose human rights obligations to non-state actors ; including the United Nations.

B – Human Right's implementation in the UN

1. The will to incorporate Human rights by UN organs

The implementation of Human rights started with the efforts of Secretary General Kofi Annan who was willing for a UN reform right after he took office in 1997. Since then, at least in theory, Human rights were integrated in most of the UN work[37].

Moreover, in the UN offices located in Geneva, all the Human rights activities are collected in the Office of the High Commissioner for Human Rights. The OHCHR is obviously the most visible organ of the UN affected by Human rights concerns, but many others are also dealing with Human rights preoccupations[38].

The UN Children's Fund has adopted the Convention on the Rights of the Child. The UNESCO, which is working on cultural and education rights to people also has a

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[35] M.Faix, Czech Yearbook of Public and Private International Law, Prague, Vol.5, 2014, « *Are International organizations bound by Human rights obligations* », p.274.
[36] Ibidem, p.272.
[37] Hurst Hannum, *Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding*, 2006, p.11.
[38] M.Darrow & L.Arbour, The American Journal of International Law, Vol 103, n°3, « *The Pillar of glass ; Human rights in the development operations of the United Nations,* 2009, p.449.

mechanism permitting individuals to claim a violation of their rights. The International Labour Organization has also some mechanism allowing workers to address complaints about their rights. Many other organs are linked with the Human rights concerning the rights of women, refugees, health and so on[39].

The most active organ of the UN seem to be the UNDP, and the UNDPKO. Their Human rights activities contain three objectives in sight[40]:

- strengthening the UN-led international human rights system.
- strengthening regional and national human rights capacities as part of the enabling environment for sustainable human development.
- mainstreaming human rights in all of the organization's practice areas: democratic governance, poverty reduction, energy and environment, crisis prevention and recovery, HIV/AIDS, and IT for Development.

The Human rights topic is currently an important part of the peacekeeping operations even if there is no express human rights protection inside the legal mandate of the mission[41]. Nonetheless, since October 1999, every peacekeeping operation contains a human rights unit or at least a human rights advisor[42]. The human rights component of an operation as the same status as any other component, which implies the participation in the internal policymaking process and all the "*duties*" as reports sent directly to the Secretary General and the OHCHR[43]. Consequently, the UN Security Council can be submitted and briefed quickly about an urgent situation concerning Human rights like it happened in Darfur and Ivory Coast in May 2004[44].

The active involvement of the UN concerning the human rights is a really recent phenomenon. Before the Secretary General Kofi Anan, the Human rights were victim of

[39] Hurst Hannum, *Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding*, 2006, p.11 & 12.
[40] Ibidem, p.12.
[41] Ibidem, p.12 : « *DPKO does not mention protection of human rights as falling within its mandate* ».
[42] M.Darrow & L.Arbour, The American Journal of International Law, Vol 103, n°3, « *The Pillar of glass ; Human rights in the development operations of the United Nations,* 2009, p.451-461.
[43] F.Mégret & F.Hoffman, The John Hopkins university Press, Vol 25, n°2, *« The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities* », 2003 p.318-320.
[44] Hurst Hannum, *Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding*, 2006, p.14.

a separation from the UN system. Rather than separation, integration is currently the new principle which is governing the UN policy towards the Human rights[45].

2. The Human rights through the action of the Security Council

Through its resolutions which enjoy a binding character, the Security Council bear an important responsibility on the world stage according to the actions it decides to establish, and precisely the peacekeeping operations. In that meaning, it is relevant to analyse if the Security Council is directly bound by Human rights obligations.

The Security Council, in its mission to maintain peace and security according to the UN Charter, is also concerned with Human right topics. It made itself competent for Human rights protection functions. The Human rights became a real "*component part of the security fabric*"[46].
Nevertheless, a paradox can be observed regarding the practice; through its decisions, the Security Council can make States evolving their Human rights obligations under international law, but it can also override them in some situations.

Indeed, the Council, as it is demanded by article 39 of the UN Charter, has determined State breaches of Human rights and humanitarian law as "*threat to the peace, breach of the peace, or act of aggression*"[47]. For instance, genocide, ethnic cleansing, violation of the right to self-determination are considered as breach of article 39[48]. This has for consequences that the Council can take enforcement measures under Chapter VII of the Charter, which can allow the use of force. In practice, the Council limited its decisions to economic and financial functions and nullity of certain illegal acts. Those measures had been enforced not only on States but also on non-state actors and individuals[49].

The Council has obviously an impact on the development of human rights law. It is playing a huge role when creating international tribunal for Ex-Yugoslavia or

[45] Hurst Hannum, *Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding*, 2006, p.14.
[46] V.Gowlland-Debras, *Is the UN Security Council Bound by Human Rights Law*, 103 Am. Soc'y Int'l L. Proc. 199, 202, 2009, p.199.
[47] Article 39 of the UN Charter.
[48] V.Gowlland-Debras. *Is the UN Security Council Bound by Human Rights Law*, 103 Am. Soc'y Int'l L. Proc. 199, 202, 2009, p.200.
[49] Ibidem, p200.

International tribunal for Rwanda[50]. The Special Court for Sierra Leone quoted the resolution about child recruitment in armed conflict and put in evidence "*that the protection of children is regarded as an important value*"[51].

The link between the Security Council and Human rights is still vague. According to the practice, the Council is concerned by the question of Human rights and is integrating it in its decisions. The Charter does not limit clearly the Council's action towards Human rights. The Human rights treaties can be seen as a way to extend the provisions of the Charter. In order to illustrate those words, the International Court of Justice, in its *Advisory Opinion Reservation to the Genocide Convention* (1948), had decided that because the Genocide Convention had been adopted and signed by the UN General Assembly, the UN had a "*legal interest*" to protect the treaty alongside the Member States[52].

The Council is viewed as bound by the Charter and by international law unless the international law makes derogations or is in any case limited by the rules of *jus cogens*. As always, especially in public International law, the problem is about the mechanism of sanction. Even if legal texts are there, what would happen if they are not respected ? In this situation what would happen if the Security Council acts *ultra vires*, beyond its powers ?

Regarding the article 103 of the UN Charter[53], the Member States have to respect the Charter in case of contradiction with another international obligation. The Security Council resolutions are obviously calling the Member States to abide by their obligations under Human rights and humanitarian law. In this way, the Council plays a huge role towards the protection of fundamental Human rights.

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[50] UN, répertoire of the practice of the Security Council : http://www.un.org/en/sc/repertoire/subsidiary_organs/international_tribunals.shtml

[51] Child Recruitment, Appeals Chamber Decision on Preliminary Motion Based on lack of Jurisdiction, Case No. SCSL-14-131, 29 (May 31, 2004).

[52] V.Gowlland-Debras, *Is the UN Security Council Bound by Human Rights Law*, 103 Am. Soc'y Int'l L. Proc. 199, 202, 2009, p.200.

[53] UN Charter Article 103 : « In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. »

But regarding the interrogation consisting to know if the Security Council is directly bound by Human rights, the answer would not be expressly clear. As an organ of the UN, the Security Council is bound by the UN's obligations. It was previously mentioned that the UN is considered linked with international customary law, and a fortiori Human rights, by numbers of scholars[54].

Looking into facts, the Council started a move integrating Human rights in its own actions, and notably in the peacekeeping operations. Theoretically it could decide to stop referring to the Human rights. The Security Council is currently an actor for the provision and respect of Human rights but is not itself expressly legally bound to them[55]. Hopefully, the Security Council, when its action is not blocked by the permanent Member States, is mostly acting as a responsible organ of an organization promoting Human rights and the rule of law.

C – Human rights obligations inside the UN peacekeeping operations

1. Human rights development in the UN operations

Originally, the operations were generally limited to cease-fire agreements and buffer zones. It is only after the Cold War that Human rights became a standard of peacekeeping operations[56]. The OHCHR is hugely involved in making the peacekeeping regulations appropriate toward the Human rights. Moreover, a Rapid Response Unit has been created to follow the evolution of the Human rights' situation during the operations. Despite the lack of responsibility in case of Human right violations, those rights are nonetheless taken as a serious matter since the end of the Cold War.

The Special Component of Human rights in peacekeeping operations is composed of a supervisory mechanism for Human rights abuses. This allows the investigations of

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[54] N.Blokker, International organizations Law review 14, « *International Organizations and Customary international Law* », 2017, p.2.

[55] K.Okuizumi, The Johns Hopkins University Press, Vol 24, N°3, *« Lessons from the UN Mission in Bosnia and Herzegovina* » 2002, p.725-727.

[56] F.Mégret & F.Hoffman, The John Hopkins university Press, Vol 25, n°2, *« The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities* », 2003 p.315-316.

specific cases and the prevention of violations by active attendance, but also stimulating Human rights through education. It is helping the peacekeepers knowing how to treat the local civilian population[57].
International Human rights law is a key component of peacekeepers because it applies at anytime and anywhere, peacekeepers are not exempt of this obligation[58]. Protection of life, liberty, safety and security have been recognized in international law provisions.

Among all the peacekeeping operations the UN has deployed over the world, Human rights were often neglected due to a lack of education amongst the peacekeepers. Consequently, The UN is victim of the damage of its reputation when peacekeepers are involved in gross human rights violations.

Human rights components are required in every operation in order to respect their obligations. When peacekeepers use the force, it should be justified, otherwise, without any justification, the peacekeepers should be investigated and punished if they are found guilty in Human rights violation cases[59].
Currently, the system provided by the UN seems insufficient. The prosecution is under the authority of the State troop-contributing, and since the State remains reluctant, the violators are not often punished. Impunity in UN operations may increase Human rights violations by peacekeepers. The mechanism of prosecution has to be reviewed and correspond to the needs of victims.

From the moment the UN actions were including Human rights initiatives, it should deal with the compliance with human rights principles as Charter-based obligations. Human rights laws were included inside administrative regulations for the Kosovo and East Timor operations[60].

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[57] Md. Kamal Uddin, "*Human Rights Violations by UN Peacekeepers: An End to Impunity*", 25 Sec. & Hum. Rts, 2014, p.134.
[58]Ibidem, p.134, quoting J-M.Guéhenno : *« United Nations peacekeeping personnel whether military, police or civilian should act in accordance with international human rights law and understand how the implementation of their tasks intersects with human rights. ».*
[59] Md. Kamal Uddin, Human Rights Violations by UN Peacekeepers: An End to Impunity, 25 Sec. & Hum. Rts, 2014, p.132.
[60] Kosovo, UNMIK/REG/1999/,1 of 25 July 1999, and East Timor UNTAET/REG/1999 of 27 Nov 1999.

Even international treaties as the International Covenant on Civil and Political Rights have direct consequences on the peacekeeping operations; if the States contributors to those operations are parties to the ICCPR, they are obliged to protect and promote Human rights during a peacekeeping operation. The UN itself is not party to the ICCPR but it is bound to promote Human rights as customary obligations in its activities[61].

The legal problem in this situation was to know if the troops are bound by the ICCPR even if they are not acting on the territory of the State party to the Covenant. The Human Rights Committee gave a clear answer, saying that: "*State party must respect and ensure the rights laid down in the Covenant to anyone within the power of effective control of that state party, even if not situated within the territory of the State Party[62]".*

Consequently, there is no difference if the individuals are living or not within the territory in conflict. If they are victims or simply beneficiary of the peacekeepers' actions, they can enjoy the benefits of the ICCPR[63]. It is thus not surprising that the UN Office of the High Commissioner for Human Rights stated that the Covenant rights is applicable to all individuals, no matter the nationality and the citizenship to State party to the Covenant[64].

Finally, According to the Decision No. 2005/24 of the Secretary-General's Policy Committee on Human Rights in Integrated Missions, it is strictly laid down *that "United Nations peacekeeping personnel should respect human rights in their dealings with colleagues and with local people, both in public and private lives."*

If they violate Human rights, they must be held to account and be punished. In most modern conflicts, violations of Human rights are normal phenomena. *"Many of the worst human rights abuses occur during armed conflict and the protection of human rights should be at the core of action taken to address it. All United Nations entities have a*

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[61] Md. Kamal Uddin, "*Human Rights Violations by UN Peacekeepers: An End to Impunity*", 25 Sec. & Hum. Rts, 2014, p.134.
[62] Human Rights Committee General Comments No.31, 2004.
[63] Md. Kamal Uddin, "*Human Rights Violations by UN Peacekeepers: An End to Impunity*", 25 Sec. & Hum. Rts, 2014, p.135.
[64] United Nations Office of the High Commissioner for Human Rights UneditedVersion:The Nature of the General Legal Obligation Imposed on State Parties to the Covenant:o5/o5/2oo3 *: « The enjoyment of Covenant rights is not limited to the citizens of State Parties but must also be applicable to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves under the territory or subject to the jurisdiction of the State Party ».*

responsibility to ensure that human rights are promoted and protected by and within their field operations"[65].

By those statements the UN institutions recognize the explicit provision of the UN Charter which states that application of Human rights should have "*unbiased and universal acceptability in all context*"[66].

2. Human right violations committed by peacekeepers in past operations

Peacekeepers are often responsible to maintain the peace and uphold Human rights. The consequences are huge when innocent people are victims of Human rights violations. Most of the time those situations concern women, children or civilians, victims of peacekeepers' wrongful acts. Peacekeepers were originally supposed to protect those persons and play a better role in protecting and promoting Human rights for local people[67].

Paradoxically, even if they are trained to protect civilians, peacekeepers are involved in numerous cases of massive violations of Human rights. Many civilians are reportedly killed during UN operations, but the circumstances and facts are hard to establish.

A more recent phenomenon is the sexual abuses by the UN personnel during peacekeeping operations. It had been demonstrated that peacekeepers were involved in cases of rape and prostitution. Those situations were unfortunately reported in almost every operation[68].

During the UN Mission in the Democratic Republic of Congo (MONUC), the peacekeepers were going in a club called "*Little Lagos*". Inside this club, 12 years old girls were engaged as prostitutes and were forced to have sex acts. Sometimes they were even photographed by UN peacekeepers in exchange for money or food[69].

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[65] Md. Kamal Uddin, "*Human Rights Violations by UN Peacekeepers: An End to Impunity*", 25 Sec. & Hum. Rts, 2014, p.135, quoting decision No 2005/24 of the Secretary General's Policy Committee on Human Rights.
[66] Ibidem, p.136.
[67] C.Rose, An Emerging Norma : "*The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors*", 33 Hastings International & Comparative Law Review, p307-311.
[68] Felicity Lewis, "*Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress"*, 23 S. Cal. Interdisc. L.J., 2014, p.597.
[69] Md. Kamal Uddin, "*Human Rights Violations by UN Peacekeepers: An End to Impunity*", 25 Sec. & Hum. Rts, 2014, p.140.

After, few sandals of this order, the problem of extra-legal activities of the peacekeepers has been recognized as an "*urgent issue that needs to be addressed*"[70]. But once again the reaction was slow, the UN had for reaction to send back the troops, which is the minimum expectation. No UN mechanism was provided to pronounce sanctions against the wrongdoers. Back home, their national State is not under an obligation to start prosecution.

Most of the reports attesting misconducts as rape and forced prostitution come from the MONUC. But similar sexual exploitation could be observed in Bosnia, Haiti, Sierra Leone and many more operations. If some wrongdoers had been sanctioned by the ICTY for misconduct in Bosnia, nobody has been punished for the crimes committed in Haiti in May 2008. The UN announced a zero-tolerance policy in situation of sexual abuse but the disciplinary mechanism still remain inadequate and most of the wrongdoers are not punished[71].

In Somalia, many of the sexual violence were alleged against the military personnel from the African Union Mission for Somalia (AMISOM) since 2007. In 2012, at least 1.700 people were affected by sexual violence[72]. According to the Model Status of Forces Agreement the *article 47 (b)* provides that if a person from the military staff is accused, this person "*shall be subject to the exclusive jurisdiction of their respective participating states*"[73]. This aspect will be detailed further in the part dealing with the responsibility of peacekeepers.

The protection of victims is also an aspect of Human rights. The ICTY and the ICTR had units dedicated for supporting and protecting victims and witnesses whereas in Somalia the absence of mechanism of protection could bring some tragic situation; in January 2013, the government arrested a woman who was accusing the military forces for raping her[74].

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[70] Md. Kamal Uddin, "*Human Rights Violations by UN Peacekeepers: An End to Impunity*", 25 Sec. & Hum. Rts, 2014, p.140.
[71] Ibidem, p.141.
[72] Richard J. Wilson; Emily Singer Hurvitz, « *Human Rights Violations by Peacekeeping Forces in Somalia* », 21 Hum. Rts. Brief 2,8, 2014, p.2.
[73] Ibidem, p.3.
[74] Ibidem, p.4.

The most recent and deafening case happened in Haiti, where military forces from Nepal were sent to Haiti after the earthquake of 2010 in order to help the population. The Nepalese soldiers tragically unconsciously brought the cholera disease which killed and injured many civilians[75]. This case will serve as an illustration in the following parts of this work.

All those cases in which Human rights had been violated raise the question of balance between all the current obstacles to clearly identify a responsible: the issue of international organization's immunity but also the entity which is exercising the control over the military contingent[76].

[75] M.Jean, « *Cholera en Haïti : vers la fin du déni de justice de l'ONU ?* » ; http://www.jeuneafrique.com/360862/societe/cholera-haiti-vers-fin-deni-de-justice-de-lonu/

[76] Richard J. Wilson; Emily Singer Hurvitz, "*Human Rights Violations by Peacekeeping Forces in Somalia*", 21 Hum. Rts. Brief 2, 8, 2014, p.5 : « *The case, however, raises important questions about the extent to which traditional organizational immunities can be trumped by the more fundamental values inherent in the international human rights of victims of serious or ongoing violations*. »

Chapter II - Responsibility for Human rights violations

A - Responsibility of the United Nations in International Human right law

The creation of international organizations is still quite recent regarding the History of law. The process about their responsibility in International law is slow because of some obstacles as their immunity. Nonetheless, the International Law Association and the International Law Commission frequently worked on this question. For instance, in 2011 the International Law Commission adopted the *Draft Articles on the Responsibility of International Organizations* which is currently an unmissable document[77].

The capacity to have rights and obligations has for consequence to bear responsibility, being held to account. States were during a long time considered as the only actors of international law. If the international organizations were bearer of rights and obligations, and had its personality recognised by the International Court of Justice in the *Advisory Opinion Reparation for Injuries* in 1949[78], their immunity had for consequence to hide their responsibility in order to not be misused by States or victims of their unlawful acts[79].
It is now widespread that international organizations possess international legal personality distinct from their member States.
The relevant question here is specifically about their responsibility. In theory, the responsibility of International organizations is also different from their Member States.

1. The legal sources of UN's responsibility

The responsibility is the consequence of having a legal personality. The legal personality of the UN is provided by the Article 1 of the *Convention on the Privileges and the Immunities of the United Nations* adopted by the General Assembly in February 1946[80].
As it was already mentioned the ICJ recognized the effectiveness of the UN's personality by recognizing the possibility for the UN to invoke the responsibility of a State. But the ICJ did not directly mentioned the possibility for the UN to be held responsible. In the

[77] Audiovisual Library of International Law : http://legal.un.org/avl/ha/ario/ario.html
[78] ICJ, Advisory *Opinion Reparation for Injuries* http://www.icj-cij.org/files/case-related/4/1837.pdf
[79] Council of Europe, Report on Accountability of International organizations for Human rights violations, doc.13370, December 2013, p.7.
[80] CPIUN : http://www.un.org/fr/ethics/pdf/convention.pdf

Advisory Opinion Cumaraswamy[81] (1999), the ICJ mentioned the possibility for the UN to be held responsible for unlawful acts[82].

More recently, the latter version of the *Draft Articles on the Responsibility of International Organizations* article 6 is stating : "*The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization*"[83].
The article 6 can be insofar as a UN peacekeeping operation is considered as an organ of the organization. But in details, the military contingent as a special status since it is still linked to its national States. The military contingent is considered as a "*loan*" to the UN.

Therefore it is more appropriate to quote the article 7 of the DARIO which is stating : "*The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct*"[84].
The DARIO seems to insist on the fact that an act has to be considered as an act of the organization if this act is accomplished during "*the performance of functions*" for an organ of the organization or if the UN "*exercises the effective control over that conduct*" in the situation where an organ is placed at the disposal of the organization.

But in regard to this text, it is interesting to see in practice the reaction of the UN. The article 17 tries to regulate the relationship between the UN and its member States in case of responsibility[85]. The UN is now fully recognized as subject which has to answer for its

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[81] Curamaswary Advisory Opinion : http://www.icj-cij.org/files/case-related/100/7621.pdf
[82] Marten Zwanenburg, *UN Peace Operations between Independence and Accountability*, 5 Int'l Org. L. Rev. 23, 48 (2008), p.25.
[83] DARIO, Art.5, adopted by the International Law Commission at its sixty-third session, in 2011.
[84] Ibidem, art 6
[85] DARIO, article 17 ; « 1. *An international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization.*
2. An international organization incurs international responsibility if it circumvents one of its international obligations by authorizing member States or international organizations to commit an act that would be internationally wrongful if committed by the former organization and the act in question is committed because of that authorization.

acts. However, this is theoretical. It is relevant to analyse the reaction of the UN itself and the reaction of the UN Secretariat. Moreover, one of the biggest critic toward the DARIO is the absence of any mechanism which would enable individuals to invoke the responsibility of the UN and ask for reparations.[86]

2. The process of UN's international responsibility

It is now generally acknowledged that the UN assumes responsibility for the activities of the UN peacekeeping forces[87]. The UN Secretariat has stated himself that " *As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation* "[88]. In practice, the expression "*in principle*" seems to be problematic since it implies exceptions. The international responsibility of the UN has to be analysed to understand its structure and effectiveness.

There is one requirement under which one the UN responsibility is conditioned; the operation has to be executed under the "*exclusive command and control*" of the UN. In this condition, the operation is legally considered as a subsidiary organ of the UN[89].
In the case of joint operations, the responsibility could be identified when "*effective command and control*" or "*operational command and control*" is vested. But the UN Secretariat did not seem to recognize the UN responsibility in that case. Probably because of the dual aspect of those operations and the presence of a third party. Indeed, it appears

3. Paragraphs 1 and 2 apply whether or not the act in question is internationally wrongful for the member States or international organizations to which the decision or authorization is addressed».

[86] Council of Europe, Report on Accountability of International organizations for human rights violations, doc.13370, December 2013, p.9.

[87] Christopher Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.350 : « *The UN has, in general, assumed responsibility for the activities of UN peacekeeping forces. The UN perceives its international responsibility to be an aspect of its international legal personality and its capacity to bear international rights and obligations. It has noted that the principle that a breach of an international obligation attributable to the 10 entails the responsibility of the 10 and its liability in compensation is widely accepted* »

[88] UN Secretariat, Responsibility of International Organizations : Comments and Observations Received from International Organizations, 56th sess, UN Doc A/CN.4/545 (25 June 2004) 17.

[89] Christopher Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.350.

that the UN rejects any responsibility if at any moment of the mission the peacekeepers acted under another direction than from the UN, for instance from a national direction[90].

The UN has accepted the responsibility for peacekeepers' activities "*in the performance of their duties*" but also for the ultra vires acts of peacekeepers in a situation where peacekeepers opened fire and killed civilian without any order[91]. In other words, the UN assumes its responsibility if the peacekeepers are doing mistakes, are acting beyond their powers, in the framework of their mission.

Conversely, the UN denies any liability for the conduct of peacekeepers when they are "*off-duty*", which means that the peacekeepers were acting in an "*non-official/non-operational*" capacity[92]. But this creates a difficulty for the different acts of sexual exploitation and abuse or other human rights violations which are generally not committed during the service of the peacekeepers.

2.1 The UN's responsibility in the context of UNMIK

After the NATO intervention in 1999, Roma people were displaced in three temporary camps which were demonstrated to be contaminated due to high levels of lead. The camps were functioning more than five years, while the UN kept assuring the closure of the camp. The World Health Organization finally demonstrated that children under six years old were having high levels of lead in their blood, which would endanger their life[93].

A private claim was brought to the UN, requesting compensation and remedies for economic losses. In a letter of July 2011, the UN rejected the claim, stating that reported facts "*do not constitute claims of a private law character and in essence, amount to a*

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[90] Christopher Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.350 : *« Critically, the UN Secretariat does not seem to accept - at least overtly, as the ILC has - the possibility that peacekeepers may not always act under UN direction and could sometimes act upon national direction* ».

[91] Ibidem, p351 : « *Similarly, the UN has accepted responsibility for the ultra vires acts of peacekeepers in ONUC and the UN Emergency Force who opened fire and killed civilians without any orders to do so* ».

[92] Ibidem, p351.

[93] Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L., 2016, p.356-357

review of the performance of UNMIK's mandate (...) therefore, the claims are not receivable"[94].

The UN gave for justification that the situation was rising health and environmental problems and that because the UNMIK was only an interim administration, it was a sovereign function to deal with the public health and common goods and could be handled by this interim administration. However, the UN itself chose to move the population in the camps, knowing the health risks[95].

The case of Kosovo has the advantage to put into light that even when the UN is reluctant and careful to not admit its responsibility, the legal pressure upon the UN lead the organization to adapt its actions.

The UN secretariat seems to recognize the UN responsibility when the command is fully from the UN, and not from a third part at any moment of the mission but also when the illegal acts were committed during the part of the official functions of the UN; when the peacekeepers were in service.

3. UN's Responsibility before national jurisdictions ; Georges v UN Haiti

In Haiti, five days after the earthquake of January 2010, the Security Council of the UN, in its resolution 1908, decided to increase the force level of the MINUSTAH to support the immediate recovery. Consequently, blue helmets from Nepal were sent in Haiti[96]. Unfortunately, the peacekeepers brought, without knowing, the cholera which turned into an outbreak killing around 8.000 people.

A request for reparations, brought directly before the UN, was claimed by the NGO *Institute for Justice and Democracy in Haiti* and the Haitian NGO le *Bureau des avocats internationaux* and some Haitian lawyers claiming on behalf of 5 000 individual requests of victims of the epidemic[97]. Financial compensations were requested for victims, as well as better water sanitation and a public acknowledgement of responsibility.

Moreover, it was alleged that the cholera outbreak was violating international law such

[94] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.357.
[95] Ibidem, p.357 & 358.
[96] United peacekeeping operations department : https://peacekeeping.un.org/en/mission/minustah
[97] F.Mergret, Responsabilite des Nations Unies Aux Temps du Cholera, La, 46 Rev. BDI (2013), p.163.

as the right to life[98].

3.1 Internal mechanism of the UN

One year and a half after, the judicial office of the UN finally gives its conclusion stating that the organization already consented huge efforts to eradicate the epidemic and put an end to the request which would not be admissible regarding the section 29 (article VIII) of the Convention on the Privileges and Immunities of the United Nations[99]. Indeed, this article provides that the UN shall organize appropriate settlement only for the disputes about contracts or other disputes of a private law character.

Consequently, the UN replied negatively to the request, considered "*not receivable*" because it concerned "*political and policy matters*". In other words, the dispute implies a public law character, which is contrary to the CPIUN (Section 29, art VIII) and SOFA (art.53) providing the obligation for the UN the obligation to create settlement mechanism for dispute of a private law nature[100].

The difficulty so far is to understand how the UN decides the nature of a legal conflict since either the CPUIN nor the SOFA provide any definition of "*private law character*". The UN explains that the non-private law claims are those "*based on political or policy-related grievances*" such as those "*related to actions or decisions taken by the Security Council or the General Assembly*" do not fall within the scope of the section 29 of the CPUIN[101]. According to the UN itself "*an assertion that the United Nations has not adopted or implemented certain policies or practices does not generate a dispute of a private law character*"[102].

From a legal point of view, the problem is that the UN is implementing its own understanding of the CPUIN whereas it should be done by a standing claims commission

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[98] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.359.

[99] Article VIII section 29 of the Convention on the Privileges and the Immunities of the United Nations ; « *The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General* ».

[100] Thomas G. Bode, Cholera in Haiti: United Nations Immunity and Accountability, 47 Geo. J. Int'l L., 759, 2016, p.774 & 775.

[101] Ibidem, p.775.

[102] Ibidem.

composed of three persons : one from the UN, one from the host State and a third person chosen by the two firsts. Consequently, this extensive definition allows the UN to almost always consider a claim as a "*non-private*" matter[103]. The CPIUN is also very broad concerning the "*appropriate modes of settlement*".

The qualification of the dispute should be done by a permanent special commission as it was established in the article 51 of the *Model Status-of-forces agreement for peacekeeping operations*, A/45/594, 9 October 1990, with a minimum of transparency. In the current situation, claimants cannot even know why their request is not about private matter since it is decided by "*local committees*" as a unilateral decision[104].
As Hans Kelsen has written about the law of the United Nations; "*the differentiation between public and private law is highly problematical and justified only in so far as based on positive provisions of a legal order*"[105].

The SOFA is more precise with the provision of standing claims commission. But such a commission was not created in the Haiti situation. The Institute for Justice and Democracy in Haiti (IDJH) claimed that injury suffered by individuals is the archetype of a "*private law*" claim such as covered in the CPIUN and SOFA[106]. Moreover, the UN already recognized injuries caused by peacekeepers as private law matter in the past. The financial aspect and the sweep of damages is probably one of the reasons why the UN is reluctant to recognize its responsibility.

3.2 UN's Responsibility before national jurisdictions ; Georges v UN Haiti

In October 2013 the Institute for Justice and Democracy in Haiti has filed a formal claim against the UN in the United States District Court for the Southern District of New-York : *Georges v. United Nations*. The claim contained evidence of the UN's responsibility for the outbreak and alleged negligence. The claim asked for financial remedy[107] :

- 50.000 US dollars for each petitioner injured.

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[103] F.Mergret, "*Responsabilite des Nations Unies Aux Temps du Cholera*", La, 46 Rev. BDI, 2013, p.166.
[104] Ibidem.
[105] H.Kelsen, The Law of the United Nations : A Critical Analysis of its Fundamental Problems with Supplement 1964, Clark (NJ), The Lawbook Exchange, Ltd., 2000, p.318.
[106] Thomas G. Bode, Cholera in Haiti: United Nations Immunity and Accountability, 47 Geo. J. Int'l L., 759, 2016, p.776.
[107] Ibidem, p.774.

- 100.000 US dollars for each family of dead petitioner
- A national clean water system
- A public apologies

The class proceeding contained at least 679.000 individuals including 8.300 representatives of people who died from cholera. Anyway, the US federal court upheld the absolute immunity of the UN and the claim failed for the second time. The claim was addressed against three actors : the UN Secretary General at that time (Ban Ki-Moon), the former Under Secretary-General for MINUSTAH and the UN. The two firsts were claiming their immunity under the CPIUN as they were officials of the organization and consequently immune from legal process[108]. Concerning the UN, the legal reasoning of the claimant was that the UN "*can incur legal liability and "has" an obligation to provide compensation for injury (it has) caused*".

According to some amicus briefs, two arguments can be brought in favour of the UN's liability[109]:

- UN's immunity should be limited by the plaintiffs' inability to seek a remedy elsewhere.
- Functional immunity was not warranted because of the private law nature of the claim (Functional immunity should be warranted for public law matters).

The immunity of the UN should be functional rather than absolute, but the CPIUN is expressly providing that the UN enjoys "*immunity from every form of legal process*" unless it expressly waives its immunity. This is the main difference between the Un Charter and the CPIUN[110]. The article 105 of the UN Charter is providing a functional immunity; the UN "*shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes*".

The CPIUN changed the nature of the UN's immunity since the article II section 2 provides that the UN "*shall enjoy immunity from every form of legal process except*

[108] Thomas G. Bode, Cholera in Haiti: United Nations Immunity and Accountability, 47 Geo. J. Int'l L., 759, 2016, p778.
[109] Ibidem.
[110] A.Reinisch, *UN Immunity and Acess to Dispute Settlement,* University of Vienna, Fall Semester 2010/2011, p.1.

insofar as in any particular case it has expressly waived its immunity"[111].
Obviously the US court strictly interpreted the CPIUN and considered that the individual's right to remedy cannot limit the UN's liability[112].

B - The responsibility of peacekeepers

Despite the widely accepted mechanism by which the international community tries to restore and maintain the international peace and security, with UN missions such as in Kosovo, East Timor, Afghanistan and many more, violations of international Human rights by personnel deployed to promote and protect those same rights has become a regular practice[113].
Therefore, there is a moral and legal need to face and give answers to this phenomena which should lead to criminal prosecutions.

The question of responsibility of the peacekeepers is crucial when thinking that it concerns the credibility and the future sustainability of those peace operations which are supposed to promote and protect Human rights values[114]. The article VIII of the *Model agreement* between the UN and Member States contributing personnel is stating that *"[T]he [Participating State] agrees to exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with [the United Nations peace- keeping operation]. The [Participating State] shall keep the Head of Mission informed regarding the outcome of such exercise of jurisdiction*"[115].

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[111] A.Reinisch, *UN Immunity and Acess to Dispute Settlement,* University of Vienna, Fall Semester 2010/2011, p.1-2.
[112] Thomas G. Bode, Cholera in Haiti: United Nations Immunity and Accountability, 47 Geo. J. Int'l L., 759, 2016, p.779 & 780.
[113] Rachel A. Opie, *Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility*, 2006 N.Z. L. Rev. 1, 34, 2006, p.2.
[114] Ibidem, p.22.
[115] Model Agreement between the UN and MS contributing personnel and equipment to UN peacekeeping operations :http://dag.un.org/bitstream/handle/11176/184843/A_46_185EN.pdf?sequence=3&isAllowed=y

1. The SOFA as the legal structure of peacekeeping operations

Status of Forces Agreement (SOFA) "*are used widely to govern the legal status of forces deployed on foreign soil with the consent of the host State*"[116]. A SOFA is an agreement regulating the relationship between the host State and the UN. It is for instance providing the legal status of the UN forces on the territory of the host State. It is also dealing with the jurisdictional demarcations. Most of the time the UN missions are subject to a SOFA. Each SOFA is based on the model SOFA for UN peacekeeping operations requested by the UN General Assembly in 1990. Then, each SOFA is adapted case by case. The SOFA is generally temporally and territorially limited, providing the legal status, privileges and jurisdictional immunities of all categories of UN peacekeeping personnel[117].

The difficulty is to determine the nature and structure of the peacekeeping operations. As Christopher Leck reminds in his work, « *the command and control structures of UN PKOs are straightforward in theory, but seldom so in practice* »[118].
In a Peacekeeping operation, all the aspects have to be taken in account : military, police and civilian aspects. Then there are also more technical obstacles. As the Capstone doctrine noted; "*in the case of military personnel provided by Member States, these personnel are placed under the operational control of the United Force Commander or head of military component, but not under United Nations command*"[119].

This is crucial for the UN secretariat to not assert that it possess command of peacekeepers because of some national policies which consider illegal the fact to hand over their military forces to a foreign command. For instance, Canadian law does not allow national command of Canadian forces to be given to a foreign commander, even if it is an international organization. But the Canadian law allows "*operational control*" to be vested to a foreign commander. The distinction is thin but important to avoid further

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[116] Roisin Burke, Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity, 16 J. Conflict & Sec. L., 2011, p.65.
[117] Roisin Burke, Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity, 16 J. Conflict & Sec. L., 2011, p.66.
[118] Christopher Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.352.
[119] DPKO, *UN Peacekeeping Operations: Principles and Guidelines (2008) 68, ('Capstone Doctrine').*Operational authority is understood to mean 'the authority to issue operational directives within the limits of a specific mandate, a specific geographic area (the mission area) and for an agreed period of time': DPKO, *Handbook on United Nations Multidimensional Peacekeeping Operations*(2003) 68 *('Handbook') : http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf*

technical mistakes of procedures, and responsibility[120].

UN SOFAs are providing that members of military contingent are responsible and can respond of their acts only before a criminal jurisdiction of the troop-contributing Country (TCC), in other words, their national State. This directly excludes the ICC which concerns only the most serious international crimes and will not cover the numerous but "*lesser*" Human rights violations in the context of the peace operations[121].
Moreover, the Court was not designed to prosecute peacekeepers or even "*mere soldiers*" but to prosecute leaders of State, of organization or army, for being responsible for the crimes contained in the Rome Statute, article 5[122]. Then, the liability of peacekeepers before the ICC would have once again a huge negative impact on the involvement of the Troop Contributing States in the participation of the UN activities such as PKO. For instance, in 2002, the USA conditioned the continuation of their participation in the peacekeeping operations to the immunity before the ICC[123].

The SOFAs are also mentioning that peacekeepers must respect local laws, wherever an operation takes place. If not, the criminal Court of the TCC is theoretically competent to punish the crime. But in reality, crimes committed during a PKO are seldom punished. The TCCs seem reluctant to prosecute their own national soldiers. This is why a need of reform in the functioning of PKO is more than desirable and in process for few years[124].

Nonetheless, the conclusion of a SOFA is not always possible. Indeed, when there is no competent authority with whom to negotiate or when there is not enough time between the decision of the Security Council and the deployment of the troops. When this situation occurs, there is a sort of legal emptiness. They could be subject to local jurisdiction. Even

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120 Christopher Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.352 & 353.
121 Rachel A. Opie, *Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility*, 2006 N.Z. L. Rev. 1, 34 (2006) p.3.
122 Rome Statute, article 5 ; Crime of genocide, Crimes against humanity, War Crimes, Crime of aggression : https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
123 Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. Cal. Interdisc. L.J., 2014, p.613 & 614.
124 United Nations peacekeeping Law Reform Project, *UN Peacekeeping and The Model Status of Forces Agreement*, School of Law University of Essex, 2011, p.2.

if for some authors, SOFAs would be part of the customary international law[125], which implies for instance that even without a SOFA military contingent could not be prosecuted somewhere else than their own State, peacekeepers could be prosecuted in the host State where they violated Human rights[126]. But this is not a satisfactory option regarding the guarantee of a fair trial and independence of judicial mechanisms in the States receiving UN peace operations. This question of absence of SOFA will not be developed here because those cases are very rare.

2. Jurisdictional Immunities provided by the SOFAs

There are three sources of judicial immunities:

- The law of visiting forces,
- The diplomatic immunity,
- The doctrine of functional necessity.

The functional necessity is the proper one for analysing the extent and form of immunities that can be granted to military forces during a peacekeeping operation.

Since the peacekeeping operations are considered as subsidiary organs of the UN, they are enjoying the same privileges and immunities governed by the article 105 of the UN Charter and the UN Convention on Privileges and Immunities (1948)[127]. But the *UN Charter* and the *Convention on Privileges and Immunity* do not apply to members of military contingents deployed on UN missions because the UN peacekeepers are not considered as part of the UN staff[128]. They belong to their home State and serve as soldier for the UN as a loan. They are different as UN officials or experts on missions.

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[125] W.T.Worster, Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement, Military Law and Law of War Review, 2008, p.356.

[126] Roisin Burke, Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity, 16 J. Conflict & Sec. L., 2011, p.67 & 68.

[127] Article 105 UN Charter : « 1.The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

[128] Roisin Burke, Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity, 16 J. Conflict & Sec. L., 2011, p.84.

Consequently, SOFAs came as a necessity to regulate the relations between the UN and a host State concerning the peacekeepers, the military forces.

The immunities are not the same according to which category of personnel is concerned. In the case of military contingents, SOFAs are providing exclusive criminal and disciplinary jurisdiction over military contingent. According to Paragraph 47(b) of the UN Model SOFA: "*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]*."[129]

The administrative power of the Secretary General in case of misconduct by a peacekeeper is limited to the measure of repatriation of the individual concerned. The grant of exclusive criminal jurisdiction was not created to improve impunity but in order to avoid the problems of lack of judicial guarantees and sufficient Human rights standards in host States[130].

The notion of "*functional necessity*", for international organizations, is the fact to beneficiate a jurisdictional immunity covering the acts committed in an official function. The acts were doing in accordance to the function. For that purpose and in order to protect the actions of the person who is acting in an official way, it is not possible to start prosecution. The functional necessity is the justification of the peacekeeper's immunity.

For instance, the United Nations Emergency Force I (UNEF I) status agreement had a reference directly from article 105 UN charter and article 22 of Convention on Privileges and Immunities[131]. Peacekeepers were fully immune under the agreement from host State criminal and civil jurisdictions for the acts committed in their official capacity.

UNEF and ONUC (United Nation operation in the Congo) Force Regulations provided that the peacekeeper forces are enjoying the same privileges and immunities as the organization itself, as a subsidiary organ. If originally the military components are not

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[129] Roisin Burke, Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity, 16 J. Conflict & Sec. L., 2011, p.70 & 71.

[130] D.Fleck, *The legal status of personnel involved in United Nations peace operations,* 95 International Review of the Red Cross, 2013, p.628-629.

[131] Convention on the privileges and immunities of the United Nations : https://treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf

considered as the UN Staff, in practice the UN and host States decide to base SOFAs according to the UN Charter and Convention on Privileges and Immunity (CPI)[132].

Alongside the SOFAs - agreement between the UN and the host State -, there are the MOUs -Memorandum of Understanding-, which are agreements between the UN and the Troop-contributing Countries. Concerning the latter one, TCC were requested to give assurances to the UN that they will effectively exercise jurisdiction over their troops in case of misconduct to avoid the impunity of military contingent. However, the absence of legal relation between the TCC and the host State is not helping to limit the impunity phenomenon[133].

Nonetheless, the UN, as the authority in mandated operations, could be in position to make the contributing states respect their human rights obligations. This implies that the Secretariat itself would track each misconduct and guarantees the effectiveness of the States' sanctioning procedures when violations of Human rights are committed by State organs[134].

C - When unlawful acts can be attributed to the UN

Several elements have to be taken in account to understand how to make a link between an action, and especially an unlawful action, and the UN. The first relevant question is to know who is in control of the UN peacekeepers.

"*Once Troop-Contributing Countries place their forces at the disposal of the UN, the UN then possess an overall "operational authority" over the forces*"[135].

The department of peacekeeping operations says that this authority allows the Secretary General to issue "operational directives" within the limits of a specific mandate, of time period and a geographic area.

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[132] Roisin Burke, Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity, 16 J. Conflict & Sec. L., 2011, p.97.

[133] Roisin Burke, *Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity*, 16 J. Conflict & Sec. L., 2011, p.97.

[134] Rachel A. Opie, *Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility*, 2006 N.Z. L. Rev. 1, 34 (2006) p.32.

[135] Russel Buchan, *UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?* Legal Studies, Vol 32 n°2, June 2012, p.285.

"*The UN Force Commander is vested of 'operational control' over the peacekeeping force in order to implement the Secretary-General's operational directives (…) the UN Force Commander is under an obligation to consult troop contributing countries when exercising its operational control"*[136]. But this is just an obligation to "*consult*", which means that the Troop-contributing Country cannot veto any decision of the Force Commander. Nonetheless, as an ultima power, the State can play its "red card" by the withdrawal of its forces from the operation.

Because the position of States is bolstered by the voluntary nature of their contribution and their right of withdrawal, a TCC can decline to take on a task at any time[137]. However, the forces are deployed under the UN authority, which means that the UN Force Commander can also decline a proposal coming from a TCC.
In this meaning C.Leck says that "*peacekeepers are under the dual or joint control of both the UN and TCC*"[138]. The control over administrative matters remains with the Commander of the national contingent. This implies the exercise of disciplinary and criminal jurisdiction over national contingent by the TCC.

1. The International Court of Justice and the effective control test

It already happened that the UN voluntarily accepted liability for unlawful acts committed by peacekeepers. Indeed, the UN Secretariat, in 2004, stated that peacekeeping forces are under UN command; they are considered as international personal under the authority of the UN and subject to the instruction of the Force Commander.
However, in some cases, the UN refused to accept liability. The problem here is the following one : Human rights abuses cannot depend on UN benevolence[139]. The concept of "*effective control*" started in the *Nicaragua case* in 1986 when the International Court of Justice stated that the USA would be liable only if they had an "*effective control*" over the military or paramilitary operations[140].

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[136] Russel Buchan, *UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?* Legal Studies, Vol 32 n°2, June 2012, p.285, p.285 & 286.
[137] Christopher Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L., 2009, p346-359.
[138] Ibidem, p.359.
[139] Russel Buchan, *UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?* Legal Studies, Vol 32 n°2, June 2012, p.288.
[140] Ibidem, p.288.

The difficulty is to link the effective control in connection with acts contrary to international law. Indeed, according to A. Cassese, it would mean that the States either issued directives ordering the commission of the unlawful acts, or enforced the commission of the unlawful acts[141].

Even if the Nicaragua case was about the responsibility of States and not of international organizations, it does not make a huge difference concerning the legal reasoning since international organizations are bearing international legal personality and are consequently able of bearing international responsibility for internationally wrongful acts.

"*There seems to be no convincing argument for why the test established in Nicaragua should not apply equally to determining when an unlawful act can be attributed to an international organization*"[142]. The ICJ reiterated this position in 2007 in the Bosnian Genocide case where it held again the effective control case instead of the overall control test held by the ICTY[143].

1.1 Differences between "*overall control*" and "*effective control*"

In the Tadic case before the Appeals Chamber of the ICTY, the Chamber stated that the overall control goes "*beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of (...) operations*"[144].

On the contrary than the effective control, "*it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law*".

Comparing with the Nicaragua case, it appears clearly that the overall control requires a "*lower degree of control*" than the effective control[145]. Consequently, the choice of the

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[141] A Cassese 'The Nicaragua and *Tadic´* tests revisited in light of the ICJ judgement in Bosnia', 2007, p.649 – 653.

[142] Russel Buchan, *UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?* Legal Studies, Vol 32 n°2, June 2012, p.289.

[143] Ibidem, p.290.

[144] Ibidem, p.301: «*financial « and training assistance, military assistance, military equipment and operational support and, in addition, participated in the organisation, coordination or planning of military operations* ».

[145] Ibidem, p.296.

International Law Commission and International Court of Justice to apply this effective control reveals a cautiousness which requires a high degree of control, rather than another control which would maybe fit the reality more.

2. The contribution of the ECHR and its "*ultimate authority and control*" test

In 2007, the ECtHR, in *Behrami and Saramati* cases, was confronted to the problematic concerning when unlawful acts could be attributed to an international organization. The facts and legal consequences are not exactly the same. In this regard it is relevant to analyse these cases one by one.

2.1 Analysis of the Behrami case

First, in *Behrami case*, the UN resolution established two different units in Kosovo. One was a civil administration, directly coordinated by the UN Mission in Kosovo (UNMIK) and a military force for Kosovo (KFOR), directly coordinated by the NATO. In this case a boy was killed by an unexploded bomb dropped by the NATO itself in 1999. France, which was the KFOR representative in the area was sued by the claimants who were claiming a violation of Article 2 of the ECHR for not demining the unexploded bomb.

The ECtHR ruled that the failure of demining was the responsibility of the UNMIK, not the KFOR, according to Resolution 1244 which placed the UNMIK in charge of demining the area in question. The Court considered the unlawful act attributable to the UN on the basis of the DARIO principle; the UNMIK was a subsidiary organ of the UN and the latter one is responsible for unlawful acts committed by its organs[146].

2.2 Analysis of the Saramati case

Second, in the *Saramati* case, an individual considered as a threat to the international presence in Kosovo was detained by KFOR commanders. The individual brought a claim against France and Norway (because of the commander's nationalities) before the ECHR saying that his detention based on preventive grounds was in violation of Article 5 of the ECHR. The KFOR was not a subsidiary organ of the UN but merely at its disposal, which does not link automatically unlawful acts to the UN.

[146] *Behrami and Behrami v France, Saramati v France, Germany and Norway* App Nos 71412/01 and 78166/01, Grand Chamber Decision, 2 May 2007, paras 142-143.

In this regard, the Court had to analyse whether the UN exercised sufficient direction and control over KFOR to determine if its unlawful acts could be attributable to the UN[147]. The resolution 1244 of the Security Council delegated power to the NATO in order to establish international security presence in Kosovo; NATO created the KFOR. Consequently, the KFOR troops were under the NATO direct command since the UN delegated powers. This is why the Court had to determine the lawfulness of the delegation of powers.

The ECHR held that the delegation of Security Council powers "*must be sufficiently limited so as to remain compatible with the degree of centralisation of collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN*"[148]. In other words, the delegation of powers is legal if the Security Council retains "*ultimate authority and control*" over the delegated power. The Security Council must keep the last word.

The Court recognized the legality of the delegation of powers, governed by the Chapter VII of the UN Charter. This implies that the possibly misconducts would be, in principle, attributable to the UN[149]. By doing this, the Court decided to ignore the Special Rapporteur's commentary on Article 5 and the practice of the UN through numerous memos from the Secretariat. Those two sources are establishing that the actions decided by the Security Council and implemented by the Member States can only be attributable to the latter[150].

2.3 The legal breakthrough of the ECHR

Summarizing these two cases, the Court had to examine the responsibility for actions and omissions in Kosovo: detention and failure to deactivate mines. The responsibility could not be attributed neither to Member State, nor to the Interim Administration Mission in Kosovo Force (KFOR) nor to the NATO Kosovo Force. The UN as international organization was the only one which could have been theoretically recognized

[147] Ibidem, paras 140.
[148] *Behrami and Behrami v France, Saramati v France, Germany and Norway* App Nos 71412/01 and 78166/01, Grand Chamber Decision, 2 May 2007, para 132.
[149] Ibidem, para 141.
[150] V.Gowlland-Debras, *Is the UN Security Council Bound by Human Rights Law*, 103 Am. Soc'y Int'l L. Proc, 2009, p.201.

responsible since it had the ultimate authority and control over the KFOR's operations. But the ECHR decided to reject the admissibility based on *ratione materiae*, the UN being protected by its immunity[151].

It is really interesting to see how the ECHR adopted a third vision between the *effective control test* used by the ICJ and the *overall control test* used by the ICTY. The European Court, obviously, uses an "*ultimate authority and control*" test to analyse if the delegation of powers was lawful.
In 2008, the Dutch district Court, in the *Mothers of Srebrenica case*, obviously used the "*ultimate and control test"* even though the Court did not mention this expression[152]. The case then went before the Court of Appeal, and meanwhile, the Law Commission adopted its Articles on the Responsibility of International Organizations, in which article 7 is stating the "*effective control*" used by the ICJ.
As a Consequence, the Dutch Court of Appeal decided to follow this reasoning and declared that the District Court made an error by using the *ultimate authority and control* approach[153].

In July 2011, the ECHR received the *Al-Jedda* case. In this case the Court seemed to confirm its position saying that when the delegation of powers was legal; the unlawful acts could be attributed to the UN if it retained *ultimate authority and control* over the mission. Moreover, the Court said that this reasoning works in the situation when the UN runs a mission, opposed to the situation when the UN authorises a mission[154].

3. The disadvantages of the UN liability

The Human rights violations should not impeach the continuity of peacekeeping operation in the sense that promoting Human rights and democracy values remain the main objectives of the mission. It already happened, during the Mission in the Democratic Republic of Congo, that the question of ending the mission appeared. But this is not the satisfactory answer; this would brought even more violence by letting an area in a chaotic

[151] Russel Buchan, *UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?* Legal Studies, Vol 32 n°2, June 2012, p.293.
[152] Russel Buchan, *UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?* Legal Studies, Vol 32 n°2, June 2012, p.294.
[153] Ibidem, p.296.
[154] Ibidem, p.296.

situation. Even if some unfortunate misconduct are regularly happening, it is important to have in mind that most the peacekeepers are filling their duty by upholding Human rights and protecting the civilians[155].

Furthermore, the UN cannot afford criminal or civil liability; the organization has financial boundaries. First, this would have consequences on the financing of the UN activities and notably the peacekeeping operations. The State would probably get less involved into un action and budget as did the Netherlands after Srebrenica.
Second, this would jeopardize the image of the organization and would impact its legitimacy[156]. As a result, establishing the UN responsibility could have negative repercussion on its main purpose of promoting Human rights.

D – The State's responsibility

The responsibility for States which committed wrongful acts is finding its source in the Draft Articles On Responsibility of States for Internationally Wrongful Acts; articles 1 & 2[157]. This document is the result of more than forty years of work of the International Law Commission[158]. According to those articles, two questionings are relevant; whether an act or omission is attributable to the State and whether the act or omission constitutes a breach of the State's international obligation[159].

[155] Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. Cal. Interdisc. L.J., 2014, p.608 & 609.
[156] Ibidem, p.609.
[157] International Law Commission, 'Responsibility of States for Internationally Wrongful Acts, with commentaries', in *Yearbook of the International Law Commission* (2001), Vol. II, p.26 : Article 1 : Every internationally wrongful act of a State entails the international responsibility of that State.
Article 2 : There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.
[158] Rachel A. Opie, *Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility*, 2006 N.Z. L. Rev. 1, 34, 2006, p.4.
[159] N.Mileva, *State Responsibility in Peacekeeping*, 12 Utrecht L. Rev., 2016, p.124.

1. State's responsibility held through the diplomatic protection

The diplomatic protection is based on the principle that an injury to a State's citizens is deemed an indirect injury to the State itself"[160] . This legal theory is coming from the Swiss lawyer de Vattel in "*Le Droit des Gens"* ("*Quiconque maltraite un citoyen offense indirectement l'Etat qui doit protéger ce citoyen*").

However, States have no obligation to sue the other State. This is a discretionary attribution of the State. But if it does, the State is suing the international responsibility of the other State which will be analysed before the ICJ.

Consequently, a State can be held responsible if the State of the claimant agrees to sue the wrongdoer State. In this case, the responsibility of the State will be analysed and held responsible if violations of Human rights were indeed committed. Otherwise, if the State does not approve to sue the other State, the responsibility will never be analysed and the claimant, the individual, has no way to obtain justice.

Nonetheless, the principle that a State must make full reparation in case of internationally wrongful act is well established[161]. The article 36 of the *Draft Articles on States Responsibility* provides the obligation for a State to compensate for damaged suffered[162]. Therefore, it is problematical in that case that the individual has to act through its own State in order to have the opportunity to see the responsibility of the State recognized.

2. State's authority over peacekeepers

In the case of peacekeeping operations, the command of peacekeepers leads to distinguish the State's authority and the authority of the UN during a mission. The acts of the peacekeepers have to be seen as acts of the national contingents contributed by States[163]. According to article 7 DARIO, the conduct of peacekeepers, as placed at the disposal of an international organization, should be considered as the conduct of the organization.

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[160] N.Mileva, *State Responsibility in Peacekeeping*, 12 Utrecht L. Rev., 2016, p.124

[161] The Permanent Court of Justice stated the basic principle in the jurisdiction phase of the case, entitled *Factoryat Chorzow* (1927, PCIJ Series A, No 9) 21. The Court expanded upon it in the merits phase of the proceedings. See (1928, PCIJ, Series A, No 17) at 47.

[162] Rachel A. Opie, *Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility*, 2006 N.Z. L. Rev. 1, 34, 2006, p.5.

[163] C.Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.352.

But the special treatment of military contingent in UN mission, as non-official agents, do not allow such a reasoning.

The status of peacekeepers is indeed the sensitive question to understand how the State's responsibility can be linked to them. While the soldiers are still in their national service, peacekeepers are in the same time international personnel acting according to the Security Council authorization and placed temporarily under the control of the UN[164].

This leads to a "*chain of command*" where concretely peacekeepers are under the control of their sending States but also under the direction of a Force Commander[165]. Scholars seem to consider that the UN exercises an operational control over the troops, where the effective control remains with the States[166]. The Force Commander, chief of the military component, can be the head of the overall mission. The head of a mission generally has a civilian status and represents authority on behalf of the Secretary-General. But the Capstone doctrine explicitly mentions that the military personnel is placed under the Force Commander and not under the UN command[167].

The final link between the UN and the military contingent is the National Contingent Commander (NCC) of the contributed troops. He transfers the orders from the Force Commander to its contingent. The NCC is consequently a very important actor, transferring orders, but probably also responsibility from the UN to the sending State. Indeed, « *it is precisely in this instance of the structure that the test of 'effective control' becomes relevant, as it is often in this « instance of the chain of command that direction relating to the mission runs astray.*[168] »

Concerning the "*effective control*", the International Law Commission, in its Commentary to article 7 of the DARIO, clarified that it has to be applied only to the acts

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164 N.Mileva, State Responsibility in Peacekeeping, 12 Utrecht L. Rev., 2016, p125.

165 Ibidem, p.125 : « *This duality gives birth to a chain of command whereby peacekeepers remain primarily within the control of their sending states by virtue of a National Contingent Commander (NCC) of the contributed troops, but are also under the direction of a Force Commander who is the UN senior military official for the peacekeeping mission.*»

166 Ibidem.

167 C.Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.353-354.

168 Nina Mileva, State Responsibility in Peacekeeping, 12 Utrecht L. Rev., 2016, p.126.

that are considered to be unlawful; the aim is to identify if the act in question was committed under the control of the international organization or the sending state. This is extremely important in cases where troops have refused to follow the orders from the organisation and were waiting for national orders[169].

The International Court of Justice (*Nicaragua case* 1986 and *Bosnian Genocide case* 2007) has found that to speak about "*effective control*", the acts would have had to be "*directed or enforced*" by the State[170]. To invoke the State responsibility for misconduct of soldiers during a peacekeeping operation, the entity must have acted under the State's "*effective control*"[171].

3. Analysis of State's responsibility through Srebrenica cases

In July 1995, thousands of people were killed by Bosnian and Serbian armies under the command of Ratko Mladic. After this dramatic event, the survivors and family members of the dead decided to create an association, so called "*Mothers of Srebrenica*", in order to claim reparations[172].

After receiving no response from claim directly addressed to the Secretary-general, the *Mothers of Srebrenica* filled a civil action before the Dutch jurisdictions against the UN and the Netherlands government. The request was claiming compensation from the United Nations and the State of the Netherlands for being both responsible for the failure to prevent the genocide. The UN invoked its international immunity. In 2008, the District Court of The Hague ruled that the UN was enjoying an "*absolute immunity*". Consequently, the Court did not have jurisdiction over the UN and could not link any responsibility to the case in question[173]. But the Court suggested that in theory, according to article 48 of the DARIO, the dual responsibility may be possible. In March 2010, the Court of Appeal upheld the immunity of the UN. Then the case went before the Supreme Court of the Netherlands which, in April 2012, had the same position.

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[169] C.Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.353-357.
[170] Nina Mileva, State Responsibility in Peacekeeping, 12 Utrecht L. Rev., 2016, p126.
[171] R.J.Wilson & E.Singer Hurvitz, *Human Rights Violations by Peacekeeping Forces in Somalia*, 21 Hum.Rts. Brief 2, 2014, p.4-5.
[172] F.Mergret, "*Responsabilite des Nations Unies Aux Temps du Cholera*", La, 46 Rev. BDI, 2013, p.162-163.
[173] Nina Mileva, State Responsibility in Peacekeeping, 12 Utrecht L. Rev., 2016, p129.

The Court used the "*effective control*" standard, referring to article 7 of the DARIO, to link the unlawful acts to the troop contributed State. The Court considered that the acts were committed *ultra vires*, beyond the powers, in relation to the UN direction. In other words, it means that the State "*has a say over the mechanisms underlying ultra vires action*"[174]. Consequently, the acts are attributable to the State; the instructions of the State were in contravention with the general mandate. The Court considered that the Netherlands State had not the "*effective control*" before the fall of Srebrenica but had it during the "*transitional period*" over certain activities[175]. This is how the Court could finally attribute the responsibility to the State of the Netherlands.

The Mother of Srebrenica went before the European Court of Human Rights to claim the responsibility of the UN. But in June 2013, the Court confirmed and upheld the absolute immunity of the UN[176]. Moreover, it ruled that a civil action could not override the immunity with just an allegation of international law violation[177]. But this can implicitly say that a criminal action could override the immunity or that a real proof of international law violation, even in a civil action, could be enough to recognize the responsibility of the UN.

Other cases were claimed before the Court with the same reasoning of effective control. A criminal case against three commanding officers went before the Court of Appeal of Arnhem-Leeuwarden which decided to not prosecute. The claimants went before the European Court of Human Rights saying that the State did not properly investigate. In September 2016, the ECHR declared the claim inadmissible, ruling that the blue helmets

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[174] Ibidem.

[175] Nina Mileva, State Responsibility in Peacekeeping, 12 Utrecht L. Rev., 2016, p129: « *Bearing all of that in mind, the Court decided that, while the Netherlands did not have effective control over Dutchbat prior to the fall of Srebrenica, it did exercise such control for certain acts during the so-called 'transitional period' after the fall of the enclave. Therefore, the Court attributed responsibility to it for these activities*. »

[176] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.378.

[177] Le Monde, *Massacre de Srebrenica : l'immunité de l'ONU confirmée par la CEDH : « Une action civile ne l'emporte pas sur l'immunité au seul motif qu'elle repose sur une allégation faisant état d'une violation particulièrement grave du droit international, fût-ce un génocide. » http://www.lemonde.fr/europe/article/2013/06/27/massacre-de-srebrenica-l-immunite-de-l-onu-confirmee-par-la-cedh_3438161_3214.html*

could not know the sweep of the following actions; nothing can demonstrate their direct role of in the massacre[178].

As a summary, it is relevant to quote Nina Mileva who underlines two ways to find a responsibility; the effective control test and the overall control test; "*The current command and control structures of peacekeeping missions have led scholars to believe that liability may be apportioned to a different actor depending on the different test applied, observing that states are more likely to be found liable if the test of 'effective control' is applied, while the UN is more likely to be found liable if 'overall control' is used"*[179]. Since the Courts decided to refer to article 7 of the DARIO, the State's responsibility is the logical legal outcome and seem to be the current rule to apply in the scenario of peacekeeping operations.

The problematic here is to know how to link the wrong actions of peacekeepers with their national State. This is why the legal chain has to be analysed. The status of peacekeepers is primordial to understand the responsibility issues. In this regard, the SOFAs are the key of understanding since they regulate the status of peacekeepers towards the UN and the TCC.

The 27th June 2017, the Court of Appeal of the Hague, in the case *Mothers of Srebrenica vs The State of The Netherlands*, the Court ruled that the behaviour of the Dutch soldiers contributed to facilitate the operation of the Bosnian Serbs, torturing and murdering which represent a breach to the ECHR articles 2&3[180].

The Court considered that until the Dutch Battalion was under the effective control of the UN it was not possible to find a liability regarding the State of The Netherlands. Nonetheless, as a second aspect of the decision, the Court analysed in details individual components of Dutchbat's who were dealing with the evacuation of refugees. It

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[178] Le Point, *Rôle des casques blues à Srebrenica : la CEDH refuse un procès*, 22 September 2016, http://www.lepoint.fr/justice/role-des-casques-bleus-a-srebrenica-la-cedh-refuse-un-proces-22-09-2016-2070554_2386.php

[179] Nina Mileva, State Responsibility in Peacekeeping, 12 Utrecht L. Rev., 2016, p130.

[180] De Rechtspaak, *The Netherlands partially liable for losses of Mothers of Srebrenica* ; https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/The-Netherlands-partially-liable-for-losses-of-Mothers-of-Srebrenica.aspx

confirmed that military forces can be sued before criminal but also civil courts[181]. Moreover, the Court decided that in that situation the unlawful conduct of the soldiers could be attributed to the sending State which then becomes the legal subject providing reparations[182].

Concerning the responsibility, this decision is very interesting since it is respecting the effective control established by the ILC and used by the ICJ but analyse the individual behaviour of military forces to enlighten the State's responsibility. On top of that, the Court recognizes the State of the Netherlands as partially liable, which implies that the UN would also have a part of liability, responsibility[183]. Obviously the Court came to this conclusion in an implicit way, it does not mention the recognition of the UN responsibility in any part of the decision[184]. But it can be considered as a first small step that other jurisdiction may one day use and develop if the legal gap is not fulfilled in the following years.

[181] *Mothers of Srebrenica vs the State of The Netherlands*, http://www.nuhanovicfoundation.org/en/reparations-cases/the-netherlands-appeals-court-of-the-hague-mothers-of-srebrenica-vs-the-state-of-the-netherlands/

[182] Ibidem.

[183] Radio France International : http://www.rfi.fr/europe/20170627-genocide-srebrenica-responsabilite-pays-bas-reconnue-appel-forpronu

[184] Decision of the Court of Appeal of the Hague https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2017:1761

Chapter III - Individual's right to reparations for HR's violations

A – The recognition of victims' right to reparations under public international law

As Cherif Bassiouni points out, there is "*no legal system known to humankind has ever denied the right of victims to private redress of wrongs*"[185]. The reparation of wrongs is a fundamental legal principle which is recognised in most legal systems. States are supposed to provide a mechanism and enforcement of the remedy. This fundamental principle was mainly based on the concept of responsibility, more than any human or social solidarity[186].

This topic came back into the light as a consequence of the two World Wars. The concerns of victims' right in International law grew up similarly as the concept of individual criminal responsibility; the individual became a subject of International law, at least in some areas such as International Human rights.
Indeed, the European Convention on the Protection of Human Rights and Fundamental Freedoms was created in the aftermath of the Second World War. An individual is now able to bring claims in front of the European Court of Human Rights (ECHR).[187]

In addition to regional mechanisms, national mechanisms expanded. For instance, the French Constitution of the Fifth Republic integrated the *Universal Declaration of Man and of the Citizen* as part of its Constitution by mentioning it in the preamble[188] and by its effective legal recognition ruled by the Conseil d'Etat and the Conseil Constitutionnel[189].

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185 C.Bassiouni, "*International Recognition of Victims' Rights*", Human Rights Law Review 2006, p.207
186 Ibidem.
187 Ibidem, p.210.
188 French Constitution ; http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur.5074.html
189 Centre juridique franco-allemand (CJFA): http://etudes.cjfa.eu/lessons/lecon-27-les-composantes-du-bloc-de-constitutionnalite/

The reparation is usually composed of two aspects ; financial compensation for the victim and prosecution against the author of the crime. Since the 1960's, some movement for victims' rights highlighted the fact that monetary compensation is just a start and prosecutions are also necessary, as a second part of the reparation. This movement lost influence during the 1980's because of the States who clearly stated that they were willing to recognise victims' rights when the harm was from an individual action, and not from State's action through its policy or its actors. In other words, this designates the individual criminal liability under international law. The prosecution issue came back in the 1990's with the ad hoc tribunals and the creation of the International Criminal Court[190].

1. Framework of Victims' Rights to reparation

Originally, inside the international legal order, the States could be the only wrongdoers. Consequently, the rules were specifically creating obligations towards them. Individuals were completely absent from international rights and obligations. If an individual can sue his State in his home country, before a national jurisdiction, this same individual has no right to take legal action before an international jurisdiction[191]. A person can anyway fil a request claiming the responsibility of the UN, but the national jurisdiction will declare itself not competent because of the immunity[192].

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[190] C.Bassiouni, "*International Recognition of Victims' Rights*", Human Rights Law Review 2006, p.210-211. « *A 1960s 'victimology' movement grew that was not only concerned with monetary compensation of victims of common crimes but also offered an incentive to governments by linking such compensation to victims' cooperation in the pursuit of criminal prosecutions. Canada and several states within the United States began providing victim compensation for common crimes and thereby encouraged victim participation in criminal prosecutions. The movement gained prominence until the 1980s, when experts of victimology and other fields sought to extend monetary compensation to other forms of redress, including medical, psychiatric and psychological treatment and to expand the basis of such compensation and redress modalities to violations committed by State agencies and State officials. By the 1980s, the movement of victim compensation started to lose momentum. States were willing to recognise victims' rights when the harm arose from individual action, but not when the harm was a product of State policy or committed by State actors. States' reluctance increased significantly when proponents of victims' rights began to claim reparations for historic violations, and were successful in some of these claims. Throughout the 1980s and 1990s, the cause of victims' rights was furthered as a result of the establishment of ad hoc and hybrid tribunals and the International Criminal Court (ICC), various national prosecutions, and the burgeoning truth commission industry. In addition, victims' rights have been fundamentally strengthened by the 2006 Basic Principles and Guidelines. An individual victim's right to redress has increasingly become an indispensable component of efforts to protect individual human rights*."

[191] A.I. Young, « Deconstructing International Organization Immunity », 44 Georgetown Journal of International Law, p.313-314.

[192] Ducth Supreme Court, Mothers of Srebrenica v The Netherlands and the UN, 2012 ; http://www.internationalcrimesdatabase.org/case/769/mothers-of-srebrenica-v-the-netherlands-and-the-un/

There is no international jurisdiction able to register an individual request apart from some exceptions as the European Court of Human Rights or the Inter-American Court (and Commission) on Human Rights[193]. Indeed, no individual's right to reparation exist under international law[194]. However there is a need to catch the reality into the judicial mechanisms which would take into account the emergence of Human rights in international law within the post-World War context.

Until there is no mechanism of procedural remedy for individuals under international law, the idea of reparation does not exist in reality, in positive law.
As mentioned above, some regional systems have drawn a different path and give expectation for the evolution of individuals' rights. The article 13 of the ECHR is explicitly speaking about a right to remedy but only before a national court[195]. In the best understanding for individuals, this article would mean that this is the duty of a State to provide remedy when one of its national is victim of a violation of a right directly provided by the Convention and inside the regional area of the effectiveness of the Convention[196].

The article 43 of the same Convention is providing a mechanism to get reparation if the State gave a partial or no reparation: "*If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party*."
The equivalent can be found in the American Convention on Human Rights article 63(1)[197]. These two mechanisms are indeed providing a victims' right to reparation. But

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193 https://www.humanrights.ch/fr/droits-humains-internationaux/regionaux/systeme-interamericain-des-droits-humains/

194 M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization?*", p.167.

195 Article 13 ECHR : "*Everyone 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.*"

196 C.Rose, An Emerging Norma : "*The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors*", 33 Hastings International & Comparative Law Review, , p.314-317.

197 Article 63(1) ECHR « *1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.* »

as those two mechanisms are exceptions in the international system, it is not possible to speak about a right to reparation under customary international law.

Two remarks have to be mentioned here. First, those two examples are limited to regional area, it is not possible to speak about general international law. Second, even if these exception cases establish a local victims' right to reparation, this right is once again towards States and not towards the international organizations.

2. Individuals as bearer of rights and obligations

According to general international law, any breach of an obligation under international law by a State leads to its responsibility. One of the legal obligation after committed a wrongful act is to provide a full reparation which can take different forms as restitution, compensation or satisfaction[198]. But as it was already said, the principle of State's responsibility was originally only at inter-State level, between themselves. One of the reasons was that individuals were not recognized as subjects of international law. But progressively their role has changed and they are now bearer of rights and obligations under international law[199]. According to E.Schwager it is relevant to differentiate the bearing of right and the mechanism to enforce it[200].

Looking at the case *Jurisdiction of the Court of Danzing*, the Permanent Court of International Justice (PCIJ) stated that the impossibility to enforce an individual right at the international level is an obstacle to the existence of individuals' rights under international law[201]. Later, in the Case *LaGrand*, the ICJ followed the same argumentation, based on the article 36(1) of the *Vienna Convention on Consular Relations* (1963) about the Communication and contact with nationals of the sending

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[198] E.Schwager, « *The right to compensate for Victims of an Armed conflict* », Oxford University Press, 2005, p.418.

[199] Emmanuel Roucounas, Facteurs prive´ et droit international public, 299 RdC (2002), 24–40; Robert McCorquodale, The Individual and the International Legal System, in: Evans (ed.), International Law (2003), p.304.

[200] E.Schwager, « *The right to compensate for Victims of an Armed conflict* », Oxford University Press, 2005, p.419: « *It is often argued that the existence of a right for individuals under international law is dependent on the availability of a procedure to enforce the right under international law. This reasoning cannot be substantiated, as the bearing of a right has to be differentiated from the procedural capacity to enforce it* ».

[201] Jurisdiction of the Courts of Danzig, Advisory Opinion, PCIJ, Series B, No. 15, 17, 18: *''. . . it cannot be dis- puted that the very object of an international agreement, according to the intention of the contracting parties, may be the adaptation by the parties of some definite rules creating individual rights and obligations and enforce- able by national courts.''*

State. The Court stated that this article "*creates individual rights, which, (...) may be invoked in this Court by the national State of the detained person*[202]".
In this case the Court is expressly stating that individuals have rights under international law and that their national States are able to act as representing their nationals.

Under the regime of Human right law, mostly provided by the International Covenant on Civil and Political Rights (1966), States are guaranteeing rights not only to their nationals but also to aliens, respecting the words of ICCPR article 2(1)[203].

The *Drafts Articles on Responsibility of States for Internationally Wrongful Acts* (Article 33(2)) are also providing the fact that a State should compensate persons or other entity than a State for an act ensuing from its international responsibility[204].

Finally, the Rome Statute, in its article 75, also recognizes a right to reparation, not against State but individual perpetrator[205]. The reparation is only possible if the crime is under the jurisdiction of the ICC. Those crimes are not numerous, because limited to serious crimes, and enumerated in the article 5(1). Moreover, the ICC is not a relevant jurisdiction regarding misconduct during a peacekeeping operation since all members can be sued only before their home State's jurisdiction according to the SOFA but also because the crimes covered within the Rome statute are very broad and difficult to prove at the scale of a peacekeeper solider[206].

Mechanisms for reparation are still missing except few exceptions as the European Court of Human Right. Furthermore, where the right to reparation is recognized, it enforceable only against States. Once again, no legal text is mentioning international organization as

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[202] Pieter H. Kooijmans, Statement; LaGrand (Germany v. United States of America), ICJ Reports 29 (2001), para. 77.
[203] ICCPR, article 2(1): « *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*".
[204] Article 33(2) Draft Articles on Responsibility of States for Internationally Wrongful Acts : "*This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State*"
[205] Rome statute, article 75 : https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
[206] E.Neumayer, « A New Moral Hazard ? Military Intervention, Peacekeeping and Ratification of the International Criminal Court », Journal of Peace Research, Vol 46, N°5, 2009, p.668-669.

wrongdoer against whom it would be possible to claim a compensation for Human rights violation. States seem to be the only one able to compensate when it is possible; when a legal procedure constrains States to do so.
In the context of the UN peacekeeping operations, the issue of a right to reparation is even more problematic by the fact that the legal rules and procedures are established inside the SOFAs[207].

3. Diplomatic protection

From the legal doctrine of Public International law, individuals are not fully recognised in the way that they cannot form a request against a State before an international jurisdicon. The claimants have first to exhaust all the local legal submissions and then can ask his own State of nationality to start a procedure. The individual's situation depend on the State's will to act against another State, this is the diplomatic protection[208].
If the State is willing to do so, and obtains reparations for the violation of the rights of its national, the State has no obligation either to give the financial reparation to the victim. This is a discretionary attribution of the State.

The mechanism of diplomatic protection is an indirect non-guaranteed way to get reparation for an individual. The victim cannot act on its own. The State has no obligation to follow the request of its national. If he does, the procedure will confront one State against another. Consequently, there is no right to diplomatic protection. Thus, there is no right to reparation through the diplomatic protection[209].
If the State gets a financial reparation, there is no obligation to then transfer it to the victim[210]. But here again, the State is able to start a procedure against another State, not an international organization. Moreover it has to be noted that the victims of Human rights' violation in the context of UN peacekeeping are first the inhabitants of the host country. States receiving help from the UN are generally in a bad shape and not able to deal with judicial procedures as diplomatic protection for numerous of their nationals.

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[207] J.Voetelink, « *The European Union status of forces Agreement* », 44 Mil. L. & L. War Review, 2005, p.20
[208] C.Bassiouni, "*International Recognition of Victims' Rights*", Human Rights Law Review, 2006, p.212.
[209] Ibidem.
[210] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization ?*", p.170.

4. Legal breakthroughs over victims' right to reparation

The International Criminal Tribunal on Former Yugoslavia played a huge role in the area of victims' right to reparation. Indeed the court concluded that : "*Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act*"[211]. The court seems to recognize a right to reparation for victims under international law which can be brought before international, national or even before a foreign state court[212].

In 2005, the UN General Assembly adopted a document going in the same way; the *UN principles on Victims' Reparation*[213]. This document identifies "*mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law*".

The same year, the Report of the International Commission of Inquiry on Darfur is stating that "*whenever a gross breach of human rights is committed (...) customary international law (...) imposes an obligation (...) to make reparation (including compensation) for the damage made*"[214].

The duty to provide reparation, indirect expression to call the victims' right to reparation seem now well accepted through the international jurisprudence, the UN documents and by some regional courts. Those favourable indicators have now to be followed by international practice.

[211] ICTY, Prosecutor v. Furundzija, Judgment of 10 December 1998, para 155.
[212] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization ?*", p.173.
[213] UN Human Rights Office of the High Commissioner ; http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx.
[214] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization ?*", p.174.

B - The problematic of the right to reparations against the UN

As it was already mentioned, international organizations are free to conclude international agreements as a tool to create obligations with other international organizations or States. They are free to include human rights concerns in those treaties, protection of human rights, mechanism of reparation and so on. Regarding the practice, international organizations are mostly reluctant to do so even in the situation where they could possibly violate human rights[215].

In the scope of military operations, the UN is contracting the Status of Forces Agreements (SOFAs) with host States. Those contracts are for instance organizing the status of personnel, the conduct and activities of the UN personal, the settlement of disputes and so on. The UN and the host States could use those contracts to insert specific mechanisms of reparation for human rights violations if this situation would come to happen. But the practice did not come to this[216]. Probably because of the States which fear to bear another potential responsibility; the responsibility to financially compensate the victims or the UN.

Through the founding documents of International Organizations, written by States, it is also obvious that States are reluctant to explicitly include human rights provisions.
When international organizations are producing unilateral acts, it may create obligations with several addresses; the organization itself through its organs, through its external relations, or towards its Member States.

1. The absence of explicit right to reparation against the UN

As the UN can decide the topic of such a unilateral act, human rights obligations and provisions for reparation for human rights violation can be a source of the UN's obligations. Concerning the peacekeeping operations, the UN has developed internal

[215] Kristen E. Boon, « *The United Nations as Good Samaritan: Immunity and Responsibility* », 16 Chi. J. Int'l L., 2016, p.370.
[216] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization ?*", p.177.

liability rules[217]. These liability rules form binding provisions which can be the source of a victim's right to reparation[218].

One part of the literature would consider the practice of international organizations compensating human rights violations as sufficient basis to consider the customary obligation of reparation. Obligation to compensate violations would be attributable to international organizations as "*a general principle of liability law of international organizations. The refusal to pay compensation to individuals unlawfully damaged through negligence or intent would therefore constitute a violation of international law*"[219].
If the right to reparation is established under general international law, it should be applicable to international organizations.

The responsibility of international organizations in now well accepted. It is reaffirmed in the DARIO article 3 which is stating that "*Every internationally wrongful act of an international organization entails the international responsibility of that organization*". Being the bearer of responsibility should imply all the consequences of responsibility; notably the duty to give reparations.

The difficulty is the status of individuals under international law and whether it is relevant to consider them as part of the "*entities to which the obligation of reparation under the responsibility regime of international organizations is owed*"[220]. But in the case of victims' right in the scope of UN peacekeeping operations, the International Law Commission itself clarified that "*Another area is that of breaches committed by peacekeeping forces and affecting individuals. The consequences of these branches with regard to individuals, as stated in paragraph (1), are not covered by the present draft articles*"[221].

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[217] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization* p.178.
[218] Ibidem.
[219] Ibidem, p.179, quoting, SCHMALENBCACH, Kirsten. Third Party Liability of International Organizations, p.51.
[220] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization ?*", p.181.
[221] ILC, Commentary to Article 33, Draft articles on the responsibility of international organizations.

However, the UN Secretary General in 1965, stated that "*It has always been the policy of the United Nations (...) to compensate individuals who have suffered damages for which the Organization is legally liable. This policy is in keeping with generally recognized legal principles...*"[222]. Nonetheless, the weakness of such a statement is the absence of legal binding rules.

Then, the effectiveness of remedy depends exclusively on the good will of the UN. In the case of Haiti, the good will of the UN was obviously absent. Indeed, the UN General Secretary recognized the responsibility of the UN, but a moral responsibility, which was not followed by facts, asserting its immunity under international law[223]. No Haitian victim could get any kind of remedy.

If the right to reparation is a part of customary law, there is no reason why such a concept would not be enforceable against International Organizations. As international subjects and actors, general international law, and a fortiori customary law, is applicable to them.

Finally, bringing the case in front of a national court is facing the obstacle of the international organization's immunity[224]. Looking at the Srebrenica case, which was brought before Dutch jurisdiction, the victims could at the end get a reparation, not from the UN, but from the State of the Netherlands. The UN seems protected from the duty to give reparation in any case.

2. The immunity of the UN as obstacle to the right to reparation

First of all, it is relevant to give clarity on the reasons and purposes of legal immunity. This is not a tool used to avoid responsibility issues. The immunity does not delete the legal liability but it does annihilate the consequences of liability. Through a resolution, the General Assembly itself limited the UN responsibility but without contesting its "*duty*" towards third parties which would be victim of damage because of the peacekeepers[225].

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[222] Letter Dated 6 August 1965 From the Secretary-General Addressed to the Acting Permanent Representative of the Union of Soviet Socialist Republic (UN Doc. S/6597).

[223] http://www.france24.com/fr/20161202-haiti-ban-ki-moon-presente-excuses-haitiens-cholera-role-responsabilite

[224] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization ?*", p.184.

[225] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l

It is extremely difficult, to not say impossible, for individuals to overcome the UN immunity. Immunity for international organization was originally created to protect them against their Member States, against any attempt to be used by the States or responsible for their acts. Immunity is a way to preserve the UN independence[226].

The UN would probably be under many lawsuits, responding for its own actions or even its Member's States actions through the blue helmets acts. It is relevant to remember that the UN is the only universal organization able to provide peacekeeping actions all over the world.
Consequently, the thinking process about its immunity has to be nuanced. The reasons of the immunity's creations are perfectly understandable and necessary. Nowadays there is a need to adapt in order to face the current problematics[227].

The immunity of the organization itself, the UN, and the one of peacekeepers have to be distinguished. The immunity from civil and criminal procedures of peacekeepers should be exercised in the narrowest way and circumstances[228]. While the Courts are debating between the "*effective control*", "*overall control*" and "*ultimate authority and control*", it is hard to imagine that Human rights violations such as torture, rape and other misconducts would be under any sort of control of the UN[229].

This is why the waive of the UN immunity do not seem to be an appropriate answer. Whereas putting the UN under pressure to adopt an internal and transparent judicial system, with real reparations, seems more accurate.

The UN immunity is valid no matter the jurisdiction's level. International, regional and national levels are concerned and respect this legal immunity[230]. It is limited by the UN Charter itself, article 105, is mentioning "*functionally necessary*". The Convention on the

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L., 2016, p.349.
[226] Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L., 2016, p.350.
[227] P.Neumann, « Immunity of International Organizations and alternative remedies against the United Nations », Vienna University, Sminar on State Immunity, Summer Semester 2006, p.10-11.
[228] Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. Cal. Interdisc. L.J., 2014, p.621.
[229] Ibidem, p.622.
[230] Note d'information ECHR "Mothers of Srebrenica": https://hudoc.echr.coe.nt

Privileges and Immunities of the UN mentions that the UN is immunized from any legal process except when the UN waives its own immunity[231]. This makes the UN's immunity much wider. As it was previously mentioned, the CPIUN changed the nature of the UN immunity[232]. However, the UN is nevertheless under the obligation to provide mechanisms of settlement since the article 29 of the CPIUN provides that "*The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party*."

There is an obligation over the UN to provide mechanisms permitting to solve legal problem in the area of private law. The UN is immune from public law but not from private law procedures[233]. The UN is nonetheless not providing any measures to fulfil its obligation. This is obviously creating a situation of breach regarding the Convention. But there is no legal way to constraint the UN to create one.

3. Distinction between public and private law as key factor of claiming reparation

The distinction between private and public law and the criteria distinguishing them is relevant to understand the extend of the UN immunity. But the criteria used by the UN are lodged in the "*internal jurisprudence of the UN*" which is inaccessible to outsiders[234]. However, regarding specifically the dispute of private law nature, the Secretary-General published a report where it identifies death and damage caused by actions of UN peacekeepers as a matter of private law[235]. The right of individuals to a remedy has been recognized by the UN itself[236]. But the UN is not acting according to what it recognized, it does not provide any mechanism to give remedy for victims during a peacekeeping operation.

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[231] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.353.

[232] A.Reinisch, *UN Immunity and Acess to Dispute Settlement,* University of Vienna, Fall Semester 2010/2011, p.1-2.

[233] Ibidem, p.354.

[234] F.Mergret, "*Responsabilite des Nations Unies Aux Temps du Cholera*", La, 46 Rev. BDI, 2013, p.166.

[235] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.356: "*The definition of disputes of a private law matter, in contrast, were clarified by a 1995 report of the Secretary-General to the General Assembly, which identified two categories: (i) commercial agreements that the UN has entered into: and (ii) claims by third parties for personal injury, death, or property loss or damage, specifically as caused by actions of UN peacekeepers".*

[236] See discussion of General Assembly. Res. 52/247, U.N. Doc. A/RES/52/247 (ul. 17 1998), quoted by Kristen E. Boon in *The United Nations as Good Samaritan: Immunity and Responsibility*.

The two recent cases, the *Kosovo Poisoning* and *Haiti Cholera cases*, demonstrate the involvement of peacekeepers in Human rights violation against number of people. The UN claimed that these cases were not part of private law nature and are not receivable in the sense of the CPIUN. This position is more than questionable[237].

The UN immunity is leading to a paradox. Indeed, it is contradicting the principle under which one an organization is responsible for the harm it causes by negligence. Moreover, it is leading to a sort of hierarchy between injury or loss of life caused by the UN and another actor[238]. The damaged caused by the UN would be less important since the aim is to bring the peace.

In Haiti case, financial compensations were requested for victims, as well as better water sanitation and a public acknowledgement of responsibility. Moreover, it was alleged that the cholera outbreak was violating international law such as the right to life[239]. None of them were attributed to the request.

The Kosovo and Haiti cases are both enlightening the UN's negligence which had huge consequences on individuals, private persons. The argumentation claiming general health problem and the absence of facts as they are determined by the UN itself is extremely arguable. Moreover, these two cases but also the Srebrenica cases, are showing the lack of mechanism of the UN system which is an obligation under the CPIUN. This is maybe a reason why the UN is so reluctant to admit claim of private character; the UN tries to avoid the situation where it would face the obligation to recognize its responsibility and give reparations for the damages caused.

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[237] Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L., 2016, p.356.
[238] Ibidem, p.364.
[239] Ibidem.

C - Providing punishment and reparation during a UN peacekeeping operation

1. General actions of the UN facing HR violations during an operation

Many of the peacekeepers who committed Human rights violations, such as rape or sexual abuse, outbreak or failure to protect to be slaughtered, never faced punitive measures or prosecutions[240]. There are few obstacles for victims to fill civil claim ; the UN immunity, the limited prosecution policies of the International Criminal Court, , the weakness of the SOFAs which gives the entire responsibility of soldiers to Troop Contributing States, the lack of political will of Troop Contributing States to sue their soldiers for misconduct and the absence of any system which would verify the prosecution and disciplinary measures against soldiers by Troop Contributing Countries[241].

Sexual abuse and exploitation of women has occurred on UN missions in Guinea, Democratic Republic of Congo, Rwanda, Bosnia-Herzegovina, Haiti, Somalia, and many others. It is "*the most notable humanitarian violations associated with peacekeeping*"[242]. The response against those misconducts are quasi non-existent; in Côte d'Ivoire, height hundreds peacekeepers received a suspension of confinement to their barracks for having sex with children. The suspension was time-limited and they could take back their duties once the suspension expired[243].
In Haiti, for the same misconducts, one hundred Sri-Lankan peacekeepers were sent home as a sanction for sexual abuse. No matter the nature of the misconduct, sex abuse is the most used example because it is easily shocking, but any misconduct needs a procedure of investigation, and a punishment if the facts are demonstrated being true.

The UN created a "*local claim review boards*" so that individuals or States can fill up claims against peacekeepers in a civil procedure. Those mechanisms are composed of three UN members and are established at the condition that the Special Representative of

[240] Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. Cal. Interdisc. L.J., 2014, p.598.
[241] Ibidem, p.599.
[242] Ibidem, p.601.
[243] Ibidem, p.602.

the Secretary General concludes that humanitarian violations have occurred on a UN peacekeeping operation.

Once again, as for determining if a misconduct concerns the private or public law area, the UN is deciding alone to establish those review boards[244]. Moreover, most review boards are not published. « *The U.N.'s local claim review board does not provide proper redress to persons victimized by the human rights violations of peacekeepers because internal bias and financial constraints inhibit adequate, impartial decision-making* »[245].

2. The Example of mechanism provided in the UNMIBH

The UN Security Council mandated the UNMIBH (UN Mission in Bosnia and Herzegovina) to carry out independent Human rights investigations. The investigations were under the Human Rights Office. Let's mention here that the scope of this office was limited to Human rights violations allegedly committed by law enforcement officials. This means that the military personnel are outside the scope of the Human Rights Office[246]. De facto, the peacekeepers are outside the UN system concerning violation of Human rights. This is reducing significantly the number of violations seeing as most of them are alleged against military contingent.

It was in its resolution 1035 that the Security Council established the International Police Task Force (IPTF) and United Nations civilian office. The mission of the IPTF was to assist Bosnia and Herzegovina "*in providing a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for fundamental freedom*"[247]. The Human Rights Office is able to call upon local authorities in order to conduct disciplinary and criminal proceedings or also to pronounce sanctions as the de-authorization and removal of law enforcement officials, even if there is no exact definition of "*law enforcement personnel*"[248].

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[244] Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. Cal. Interdisc. L.J., 2014, p.605.
[245] Ibidem, p.607.
[246] Kaoru Okuizumi, Peacebuilding Mission: Lessons from the UN Mission in Bosnia and Herzegovina, Human Rights Quarterly, Vol. 24, No. 3, 2002, p722.
[247] Dayton Peace Agreement, supra note 5, Annex 11, art. I(1).
[248] Kaoru Okuizumi, Peacebuilding Mission: Lessons from the UN Mission in Bosnia and Herzegovina, Human Rights Quarterly, Vol. 24, No. 3, 2002, p733.

This is showing that inside a peacekeeping operation, military contingent and UN officials do not receive the same treatment. The officials are directly under the UN administration, even for the sanction. The military force can only be removed from the Host State and be sent back to their home State. Their status, regulated by the SOFAs, is expressly mentioning that criminal proceedings can be held against them only in their national State.

Kristen E. Boon is using a good analogy of the Good Samaritan in the context of tort law to demonstrate the principle that "*once a Good Samaritan begins a rescue, they are held to a certain duty of care and will usually be found liable for harms that occur in the course of a rescue*[249]". This principle spring to mind after all the cases where the UN decided to intervene in order to bring help but does not provide mechanism of reparations in case of damage. The most gripping example is probably the Haiti case.

3. The role of ad hoc jurisdictions in the process of reparations for HR violations

During the second half of the 20th century, *ad hoc* jurisdictions have known a huge expansion mostly through the resolutions of UN Security Council[250]. The objective in sight was to have new mechanisms, permitting individuals to get reparation for damages or losses caused during a conflict situation.

Even if those special jurisdictions represent a hope in the area of individual reparation, few inconveniences such as the forms of reparation, the absence of real criminal liability or real determination of violation of an international law are visible and give leads to improve those mechanisms[251].

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[249] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.379 : « *Similarly, in tort law, although there is no duty to rescue passersby, once a Good Samaritan begins a rescue, they are held to a certain duty of care and will usually be found liable for harms that occur in the course of a rescue. Reasoning by analogy, the U.N. started a rescue by setting up a peacekeeping mission and establishing safe areas, but failed to protect the individuals who relied on these acts. The Mothers of Srebrenica decision suggests that the parameters of operational necessity require careful scrutiny*."

[250] ICRC, « *Ad hoc tribunals* » ; https://www.icrc.org/en/document/ad-hoc-tribunals

[251] J.Piacibello, *Ad Hoc Reparation Mechanisms*, 35 Hous. J. Int'l L, 2013, p.89.

3.1 Examples of Kosovo and Bosnia & Herzegovina

In Bosnia and Herzegovina, the Commission for Real Property Claims of Displaced Persons and Refugees was created by the article VII of the "*Dayton Accord*"[252]. In Kosovo, the Kosovo Housing and Property Claims Commission was established by UNMIK regulation 1999/23. Both Commissions were able to receive individual claims. Evidently, their object was limited to the result of ethnic discrimination and conflict. Their composition was organized in order to guarantee their impartiality. For instance, concerning the Bosnian Commission composed of nine members, three were designated by the President of the European Court of Human Rights, and the six others were appointed by the Croat, Bosnian and Serb of Bosnia-Herzegovina[253].

The requirement to be able to form a claim was, during an interview, to give its identity and a legal interest. The opportunity to file a claim was thus quite accessible, which seems appropriate for a jurisdiction which has for purpose to give individual reparation[254].

Concerning the claims about the loss of property during the conflicts, the Courts gave remedy in the form of restitution rather than compensation. The use of restitution permitted the return of displaced people and was also a way to save money for physical damage claims. Moreover, in the case of Bosnia-Herzegovina, the trust fund established to finance compensation never had enough donation, which led to the abandon of remedy by compensation[255].

Those two commissions were not established in order to fix especially Human right violations committed by peacekeepers but for violations resulting from the armed conflict. The purpose to analyse those two commissions is to take example of mechanisms which could be used to provide reparations.

Observers were sent to make report on the two Commissions. They reported the lack of effective compensation because the Commission seemed to focus on restitution. The

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[252] Office of the High Representative ; http://www.ohr.int/?page_id=1252
[253] J.Piacibello, *Ad Hoc Reparation Mechanisms*, 35 Hous. J. Int'l L, 2013, p.91-92.
[254] Ibidem p.93.
[255] J.Piacibello, *Ad Hoc Reparation Mechanisms*, 35 Hous. J. Int'l L, 2013, p.95.

absence of alternative restitution (except the restitution) leads to a really unfair situation for people who were not victim of property damages or destructions[256].

Regarding the results of the Commissions, the implementation of the decision was high. Ninety percent of the decisions from the Bosnian Commission were implemented (more than three hundred thousand decisions were adopted). Ninety height percent of the Kosovo Commission were implemented (for twenty-nine thousand decisions adopted)[257]. Consequently, even if those mechanisms were too weak to give reparation for each claim, and that they were mostly restitution, the independency of jurisdictions and the implementation of the decisions were guaranteed.

This is an exceptional situation, which implies that *ad hoc* quasi jurisdictions are appropriate, even if they were established because of the lack of strong jurisdictions. In Bosnia, local jurisdictions would have not had a "*fair*" composition able to give decisions and consequently those decisions would have been less accepted because of the unequal ethnical representation of the Courts.

The advantages of *ad hoc* jurisdictions are multiple[258]. The composition of the Commission is made in accordance with the location where the need of justice is. In Bosnia, the necessity to have a mixed nationality Commission was guaranteed by the multiple actors appointing the judges. Then, the appellation "*ad hoc*", meaning temporary, is reminding that this is an extraordinary situation, not suitable to a peaceful and stable world.
Then, more concretely, the decisions are mostly implemented, which is showing the success of such mechanisms even if improvements could be noticed and are desirable for the future, notably the real liability between victims and State or other responsible.

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256 K.Okuizumi, « Peacebuilding Mission : Lessons from the UN Mission in Bosnia and Herzegovina », The Johns Hopkins University Press, Vol.24, N°3, 2002, p.733-735.
257 J.Piacibello, Ad Hoc Reparation Mechanisms, 35 Hous. J. Int'l L, 2013, p.98 & 99.
258 N.Kurt, « *Ad hoc tribunals Comparative Framework : National Courts, Truth Commissions and the ICC* », King's College, War studies department, 2014 ; http://www.academia.edu/26410332/Ad_Hoc_Tribunals_Comparative_Framework_National_Courts_Truth_Commissions_and_the_ICC

D - Providing reparations, between the UN and its MS

Victims of Human rights violation can get reparation before States' national Courts. There is *a priori* no distinction for claims for compensation based on violations of international law or based on a national law, even if there is no reference to international law[259].

Each State is different about the procedure. In the United States exists a "*Human Right Litigation*" for the claims based on violation of international law. In theory, every State is competent regarding claims brought by one of its nationals, according to the passive personality principle.

Obviously, bringing the case in front of a national court is facing the obstacle of the International organization's immunity[260]. Looking at the Srebrenica case, which was brought before Dutch jurisdiction, the victims could at the end get a reparation, not from the UN, but from the State of the Netherlands. The UN seems protected from the duty to give reparation.

1. Reparations provided in the Srebrenica case

Coming back to the decision of the Court of Appeal of the Hague, and in regard to the reparation issue, the decision of the Appeal's Court is surprising. The District Court of The Hague had decided to give full reparation to the plaintiffs, but the Court of Appeal reduced the reparation to 30%, considering that these 30% represented the chance of male refugees of having a better outcome[261]. This reasoning is hard to understand especially from a legal point of view. Appreciating the percentage of the possibility to escape belongs to the science-fiction.

Anyway, the Court decided to confirm the reparations to the victim, which is a first signal showing that a violation cannot remain without remedy.

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[259] E.Schwager, « *The right to compensate for Victims of an Armed conflict* », Oxford University Press, 2005, p.430.

[260] M.Faix, Czech yearbook of Public & Private International Law, Prague, Vol.6, 2015, "*Victims' right to reparation under international human rights law: also against international organization ?*", p.184.

[261] Nuhanovic Foundation, Court of appeal of the Hague – Mothers of Srebrenica vs the State of the Netherlands ; http://www.nuhanovicfoundation.org/en/reparations-cases/the-netherlands-appeals-court-of-the-hague-mothers-of-srebrenica-vs-the-state-of-the-netherlands/

2. Duty of States to provide reparation ?

Theoretically, the duty for a State to provide a domestic legal remedy to victims of violations of International Human rights and humanitarian law norms committed in its territory is well established[262]. The basis of this duty can be found in different international and regional conventions. But the weakness is the theoretical aspect since that there is no right for individuals of legal action against a State before an international jurisdiction. As it was previously demonstrated no citizen can claim as the diplomatic protection as a right[263].

Consequently, it is hard to speak about a "*duty*" when there is no sanction for omission. Just a moral duty can be seen in this situation. Nonetheless, the article 2(3)(a) of the International Covenant on Civil and Political Rights (1966) states ; « *ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity* ».
If this article is enforcing the remedy for individuals' victim of human rights violation. Once again, no mechanism can permit to a citizen to sue a State by itself.

Through the different legal texts, it is possible to speak about a State duty to provide remedy, reparation, but in practice it is different because of the absence of a real status for the individuals who are not legal actors of public International law and cannot enjoy binding mechanisms of reparation[264].
The International Court of Justice itself seems to consider the victims' right to reparations in case of fundamental human rights violations. Indeed, since fundamental human rights are *erga omnes*, there should be a reparation in any case; "*Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned*"[265].

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[262] C.Rose, « *An Emerging Norma : The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors* », 33 Hastings International & Comparative Law Review, 2010, p.307-309.
[263] C.Bassiouni, "*International Recognition of Victims' Rights*", Human Rights Law Review, 2006, p.213.
[264] C.Rose, « *An Emerging Norma : The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors* », 33 Hastings International & Comparative Law Review, 2010, p.311-318.
[265] ICJ, Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion), Advisory Opinion, ICJ Reports 2004, para 152-153.

One of the criticism of the *Basic principles and Guidelines on the Right to a Remedy and Reparations* is that it did not cover the sensible question of bearer of the responsibility to provide reparations[266].

Concerning the option permitting proceedings of peacekeepers in the host-State of a UN peacekeeping operation does not seem a good solution since most host-States do not have a "*minimum standards*" of Human rights protection nor a satisfactory judicial mechanism. Such a situation would finally be in contradiction of the UN's goal of promoting universal Human rights and the rule of law[267].

In this optic the SOFAs are expressly putting aside this possibility but one weakness remains ; the lack of clarity in SOFAs does not help to prosecute the soldiers in the Troop Contributing Countries. Moreover, all the TCC do not have the same judicial efficacy and are more or less active. France sentenced Didier Bourguet to nine years of jail for having sexual relations with two African women he paid for. The economic situation of the two women did not let them having a real choice[268]. Canada also prosecuted ten of its peacekeepers for murder and torture acts committed in Somalia. Those example show that it is absolutely possible for a State to prosecute one or numerous of its peacekeepers.

However, for some other TCC, such as India, they see the donation of soldiers as the opportunity to make them gain preparation and experience and the possibility to remove them from the wage list; the UN gives salaries to the blue helmets, consequently the TCC do not have to continue to pay their soldiers[269]. Having this in mind helps to understand the reason why some Countries are reluctant before the "*duty*" to prosecute their soldiers, this is a waste of investment and money.

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[266] C.Rose, « *An Emerging Norma : The Duty of States to Provide Reparations for Human Rights Violations by Non-State Actors* », 33 Hastings International & Comparative Law Review, 2010, p.307-309.
[266] C.Bassiouni, "*International Recognition of Victims' Rights*", Human Rights Law Review, 2006, p.220.
[267] Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. Cal. Interdisc. L.J., 2014, p.615 & 616.
[268] Ibidem, p.620.
[269] Ibidem, p.621.

Here again, there should have a binding rule under which one States shall prosecute their peacekeepers when violations of Human rights have been reported. In that case States would have no choice but facing their obligations toward the United Nations.

3. Absence of legal reparations or alternative means from the UN

According to article 29 of the CPIUN, the UN has the legal obligation to provide mechanisms of settlement for private law claims. The article is too broad, to vague, and does not indicate precisely any alternative. The UN is somehow enjoying this absence of concrete criteria whereas it could be beneficial also for the UN. It could serve to minimize the legal cost and delays with private law suits and it could avoid the situation when a national court takes jurisdiction over UN matters[270].

In previous and different dramatic event, there has been some solution found in order to compensate the victims. Such mechanisms could be built for some extraordinary and unexpected events such as the Haiti case.

Indeed, the UN could use the 9/11 Victims Compensation Fund as an example to give compensation to victims. The solution could also be to extend the competence of the local claims boards which already have jurisdiction over individual torts committed in peacekeeping operations[271].

Whatever solution is the best, the UN mechanism must be impartial, transparent and has to justify its decision. Not as the current situation when the UN decides by itself about the public or private nature of a case.

There is still the possibility that the UN would waive its immunity, power attributed to Secretary-General, but this scenario is less likely. Plus, it is not sure this would be the suitable option. On the one hand, it happened few times in the UN history for criminal cases concerning the UN staff. Not waiving the immunity in some cases as Haiti or Srebrenica is considered by some scholars as an "*abuse of immunity*"[272]. But on the other

[270] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.375.
[271] Ibidem, p.376.
[272] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.380.

hand, if the UN would have been condemned to give financial reparation, the UN would have to give more than 10 billions US dollars[273]. As a comparison, the UN budget attributed for 2018 – 2019 is 5.4 billion. It is clear to understand that such an action would just bring the UN down.

4. A need to take actions between the UN and Member States to fill the legal gap

The UN Charter is clearly providing requirements to respect Human rights[274]. The UN action is taking into account its protection and promotion through its actions. One of the current problematic is to know if the Member States are bearing the obligations as the UN. This is a crucial question from the perspective of individuals as third-party claimants. This would clarify against which responsible actor they could ask for reparation.

The current practice does not give clear answer but shows multiple possibilities. Three cases before the European Courts are questioning if the attribution to wrongful acts should be oriented towards the UN or the Member States. *Behrami and Saramati v. France, but also Norway*, *Al Jedda v. UK*, and finally *Nuhanovic v. The Netherlands*.

Those three cases led to the same conclusion; the attribution of conduct was attributed neither to the UN nor the Member States.

However, the Court gave to understand that the conduct could be attributable to both entities; the UN and the Member State concerned in the case[275].

The European Court of Human Rights has found the acts attributable to the UN, but the Court declared itself non-competent for the reason of having no jurisdiction over the UN, and, *de facto*, left the victims without remedy. In the *Nuhanovic case*, the Dutch Court of Appeal stated that the effective control exercised by the Netherlands was not excluding the possibility of effective control exercised also by another entity as the UN[276].

[273] Calculation of the request before US court which claimed 50.000 $ for each petitioner injured, there were more than 600.000 petitioner injured ; 50.000$ x 600.000 = 10 billions $.

[274] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.381 : « UN Charter Provisions 1(3), 55 and 56 require the UN to respect human rights, even if there is debate over whether the Organization is directly bound by human rights. »

[275] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.382.

[276] Ibidem p.383.

It is currently interesting to question the relevance of the article 105 of the UN Charter. If it originally had some justification, it has to be adapted to the current problematics.
The UN legitimacy is suffering itself from all those cases when the UN recognizes its moral responsibility but does not waive its legal immunity, does not recognize the claim as a private law matter or does not establish some financial fund in order to give remedy to the victims[277].
The absolute immunity of the UN is currently problematic because it seems to be an obvious breach of the rule of law principle that the UN itself is supposed to promote[278] but also a sort sanctuary under which one the UN is hiding to avoid the question of alternative means.

Domestic Courts are participating on the research of reasonable legal answers, without being over their own power. The Dutch Supreme Court held that it is not because a responsibility is attached to a State that it cannot be attributed in the same time to an international organization too[279].

From the moment the UN is failing to preserve and protect Human rights, it would make sense that a Court would start paring down international organizations' immunities.
Nevertheless, the Dutch district Court wisely stated that it was not the area of national Courts to take such actions. If national Courts start to do so, dangerous situations could appear from it because of the difference of judgment of each national Court.

For these reasons, the development of internal and transparent UN jurisdictional mechanism is more than desirable to deal with these cases[280]. On top of that, the "robust" aspect of peacekeeping missions, which allow the use of force and establish an offensive mandate instead of a defensive one, will not help to decrease these phenomenon.

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[277] P.Neumann, « *Immunity of International Organizations and alternative remedies against the United Nations* », Vienna University, Seminar on State Immunity, Summer Semester 2006, p.10-11.
[278] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.384.
[279] The State of the Netherlands v. Nuhanovic, ECLI:NL:HR:2013:BZ9225 (supreme court of Neth. 2013), para 4.13 : « *Under article 7 DARIO the international organization has exclusive responsibility and the seconding State does not at the same time have independent responsibility on the grounds of its own acts. Where the conduct can be attributed to both the organization and the seconding State according to the rules on responsibility under international law, this is termed 'dual attribution', which would lead to what in private law is termed joint and several liability*."
[280] P.Neumann, « *Immunity of International Organizations and alternative remedies against the United Nations* », Vienna University, Seminar on State Immunity, Summer Semester 2006, p.24-26.

Consequently, claims for deaths and injuries are more and more regular whereas the reparation process does not evolve very much[281].

[281] Kristen E. Boon, The United Nations as Good Samaritan: Immunity and Responsibility, 16 Chi. J. Int'l L., 2016, p.385.

Conclusion

The liability of international organizations towards Human rights is still hazy and in debate in the academic wolrd. Nevertheless, some elements of answer could be brought during this work; the obligation for the UN to respect Human rights seems to come out through the customary international law[282] but also from the most fundamental Human rights, such as the right to life or the prohibition of torture, considered as *jus cogens*[283]. Moreover, a part of the doctrine considers this obligation intrinsic to the UN since the aim to promote Human rights is provided by the UN Charter itself[284].

Consequently, many factors can be taken into account to affirm the obligation to respect Human rights during UN peacekeeping operations. The problematic is about the consequences in cases where Human rights are actually violated by peacekeepers.

Then, the existing gaps in mechanisms of accountability and responsibility demonstrate the legal uncertainty with respect to the attribution of responsibility. The UN is not directly party to the body of international Human rights treaties and States remain the primary guarantors of Human rights. In addition to its rules for attribution, international States' responsibility has a fundamental reparatory function aimed at ensuring that damage caused by a violation of international obligations is remedied.
However, both adequate reparation for Human right's violations and the necessary political will to ensure Human rights violations by peacekeepers do not occur are notable for their absence in practice. Human rights standards must establish the boundaries for the work undertaken in peace operations[285].

The military contingents of peacekeeping operations have a specific position since their status is determined by the SOFAs. According to these agreements, they cannot be sued

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[282] F.Mégret & F.Hoffman, The John Hopkins university Press, Vol 25, n°2, *« The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities* », 2003 p.317.
[283] Bianchi A., *Human rights and the magic of jus cogen*, The European Journal of International Law, Vol.19, N°3, 2008, p.495.
[284] F.Mégret & F.Hoffman, The John Hopkins university Press, Vol 25, n°2, *« The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities* », 2003 p.317.
[285] Rachel A. Opie, *Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility*, 2006 N.Z. L. Rev. 1, 34 (2006) p.31.

before the internal mechanisms of the UN as other categories of the UN personnel. Their status is giving them the protection to be prosecuted and sentenced only in their home State. However, as it was demonstrated all along this work, many Troop-contributing Countries do not start any procedure against the peacekeepers accused of Human rights' violations[286].

But the legal principle of being prosecuted in its home country is questionable in itself. Indeed, as a statement of the obvious, each State has a different judicial system ; more or less efficient, strict, or severe. Thus, for a same fact, two peacekeepers who committed the exact same wrongful act could face a totally different sentence or even judicial process just because of their different nationality. This is one argument showing that even the current system is not satisfactory regarding this aspect; even though States would systematically sued their wrongdoer peacekeepers, the difference of sentences between national criminal system would be problematic.

In this regard, it could be for the best that the UN creates its own judicial mechanism for peacekeepers. That system could be especially and only for military contingents, but would give proper and equal answers for the committing of Human rights violations.

Furthermore, it can be very accurate to distinguish which violation is in question. Indeed, sexual abuses, shooting of civilians committed by few peacekeepers on one side, and the omission of peacekeepers as a whole in Srebrenica or the unconscious spread of cholera in Haiti on the other side. Evidently, any kind of violation is tragic and need a legal response. But the second aspect developed here, especially the Haiti case, is part of extraordinary or unexpected events.

As it was mentioned during this work, extraordinary responses can be brought to face extraordinary events. For instance, a special fund was provided for the victims of the 9/11in order to face this unexpected event[287]. The case of Haiti increased the negative critics towards the UN, but it is crucial to understand that if the UN would recognizes its

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[286] Christopher Leck, "*International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct",* 10 Melb. J. Int'l L. 346 2009, p.352 & 353.

[287] September 11th Victim Compensation Fund ; https://www.vcf.gov/

legal responsibility, it would then be liable to compensate all the victims and family of the dead. Such a scenario would bring the UN down.

The attribution of the responsibility to the UN may seem an appropriate solution if the UN has the guarantee to not be held responsible to give the financial reparation in case of a global violation of Human rights. The State's responsibility seems currently to be the easiest response, but probably not the most efficient one even though many scholars seem favorable to it[288]. States are the actors of public international law and can in case provide some financial reparation.

States are seen has immortal money donors, but this can have direct consequences on the behavior of States ; their involvement in the UN activities and especially peacekeeping operations. The State of the Netherlands withdrew most of its action in the UN after the massacre of Srebrenica and the involvement of the responsibility of the Netherlands in judicial affairs[289].

The legal difficulty is to distinguish the responsibility of somebody's actions and the responsibility to give reparations. Traditionally the fact to be legally responsible leads to the duty to give reparations. The duty to provide reparations is the main problem concerning violations of Human rights committed during UN peacekeeping operations. Nobody wants to be the financial guarantor.

The absence of legal answer is bringing more and more tension to these situations. The tension brings progressively the Courts to think about the recognition of the UN responsibility, such as the implicit "*partial liability*" of the UN ruled in the latest Srebrenica case by the Court of Appeal of the Hague or by the European Court of Human Rights which speaks about a possible responsibility of the UN in the previous cases analyzed during this work[290].

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[288] Rachel A. Opie, *Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility*, 2006 N.Z. L. Rev. 1, 34 (2006) p.29 & 30.

[289] Van Willigen N., *A Dutch return to UN peacekeeping ?*, Internaitonal Peacekeeping, Vol23, N°5, 2016, p.703-704.

[290] "*Behrami and Ruzhdi Saramati vs France, Germany and Norway*." LawTeacher.net. 11 2013. All Answers Ltd. 05 2018 <https://www.lawteacher.net/free-law-essays/international-law/behrami-and-ruzhdi-saramati.php?vref=1>.

The absence of action from the UN brings the situation under pressure which could lead one day to the express recognition of the UN responsibility and duty to give reparation. In that situation, it seems appropriate to think about a legal process which would make possible to held the UN legally responsible while avoiding it to give remedies ; the international organization's life being in question.

Then, the question of giving remedies is another topic. As it was develop before, the creation of special fund in case of extraordinary event seem a good solution because based on solidarity and on the statement that such an event was unexcepted and unintended. In the case of more specific violation such as rape or killing of civilians, the question has to be dealt by the UN itself with its Member States. The direct liability of the UN seems more in accordance with the reality[291].

An internal judicial mechanism dedicated to military contingent could be provided in order to give similar sanction to peacekeepers from all countries. For the payment of compensations, the UN seems to be most direct actor able to give reparations to the victims. The financial impact would be still very high but would not put the UN in a dramatic situation. It would be then the role of the UN to sensitize its Member States to financially support the organization in its action to compensate victims; this would contribute to the implementation of individual's right to reparation under International Human Rights Law.

[291] Felicity Lewis, *Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress*, 23 S. Cal. Interdisc. L.J., 2014, p.622.

ABSTRACT

Abstract : The development of the peacekeeping operations during the second half of the 20th century brought into light new legal questioning that the UN and its Member States are nowadays facing. The phenomenon of violation of Human rights has increased and became a regular problem during the PKO. Moreover, these situations are facing a legal uncertainty ; the designation of the responsible is hard because of the different scale of control exercised both by the UN and the Troop-contributing States but also because of the immunity that enjoys the UN before any jurisdiction. Consequently, in many situations, the victims of Human right's violation are facing an absence of legal answer. Finally, the sensitive question of reparations towards individuals is before a legal gap : if the existence of an individual's right to reparation seems to appear in the international texts and customary law, in reality this right has difficulties to be claimed and properly applied.

key words: Peacekeeping, Human rights violations, Peacekeepers, Responsibility, Reparations, United Nations, Immunity.

word count: 31,057.

Abskrakt : Rozvoj mírových operací ve druhé polovině 20. století přinesl nové právní otázky, kterým dnes OSN a její členské státy čelí. Fenomén porušování lidských práv se rozšířil a stal se během MO běžným problémem. Navíc jsou tyto situace vystaveny právní nejistotě; určení odpovědnosti je těžké z důvodu různého rozsahu kontroly prováděné jak samotnou OSN, tak přispívajícími státy, ale také kvůli imunitě, kterou má OSN před jurisdikcí. Proto v mnoha situacích čelí oběti porušování lidských práv absenci právní odpovědi. Konečně, citlivá otázka odškodnění vůči jednotlivcům je před právním nedostatkem: jestliže se zdá, že existence práva na náhradu fyzické osoby se objevuje v mezinárodních textech a v obvyklém právním řádu, ve skutečnosti se toto právo obtížně nárokuje a správně uplatňuje.

klíčová slova: Mírové operace, OSN, Odpovědnost, Odškodnění, Imunita, Porušování lidských práv.

počet slov: 31,057.

Résumé : Le développement des opérations de maintien de la paix au cours de la seconde moitié du XXé siècle a fait émerger de nouveaux questionnements juridiques auxquels l'ONU et ses États membres sont aujourd'hui confrontés. Le phénomène de violation des droits de l'Homme s'est développé et devenu un problème récurrent des OMP. En outre, ces situations font face à une incertitude juridique ; la détermination du responsable est laborieuse en raison des différentes échelles de contrôles réparties entre l'ONU et ses États contributeurs mais aussi par l'immunité dont l'ONU jouit devant toute juridiction. Si bien que dans beaucoup de situations, les individus victimes de violations de leurs droits se voient sans réponse juridique. Enfin, la question sensible de la réparation envers les individus fait elle face à un vide juridique : si l'existence d'un droit à réparation semble apparaître dans les textes internationaux et la coutume internationale, ce droit peine à pouvoir être revendiqué et s'appliquer dans la réalité.

Ábstrac: El desarrollo de las operaciones de mantenimiento de la paz durante la segunda mitad del siglo XX, trajo consigo nuevos cuestionamientos legales que la ONU y sus Estados miembro enfrentan actualmente. El fenómeno de la violación de Derechos Humanos ha incrementado, y se ha vuelto un problema común durante estas operaciones de mantenimiento de la paz. Además, este tipo de situaciones se enfrentan a una incertidumbre legal: primero, porque la designación de responsabilidades puede ser difícil no solo por las diferentes escalas de control ejercidas tanto por la ONU como por los Estados contribuyentes de tropas, pero además por la inmunidad de la que goza la ONU frente a cualquier otra jurisdicción. Como consecuencia, en diversas situaciones se presentan víctimas de violaciones de Derechos Humanos que adolecen de una respuesta legal. Finalmente, la delicada cuestión de las reparaciones hacia los individuos se encuentra ante un vacío legal: en caso de existir un derecho a la reparación por parte del individuo se vislumbra en los tratados internacionales o el derecho consuetudinario, la realidad es que este derecho resulta difícil de ser reclamado y propiamente aplicado.

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