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The Responsibility of UN for violation of International Human Rights Laws that made by Peacekeeping Force

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Declaration

BELAYNEH FOKORA, I hereby declare that this research is original and has never been presented in any other academic institution. Where other people‘s works have been used and or referred to, acknowledgments have been duly made.

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Key Words

United Nation Organization, Peacekeeping Force, International Human Rights Laws, UN Charter, Troops Contributing States, UN Peace Keeping Operation, International Court of Justice, Human Rights Violation and Effective Control Test.

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Acronyms

UN =	United Nation Organization
UNTSO =	United Nation Truce Supervision Organization
MONUC =	United Mission in Democratic Republics Congo
OIOS =	United Nation's Office of over Sight Service
ITCA =	International transitional civil administration
ICJ =	International court of justice
ONUC =	Operation des nations unies au Congo
VCLT =	Vienna convention on law of treaty of 1986
UDHR =	Universal declaration on human rights
ILC =	International law commission
ICCPR =	International convention on civil and political rights
DARIO =	Drafted articles on international organization
TAA =	Transfer authority agreement
DPKO =	UN department of peace keeping operation
SRSG =	Special representative of security General
KFOR =	Kosovo force
UNMIK =	United nation mission in Kosovo
EctHR =	European court of human rights
ECHR =	European convention on human rights

Abstract

UN aimed to promote and encourage the respect for human rights and freedoms for all without distinction as to race, sex, and language, or religion. In view of achieving this goal the UN pioneered peacekeeping force in 1948 with establishment of UN truce supervision organization (UNTSO) in the Middle East. In early time UN peacekeeping force was primarily limited to maintaining cease fire and resolving dispute peaceful between sovereign states. Unlikely at present time, UN peacekeeping force has been involving in multidimensional activity and in non-international armed conflicts in the view of bringing peace and security. However UN peacekeeping force while accomplishing these tasks has been involved in violation of human rights of local peoples in host state departing from their aim. This raises question of responsibility of UN for the violation of human rights that made by peacekeeping. To this end, first it determined the applicability of international human rights law to the UN and it established that the UN bound by international human rights laws since it possessed international legal personality. If it said this, then UN responsibility for violation of human rights should be determined. The UN has no its own peace keeping force rather it depends on contribution its member states. This raises question of attribution of the conducts of peacekeepers. In this regard “effective control test” which is recognized by ILC is relevant. When

UN exercised effective control on peace keeping force and the letters acted in their official capacity thus, the UN is responsible.

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UNIT ONE: INTRODUCTION

1.1 Back Ground of the Study

The United Nation organization (here after UN) is an international organization founded in1945. It currently made up of 193 member states[1]. The mission and work of UN are guided by the purpose and principle contained in its founding charter. The charter of the UN was signed in San Francisco and is the foundation document for all the united nation work[2]

The UN was established to save succeeding generations from the scourge of war and its main purpose is to maintain international peace and security[3]. UN has many principal organs which designated to accomplish its task efficiently and effectively. These organs are established under article 7 of the united nation charter. These organs are General assembly, Security Council, economic and social council and international court of justice and secretariat[4]. To serve above stated purpose, the organization (UN) pioneered peace keeping in 1948 with the establishment of the UN Truce supervision organization (here after UNTSO) in the Middle East[5].In the early time, UN peace keeping was primarily limited to maintaining ceasefires and stabilizing situation on the ground, providing crucial support for political efforts to resolve conflict by peaceful means. Those missions consisted of unarmed military observers and lightly armed troops with primarily monitoring and confidence building roles[6]. Unlikely that of early role at present time, the UN peace keeping force has been involving in

[1]History of the United Nations, available at: hhtp://www.un.org/en/about.un, last visited on 5 October, 2016.
[2]UN peacekeeping operation :available at: hhtp://www.un.org/en/peacekeeping/operationearly.html, last visited on 5 october,2016
[3]Charter of United nations Organization (1945): its preamble reads that; to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind
[4] Ibid: art7
[5] See *supra* note2
[6] ibid

multidimensional activity like protecting civilians, assist in disarmaments, demobilization and reintegration of former combatants, support the organization of elections, protect and promote human rights and assist in restoring the rule of law[7].But departing from their duties and aims, while united nations peace keeping forces accomplishing its multidimensional tasks i.e., when performing its military and civil aspect activities has been involving in the violation of international human right laws. Since the early 1990's allegation of human rights violation by UN peace keepers emerged in Bosnia and Herzegovina, Mozambique, Cambodia, East Timor, Liberia, Sierra Leone and Guinea and continued to be documented well into 21st century[8]. Human right violation by UN peace keepers in the UN mission in democratic republic of Congo (here after MONUC) caused a public outcry in 2004, which led to an investigation by the United Nations office of over sight service (here after OIOS). The investigation eventually found "serious problems of sexual exploitation and abuse in the mission[9]. It is known that international organizations including UN were not signatory parties of those international human rights norms unlikely that of the state. This thing as it is, however the United Nations has been involved in performing different tasks in international arena. As it stated in above statements, while United Nations peacekeeping force deployed in view of bringing peace and order in host state has been involving in violations of human rights and freedoms which were guaranteed and protected under international, regional and national laws. Thus, this raises different questions.

[7] ibid

[8]UN: stop sexual abuse by peacekeepers; available at, http://www.hrw.org/news/2016/03/04/un-stop-sexual-abuse-peacekeepers.last , last visited on 5october 2016.

[9]ibid

1.2. Statement of the Problem

During the establishment of modern international legal system primary actors of international laws was only states and because of this, international laws only was considered as part of laws which regulates the relationship among states. But today, this conception of international law changed to include other international obligation that the UN and private individuals have in addition to the states[10]. To perform its activities effectively and independently, the united nation has got international legal personality and became the subject of international law[11]. When the United Nations functions military and civil aspects of activities in host state in view of bringing international peace and security, personnel of organization specifically United Nations peace keeping force has been violating human rights and freedoms of individual persons in host states[12]. Due to this violation, a lots of persons have been affected the human rights and freedoms. Also it is known that, international organizations generally and UN specifically are not signatory of those international human rights

[10]David P.Fidler: Subject of International law and GPGH; Available at; www.who.int/trade/distance-learning/gpgh/gpgh7/en/index3.html. Last visited on 4 junuary,2017

[11] See infra note ,17

[12] See supra note,8

treaties and conventions unlikely that of the sovereign states. Thus it has been unanswered questions for a long time, whether the international treaties and conventions are applicable for the violations of human rights that made by United Nations peacekeeping force and responsibility of UN for those violation human rights. To put it in short and crystal manner, UN would be responsible for acts of peacekeeping force under the ambit of international human rights laws is the questions. Hence answering these questions is very foci point for the research.

1.3. Objectives of Study:

This study basically has two objectives. These are general objective and specific objective.

1.3.1. General Objectives

The general objective of study examining and revealing applicability of those international human right laws on UN and its responsibility for violation human right made by its own peacekeeping force.

1.3.2. Specific Objectives

Based on the general objective of the study, more specifically the study sought and examined;

- Existence of any legal frame work that designated to govern the deployment of the united nation peace keeping force in the target state.
- Whether the UN organization can participate in signing international human rights instrument or not. I.e. to test existence of any lee way and options that enable UN in participating signing international treaties and conventions.
- The legal foundation which the UN bound by international human right law.
- How and for whom the conducts of UN peacekeeping force could be attributed, whether it to be UN itself or troops contributing state.
- How the conducts of the peacekeeping force attributed and what kind of parameter or yardstick is used.
- For which acts of peacekeeping force UN would be responsible.

1.4. Research Question

In order to attain the above objectives the research formulated the following research questions.

- Are the international human rights laws applicable for the activity of UN, specifically to the acts of UN peace keeping force?
- Is it possible for the UN to participate in signing international conventions, like that of the sovereign state?
- Are there any explicitly or impliedly stipulated provisions under UN charter that regulate the deployment of UN peace keeping force?
- Are those convention and treaties signed by states are entirely transposable to UN?
- To whom the conduct of UN peace keeping force should be attributed, whether it attributed to UN itself or to troops sending state?

- What kind of parameter can be used to attribute the conduct of peacekeepers?
- When and for which act UN can be responsible and to which extent its responsibility extends?

1.5. Significance of the Study

After study analysis and examines the existed literature, laws and practice on the area of the problem, it will have the following implications.

- Through revealing responsibility of UN under international convention and treaties, it helps international community to be aware this and to exercise their rights against UN when it's peacekeeping force violated human rights.
- It gives awareness to peacekeeping force and helps in reducing the violation human right.
- It helps the victims of human rights violation to claim redress from UN when the latter exercised effective control over national contingent.
- It also aware peace keeping force not to commit those acts that violates individuals' rights and in turn this saves them from becoming criminals.
- It helps international courts in determining the conducts and attributing the same without any ambiguity.
- It explored and revealed the possible ways that the UN can participate in signing international human rights laws in turn this has great importance in protecting and respecting of human rights

1.6. Scope of the Study

The research is doctrinal research. Thus the research is highly dependent on the literature of the subject matter. Regarding the scope, the research basically focused on the responsibility of UN for violation of human rights

that made by peace keeping force. To this end, the research examined the applicability of international human rights law to UN. The research only examines responsibility of UN for violation of human rights that occur by commission rather than omission.

1.7. Limitation of the Study

While I conducted this research, following problems were faced.

- The lack of relevant materials to conduct research like books well networked computer.
- Time shortage due to existence big work load that I have been accomplishing.
- Financial problems

However, despite of these factors, the possible of attempts were made to conduct research in the way it attains its purpose

1.8 Research Methodology

1.8.1. Research Method

As it described in the scope of study, the research is the doctrinal research. Hence study begun with analyzing and reviewing the existed literature, relevant cases on the area, international laws, and the current practice of UN and relevant laws on the subject matter. By doing this, the study answered formulated research questions.

1.8.2. Sources of Data

In trying to obtain necessary data, the study employed both primary and secondary source of data. Then in this regard international laws, books, related research papers on the area, cases, conventions, DARIO(draft articles on international organization, reports and bulletins of UN Nations and other relevant materials were used.

UNIT TWO: GENERAL OVERVEIW OF UN AND PEACEKEEPING FORCE

2.1 History and Purpose of United Nation

On Octobers 1945 UN official comes in to existence when the representatives of 50 countries met in San Francisco at the international conference on international organization to draw up the United Nations charter[13].The UN aimed to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to establish conditions under which the justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedom[14]. In order to handle the complex task of getting its members states to cooperate most efficiently, the UN today is divided in to five branches. These principal organs are general assembly, Security Council, international court of the justice, economic and social council and secretariat[15].

2.2 Legal personality of United Nations

International legal personality gives an entity to legal rights duties which can be enforced before an international or municipal tribunal. The classical era of international law was dominated by the positive view that state was the exclusive legitimate legal persons on the international plane. This

[13] http://www.un.org/about un/San Francisco/history.htm/,last visited on 5 October 2016.
[14] See *supra* note.3
[15] See *supra* note.4

system is said to date back to the treaty of Westphalia in 1648 and the shift to a system of sovereign state regulating their relations with each other. [16]
Since the inception of the United Nations (UN) and the end of the Second World War, the scope of international legal personality has expanded to 'non – state entities'. Since the *reparations for injuries case*[17], it has been well established that non – state entities may possess international legal personality separate from that of its members. The international court of justice (in here after ICJ) found that the UN had a derived legal personality implied by the UN charter and the organization's given functions, and merely because it was recognized by member state alone. Legal personality must have been intended; otherwise the UN would not be able to carry out its purpose as intended by its founding members. This point was confirmed in the advisory opinion concerning the *legality of the use of nuclear weapons case*[18], were the ICJ stressed *that the legal competence of non-state entities was governed by the 'principle of specialty' meaning that the states can award them with powers limited to their function* [19]. Hence, whilst states have original personality following them a general competence and equal capacity under international law, non – state entities only have personality to the degree necessary for the achievement of their roles with in the international legal system. Thus the approach taken in relation to legal personality of non –state entities is functional rather than territorial.

In above discussion it was established that the legal personality of the UN, however this would cause the question of whether this legal personality can be extended to the united nation peacekeepers and the issue of existence of

[16] The treaty of Westphalia of 1648 brought the 30 years' war to an end. It is broadly accepted that the treaty defined principle of sovereignty legal equality and international law.
[17] Reparation for injuries suffered in the service of united nation ICJ rep 1949 p.179
[18] Advisory opinion concerning the legality of the use by a state nuclear weapons in armed conflict ICJ,rep1996
[19] Interpretation of the agreement of 25 march1951between WHO and Egypt, advisory opinion of ICJ 20 December 1980,reports 1980 p.89

any provision in united nation charter regulating deployment of the peacekeepers. The next topics of this section will address these questions.

2.3 The Extension of UN Legal Personality to UN Peace Keeping Force

It is known that peace keeping has been tools of the UN to maintain international peace and security for decades. However, the UN charter does contain its legal framework as peace keeping was not foreseen at the time drafting the document. Establishing peacekeeping operation the UN is thus required to take adhoc measures, which can be taken in compliance with a number of instruments adopted or concluded to regulate the legal status of such operations[20]. Over time the content of these instruments has become more or less a uniform pattern with the result that a peace keeping missions is established by Security Council or general assembly resolution that set out the mandate of the mission[21].

The power UN organs to establish a peace keeping operation drive from article of 7(2) UN-Charters which provides a general authority there to. Furthermore, when these organs deem it necessary for the performance of its functions[22], the UN charter also grants specific power to create subsidiary organs to the general assembly by article 22 and Security Council by article 29 UN charter. The ICJ confirmed in the *'certain expense case'* that the UN peace operation in the Congo (ONUC) was a subsidiary organ of the Security Council[23]. Thus, the UN peace keeping operations are subsidiary organs of the main organ by which they have been established. The legal frame for the actual conduct of peace keepers reflects their status as UN organs and as a result they are also subject to the law applicable to

[20]Marieke van zantvourt; the UN and international human rights law ,*Analysis of the extent to which the UN and UN peacekeeping forces are bound by international human rights law*: last visited on 14 November 2016 p.12

[21] ibid

[22] ibid

[23] ibid

the UN as a whole such as laws concerning the privileges immunities of UN personnel and responsibility[24].

The question that arises is whether peace keeping operations as subsidiary organs of the UN also enjoy international legal personality. According to klabbers[25], organs that perform tasks in name of the organization usually lack a separate legal personality which indicates that they should not be considered as actors in their own rights. However, marten zwanenburg argues that the legal personality[26] is identified with that of UN due to the fact they subsidiary organs.

John Cerone[27]supports this argument by stating that the reasoning of the ICJ in the reparations for injuries case can be extended to subsidiary organs because they may act qua government such as the UN administration in East Timor. JultaWarzer also supports the extension of the UN's legal personality to peace keeping operations because the forces are subsidiary organs. She asserts that since states cannot circumvent their international obligations by transferring power to an international organ. UN organs cannot escape its human rights obligations by creating subsidiary organs[28]. Therefore, one concludes that the international legal personality of the UN can be extended to UN peacekeeping operation. As peacekeeping force is subsidiary organs, the same law is applicable to them as governing the UN as whole. After having said this, it is essential to discuss the core business of UN peace keeping force operation. Thus, the next topic will deal with this matter.

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[24] ibid

[25]Klabbers, j. An introduction to international institutional law, new York: Cambridge university press, 2nd (2009) .p.39.

[26]Zwanenburg: UN peace operations between independence and accountability, Leiden: martinis nijhoff publishers, international organizations law review 5(2008) 23-47

[27]Werzer j: The UN human rights obligations and immunity; an oxymoron casting shadow on the transitional administration in Kosovo and east tumor. Nordic journal of int'l law 77(2008)105-140 p115

[28]Zanvourt, *supra* note 20.p.13

2.4 The Core Business of United Nations Peace Keeping Force Operation

Although not provided for in the charter the practice of peace keeping began in 1948 when the first United Nations military observers were deployed to the Middle East. During the ensuing cold war years , the goal of united nations peace keeping were necessarily limited to maintaining cease fires and stabilizing situation on the ground , so that efforts could be made at the political level to resolve the conflict by peaceful means. Several of the United Nations long standing peace keeping operations fit this “traditional” model.[29]

Traditional United Nations peace keeping operations are deployed as interim measure to help manage a conflict and create conditions in which the negotiation of a lasting settlement can proceed. The tasks assigned to traditional United Nations peace keeping operations by Security Council are essentially military in character and may involve the following[30]

- ✓ Observation monitoring and reporting – using static posts, patrol, over-flights on other technical means, with the agreement of the parties.
- ✓ Supervision of the cease fire and support to verifications mechanisms.
- ✓ Interposition as a buffer and confidence building.

By monitoring and reporting on the parties’ adherence to commitments regarding a cease –fire or demilitarized zone and by investigating complaints of violations, traditional peace keeping operations enable each parts to be reassured that the other parts will not seek to exploit the cease-fire in order to gain military advantage.

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[29] UN Document; United Nations Peace Keeping Operation Principle and Guidelines p.20 Available. At, http://pbpu.unlb.org/pbps/library/capstone_doctrine_eng.pdf., last visited on 7october 2016.

[30] ibid

With end of cold war, the strategic context for United Nations peace-keeping changed dramatically and the Security Council began to work more activity to promote the containment and peaceful resolution of regional conflicts. While the end of the cold war coincided with a general decline in the incidence of conflict around world, internal armed conflicts constitute the vast majority of today's wars.[31] Many of these conflicts take place in the world's poorest countries where the capacity may be weak, and where belligerents may be motivated by economic gain as much as ideology or past grievances.[32]

The transformation of the international environment has given rise to a next generation of "multi-dimensional "united nation peace keeping operations. These operations are typically deployed in the dangerous aftermath of a violent internal conflict and may employ a mix of a comprehensive peace agreement.[33]

Some multi-dimensional united nations peace keeping operation have been deployed following a request from the national authorities to support the transition to legitimate government, in the absence of formal peace agreement. In exceptional circumstances, the security council has also authorized multidimensional united nations peacekeeping operations to temporarily assume the legislative and administrative functions of the state, in order to support the transfer of authority from one sovereign entity to another or until sovereignty questions are fully resolved (as in the case of transitional administrations) or to help the establishment administrative structures that may not have existed previously.

Multi-dimensional United Nations peace keeping operations are deployed as one part of a much broader international effort to help countries emerging from conflict make the transition to sustainable peace.

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[31] ibid.21
[32] Ibid.
[33] Ibid.p.22

Within this boarder context, the core functions of a multi-dimensional United Nations peace keeping operation are to:[34]

- ✓ Create a secure and stable environment while strengthening the stats ability to provide security, with full respect for the rule of law and human rights
- ✓ Facilitate the political process by promoting dialogue and reconciliation and supporting the establishment of legitimate and effective institutions of governance.
- ✓ Provide a frame work for ensuring that all United Nations and other international actors pursue their activities at the country level in a coherent and coordinated manner.

In addition to monitoring and observing cease-fire, multi-dimensional united nations peace keeping operations are frequently mandated to provide operational support to national law enforcement agencies, provide security at key government installations, ports and other vital infrastructure, establish the necessary security conditions for the free flow of people, goods and humanitarian assistance and provide humanitarian mine action assistance

2.5 The Mechanism of Intervention Available to UN

International organizations, specially the United Nations, intervene in a multitude of ways that may, in some cases, involve the use of armed forces & civil administration of territory.[35]

2.5.1 Military Aspects: International Security Forces

The use of forces by international organizations comes with the more general frame work of the system collective security established by the

[34] Ibid.p.23

[35]Gabriel porratto and sylvan vite, the application of international law and human rights law to international organization(2006) p.9.

United Nations charter. This system provides for reallocation of the power to use force, which tends to be transferred states "utisinguli"to the world organization. The range of international forces that can be established in this context may be classified according to command structure.[36] Example UN mission in Democratic Republic of the Congo in 2004.[37]

2.5.2 Civil Aspects: International Transitional Civil Administration (here after ITCA)

In the 1990s, the Security Council began using its powers under chapter VII of the UN charter to establish ITCA. When faced with a humanitarian emergency (where massive, serious breaches of human rights occur in the context of armed conflict or the failure of state infrastructure), the security council generally authorize the deployment the peace keeping or peace enforcement operations.[38]

ITCAs are thus "One element among the others panoply of instruments available to the United Nations in order to maintain peace.[39]They have involved out of the peace keeping operation of the preceding decade, the civilian components of which were already involved, to a greater or lesser extent in activities relating to territorial administration.

2.6 Laws Applicable to the UN and its Peacekeeping Force.

International organizations are established by state by the means of international agreements and the ICJ asserts these relationships, as well as international organizations in general are governed by international law[40]. Beside subjects of international law can also be bound by international customary law. This type of law is the result of a state's general practice

[36] ibid
[37] See *supra* note 8
[38] Ibid.p.12
[39]Porretto ,*supra* note 35.p.12
[40] ibid

which is accepted and observed as a law i.e. from a sense of legal obligation[41] Although the application of customary law to international organizations such as the UN is not as obvious as it is for states, the UN as a subject of international law, is a certainly subject to ius cogens[42] and as many would argue to customary norms of human right as well[43].

In respect of human rights treaties, despite its international legal personality, the UN is in most case not able to become party to international instruments, because statehood is frequently a condition for acceding to such instruments. Even though the UN sponsored the major human rights treaties and even adopted the universal declarations of human right, it cannot accede to these instruments. This is consequence of the fact that the UN is an international organization and does not possess juridical or administrative power to disclose many of obligations that are enshrined in international treaties[44]. More over the UN lacks the legal and other structure for dealing with violation, of those international instruments. The result is that the UN is not a party to the instruments of international humanitarian law and international human rights law, which nevertheless form an important frame work in the work of the UN.

In this regard instruments of international humanitarian law, like the 1949 Geneva

conventions and its additional protocols may play a significant role in UN activities as peace keeping operations, the then secretary general Kofi Annan promulgated the 1999 Bulletin on the observance by UN force of international humanitarian law . The bulletin contains ten sections. In its first section it incorporated the field of application and provided that the principles and rules of international humanitarian law sets out in the

[41] ibid
[42]ibid
[43]See *supra* note,17
[44] ibid

bulletin are applicable to UN.[45]Since the UN bound itself by international humanitarian law, inter – alia, by promulgating the 1999 bulletin, this could serve as a precedent for binding the UN by international human rights law by means of enacting a similar document. Besides international law, UN peace keeping operations are also bound by the domestic law of their sending state and of the host state where they are deployed[46].

UNIT THREE: APPLICABLITY OF INTERNATIONAL HUMAN RIGHTS LAW TO UN

[45] Secretary general bulletin on the observance by UN force of int'l humanitarian law 6 august 1999 un .doc st/ sgb/1993/13

[46]Poretto, *supra* note 35.p.40

International human rights laws primary purpose is to protect individuals from abuses committed by their government and is formulated in terms of individuals against state. The right of individuals gives rise to obligations for the state to defend those rights through institutionalized means i.e., its legislative, administrative and judicial systems. As discussed above, international organizations possess a distinct legal personality from that of their member states. They can thus be addresses of international rights and obligations.

However, this international personality is not absolute, being limited by the scope of the organizations powers. In this regard it causes question if it said that the UN only possess limited legal personality since there is situation that, the UN acts like sovereign state[47]. This is when an international organization established an international transitional civil administration (ITCA) it exercises progressives of public authority affecting the livelihood and legal status of physical and legal persons. During this situation, arguing that the UN only possesses limited legal personality doesn't hold water.

The organization gets through specially established bodies and administrative structures, it adopts norms and make decisions regulating all aspects of daily life with in the territory; it gives itself the means to ensure execution of its roles and decisions by the population; it exercise judicial functions to varying extents. Accordingly, the organization, as subject of international law becomes the addressee of international human rights norms due to its territorial authority and "control" over the population. Consequently, in addition to any obligations of its member states or states contributing to the operation, the organization becomes an addressee of the rights and obligations deriving from international human rights norms.

The importance of human rights for the UN follows from the UN charter which places a high emphasis on international human rights standards.

[47]Zanvourt *supra* note20.p.15

Besides the fact that the preamble to the UN charter states that it is one of the purposes of the UN "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women". Article 1(3) of the UN – charter expressly refers to the protection and promotion of a respect for human rights as one of the UN's purpose. For this reason it can be concluded that the UN has an obligation to consider and promote human right in all its work this including UN peace keeping[48]. Beside article 1(3), also article 55 and 56 of the UN charter explicitly refer to human rights.

3.1 UN Bound by International Human Rights Law

It is known that UN is not capable of acceding to international human right treaties; it appears that the international organization is barred from being formally bound by human rights norms[49]. However, human rights standards have prominent position in the work of the UN and as such it is not surprising that over the last years a development in academic writing took place, bounding the UN by international human rights law[50]. The necessity to establish possible foundations for the applicability of human rights standard to the UN is mainly a corollary of the absence of the UN as a party bound to international human rights treaties refines which are open only to state parties. In general, there are three main ways in which the United Nations can be bound by international human rights law have been depicted. These are external conception, the internal conception& the hybrid conception[51].

[48]ibid
[49] ibid
[50]ibid
[51] Fredric Megret and Florien Hoffmann, the UN as a human rights violator?: some reflections on the UN changing human rights responsibilities :last visited on 14 November 2016. p.3

3.1.1 External Conceptions: (Bound by Customary Human Rights Norms)

This conception is referring to that the UN can be bound due to the fact that international human rights standards can reach the status of customary international law and there by become applicable to the UN and its peace keeping forces. This perspective starts from the point that the UN has international legal personality and therefore a subject international law[52].

Customary international law can be derived from actual state practice and sense of legal obligation[53]. Article38 (1) of the ICJ statute which comprises the source of international law describes international custom as evidence of general practice accepted as law.[54]The result of customary norm is that it is binding up on all state. Consequently, the states are not parties to the legal instruments in which the particular norm is restated are also bound regardless of whether they have given their consent. The most general accepted method of building international law is through actual practice that must have been followed out a sense of legal obligation, opinion juris[55]

Article 38 of the 1969 of Vienna convention on law of treaties (here after VCLT) confirms the third parties can be bound by obligation contained in treaty through international custom. Customary rule have involved primarily those human norms that are considered to be universal in character and that are proclaimed in various international instruments. Examples are several provision of universal declaration of human rights (here after UDHR) that have reached the status of customary international law with the result that they are legal binding up on all states. Despite the facts that it is nowadays still disputed to what extent the provisions have achieved the status of custom, the right to life the prohibition of torture and degrading treatment prohibition of arbitrary deprivation of liberty and the

[52]Zanvourt, *supra* note 20.p.16
[53] ibid
[54] ibid
[55]Zanvourt, *supra* note.20 p.16

prohibition of systematic racial discrimination are now recognized as rules of customary international laws binding on all states[56]

Currently, it has generally been accepted that the core right which are directly related to human existence are to be classify as "jus cogent[57] .it defined in article 53 of the 1969 VCLT as 'accepted and recognized by the international community of state as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of generally international having same character. In the *US vs.Matta-Ballestreos* case this is confirmed, there by emphasizing that the norm are "peremptory, enjoy the highest status within customary international law, are binding up on all nations and cannot be preempted by treaty.[58]By taking in to consideration the characteristics of iuos cogens norm it is now a day's hardly disputed that also the UN is bound by such norms. The ILC conformed in the context of its commentary to the 1986 VCLT that international organization are bound by norm of ius cogens because state should not escape from its obligation by creating an international organization[59].

3.1.2 Internal Conceptions :- (Via its Internal Legal Order)

This conception up hold the view that the UN and peace keeping force can be bound by international human rights law means of its own internal legal order i.e. by examining the UN-charter, the UN resolutions, UN reports, the capstone doctrine and the different documents with regard to the specific peace organizations. This perspective emphasizes that the UN's internal legal and constitutional order obliges the organization to pursue its own

[56]Vienna Convention on the Law of Treaties (1 969). Art 38
[57] ibid. art 53
[58] US vs. Ballesteros case .71f,3d.754.764
[59] Hoffmann, *supra* note 51.p3

purpose and principles, which includes promoting and encouraging respect for human rights and for fundamental freedom for all[60]

3.1.2.1The UN Charter

Starting with the permeable and article1(3)UN charter which states that UN should strive for protection of respect of human rights, it can be concluded that the UN has an obligation to consider and promote human rights in all its work , including UN peace keeping force.

Additionally, there are other articles included in the UN charter referring to human rights, in particular are art 55. said article states in mandatory terms that the UN 'shall' promote a respect and absence of , human rights and fundamental freedoms for all without distinction as to race, sex, language or religious [61] . Consequently, a UN peace keeping force is obligate to promote the observance of human rights because it is subsidiary organ of the UN. The problem remains however, that the UN, charter sets not out in detail what is meant by these human rights. Nonetheless, many argue that the UDHR, ICCPR, ICESCR and other UN instruments on human right form an elaboration of the charters original vision of human rights, which the UN is obliged to promote and respect according articles 1(3) of the UN charter[62]. Therefore it can be reasoned that there is a legal expectation that UN and its organs will respects comply with the human rights norms that created and monitored under the auspices of the UN. Thus the international human rights laws are applicable to the activities of UN and its peace keeping force.

3.1.2.2 UN Resolutions

Although the resolutions of general assembly are not legally binding, they can certainly influence the development of international law. Organs of the

[60]Zanvourt, *supra* note20.p.20
[61] UN charter article 1(3).
[62]Zanvourt, *supra* note 20 .p.21

UN, including the Security Council and the general assembly are frequently considered as identifying customary role or general principles of international law in resolutions or statements, due to the UN universality of membership and extensive field of activity and interest[63]. Thus because the general assembly has adopted by resolutions the ICCPR, the UDHR and the conventions against torture and other cruel, inhuman or degrading treatment or punishment, the secretary general is obliged to conduct peace keeping operations in compliance with these treaties. This source of obligation is a compliment to the obligation of the UN to comply with human rights norms that have passed in to customary international law[64]. As a result it is not a relevancy whether it concerns customary international law because the UN peacekeeping forces are under the control of secretary general and must therefore be directed to comply[65].

The general assembly made several important resolutions & declarations with regard to human rights which called for broad ratification of the treaties and the need for more compliance and enforcement mechanisms[66].
UN Security Council Resolution 1612 on protection of children affected by armed conflict adopted by Security Council at its 5235th meeting (26 July 2005); this resolution in its preamble welcomed the efforts undertaken by UN peacekeeping operations to implement the Secretary General's zero tolerance policy on sexual exploitation and abuse and to ensure full compliance of their personnel with UN code of conduct, requests the secretary general to continue to take all necessary action in this regard and to keep security council informed and urges troops contributing countries to take appropriate preventive action including predeployment awareness training and to take disciplinary action and other action to ensure full accountability in cases of misconduct involving their personnel.

[63] ibid
[64] ibid
[65] ibid
[66] ibid

Resolution 1674(2006) Adopted by the Security Council at its 5430th meeting; On Protection of Civilian in Armed Conflict, in its preamble under paragraph 20 condemn all acts of sexually exploitation ,abuse and trafficking of women and children by military, police and civilian personnel involved in UN operations. Although it ensure that peace support operations employ all feasible measures to prevent such violence and address its impact where it takes place. Another relevant resolution in the context of international human right law and UN peace operation is the resolution that adopted the 1995 convention on the safety of UN and associated personnel. This convention starts it's saving clauses with *"Nothing in this convention shall affect applicability of international humanitarian law and universally recognized standard of human rights as contained in international instruments in relation to the protection of UN operation and UN associated personnel or responsibility of such personnel to respect such law and standard*[67]". Then as it inferred from these stipulations it can be conclude that the international human rights laws are applicable to the activities of UN.

3.1.2.3 UN Reports

When the time went by in relation with UN peacekeeping operation several reports by united nation organs were dedicated to this subject. In April 2016, the general assembly passed the report, UN to enforce zero tolerance policy on sexual exploitation and abuse, senior official tells member state. In this regard UN secretary general bank-moon stated that;

> *"The UN and he personally are profoundly committed to a zero tolerance policy against sexual exploitation and abuse by their own personnel. This means zero complacency when it received credible*

[67]GA Resolution. 49/59, adopted 9 December 1994, art.20 (a).

allegation and this to ensure that they are looked in to fully implementation and means zero impunity[68].

The head of united field support on March 2016 argued not to allow protectors to become predators[69].The 2000 Brahim report argued for robust operation and considered that the mandates should specify more on the operation power to use force[70].In relation with reports of UN, if it implemented as it planned and programmed it can said that the international human rights law were preserved and reflected in the works and activities of UN. Then it can be conclude that the international human rights laws are applicable to UN and its peacekeeping force.

3.1.2.4 The Capstone Doctrine

Capstone doctrine emphases on human rights and fundamental freedom are universal and guaranteed to everybody. It states that, for this reason the UN peacekeeping force should respect human rights and should strive for advancing human rights through the implementation of their mandate[71].In May 2008 the UN developed the capstone doctrine authoritive guidance for all UN personnel serving in the field and it UN headquarters on the many tasks that UN peace keeps are required to perform[72]

It is framework on the highest level and any subordinate directive guidelines, training material or other documents issued the department of field support should be in compliance with the principles and concepts that are enshrined in this doctrines. More over the doctrines states that "*one of the main tasks of UN peace keepers is to create a secure and stable environment while strengthening the ability of the state to provide security with respect for the rule of law &human rights*[73]*.* The peace keeping force must be able to recognize human rights violation or abuse and be prepared

[68]United Nation report to enforce zero tolerance policy ,April 2016
[69] United Nation report of March 2016; we must not allow protectors to become predators.
[70] Report of the panel on UN peace operations, A/55/305-S/2000/8009.
[71]Hoffman, *supra* note 51.p.3
[72] See *supra* note 29.p.6
[73] Ibid.p.23

to respond adequately with is their limits of their mandate and their competence. Under the pain of repetition the capstone doctrines' also declare that where UN personal commits abuse they should be held accountable.[74] Thus UN bound by international human rights law.

3.1.2.5 Alternative Approaches of the Internal Obligations up on the UN

Another way to approach the international rights norms being applicable to the UN and its peace keeping operations is by so called 'axiomatic approach'. This approach is identified by Andrew clap ham and signifies *"that the UN is bound to respect human rights because it has unilaterally declared that it expects its personnel to act in accordance with the UDHR and as if it were itself bound[75]".*Due to the existence of many official training manuals and courses on duty of UN personal protect and respect human rights, it become clear that and the organization and its personnel, should respect international human rights. Nigel white and Dirk klaasen argue that *"the UN charter and the human right instruments under the auspices of the UN form a constitution[76]".* According to them human rights are mentioned is the UN charter and further developed by UN resolutions and UN supported instruments that governs the UN practice such as the UDHR, ICCPR, and ICESCR& Torture convention[77]. This approach asserts that states cannot create as organization to escape from its international obligation and therefore the human rights derived from afore mentioned instruments form part of a 'UN constitutions' that not solely applies to the member states, but also 'constitutionally' to the organization itself [78].

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[74] ibid

[75]Clapham, A: Human rights obligations of non-state actors, oxford university press(2006) p.65

[76]Zanvourt, *supra* note 20.p.25

[77] ibid

[78]Jondini,m UN peace operation j, last frontier of the extra territorial application of human rights law;mil&l.war rev(2005)

3.1.3 The Hybrid Conception (UN Via Through its Member States)

Megret and Hoffmann call it the hybrid conception – this conception state that UN is bound "transitively" by international human rights standards as a result and to the extent that its members are bound[79] . This approach follows the reasoning that states should not allow to circumvent human right obligations by establishing an international organization to do the "dirty work"[80]. This approach has been affirmed by the European courts of human rights in the *Bosphorus case* concerning member states under the European convention for the protection of human rights & fundamental freedoms & their transfer of sovereign power to the European Union[81].From this perspective, UN peace keeping forces are bound by international human rights norms due to the fact that their sending states are states parties to human rights instruments. Although originally the application of these treaties contain articles limiting their applications to situation with in a state's territory only, this is extended since human rights treaties contain articles limiting their application to situations with in a state's jurisdiction[82.] The human rights commission confirms in the *Lopez Burger vs. urgency* case that in certain circumstances jurisdictions could be extended outside the states territory on the condition that it would not infringe the sovereign of another states[83]. The extension of the jurisdiction of human rights treaties outside the territory of state parties is called extra territorial jurisdiction or extra territorial applicability. The result of their principle is that the obligation of states to ensure compliance with a human rights instrument simultaneously are extended to its acts or omissions abroad for example during peace keeping operations. However it is argued that this argument

[79] Hoffmann, *supra* note 51.p.318
[80]Zanvourt ,*supra* note 20,p.25
[81]ibid
[82]Oppenheim r, R Jennings & watts, Oppenheim's' int'l law (Longman Harlow1992) p.456; Jurisdiction concerns essentially the extent of each states right to regulate conducts on the consequence of invents.
[83] Lopez Burgos vs. Uruguay, HRC 29 July 1981

shows the extra territorial applicability of human rights obligations on the member states rather than the UN bound by these norms.

3.2The Options Open to UN for Participation in Human Rights Conventions

In preceding topics, it established that the legal bases or foundations UN to bound by the international human rights law and it is said that united nation on organization and its peace keeping forces are bound by the international human rights laws. This topic designed to answer two questions. The first one is that, it is possible to the UN organization to participate in signing international conventions that is like of the sovereign states? If the answer is affirmative, the second question is one those conventions and treaties signed by states are entirely transposable to the organization (UN)?

When an organization adopts territorial authority and establishes governmental bodies similar to those of states, exercises authority over the territory and its population that clearly involve "personal" powers devolving from territorial jurisdiction. This raises the primary question whether the defacto assimilation of the international organization to a state, through exercise of the typical function of the state apparatus, can translate in to dejure assimilation as regards the organization adhesion to human rights. Given the "functional "nature of the personality of organizations and the absence of any international rule recognizing the several capacities of all organizations to conclude any treaty, it doesn't appear to formulate a general rule concerning the capacity of organization to be bound by conventional human rights norms. The answer must be sought in the rules of the organization that is the internal law of each organization in so doing, account must be taken not only of its constitutive act but also its activities, the organizations effective status is an important as its normative rules. This conclusion appears to comply with the letter and spirit of the 1986 Vienna convention[84]as well as the case law of ICJ. Consideration must be

[84] Under article 2(1)(J) (1986) of the Vienna convention ;rules of international organization means in particular the constituents instrument , decision and resolutions adopted in

given to the organizations "constitutional" treaty, "derived law" and ulterior practice. A global examination of all these elements is needed in order to verify on a case by case basis whether the organization can become a party to international human rights treaties. As P Klein states clearly, "*when organization hesitate about adhering to major multilateral treaties, the obstacles appear, in reality, more political (or even psychological) than truly legal*[85]*".* This is particularly true for the treaties which prevent organization from participating in normative processes on an equal footing with states[86].indeed, any organizational whole internal rules and effective powers allow it to conclude these instruments should have the right to become a party to them. The real question is whether the organization has the indispensable physical and legal means to implement the obligations set out in relevant conventions. It suffices to observe, in this respect, that the law of treaties provides the means to surmount certain obstacles that may arise. In particular, an organization could always make reservations to human rights treats at the time of adhesion by reason of its limited material capacity to fulfill certain obligation[87].

One possible solution allowing international organization to participate fully in human rights conventions would be to modify the instrument themselves. The aim this modification would be to widen the list of potential parties beyond states. This is politically viable possibly and would relatively simple from a technical view point. The adhesion of an international organization to a multilateral convention would have a great symbolic importance. It would be clearest solution, allowing the organization to express also explicit commitment to human rights, as a distinct entity from with member states. An alternative such adhesion would be for international organization to participate in one or more treaties through "adhoc adhesion" in the

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accordance with them and established practice of organization

[85]Poretto, *supra* note 35,p.42

[86] ibid

[87] ibid

framework of particular operation or ITCA. This would allow the organization to make a commitment to respect and important conventional obligations in relation with the activities of specific operations. It goes without any human right convention could be modified to make express provision for the adhesion of international organizations. However it may also be possible to achieve such conventional amendment within the lex late, by virtue of non-conventional norm or objective procedure. The principle of effectiveness also supports this argument. It has already been shown that, in the domain of humanitarian and human rights. This principle determines the scope of applicability. Humanitarian law applies whenever there is an effective armed conflict and human rights rule apply whenever there is effective exercise of public authority, regardless of the precise legal basis for this situations. It could be thus be argued that operation this fundamental principle requires a widened regarding of the adhesion clause of human right treaties, to the extent that international organizations actually exercise prerogatives of public power in a country. Such evolutionally interpretation can open these treaties to non-state parties. An alternative to direct participation in such treaties is foreseeable an adhoc declaration committing the organization to respect & implements at least some conventional obligations. This would overcome any objections to the formal adhesion of organizations to the underlying treaties on equal footing with state parties. Finally, it might be possible to set up from scratch in UN specific system of protection for fundamental rights. However this would undoubtedly be very complicated process, leading to futile duplication of laws that has already been codified for decades.

3.3 The Applicability of Human Rights Treaties to the Military Activities of UN in the Absence of Formal Adhesion

At the outset, it must be recalled that the personnel of an international organization are independent of their respective government, as well as any other member state of the organization. The concept of “international

personnel" is rather wide as it includes not only international officials but also for example, members of international armed forces placed at the disposal of the organization by states, as well as consultants and experts on mission[88].Such personnel are recruited by the organization and exercise their duties in the name of organization. Their status is thus governed by the organization's "internal law" which guarantees their independence from government influence. If the organization conducts an operation, its internal law will generally apply to implementing action. This is a consequence of the internationally established principle of autonomy[89]. However there is an important distinction. On the one hand, civilian personnel, generally recruited by contract, are subject to the organizations staff rules and regulations and any adhoc agreements governing specific mission. Accordingly, international civilian officers are only bound to observe international human rights norms with in frame work of their relations with the organization to the extent that it is bound by those norms. Military personnel, on the other hand, continue to be linked to their home states in some respects. As explained above, operations involving peace keeping forces are subject to "dual control" operational and strategic command is exercised by the organizations unified chain of command, whereas each contributing states (whether or not it is member) is responsible for the execution of orders and the administration of each contingent (or individual in the case of military observers). As a result, the application of human right treaties to military personnel depends on the organic relationship between the soldiers and both the conducting state and the organization. Therefore it is possible to envisage the application of human rights treats to the activities of these forces independently of the applicability of such instruments to the organization itself. All in all it can be concluded that international human rights laws are applicable to the activities of UN and its peace keeping force.

[88] ibid
[89]ibid

UNIT FOUR: RESPONSIBILITY OF UN AND ATTRIBUTION OF CONDUCT OF PEACEKEEPERS

In preceding chapters the study examined the applicability of international human rights laws to the activities of united nation organization in general and its peacekeeping force particular. Moreover it established that the international human rights laws are applicable to UN and its peacekeeping force activities. This chapter devoted to determine and answer the issue of attribution of the conducts of peacekeeping force. I.e. when UN itself become responsible for the violation of human rights that made by peacekeepers is the question. Since the UN doesn't have its own peace keeping force it is dependent on the preparedness of its member states to contribute troops, their force will be transferred to the operational command and control of UN by means of transfer of authority agreement between the UN and the individual troops contributing states.[90] Thus the chapter going to answer how and when UN become responsible for those

[90]zanvourt, *supra* note 20.p.33

violation of human rights that made by UN peacekeepers in the host state and the extent of its responsibility. But before going to deal with the responsibility of UN let's explore how the conducts of peacekeepers attributed

4.1 Attribution of Conduct of Peacekeepers

The International law commission (here after ILC) has to date provisionally adopted the draft articles on responsibility of international organization here after (DARIO).Some of which also touch on the responsibility of state. Among all these draft articles, article 7 of the draft articles (as the ILC explicitly indicated in its commentary) is the provision most relevant in terms of imputing the conduct of international originations.[91]

Article 7 set out the principle governing the attribution of conduct which includes acts and omissions[92] of organs placed at the disposal of an international organization by state. Peace keepers as members of the military force of states are undoubtedly elements of state organs but are placed at the disposal of the international originations by their states. Article 7 of DARIO, provide that*;*

> *The conduct of an organ of state that is placed at the disposal an international organization shall be considered under international law an act of the latter organization if the organization exercises "effective control" over that conduct.*[93]

Similarly article 6(1) of DARIO provided that;

> *Conduct of an organ of a state or an organ or agent of an international organization that in the performance of function of that organ or agent shall be considered as an act that organization under*

[91]ILC Drafted articles on the responsibility of international organization 2011.art7
[92]ibid
[93]Ibid. art 7

international law whatever position the organ or agent holds in respect the organization [94]

Both articles recognized the effective test as parameter to attribute the conducts of peace keeping force. As the ILC's commentary made clear, the effective control test is not applied generally to the overall conducts of the organ, but rather to each specific unlawful act in order to verify if the act in question of the organ was performed under the control of international organization or the troops contributing state.

If the unlawful act was executed on the instruction of the sending state the conducts should be attributed to the state[95].if the carried out of on instruction and control of the international organization, the act should be imputed to the international organization. Although article 7 has only been provisional adopted by ILC the rule that is it espouses the application of the effective control test to determine the attribution of conduct is the based on principle held by several scholars and international originations such as the UN[96].The effective control test itself as test for the attribution of conducts has been affirmed by a number of tribunals, including the ICJ in case such as *Nicaragua*[97] and *Bosnia genocide*[98].Article 7 or the principle of effective control has also been invoked in a number of recent cases such as *behrami* and *saramati*[99] Al-*jedd* and *HN* vs. the *Netherlands*,[100]altogether giving it significant weight in determination and of the attribution the conduct of peace keepers.

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[94] Ibid .art6
[95]ibid
[96]Ibid
[97] Military and Para military activities in and against Nicaragua(Nicaragua vs. us)(1986)ICJ rep 14
[98] Application of the convention on the prevention and punishment of crime of genocide (Bosnia &Herzegovina vs. Serbia and Montenegro) 2007 ICJ REP 142-5
[99]ECtHR, behrami v France(application no.7141/01.,saramati v. France Germany and Norway(application no.78166/01,admissiblity decision of 31 may2007
[100]AL Jeddah v. secretary of state defense 2007 UKHL58

Another outcome of the effective control test could be that it would lead to dual or joint responsibility i.e. where it is impossible to establish if the UN or the troops contributing country exercised effective control during the peacekeeping operation. This dual responsibility is incorporated under article 48 of the DARIO[101].

Generally it is possible to conclude that there are scenarios under which the UN or troops contributing states or both UN and troops contributing state jointly responsible for same internationally wrong of peacekeeping force.

In preceding section it established effective control test as a yardstick to attribute the conducts of peacekeeping force. But this raises question, what effective control test referring and when it can be said that the UN exercised effective control test.

4.2 Effective Control Test

There is no consensus to the precise meaning of effective control. In this regard Burke observes that" *what is really at issue in determining effective control is who had the ability to act to prevent misconduct or to punish the perpetrator*"[102].

Besides its incorporation by ILC for example, the Secretary General in his report to the 51 session of UN General Assembly states that "*the international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of UN[103]".*The command and control shows the nature of the authority exercised by the military commanders over its forces

[101] see *supra* note 91, art 48

[102]Sepideh Doust Mohammed: responsibility under int'l law for human rights violations committed by the personnel of UN peace support operation. (June 2014) P.35

[103] UNGA, report of the UN Secretary Generta,20 September 1996,UNdoc.A/5//389,p,6.para 17

Here the focus will be on peacekeeping operations that are under UN command and control and not the operations where the UN has solely political control. Since the UN does not have its own peacekeeping forces, it is dependent on the preparedness of its member states to contribute troops. When states are willing to provide troops, their forces will be transferred to the operational command and control of the UN by means of a Transfer of Authority Agreement (here after TAA) between the UN and the individual troop contributing countries[104]. The forces at the disposal of the UN are for the period of their deployment considered as international personnel under the authority of the UN.[105]

This means that the Security Council, or in some case the General Assembly, will maintain overall political control and authority over the mission, whereas the executive direction and control lies with the Secretary-General. On the ground, the forces are subject to the instructions of the UN Force Commander which is usually appointed by the Secretary-General with the consent of the Security Council. The force commander exercises operational control over the military component and determines the chain of command.[106] However, the level of command and control is difficult to determine since the UN has no agreed terms to designate this. Therefore, it might be the case that states use different terms while designating the same According to the UN Department of Peacekeeping Operation (DPKO), command "*is the authority vested in a commander of the armed force to the direction, coordination, and control of military forces*"[107]. Operational control is described as "*The FC has the authority to direct forces assigned so that the Commander may accomplish specific missions or tasks which are usually limited by function, time or location (or a*

[104]Gill.T.D&Fleck D :The handbook of int'l law of military operation new York oxford university press. (ed)(2010) p.135
[105] ibid
[106] ibid
[107]UNDPKO. department of field operation *authority, command and control in UN* peacekeeping opration,4 February 2008$4

combination), to deploy units concerned and/or military personnel, and to retain or assign separate tasks to sub units of a contingent, as required by operational necessities, within the mission area of responsibility, in consultation with the Contingent Commander and as approved by the United Nations Headquarters." [108]

The overall control on the ground is in the hands of the Special Representative of the Secretary-General (hereafter SRSG) which has authority over not only the military elements but also over the civilian part of the mission. The SRSG, or the Force commander in absence of the SRSG, is the Head of Mission and needs to report to the Secretary-General.[109] The level of command and control that is transferred to the UN may be included in the participation agreements and, or in a memorandum of understanding. Despite the fact that the UN has the assumption that it has in principle exclusive control over the national forces of the peacekeeping operation, in practice it never exercises full command, i.e. authority and responsibility on every aspect of the military operation and administration. This is also confirmed by the Capstone Doctrine: "*In the case of military personnel provided by member States, these personnel are placed under the operational control of the United Nations Force Commander or head of military component, but not under the United Nations command*."[110]Thus, the national forces remain organs of their contributing state with the result that the state retains full and exclusive strategic level command and control of its troops. Consequently, the national forces fulfill a dual role since they have the obligation to act in compliance with the interests of the UN when they are transferred to the operational command and control of the UN. Sometimes this forms a problem as troop contributing states do not respect the agreements relating to command and control, resulting in for example

[108] ibid
[109] UN DOC.A/46/185$7,M.C.supra note26,p.39
[110] See *supra* note 29

countermanded orders or the bypassing of the chain of command. Several examples can be mentioned, such as reports stating that then President Chirac of France bypassed UN commanders during the UN peacekeeping operation in the former Yugoslavia, and the case in Somalia where some national contingents during the UN peacekeeping operation first consulted with their national capitals while taking part in the operation[111].

In above topic study dealt with when effective control exists and what it meant. Then subsequent section going to answer how and when UN become responsible for the violation of human rights that made by UN peacekeepers in the host state and the extent of its responsibility.

4.3 Responsibility of UN

In order to be able to determine the responsibility of the UN, one should determine three thing, in first, it should established effective control test, in second place it should be determined whether peacekeeping operation is subsidiary organ of UN or not and lastly it should be determined the whether the conducts performed whether in official capacity or non-official capacity. In the following section each will be dealt in detail.

The ILC applied the rules on state responsibility by analogy on international organization and develop the draft article on the responsibility of international organizations. Although so far 66 draft articles have been adopted and the text is not binding instrument, it is widely accepted that most of these draft article reflects customary international law. Nevertheless, about the status of articles 7 DARIO and the existence of a rule on dual or joint responsibility has not yet reached consensus.

[111] Mohammad, *supra* note 102. p .35

With regard to UN peace keeping operations, the UN can be held responsible if one can establish that the UN had effective control over the national contingents and its soldiers while they committed an international wrongful act. This can occur by virtue of art 7DARIO which states that "*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 organization exercises effective control over that conduct.*"[112]

When it can be said UN has effective control over the conduct? If the operation in question is under exclusive command and control of UN in joint operation the international responsibility lies on the UN. In this regard the condition of effective control enjoys the support of most legal scholars and also the especial Rapporteur Gaja confirmed the important role of effective control: *"the internationally responsibility of the UN for combat related activities of UN forces is promised on the assumption that the operation in question is under the exclusive command and Control of UN in joint operations, international responsibility for the conduct of troops lies where operation command & control is vested according to the arrangements establishing the modalities of cooperation between states or state providing the troops to the UN. In absence here of, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation.*[113]

If all this said in relation with effective control test, let's deal with the legal status of peace keeping force. Article 6 of DARIO provides that; *the conducts of organs of international organization in the performance of function of that organ shall be considered as an act of that organization under international law whatever position the organ holds in respect of*

[112] See *supra* note 91. Art 7

[113] ILC, second report on responsibility of int'l organization by special Repporteur ,Mr. Giorgio Gaja(2004)UN Doc A.4/CN 4/54/$41

organization. [114] The position that the ILC has taken in drafting art 6 is interesting in view of the determining the legal status of the peacekeeping force i.e. whether the peacekeeping forces are subsidiary organ of UN or not. Also UN General secretarial appreciated position on the legal status of the peacekeeping force in response to an ILC invitation to comment on the issue of responsibility on international organization. The secretariat recognized in February 2004 (in response to an ILC invitation to comment on the issues of the responsibility of international organization) that "*UN peacekeeping force established by the Security Council or the general assembly is a subsidiary organ of UN.*"[115] The international responsibility to the UN is conditioned up on the assumption that the operation in question is executed under its exclusive command and control then peacekeeping force considered as subsidiary organ of the UN. That is, only peacekeeping operation conducted under UN command and control have the legal status of a UN subsidiary organ.

Evidently, the ILC felt that a separate article needed to be drafted to take in to account the sort of situation that UN peacekeepers and other similar state organs find themselves in and that art 6 would not apply ,notwithstanding the UN's view that UN peacekeeping force are subsidiary organ of the UN. In the ILCs' view, art 6 deals with the situation in which the lent organ or agent still acts to a certain extent of lending state. This occur for instance in the military contingents that a state placed at the disposal of the UN for a peacekeeping operation, since the state retains disciplinary powers and criminal jurisdiction over members of national contingent. Then the attribution of conduct to the contributing state clearly linked with the retention of some powers by that state over its national contingent and thus on the control that the state possess in the relevant respect.

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[114] ibid

[115] UN secretariat, responsibility of international Organization ,56th session UN DOC A/CN.4/545(25 June 2004)

It also facts that peacekeepers in some instances, persisted in seeking instruction from their governments before executing UN orders and that governments remained responsible for enforcing compliance by their peacekeepers with certain convention obligation to illustrate that state could continue to exercise some control over their lent organs. For example such as reports stating that then President Chirac of France bypassed UN commanders during the UN peacekeeping operation in the former Yugoslavia, and the case in Somalia where some national contingents during the UN peacekeeping operation first consulted with their national capitals while taking part in the operation[116]. During this situation the troops contributing state should be held responsible. However some argue that. *"UN had the authority and ability to exercise "effective control" over peacekeepers even as they believed that the UN wouldn't have the same degree of control and powers over peacekeepers as it would over its subsidiary organs"*[117].

In above section it determined legal status of the peacekeeping force and established that the peacekeeping force becomes subsidiary organ of UN if the latter exercised effective control and command over peacekeeping operation. This raises question that UNs' exercising effective control and command would make latter responsible for all misconduct i.e. for all form of human rights violation that made by peacekeeping operation in the host state? In regard with this question, the response is negative.

Article 6 of DARIO and its commentary (7) provided that; *the organ or agent acts "in the performance of function of that organ or agent is intended to make it clear that conduct is attributable to the international organization when the organ or agent exercises functions that have been given to that*

[116] Mohammed, *supra* note 102.p.35

[117]Leck, C. 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct', *10 Melbourne Journal of International Law* (2009),

organ or agent, and at any event is not attributable when the organ or agent acts in private capacity[118].

Then the in order to make UN responsible for the violation international human rights laws, it should made distinctions on the capacities of the peacekeeping force whether the human rights violated while the peacekeepers exercising in official capacities or in personal capacities.

If the peacekeeping force violated human rights while performing personal acts, in this case UN is not responsible. For example rape, gang rape, children prostitution, human trafficking would generally not incur the responsibility of the UN given that these acts cannot be considered part of the official function.

It should emphasize on the term "official capacity" to make distinction. In relation with determining which capacity is official capacity, the UNs' internal rule establishes. But exceptional, there are circumstance in which functions may be considered as given to agent or organ even if this not be based on the rules of the organization. This is also incorporated under the article 6 and its commentary (9). The other issue that should be answered is what if the peacekeeping force in official capacity exercised ultra vires?).
In this regard DARIO under article 8 provided that;

> *The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.*[119]

[118] *supra* note 91.art6 and its commentary(7)
[119] Ibid. art 7

The rationale for the attribution of ultra vires act to the UN is intended to preserve the rights of third parties (commentary 9 of article 6 of DARIO)[120]. Similarly, the UN has accepted responsibility for the ultra vires acts of peace keepers in ONUC and the UN emergency force who opened fire and killed civilians without any orders to do so [121]

The possibility of attributing to an international organization acts that an organ takes ultra vires has been admitted by the International Court of Justice in its advisory opinion on *certain expenses of the United Nations*,[122]

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4.4 The Responsibility of UN Peacekeeping Operations and Case Law

There are cases in relation to UN peace keeping operations and international responsibility that were ruled by European court of human rights (here after ECtHR).Recently in the *Behrami and Behrami v. France and Saramati v France, Germany and Norway* case[123] and the *Al Jeddah v. Secretary of State for Defence* case[124] organizational control was addressed with the focus on the question under what circumstances the wrongful acts could be attributed to either an international organization or a troop contributing country.

In the *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* case the applicants complained that the Kosovo forces (KFOR) in Kosovo violated their human rights guaranteed under the European convention on human rights and that this conduct was attributed to the individual states as KFOR was subject to the exclusive control of these states. The ECtHR rejected the claim, because it decided that the UN had

[120] Ibid. art 8
[121]Leck, *supra* note117
[122] ICJ. report 1962 .p168
[123] See *supra* note 99
[124] See *supra* note 100

‘ultimate authority and control’ and therefore the troop contributing states could not be responsible. The Court concluded that since KFOR lawfully exercised delegated Chapter VII powers of the Security Powers and UN Mission(UNMIK)was a subsidiary organ of the UN established under Chapter VII, the acts of KFOR and the inaction of UNMIK were in principle ‘attributable’ to the UN. The Court further noted that the UN possessed international legal personality separate from its member states and that it was not a party to the ECHR. Also, the operations were established under Chapter VII for the UN purpose to secure international peace and security which only could be effective with the support of the troop contributing countries. Consequently the Court ruled that the ECHR could not be interpreted in a manner which would subject the conduct of the parties which were authorized by Security Council resolutions. Thus the conduct of KFOR and UNMIK could not be attributed to the member states, since it neither took place on their territory nor by virtue of decision of their authorities. The ECtHR decided that the alleged wrongful conduct was directly attributable to the UN and therefore the cases as inadmissible

The ECtHR used in this case a different approach to decide on attribution of conduct, namely the ‘ultimate authority and control test’, instead of the effective control test adopted by the ILC, the UN and the majority of legal scholars.

In the *Al Jeddah v. Secretary of State for Defense* case the applicant complained that the British forces that were part of the Multinational Force in Iraq held him in detention without any access to court. The most important question was whether the UK was responsible for the wrongful detention or whether the UN was responsible as the acts were attributable to the UN because Security Council resolutions authorized the Multinational Force in Iraq. The House of Lords decided that the alleged wrongful acts were attributable to the UK and not the UN.

Concluding from the different decisions of the ECtHR on the same topic, one is able to see the difficulties in determining the attribution of conduct to international organizations or the troop contributing countries.

UNIT FIVE: CONCLUSION AND RECCOMMENDATION

CONCLUSION

In this research I examined responsibility of UN for the violations of human rights and freedoms that made by UN peacekeeping force. To this end the research examined the applicability of international human rights laws to the activities of UN.

The UN aimed to promote and encourage respect for the human rights. To achieve this purpose UN pioneered peacekeeping force in 1948. In early

time, UN peacekeeping force was primarily limited to maintaining cease fire and resolving conflicts between the sovereign states through peaceful means. Unlikely, at present time UN peacekeeping force has been involved in multidimensional tasks and in non- international armed conflicts in views of restoring peace and order. However apart from its aim, while accomplishing these tasks, the UN peace keeping force has been involving in violation of human rights of local peoples in host state. In this regard it remained an answered whether UN could be responsible for those the violation of human rights by peacekeeping force that contributed by member states since UN has no its peacekeeping force. This is basic point that triggered me to conduct this research.

To answer this question, in first the research highlighted the applicability of international human rights law to UN since UN has got international legal personality and it was a bearer of rights and duties. With this regard there are three main ways in which the UN bound by international human rights laws. These are external conception (bound by customary human rights norm), internal conception (via its internal legal order such as UN charter, UN resolution UN reports, capstone doctrine and axiomatic approach) and hybrid approach (via through its member states).thus the international human rights law are applicable to UN. Furthermore, also UN has option to participate in international human rights instrument up to its legal and material capacity permits. UN can be participatory in signing instrument through different possible ways like modification, adhoc adhesion and directly participation through making reservation for provision which its capacity limits.

If it said that UN bound by international human rights laws, then responsibility of UN for violation of human rights by peace keeping force should be determined. Answering, this question raises attribution of the conduct of the peacekeeping force. In this regard, ILC drafted articles on the responsibility of the international organization is very relevant. Among

those articles article 7 of DARIO recognized “effective control test” as yardstick to determine attribution of conduct. Article 6 provided how legal status of peace keeping force can be determined. In order to determine the responsibility of UN it should be established three things. The first one is existence of effective control by UN. In second place legal status of peacekeeping force meaning that whether the latter is subsidiary organ of UN or not and lastly the capacity in which the acts where performed whether peacekeeping force performed in their official capacity or personal capacity.

To be said effective control existed on the part of UN the latter must exercise overall control on the peacekeeping force. If the UN exercised effective control, then the legal status of the peacekeepers become subsidiary organ of the UN. If these two steps were proved, the remaining one is capacity issue. In this regard, if peacekeeping force acted in their official capacity, thus the UN is responsible. In contrary, if the peacekeeping force acted in private or personal capacity this cannot be attributed to the UN and in this case UN is not responsible for that acts. For example rape, gang rape, children prostitution, human trafficking cannot be performed in official capacity. However the UN is responsible for ultra vires acts if it performed in official capacity, this is intended to protect the rights of third parties. Thus, the human rights violated while peacekeeping force performing in their official capacities, the UN is responsible even the peacekeeping force acted beyond given authorities.

RECCOMMENDATION

The writer believes the following recommendation helps for determination of UN responsibility for violation of human rights and for its elimination and reduction.

- ✓ UN should be requested and allowed to participate in signing those international human rights instrument itself, like that of sovereign states. To achieve this, there are possible options. To accede already existed international human rights instrument, it can be done through modification, adhoc adhesion, enacting instrument that declare its adhesion. If it be coming conventions, its direct participation should be allowed. In both case UN should granted rights for reservation for those provisions which unable legal and material for its participation.
- ✓ In regard with determining its responsibility the ILC drafted articles on international organization is very relevant and immediately it should have to come in to force. So that attribution of the conducts of peacekeeping force can be determined without any ambiguity.
- ✓ Moreover in transfer authority agreement (TAA) the legal status of peacekeeping force should be clearly indicated.
- ❖ In order to eliminate human rights violations;
- ✓ Both UN and troops contributing countries should give adequate training for troops before their deployment in host state.
- ✓ In the status of force agreement (SOFA) the host state should secure the rights to prosecute those troops who violate human rights of local people in performing out of official capacity.

All in all it is crucial that the human rights violation should be eliminated, that the perpetrators are punished and that the victims are compensated.

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