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UN Personnel Accountability for Sexual Exploitation and Abuse: Identifying Normative Gaps

Prof. Donato Greco

SUPERVISOR

Prof. Domenico Pauciulo

CO-SUPERVISOR

Cassandra Mazzolini - 653552

CANDIDATE

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ABSTRACT

This thesis examines the accountability of United Nations (UN) personnel accused of Sexual Exploitation and Abuse (SEA), specifically focusing on personnel classified as UN officials and experts on missions. It assesses both the ability of the UN to enforce a robust accountability mechanism and the obstacles to this mechanism. Through an in-depth analysis of existing literature, normative instruments, and case studies, this research highlights gaps in the UN's accountability mechanism, mainly linked to the broad and inconsistent definitions of SEA, the challenges posed by immunities and privileges accorded to UN staff, and the absence of binding documents specifically addressing UN officials and experts' accountability. The latter showed that, although the UN is a central actor in advancing the accountability of its personnel, doing so requires the consistent involvement of Member States (MS). Revising UN investigation methods, enhancing its referral practices, and encouraging collaboration between States in initiating criminal proceedings are necessary initiatives to close the accountability gap. In addition, this research singled out potential breaches of international obligations related to international human rights law and international treaty law by the UN and its MS for failing to curb SEA. The significance of this research lies in its contribution to the analysis of the normative gaps impeding the accountability of UN officials and experts on missions for SEA, a topic understudied in current scholarship.

Keywords: Sexual Exploitation and Abuse, Accountability, United Nations, United Nations Officials and Experts on Missions, International Human Rights Law

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LIST OF ACRONYMS

CAR	Central African Republic
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIVPOL	Civilian Police
CPISA	Convention on the Privileges and Immunities of the Specialized Agencies
CPIUN	Convention on the Privileges and Immunities of the United Nations
CRSV	Conflict-Related Sexual Violence
DARIO	Draft Articles on the Responsibility of International Organizations
DARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GLE	Group of Legal Experts
HQ	Headquarters
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTFY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IOs	International Organizations
MINUSCA	United Nations Multidimensional Integration Stabilization Mission in the Central African Republic
MOs	Military Observers
MOU	Memorandum of Understanding
MS	Member States
NMS	Non-Mission Settings
OHCHR	Office of the UN High Commissioner for Human Rights

OIOS	Office of Internal Oversight Services
PKOs	Peacekeeping Operations
SEA	Sexual Exploitation and Abuse
SOFA	Status-of-Forces-Agreement
SPMs	Special Political Missions
TCC	Troop Contributing Countries
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDT	UN Dispute Tribunal
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNVs	United Nations Volunteers
US	United States
VRA	Victims' Rights Advocate
WHO	World Health Organization

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CHAPTER 1 – INTRODUCTION.

1. INTRODUCTION

"Sexual exploitation and abuse by humanitarian staff cannot be tolerated. It violates everything the United Nations stands for. Men, women, and children displaced by conflict or other disasters are among the most vulnerable people on earth. They look to the United Nations and its humanitarian partners for shelter and protection. Anyone employed by or affiliated with the United Nations who breaks that sacred trust must be held accountable and, when the circumstances so warrant, prosecuted."[1] These are the words of the former United Nations Secretary-General (UNSG), Kofi Annan, written in 2002 in his introductory note of a report on the investigation into the sexual exploitation of refugees by aid workers in West Africa. Discussion on SEA perpetrated by UN staff or related personnel initially gained momentum with reports of widespread use of prostitution by personnel working within the United Nations Transitional Authority in Cambodia in 1993. Before the mission, there were 6,000 sex workers in Cambodia; by the end of the mission, this number increased to 25,000.[2] From that point on, all the missions carried out by the UN were lambasted for a more or less elevated number of SEA allegations.[3] Initially, it was unclear whether these allegations were isolated actions or representative of a broader context of abuses perpetrated by UN-affiliated personnel.[4] The 2015 media uproar over the alleged SEA by personnel of the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), and against the French forces of Sangaris, has not been matched since. With each media crisis came a round of public outrage fueling academic research together with attempts by the UN to reform its framework aiming to address SEA by UN staff and related personnel.

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[1] UNGA, "Report of the Office of Internal Oversight Services on the investigation into sexual exploitation of refugees by aid workers in West Africa," (October, 11, 2002), A/57/465 at §3.
[2] Jasmine-Kim Westendorf and Louise Searle, "Sexual Exploitation and Abuse in Peace Operations: Trends, Policy Responses and Future Directions," *International Affairs* 93 (February 10, 2017): 365-87 at 366.
[3] See UNGA, "Draft United Nations policy Statement and draft United Nations comprehensive strategy on assistance and support to victims of sexual exploitation and abuse by United Nations staff or related personnel," (June 5, 2006), A/60/877 at §4. This draft policy statement suggests "that there are victims of sexual exploitation and abuse by UN staff or related personnel in almost all countries where the UN has a presence."
[4] Noelle Quénivet, "The Dissonance between the United Nations Zero-Tolerance Policy and the Criminalisation of Sexual Offences on the International Level," *International Criminal Law Review* 7 (May 14, 2010): 657-76 at 660.

The UN, aligned with the words of its former UNSG, has shown a willingness to take action to ensure that those who perpetrated SEA would be held accountable. To do so and based on the constraints faced by the organization, the UN published a wide range of documents, including some cornerstone elements such as the UNSG's 2003 Zero Tolerance Bulletin or the Zeid Report of 2005. Since 2004, at the request of the UN General Assembly (UNGA), the UNSG has also been compelled to publish an annual report presenting Special measures for protection from SEA and detailing the number of allegations per mission.[5] In parallel, since 2017, the UN has been disclosing online the details of the claims involving its personnel outside of Special Political Missions (SPMs) and Peacekeeping Operations (PKOs), usually known as non-mission settings (NMS). The growing public scrutiny and the blatant accountability gap convinced the organization to commission a draft Convention on Criminal Accountability of UN Officials and Experts on Mission.[6]

The implementation of effective legal accountability mechanisms by the UN when allegations of SEA have been substantiated has been hindered by various obstacles, which this study aims to explain with a particular focus on UN personnel not members of military contingents.[7] Nevertheless, members of contingents will not be disregarded due to their significance in UN deployments. This research will argue that the current accountability mechanisms are not effective enough as regards the gravity of the allegations against UN-associated personnel. Building on the existing body of literature, this research aims to shift the attention from the members of military contingents on whom most studies seem to focus, towards UN officials or experts on missions. Scholars and media have been focusing on members of military contingents while overlooking other categories. Despite the high proportion of allegations against military contingents within PKOs, the overall number of claims made against UN-associated personnel remains similarly substantial.[8]

SEA has been selected as the primary focus over other crimes committed by UN personnel due to the nature of gendered violence. It creates a paradox between the original mission of the UN and the impact of the actions of a few rogue agents. The choice was also influenced by the substantial number of allegations of SEA waged against UN personnel over

[5] More recently, the UNSG decided to disclose the nationality of the members of national contingents against whom allegations had been substantiated, adopting the naming and shaming strategy.
[6] Quénivet supra note 4 at 658.
[7] Usually, this category includes UN officials and experts on missions, this research does not focus on non-UN personnel who could be employed by UN entities to outsource some activities, especially in mission settings. However, this category could be mentioned if considered relevant.
[8] UN, "Data on Allegations: UN System-wide," un.org, (2024), https://www.un.org/preventing-sexual-exploitation-and-abuse/content/data-allegations-un-system-wide.

the years. Nevertheless, this choice does not negate all the other forms of misconduct UN personnel can engage in. SEA by a UN-affiliated staff is not like any other crime because of the particular imbalance of power between UN personnel and beneficiaries and the impact on the intimacy of the victims. Often, the population that principally falls victim to such crimes has access to little to no resources and has been fragilized by war, poverty, or severe natural disasters; however, such abuse can also occur between co-workers. Additionally, crimes committed by UN personnel do not only impact the agent involved but also tarnish the reputation of the UN. The inability of the international community to address the accountability gap for UN personnel harms the reputation of the UN even more. Letting these crimes go unpunished goes against the purpose of the UN.

First, this study discusses the definitions of key elements for this research, such as SEA and accountability, before offering a comprehensive overview of the existing legal literature on ensuring accountability for SEA perpetrated by UN personnel and members of contingents. Second, the research dives into the notion of responsibility in the case of SEA, exploring what entity can be held responsible when it occurs, focusing on the UN and States. Third, the regime of immunities granted to the UN and its personnel is examined, with particular attention paid to the legal framework underpinning this regime to assess whether such a regime prevents accountability measures from being enforced. Eventually, this study analyzes the actual handling of SEA allegations and the outcomes of the few completed trials.

1.1. Responding to SEA by UN Personnel: The UN in Difficulty

The UN had a significant impact by producing various documents that provided leadership with information to grasp the situation better and develop rules for UN workers. The knowledge produced by the UN is reflected in the current accountability mechanisms that address SEA by UN personnel.

1.1.a. The UN as a Norm Entrepreneur

In this situation, the organization's action is limited by nature as it cannot hold an individual criminally accountable. The UN significant contribution in this field lies in its

capacity to create knowledge and framework documents such as bulletins, reports, or draft conventions that can influence the development of norms relative to SEA.

The UN, specifically the Office of the UNSG, has engaged in the clarification of the rules UN personnel and related personnel were subject to when deployed under the UN banner, or at least this was their objective. Amongst the documents aiming at clarifying the rules as regards SEA, the UNSG published in 2003 its well-known bulletin entitled: "Special Measures for protection from sexual exploitation and sexual abuse."[9] The bulletin articulated standards of what is known as the Zero-Tolerance policy, which was later integrated into "the contracts, letters of engagement, and undertakings of all personnel."[10] The UN prohibits SEA and forbids its personnel from getting involved with local adult prostitutes; in the meantime, the organization strongly discourages sexual relationships between beneficiaries and UN workers to prevent any ambiguity.[11] The wording of the bulletin puts the differential power dynamics between beneficiaries and UN personnel at the core of its definition of sexual exploitation, including all categories of transactional sex, such as prostitution and survival sex.[12] Although better than immobilism, this strategy has flaws; while these standards have influenced the wording of the rules of conduct for peacekeepers, these are merely guidelines and, therefore, not legally binding.[13] In addition, the staff rules did not cover all categories of personnel and failed to account for UN civilian police (CIVPOL) and UN military observers (MOs), although enjoying the status of experts on mission.[14] Moreover, as mentioned previously these standards are not in adequation with provisions from international law.[15] Although essential in so many ways, standards established by the bulletin could not be used for criminal investigation and prosecution purposes because of the approach it has adopted: the Human Rights Approach.[16] Human rights law and international criminal law respectively focus on the State's responsibility and individual liability; therefore, the provisions of the Bulletin could not apply for criminal investigation or prosecution purposes.[17]

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[9] UNSG, "Special measures for protection from sexual exploitation and sexual abuse," (October 9, 2003), ST/SGB/2003/13.
[10] Elizabeth Defeis, "U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity," *Washington University Global Studies Law Review* 7, no. 2 (January 1, 2008): 185-214 at 195.
[11] Cassandra Mudgway, "Sexual Exploitation by UN Peacekeepers: The 'Survival Sex' Gap in International Human Rights Law," *The International Journal of Human Rights* 21, no. 9 (November 22, 2017): 1453-76 at 1454-55.
[12] *Ibid* at 1456.
[13] Defeis supra note 10 at 196.
[14] Quénivet supra note 4 at 663.
[15] Marco Odello and Róisín Burke, "Between Immunity and Impunity : Peacekeeping and Sexual Abuses and Violence," *The International Journal of Human Rights* 20 (May 5, 2016): 839-53 at 842.
[16] Quénivet supra note 4 at 668.
[17] Quénivet supra note 4 at 668.

To better understand the implications and prevalence of SEA in its various deployments, the UN has been commissioning reports to inform future developments regarding internal rules and to serve as working material for agreements with MS. A critical report stands out regarding SEA committed by UN personnel and members of contingents: the Zeid report commissioned by the UN after another scandal, fueled by allegations, broke out in 2004.[18] The report puts forward several recommendations divided into distinct categories, notably to create a mechanism to ensure "individual disciplinary, financial and criminal accountability."[19] One of the recommendations of this report was for the UNGA to ask the UNSG to convene a Group of Legal Experts (GLE).[20] In August 2006, the recommendation became a reality. It resulted in issuing a report examining the accountability of UN officials and experts on missions accompanied by a draft for a new international convention[21] to ensure the accountability of UN-related personnel.[22] Some reviews can also end up questioning the conceptualization of SEA. An independent review of SEA by international peacekeeping forces in the Central African Republic (CAR) was published in 2015 and recommended reconceptualizing SEA as Conflict-Related Sexual Violence (CRSV) as it is defined in the UN working definition.[23] Mudgway deems this option as less ambiguous than the current framing of sexual exploitation.[24] The report is focused on international personnel and primarily addresses allegations involving children. It is worth noting that while, in many cases, SEA could be linked to instances of survival sex, the report on CAR did not mention survival sex per se.[25] Survival sex is problematic as it is challenging to find a legal framework under which this could be considered systematically unlawful, and abandoning the concept of SEA to turn to CRSV would not solve this issue as it would exclude situations of survival sex involving adults.[26] Mudgway argues that this reconceptualization would not fill the accountability gap alone and would do little to pressure States to investigate and prosecute alleged perpetrators as UN policies focus primarily

[18] Anthony J Miller, "Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations," *Cornell International Law Journal* 39 (December 1, 2006): 71-96 at 73. Although not the first scandal linked to SEA allegations tarnishing the UN's reputation and legitimacy, accusations of SEA by humanitarian workers in West Africa triggered the publication of the 2003 Bulletin after UNHCR asked the OIOS to investigate the allegations. Similarly, a surge of claims against peacekeepers engaged in the UN Operations in the Democratic Republic of the Congo (MONUC) triggered the commission of the Zeid report.
[19] UNGA, "A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations," (March 24, 2005), A/59/710 at 2; Miller supra note 18 at 73.
[20] UNGA supra note 19 at §90.
[21] This convention covered all UN personnel but members of military contingents.
[22] Defeis supra note 10 at 200.
[23] Mudgway supra note 11 at 1457.
[24] *Ibid* at 1458.
[25] *Ibid* at 1458.
[26] *Ibid* at 1458.

on the role of the organization rather than the role of its MS.[27] Annual reports by the UNSG are also a tool to develop the organizational stance on SEA further. For instance, in 2017, the UNSG annual report divided SEA into four categories: (i) exploitative relationships, (ii) transactional sex, (iii) sexual activities with minors, and (iv) sexual assault.[28] However, it does not mention whether any of these acts could constitute war crimes or crimes against humanity.[29]

1.1.b. The Draft Convention for the Accountability of UN Officials and Experts on Missions

The GLE was tasked with reflecting on solutions to downplay the accountability deficit. The draft's provisions reflected the GLE's terms of reference; hence, they are exclusively related to UN officials and experts members of a peacekeeping mission but not necessarily all the UN personnel who can be deployed.[30] Conscious of the gap this focus could create, the drafters included an optional clause reading: "[o]ther officials and experts on mission of the United Nations who are present in an official capacity in the area where a United Nations peacekeeping operation is being conducted."[31] With this addition, the convention would cover all personnel deployed within or around a mission who would enjoy immunity under the Convention on Privileges and Immunities of the United Nations (CPIUN) or the Status of Forces Agreement (SOFA), including locally recruited personnel whose immunity stems from the SOFA.[32] Nevertheless, the convention would not apply to members of military contingents nor any person who is, according to the SOFA, falling under the exclusive jurisdiction of a State that is not the host State.[33] Similarly, this convention would not apply to UN officials or experts "engaged as a combatant against organized armed forces and to which the law of international armed conflict applies."[34] Additionally, in its current form, the draft convention excludes all officials or experts employed in NMS, creating a double standard based on the setting where the crime occurred. This disregard towards NMS can be explained by the context in which the

[27] *Ibid* at 1458.
[28] UNGA, "Special measures for protection from sexual exploitation and abuse: a new approach," (February 28, 2017), A/71/818 at Annex IV.
[29] Clare Brown, "Sexual Exploitation and Abuse in Conflict: An International Crime?," *American University of International Law Review* 34, no. 3 (2019): 503-33 at 507.
[30] UNGA, "Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations," (August 16, 2006), A/60/980 at Annex III at article 1.
[31] *Ibid* at article 1(d)(ii).
[32] *Ibid* at article 1, footnote 12.
[33] *Ibid* at articles 2-3.
[34] *Ibid* at articles 2-3, footnote 19. Under those circumstances, the body of law that would apply to enforce criminal liability is international humanitarian law.

draft convention was written; in 2006, knowledge of SEA was still laconic, and most scandals erupted in mission settings.

One of the core provisions of the draft convention determines which State has jurisdiction over cases involving UN officials and experts and confirms the host States' primary jurisdiction.[35] The convention allows States to divide the tasks linked to the implementation of an accountability mechanism to prevent the inability of one State to conduct the entire process from resulting in impunity for alleged perpetrators.[36] Moreover, the convention does not impose the exercise of jurisdiction for an act that would not constitute a crime under the host State law, but it does not preclude it either. Nevertheless, it creates the obligation for a State party to "submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State" if an alleged offender is on its territory and it does not wish to extradite that offender.[37] Recognizing the primacy of host State jurisdiction is one of the advantages of the convention and attributes them a status they never enjoyed before: forum conveniens.[38] The convention does not establish new rules -nor does it want to- but it reaffirms the duty of UN officials and experts to abide by the domestic laws of the host State.[39] Defeis identifies the draft convention's shortcomings.[40] One essential criticism regards the definitions of the actions that would be considered illegal under this convention; in this realm, the convention does not follow the standards established by the bulletin; for instance, seeking an adult prostitute would not be considered a crime.[41] In other words, such a convention does not consider the coercive nature of a relationship between a peacekeeper and a local community member characterized by a significant imbalance of power caused by the very particular status enjoyed by UN personnel.[42] Regardless of the legality of "voluntary prostitution" in any State, it should not be permissible under a convention meant to ensure that

[35] Quénivet supra note 4 at 665.
[36] *Ibid* at 665-66.
[37] *Ibid* at article 7.
[38] *Ibid* at 666.
[39] *Ibid* at 666; UNGA supra note 30 at footnote 22. The drafters specified that it is up to each State party to exercise jurisdiction over crimes committed in a peacekeeping context based on its domestic law, this is an attempt to circumvent the divergences of norms between MS and allow states to decide whether or not they wish to prosecute.
[40] Defeis supra note 10 at 202.
[41] UNGA supra note 30 at article 3. The draft convention defines what constitutes a crime, as regards crimes who fall under the umbrella of SEA there are: "(c) Rape and acts of sexual violence", "(d) Sexual offences involving children." An alternative of these definitions were proposed by the drafters and reads as follow: "(a) Crimes of intentional violence against the person and sexual offences punishable under the national law of that State party by imprisonment or other deprivation of liberty for a maximum period of at least one/two] year(s), or by a more severe penalty." These definitions oversee prostitution and the concept of survival sex, or at least consider the situation in which a peacekeeper exchanges money, food, or any type of goods for sexual relationship.; Defeis supra note 10 at 202.
[42] Defeis supra note 10 at 202.

UN personnel are held accountable for their wrongdoings.[43] There are arguments deeming the criminalization of prostitution as necessary to fully implement the Zero-Tolerance policy exposed by the UNSG in 2003.[44] Implementing this convention would pose a significant challenge. As mentioned earlier, its provisions differ from the ones of the bulletin; therefore, UN officials and experts on missions would have to submit to two different sets of rules, a stricter one only implying disciplinary and administrative sanctions and a more tolerant one that might lead to criminal proceedings.[45] In other words, this would not be different than the current situation. Another flaw, and probably the major one, is the improbability of implementing the convention.[46] Although the convention is welcomed as attempting to bridge the accountability gap, it does not fill the gap as it redirects the responsibility to ensure criminal accountability to MS based on domestic criminal law without analyzing the content of these laws.[47] Quénivet worried that if adopted, this convention would lead to confusion, with different norms for each group deployed in PKOs, which would not be in accordance with international criminal law.[48] This assessment suggests the necessity to reflect on an all-encompassing legal regime to address SEA by UN-related personnel.

1.1.c. Examining the State of the Current Criminal Accountability System

Even though heavily criticized, there is a mechanism to hold UN personnel and members of contingent perpetrators of SEA accountable for their actions; however, it has shown shortcomings. This section will delve into the existing criminal accountability system and the role of crucial actors such as the UN and MS in its functioning. This section shows the attempt to find the right balance between the participation of the UN and the respect of State sovereignty in a process meant to ensure that perpetrators are held accountable.

Being the direct employer of a share of the perpetrators or represented on the banner under which contingents are deployed, the UN has a role to play in the process. Years after years, the organization has developed a course of action to handle allegations against its personnel or a contingent member. Once an allegation of SEA perpetrated by UN workers is reported to the organization, an internal investigation is launched via the Office of Internal

[43] *Ibid* at 202.
[44] *Ibid* at 205.
[45] Quénivet supra note 4 at 666.
[46] Defeis supra note 10 at 205.
[47] Quénivet supra note 4 at 659.
[48] *Ibid* at 667.

Oversight Services (OIOS); if the allegation is substantiated,[49] the UN can refer the case to a MS[50] for appropriate further actions and rely on the willingness of this MS to take actions.[51] The UN can only conduct internal investigations but not launch criminal proceedings against an individual; at best, these investigations can lead to disciplinary sanctions.[52] Freedman highlighted that minimal changes have been made since 1996 regarding developing effective approaches to legal responsibility, which can function as a deterrent, a form of retribution, and a means to uphold victims' rights.[53] The organization faces practical and legal constraints preventing it from punishing peacekeepers.[54] Some have argued that the representation and interpretation of the UN statistics produced on SEA by UN staff have been slowing down the process of reforming the legal mechanisms and undermining the efforts to secure accountability.[55] It is difficult to reform the accountability system without a clear and accurate understanding of the situation. In other words, the UN's role in implementing legal accountability mechanisms is limited.

The UN cannot directly prosecute either UN personnel or personnel provided by Troop Contributing Countries (TCCs) as it neither has the authority to do so nor the forum.[56] A

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[49] UN, *Glossary on Sexual Exploitation and Abuse: Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations*, 2nd ed., (United Nations, 2017) at §68-69, substantiated means that "[t]he investigation concluded that there is sufficient evidence to establish the occurrence of SEA", unsubstantiated means that "[t]he available evidence was insufficient to allow for an investigation to be completed or the investigation concluded that there was insufficient evidence to establish the occurrence of SEA, for a variety of reasons and does not necessarily mean that the allegation was necessarily false."

[50] Usually to the authorities of the host State or State of nationality for UN personnel and to the authorities of the State of nationality for members of contingents.

[51] Jane Connors, "A Victims' Rights Approach to the Prevention of, and Response to, Sexual Exploitation and Abuse by United Nations Personnel," *Australian Journal of Human Rights* 25, no. 3 (September 2, 2019): 498-510 at 508; Quénivet supra note 4 at 664.

[52] Quénivet supra note 4 at 663.

[53] Rosa Freedman, "Unaccountable: A New Approach to Peacekeepers and Sexual Abuse Special Issue: Perpetrators and Victims of War: EJIL: Debate!," *European Journal of International Law* 29, no. 3 (2018): 961-86 at 964.

[54] Muna Ndulo, "The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions," *Berkeley Journal of International Law* 27, no. 1 (2009): 127-61 at 152-53.

[55] Kate Grady, "Sex, Statistics, Peacekeepers and Power: UN Data on Sexual Exploitation and Abuse and the Quest for Legal Reform: Sex, Statistics, Peacekeepers and Power," *The Modern Law Review* 79 (November 1, 2016): 931-60 at 4-5, 10-15. She criticized how the method used to compile SEA allegations led to question the reliability of the statistics as it could result in under-reporting or over-reporting. Not in the sense of not receiving the allegations, but the UN associates the complaints to a victim or a perpetrator regardless of whether these complaints involved multiple perpetrators or victims. Consequently, based on the data collection method, it is difficult to ascertain that some of the allegations were not counted several times. Moreover, the yearly changes the UN made to the categories and sub-categories added to the confusion. In 2005 and 2006, the allegations were divided among six different labels. In 2007 and 2008, one of the six categories was renamed. In 2009, there were eight new categories. In 2014, there were three categories. In 2015, there were four categories and seven different labels. The close-to-yearly changes regarding the definition of "entity" coupled with modification of the format used to present the data further complexified the study of these statistics.

[56] Odello and Burke supra note 15 at 841, 848.

comprehensive system has been put in place to collect allegations, investigate, -when relevant- discipline and then refer the case to MS for legal accountability.[57] The MS remain central in this system. Nevertheless, this system relies on State's willingness to address SEA allegations and to communicate the outcome to the UN, even though the UN internal investigative process is conducted regardless of the State's willingness to investigate.[58] From 2016 onwards, the annual UNSG report on SEA informed whether the UN had referred the case to the concerned MS and the advancement of each cases.[59] Challenges in prosecuting UN personnel and members of contingents are stark. Of the few trials resulting from the allegations against UN personnel and members of contingents, most cases ended up in front of domestic military tribunals.[60] Treating these cases domestically generates an inconsistent treatment: one may be sanctioned harshly based on one country's law, while another might benefit from a more permissive legal framework.[61] Since the Zeid report in 2005, organizing on-site courts-martial has been encouraged to facilitate the investigation process and ensure that justice is seen to be served.[62] However, court-martial can only adjudicate cases involving military members, not most UN personnel. According to a UN press release in 2008, at least two TCCs chose to prosecute this behavior via court martial.[63] Victims often complain of a lack of transparency from MS; they are not systematically kept aware of whether their alleged abuser was held accountable in any way.[64] This lack of transparency is even more blatant in the case of martial courts as victims cannot be parties, and the decisions are confidential, hence contributing to the victims' feelings of injustice.[65] Although legal accountability is of utmost importance in this study, it must be recognized that not all victims wish to embark on what is, at times, a lengthy and challenging process. They might prefer to receive child support, medical services, or any other kind of support they might need to subsist, earn a living, and break the stigma SEA might

[57] Shayna Ann Giles, "Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict Through Their Own Misconduct," *American University of International Law Review* 33 (2017): 147-85 at 165.
[58] *Ibid* at 166.
[59] Grady supra note 55 at 15.
[60] Carla Ferstman, "Criminalizing Sexual Exploitation and Abuse by Peacekeepers," *United States Institute of Peace*, no. 335 (2013): 1-16 at 9-10. This Statement concerns military personnel as part of contingents provided by TCCs.
[61] Giles supra note 57 at 164. A comparison between sanctions imposed on a US soldier involved in the Abu Ghraib prison case and the ones imposed on Uruguayan MINUSTAH troops showed a significant difference in the severity of the sentences for apparently similar offenses.
[62] Defeis supra note 10 at 197.
[63] *Ibid* at 198.
[64] Connors supra note 51 at 504. Most of the time, the victim is in their home country, distant from the country where measures are being taken to guarantee responsibility. This applies to all UN staff, not just members of a specific group.
[65] Marion Mompontet, "La Responsabilité Civile de l'Organisation Des Nations Unies. Effectivité et Efficacité Des Mécanismes de Réparation Offerts Pour Les Personnes Privées : Le Cas Des Exactions Sexuelles Commises Par Les Casques Bleus," *Quebec Journal of International Law* 30 (December 1, 2017): 41-63 at 62.

have put on them within their community.[66] Relying on States to prosecute their nationals has contributed heavily to creating this infamous accountability gap.[67]

1.2. Defining SEA as a Crime: the Limitations of the Current Legal Framework in Relation to the UN Definition

SEA, as defined by the UN, is an umbrella term covering a wide range of actions that may amount to a crime, depending on the gravity of the actions or the laws of the host nation. Nevertheless, it always constitutes misconduct according to UN standards. Sexual exploitation is defined as follows: "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another"[68] while sexual abuse is: "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions."[69] The definition of SEA will be further discussed later, as these are definitions chosen by the UN that do not reflect international law.[70] In fact, SEA is not a term used in international legal instruments.[71] Therefore, the rules set out by the UN based on these definitions would be inapplicable in a court.[72] Scholars have debated the definition of SEA as a crime, often wondering whether all the acts falling under the umbrella term could be considered crimes. Odello and Burke, in their attempt to define SEA, chose to exclude prostitution or allegedly consensual relationships between UN personnel and beneficiaries of assistance to focus exclusively on acts that would -in their opinion- be criminal such as rape and sexual abuse of minors.[73] This is aligned with critiques of the UN definition who deplored the negation of the women's agency in these communities and their engagement in what can be labeled as transactional sex.[74] They argued for the legitimacy of survival sex based on the economic constraints faced by women and girls in these contexts and saw women as informed decision-makers.[75] McGill argues that the standards established by the Zero-Tolerance bulletin

[66] Connors supra note 51 at 507.
[67] Mudgway supra note 11 at 1455.
[68] UNSG supra note 9 at Section 1.
[69] *Ibid* at Section 1.
[70] Odello and Burke supra note 15 at 842.
[71] Brown supra note 29 at 504.
[72] Quénivet supra note 4 at 666.
[73] Odello and Burke supra note 15 at 840.
[74] Mudgway supra note 11 at 1457; Odello and Burke supra note 15 at 840.
[75] Mudgway supra note 11 at 1457.

fail to adopt a holistic understanding of the situations of local communities and that a rights-based approach respecting individual's agency regarding prostitution would be more beneficial to local communities.[76] Nonetheless, this position can be deemed oversimplified and might require nuances. The exclusion of transactional sex from the definition of SEA fails to account for the dire situation these beneficiaries are usually in, in turn contributing to the unequal balance of power between beneficiaries and UN personnel. However, neither domestic nor international criminal law renders relationships between UN workers and local communities unlawful solely based on an unequal balance of power.[77] However, it can be argued that the unequal power relationship between local populations and security forces,[78] eventually coupled with the context of conflict, creates the grounds for abuses of power and coercive circumstances under international criminal law.[79] In Brown's opinion, these elements are incompatible with the notion of consent to a sexual act as it is presented in the Elements of Crime document annexed to the Rome Statute.[80] In the complex environments in which the UN intervenes, one cannot ensure women are exercising their freedom of choice and agency when resorting to prostitution to survive, and that is what constitutes survival sex.[81] These individuals resort to prostitution to survive and, often, as a last resort. Although survival sex can fit in the sexual exploitation category, one could argue that the definitions should be revised to reflect the plurality of situations in which individuals can turn to survival sex, considering the level of consent and agency exercised by women without negating the impact of the dire context. It seems like personnel engaging in such activities do not necessarily see it as criminal, which is in some ways understandable, as prostitution may be criminal neither in the host country nor in the country of origin of the individual.[82] In any case, Quénivet still identifies the notion of consent as essential to defining SEA.[83] In her study focused on the UN Zero-Tolerance policy and the criminalization of sexual offenses on the international level, Quénivet argues for the consideration of three types of sexual activities that could be considered as crimes based on the circumstances and consent: Rape, Forced Prostitution, and Sexual Slavery.[84]

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[76] Jena McGill, "Survival Sex in Peacekeeping Economies," *Journal of International Peacekeeping* 18 (June 9, 2014): 1-44 at 1.
[77] Quénivet supra note 4 at 668.
[78] This research would argue that this extends beyond security forces to include all categories of UN personnel, particularly aid workers, on whom many members of local communities feel dependent.
[79] Brown supra note 29 at 507.
[80] *Ibid* at 507.
[81] Mudgway supra note 11 at 1456-57.
[82] Quénivet supra note 4 at 668.
[83] *Ibid* at 668.
[84] *Ibid* at 669-74. In her study, forced prostitution and sexual slavery are gathered in the same category: Repeated Rapes.

For Mudgway, the issue lies in the fact that in these situations, transactional sex can be survival sex defined as "sex being exchanged for aid or assistance which is already owed to the local population."[85] Mudgway explored whether survival sex should be labeled as violence against women under international human rights law, and the gap identified could be filled by the Committee on the Elimination of Discrimination against Women.[86] Freedman goes as far as qualifying the failure of the UN to protect populations from SEA as torture under international human rights law.[87] Such a position was heavily criticized based on the risks associated with categorizing SEA as torture.[88] While not denying that there were instances where SEA could be labeled as torture, most of the cases do not satisfy the elements constituting torture. Hence such a categorization applied to accountability mechanisms would considerably limit their effectiveness as it would not be possible to include the wide variety of situations.[89] Survival sex type of relationships is not typically a deliberate aspect of widespread policies aimed at dehumanizing the local population and, therefore, fail to meet the requirements of crime qualification of international humanitarian law or international human rights law.[90] One option to get more clarity on SEA would be to turn to the relatively rich ad hoc international criminal tribunals jurisprudence on sexual abuse.[91]

When discussing the individual liability of UN personnel, this study focuses on the possibility of identifying SEA as a crime under international criminal law or domestic laws. Nonetheless, while discussing the UN's responsibility relating to cases of SEA, considering international human rights law is certainly relevant.

[85] Mudgway supra note 11 at 1453-54.
[86] *Ibid* at 1454.
[87] Freedman supra note 53 at 981.
[88] Devika Hovell, "UNaccountable: A Reply to Rosa Freedman," *European Journal of International Law* 29, no. 3 (November 9, 2018): 987-97 at 995-96.
[89] Michael Peel, *Rape as a Method of* Torture, (2004) as cited in Hovell supra note 88 at 996. Hovell argues in favor of clearly defining misconducts for what they are, SEA covers a wide range of behaviors such as 'survival sex,' commercial prostitution, and serious criminal offenses. Rape can be torture. However, as Hovell put it rape can also only be rape.
[90] Mudgway supra note 11 at 1458.
[91] Quénivet supra note 4 at 668-69.

1.3. Other Relevant Definitions: the Concepts of "UN-Related Personnel" and "Accountability"

The concept of UN-Related Personnel is a broad category encompassing several types of personnel who can be related to the UN in some way. The concept of accountability is in no way more restrictive; as it is a multifaceted concept.[92]

1.3.a. UN-Related Personnel

This study will often refer to UN personnel, staff, or workers. Unless otherwise specified, these are umbrella terms designating categories of personnel the UN can work with, such as UN officials, experts on missions, or locally recruited staff. For the purposes of this study, members of national contingents are a separate category of personnel. Moreover, all these categories can be involved in various settings that might impact accountability. These are organized by different legal frameworks: PKOs, SPMs, regional and liaison offices, special envoys, or even headquarters (HQ). According to the UNGA, UN officials as a category of personnel "should include all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates."[93] The GLE further developed the category by adding the United Nations Volunteers (UNVs).[94] The UN often relies on the local workforce to perform all its missions and consequently recruit local staff. These are mentioned individually as the data collected by the UN distinguishes between locally recruited and international staff.[95] Experts on mission undoubtedly constitute the blurriest category of all, although they are entitled to a significant level of protection. Mayr writes that there is neither a single authoritative definition of UN experts on mission nor enough practice to provide guidance.[96] Nevertheless, the GLE defined experts on mission or instead "experts performing missions" as including: "United Nations police, military observers, military advisers, military

[92] Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* 13 (July 1, 2007): 447-68 at 448-49.
[93] UNGA, "Privileges and Immunities of the Staff of the Secretariat of the United Nations," (December 7, 1946), A/RES/76(I).
[94] UNGA supra note 30 at §7.
[95] UN supra note 8.
[96] Teresa Mayr, "Where Do We Stand and Where Do We Go: The Fine Balance between Independence and Accountability of United Nations Experts on a Mission," *International Organizations Law Review* 15 (May 1, 2018): 130-67 at 132.

liaison officers and consultants."[97] This definition already demonstrates that establishing a division between military and civilian personnel would not be accurate, and a more careful approach must be adopted. Members of military contingents are personnel deployed by a State, who can be part of the military or civilians working for the military. A TCC deploys them, usually within the scope of a UN PKO.

1.3.b. Proposing a Definition of Accountability

Based on a UNGA resolution, accountability should be understood as "the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them and to be responsible for honoring their commitments, without qualification or exception."[98] Accountability is a multifaceted concept that scholars have studied. Bovens has thoroughly studied the meaning of accountability and adopted a broad definition extending beyond legal accountability.[99] He settled for the following definition "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences."[100] Kool's understanding is that accountability is about "being 'placed in the dock.'"[101] What makes holding someone accountable differ from requesting the provision of information is the possibility of sanctions.[102] Kool established a connection or convergence between responsibility, accountability, and liability.[103] Responsibility involves acting with due diligence; a failure to do so allows the community to demand the perpetrator to face the consequences of their behavior.[104] Liability means imposing legal repercussions for illegal actions, particularly the duty to compensate victims.[105] While agreeing with Bovens, King called for a concept of legal accountability that goes beyond its definition linked to courts and extends the definition of legal accountability based on a list of "essential attributes."[106] King

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[97] UNGA supra note 30 at §7.
[98] UNGA, "Towards an accountability system in the United Nations Secretariat," (May 5, 2010), A/RES/64/259 at §8.
[99] Bovens supra note 92 at 448-49.
[100] *Ibid* at 450, 452.
[101] Renee S. B. Kool, "(Crime) Victims' Compensation: The Emergence of Convergence Special Issue: 'Liability, Responsibility and Accountability: Crossing Borders,'" *Utrecht Law Review* 10, no. 3 (2014): 14-26 at 16.
[102] Bovens supra note 92 at 451.
[103] Kool supra note 101 at 16-23.
[104] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), at 102-03 as cited in Kool supra note 101 at 16.
[105] Robin Duff, "Who Is Responsible, for What, to Whom?," *Ohio State Journal of Criminal Law* 411 (January 1, 2005) at 441-42 as cited in Kool supra note 101 at 16.
[106] Jeff King, "The Instrumental Value of Legal Accountability," in *Accountability in the Contemporary Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford University Press, 2013), 124-152 at 127.

argues that legal accountability requires individuals with the right to petition, independent adjudicators whose decisions are rational, consistent, and public, and an available remedy that is final, subject to appeal or reversal through due process of law.[107] Under this definition of legal accountability, King claims that ombudspersons and tribunals might share these attributes and "can thus reasonably be viewed as substitutes for courts of law where circumstances demand," while Bovens classifies such instances as "quasi-legal" forums that can only enforce a form of administrative accountability.[108]

In the case of SEA allegations against UN Personnel, two categories of accountability can be distinguished: one relative to the organization itself -corporate accountability- and another relative to the organization's individual actors.[109] Regarding individual actors of the organization, there are three subcategories of accountability: hierarchical, collective, and individual.[110] The first targets the organization's highest official; the second assumes that all actors are collectively accountable and one can be personally accountable for all, and the third conception suggests that everyone is judged proportionally to his actual contribution to the action rather than its formal position.[111] While agreeing with Bovens's core argument, this thesis also considers King's additions with particular attention, which allow for a wider conception of accountability. Based on this conception, accountability can be achieved through any forum that allows alleged perpetrators or individuals and entities deemed potentially responsible to be held answerable for their actions, and which has the authority to impose consequences. As seen above, accountability is a broad concept encompassing various mechanisms. One of them relates to the individual criminal responsibility of perpetrators.

Due to various barriers in the way of criminal accountability, UN personnel might not face legal consequences for their wrongdoings under domestic laws or even international criminal law. If one considers SEA as an international crime, there are two complementary approaches at one's disposal to obtain accountability for atrocity crimes: call on the criminal justice system or the human rights system.[112] The latter would be an option if the context renders the former impossible- such as the absence of instances to prosecute. Although the human rights system can complement the criminal justice system, it cannot replace it particularly because it

[107] *Ibid* at 127.
[108] *Ibid* at footnote 11; Bovens supra note 92 at 456.
[109] Bovens supra note 92 at 458.
[110] *Ibid* at 458-59.
[111] *Ibid* at 458-59.
[112] Ghuna Bdiwi, "Should We Call for Criminal Accountability During Ongoing Conflicts?," *Journal of International Criminal Justice* 21, no. 4 (February 26, 2024): 719-34 at 722.

does not hold the same entity accountable.[113] While the two systems can result in the recognition of accountability for crimes, they do not result in the same outcomes, criminal justice system carries a punitive aspect that the human rights system does not have.[114] Accountability is typically sought through criminal prosecution in front of an international, hybrid, or domestic court of law, and may lead to a punishment commensurate with the seriousness of the crime, the level of responsibility of the accused, and the circumstances in which the crime took place.[115] Intrinsically linked with criminal accountability are the theories of punishment. The consequentialist theory of punishment claims that punishment results in an overall societal benefit by discouraging others from engaging in criminal behavior.[116] The expressive theory focuses on the symbolic value of the punishment both for the perpetrators and for the victims.[117] Under this theory, punishment represents society's reprobation and condemnation of the behavior.[118]

1.4. Problem Statement

The issues caused by SEA go beyond the suffering imposed on already fragile communities; it undermines the completion of the objectives of the UN and gravely deteriorates its reputation and legitimacy in host communities. These consequences are worsened by the inability to hold all perpetrators accountable; steps have been taken to hold accountable members of military contingents -even though processes are yet to be perfect- but it seems like comprehensive initiatives to hold UN personnel criminally accountable are lacking momentum. Moreover, for accountability to progress, there is a need to focus on individual accountability. Enforcing criminal accountability is essential to bring closure to the victims and, eventually, reparations for the prejudice they were subjected to. The existing literature still generally overlooks allegations against UN personnel, not members of military contingents. Moreover, scholars have been focusing on mission settings while neglecting NMS; however, with the current trend, the UN presence is increasingly linked to SPMs or NMS, where UN officials and experts account for most of the personnel. Therefore, focusing mainly on the criminal

[113] *Ibid* at 722.
[114] *Ibid* at 723.
[115] *Ibid* at 724.
[116] *Ibid* at 724.
[117] *Ibid* at 725.
[118] *Ibid* at 725.

accountability of members of military contingents seems to go against the tide. In addition, the UN's responsibility for the actions of its agents in the case of SEA has been seriously overlooked.

Despite numerous allegations and documented cases of SEA allegedly committed by UN personnel, challenges hinder the enforcement of UN personnel accountability, raising questions about the organization's capacity to implement an effective accountability mechanism. Is the UN incapable of enforcing UN personnel accountability for SEA? What are the impediments to implementing a robust accountability mechanism for UN staff in the case of SEA?

As the UN does not have a structure able to prosecute individuals for crimes perpetrated by individuals deployed by the organization, it must rely on States, hence the heterogeneity of the reactions to allegations. Accountability mechanisms are insufficiently enforced, and this situation is only partly explained by the existence of a strict immunity framework that benefits UN personnel. This thesis will argue that the lack of political will -from both MS and the UN- to enforce the existing mechanisms is paramount to understanding the current situation. The UNSG took a step forward by naming and shaming TCCs which were facing the highest number of allegations of SEA by their contingent. However, the UNSG has not disclosed such information when cases involve other types of personnel, such as UN officials and experts on missions, and a MS is showing unwillingness to investigate or prosecute alleged perpetrators.

2. CRIMINAL LIABILITY BEFORE DOMESTIC COURTS: BARRIERS TO THE ACCOUNTABILITY OF PERPETRATORS OF SEA

Despite the many efforts undertaken by the UN, some barriers to criminal accountability before domestic courts seem to be resistant. This section will expound on the complexity of the legal framework that can enable domestic courts to exercise jurisdiction while also touching upon the notion of immunity and how these can hinder accountability.

2.1. The Complex Legal Framework and the Exercise of Jurisdiction by Domestic Courts

Legal jurisdiction over civilians working for the UN is characterized by its significant gaps compared to jurisdiction over crimes allegedly committed by military personnel.[119] Odello and Burke identified jurisdiction and difficulties in exercising jurisdiction as one of the factors resulting in the *de facto* impunity enjoyed by UN personnel.[120] If a host country cannot assure the UNSG that standards of due process and human rights are upheld in its justice system, the UNSG will not surrender any individual; then, it might be up to the State of nationality or State of residence to engage in proceedings -if these are able to do so.

When working for the UN on the territory of a State UN personnel are bound by domestic laws. Several instruments specify that UN personnel must respect the laws of the State they are in, particularly the SOFA in mission settings, or more generally in the Convention on the Safety of United Nations and Associated Personnel[121] and the UN Staff Regulation and Rules applying to UN staff members.[122] In addition, the Standards of conduct for the

[119] Andrew Ladley, "Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations," *Politics and Ethics Review* 1, no. 1 (April 1, 2005): 81-90 at 83.

[120] Odello and Burke supra note 15 at 839-40.

[121] Convention on the Safety of United Nations and Associated Personnel, December 9, 1994, 2051 U.N.T.S. 363 at §1: describes UN personnel as: "(i) Persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation; (ii) Other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a United Nations operation is being conducted;", and associated personnel: "(i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations; (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency; (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency," and at §2 defines the scope of the convention is described as follows: "1. This Convention applies in respect of United Nations and associated personnel and United Nations operations, as defined in article 1. 2. This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."

[122] UNGA, "Draft model status-of-forces agreement between the United Nations and host countries a/," (1990), A/45/594, [hereinafter Model SOFA] at §6, the SOFA provided that without prejudice to their privileges and immunities, the UN peacekeeping missions, and its members are expected to respect "all local laws and regulations" and that ensuring the respect of these obligations and taking measures to do so is part of the responsibility allocated to the Special Representative or the Commander; Convention on the Safety of United Nations and Associated Personnel supra note 245 at article 6 stipulates that laws and regulations of the host State as well as transit State must be respected by all United Nations and associated personnel; UNSG, "Staff Regulations and Rules of the United Nations," (January 1, 2018), ST/SGB/2018/1 at rule 1.2-b: "Staff members must comply with local laws and honour their private legal obligations, including, but not limited to, the obligation to honour orders of competent courts," this document applies to UN staff members, UN volunteers, consultants and contractors.

international civil service stress that the immunities enjoyed by international civil servants "do not exempt [them] from observing local laws."[123] To ensure the respect of these laws, there must be a mechanism to ensure criminal accountability if crimes are committed. Based on the Policy "Accountability for Conduct and Discipline in Field Missions," misconducts that qualify as crimes under the laws of the host or contributing States can lead the UN to request MS to investigate and, if necessary, prosecute the individual in addition to the disciplinary actions already taken by the organization.[124] As it was mentioned earlier, the UN rules on SEA are not aligned with international law and are stricter than most domestic provisions. The UNSG, conscious that this could create a gap and various standards of conduct depending on the host State laws, specified that SEA was prohibited in any case regardless of the domestic laws.[125] While this mention is necessary, it does not solve the issue of the criminalization of SEA; if the host State has laws more permissive than the UN policy in matters of SEA, the perpetrators' sole sanction will be internal and, therefore, administrative or disciplinary. In a similar fashion, these discrepancies between domestic laws tackling SEA will lead to differences in the outcome of allegations; some perpetrators' actions might go unpunished while some others would be sent to jail. In other words, the prohibition of SEA would not apply consistently throughout the organization.

When the UN refuses to waive the immunity of its personnel because of concerns regarding the respect of its rights in host States' courts, the State of nationality, residence, or even a third State meeting the UN standards could take over and launch proceedings.[126] Nevertheless, to do so, a State must be allowed by its laws to exercise extraterritorial jurisdiction.[127] Traditionally and primarily, territoriality is the principle in international law to establish jurisdiction; it is based on the claim that an entity has jurisdiction over the acts

[123] UNGA, "Annex IV. Standards of conduct for the international civil service", *Report of the International Civil Service Commission for the year 2012* (2012), A/67/30, 72-80 at §43.
[124] UN, "Policy: Accountability for Conduct and Discipline in Field Missions," (August 1, 2015), 2015.10 at §12.6. The rule is that "[t]he responsibility for criminal accountability rests with Member States". *Ibid* at §13.3: "United Nations personnel, including those serving for the United Nations in field missions shall be accountable for violations of the United Nations standards of conduct applicable to their category of personnel and may be referred for investigation and possible prosecution before Member States' national courts when such violations constitute crimes under national laws."
[125] UNSG supra note 122 at rule 1.2-e: "Sexual exploitation and abuse is prohibited. Sexual activity with children (persons under the age of 18) is prohibited regardless of the age of majority or the age of consent locally, except where a staff member is legally married to a person who is under the age of 18 but over the age of majority or consent in his or her country of citizenship. Mistaken belief in the age of a child is not a defence. The exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour, is prohibited. United Nations staff members are obliged to create and maintain an environment that prevents sexual exploitation and sexual abuse."
[126] Freedman supra note 53 at 972.
[127] *Ibid* at 972.

perpetrated within its territory.[128] The concept of jurisdiction in international law, once viewed as a matter of rights and powers of States, has prompted some to argue that a State's exercise of jurisdiction should be considered more as a duty or obligation rather than a privilege.[129] This duty could be owed to other States or individuals primarily in matters of respect for human rights and access to justice.[130] TCCs already exercise extraterritorial jurisdiction when they decide to prosecute their nationals; the question is now to examine whether this would be possible for the cases involving UN officials or experts on missions. In practice, States rarely have extraterritorial criminal jurisdiction over their nationals and, even more so, nationals serving International Organizations (IOs).[131] As pointed out by Chairman Steve Chabot in 2000 to the US House of Representatives, many cases result in situations of impunity for American civilians committing crimes abroad.[132] There is a multifactorial explanation as this situation can be due to the unwillingness of the host State to prosecute or, in conflict-affected countries, the absence of any structure able to exercise such power.[133] Consequently, if the State of nationality of an individual is not allowed by its legal system to exercise extraterritorial jurisdiction, crimes could go unpunished. Most States still lack efficient and comprehensive mechanisms to enforce the accountability of civilians serving on international missions.[134] Nonetheless, the exercise of extraterritorial jurisdiction comes with hindrances, as investigating and collecting evidence might be difficult.[135] Without proof, it is impossible to have accountability; the difficulty to access witnesses and the crime scene, coupled with the usual lack of an on-mission capacity to gather evidence on the scene, make it frequently impossible to exercise extraterritorial jurisdiction even when the legal system of States allows for it.[136] However, there are instances where States have addressed this loophole in the criminal accountability system. For example, the SOFA of the Regional Assistance Mission in the Solomon Islands established that the Solomon Islands would exercise their criminal jurisdiction only if the sending State was not

[128] Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008) at 42; Alex Mills, "Rethinking Jurisdiction in International Law," *British Yearbook of International Law* 84, no. 1 (January 1, 2014): 187-239 at 188.
[129] Mills supra note 128 at 187, footnote 46. However, some disagree with this notion of obligation and consider that a State is not obligated to enact laws that cover the entire range of authority permitted by international law, this is the opinion exposed by ICJ Judges Higgins, Kooijmans, and Buergenthal in *Democratic Republic of the Congo v. Belgium* in 2002.
[130] Mills supra note 128 at 210-19.
[131] Ladley supra note 119 at 86; Miller supra note 18 at 92-93.
[132] Ladley supra note 119 at 86.
[133] Freedman supra note 53 at 964; Ladley supra note 119 at 86.
[134] Ladley supra note 119 at 86.
[135] Miller supra note 18 at 93.
[136] Ladley supra note 119 at 87.

able to exercise its jurisdiction.[137] This, in turn, encouraged Australia and New Zealand[138] to legislate to establish their extraterritorial jurisdiction, in other words, enabling them to exercise their jurisdiction over crimes committed by their nationals abroad.[139] There is a stark contrast between the treatment and potential outcomes of an allegation against UN personnel and those against members of contingents; there are, in comparison, a plethora of sets of laws military personnel are subject to, including UN Codes, domestic military justice systems, host State domestic laws and their State of origin domestic criminal laws.[140] In the case of contingent members, there is a form of clarity since the only entity with jurisdiction over this type of personnel is the country of origin, which is exercising extraterritorial jurisdiction. It is essential to recall that accountability mechanisms were adopted in most States to ensure their potential crimes would not go unpunished.[141] This confirms that such laws could be extended to cover UN personnel with functional immunity.

As already evoked, the definition of SEA is debated. There are even divergences in the laws and frameworks applied depending on the category of personnel concerned.[142] All countries do not share a similar definition of what may constitute an offense; therefore, the divergences between domestic legal systems may contribute to the general accountability gap particularly if exercise of extraterritorial jurisdiction becomes the norm.[143] These difficulties could also be encountered in cases of sexual exploitation; the individual may be accused of having resorted to prostitutes, which may or may not be an offense in the various States involved in the affair. Similarly, definitions of rape differ.[144] For instance, the French definition of rape is genderless, while other States' legislation, such as Germany, Japan, or China, established that a victim of rape is necessarily a woman.[145] Some legislations differ on the material element that constitutes rape, leaving space for a large interpretation of the concept.[146] The Furundzija judgment in front of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) provides precious information on the divergence of domestic laws, notably on rape.[147]

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[137] *Ibid* at 87.
[138] *Ibid* at 87. The new legislations are respectively: Crimes (Overseas) Amendment Act 2003 and Crimes and Misconduct (Overseas Operations) Act 2004.
[139] *Ibid* at 87.
[140] *Ibid* at 85.
[141] *Ibid* at 86.
[142] Freedman supra note 53 at 963.
[143] Ladley supra note 119 at 83.
[144] Mompontet supra note 65 at footnote 9.
[145] *Ibid* at footnote 9.
[146] *Ibid* at footnote 9.
[147] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, (ICTFY: December 10, 1998) at §180-85.

Due to the difficulty in identifying a suitable forum to exercise jurisdiction and the differing definitions of SEA, there may be instances where legal accountability is not possible. The challenges States face in exercising jurisdiction, combined with normative divergences, seem to create an additional obstacle to accountability rather than an optimal solution to pursue.

2.2. An Overview of the Question of Immunity

To understand the subtilities of the barriers created by the regimes of immunities, one must consider the category to which the staff belonged. An essential distinction must be made between personnel made available by MS -such as military contingents- and those who fall in the categories of UN-related personnel, such as UN officials, experts on mission, or locally employed staff.[148] This is explained by the fact that UN-related personnel tend to enjoy different forms of immunity; the form of immunity they enjoy is based on their status -to be understood as the category of personnel they are coming from-. Their status and the form of immunity they enjoy determine what kind of proceedings and on what grounds they can be held accountable since they are subject to different disciplinary rules, as was already raised in 2005 in the Zeid report.[149] The multiplicity of situations engendered by the existence of various categories of personnel further complicates the UN's attempt to secure accountability for SEA.[150] Each category of personnel is defined and examined in Chapter 3 to highlight the differences in the scope of immunity enjoyed.

2.2.a. Barriers to the Accountability of Members of Contingents

For PKOs, the UN signs two significant documents with the States involved: the SOFA and the Memorandum of Understanding (MOU). These documents aim to regulate the relationships between the UN, the host nation, and the TCCs.

On the one hand, the UN signs the SOFA with the host nation, specifying that the TCCs retain exclusive jurisdiction over their military personnel.[151] In other words, a member of a

[148] The personnel's status results in differences in the handling of allegations. The possible variations in this status will be discussed later in this research.
[149] Defeis supra note 10 at 192.
[150] Ndulo supra note 54 at 147.
[151] Model SOFA supra note 122 at article 47-b. "Military members of the military component of the United Nations peace-keeping operation 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/jurisdiction]."; Melanie

military contingent who commits a crime during a peacekeeping mission cannot be subjected to the jurisdiction of the host State. The provision applies regardless of the crime allegedly committed. Having jurisdiction over an individual and its conduct does not necessarily result in criminal proceedings, as sovereign States can act as they see fit.[152] However, reserving exclusive jurisdiction to the TCCs severely undermines the potential to secure accountability.[153] In return, the Model SOFA states that the UNSG will obtain formal assurances from TCCs that they would be prepared to exercise jurisdiction over crimes or offenses allegedly committed by their personnel.[154] Nevertheless, the practice indicates these are not obtained.[155] The 2005 Zeid report showcased the limitations of this article and recommended that the UNSG obtain these "formal assurances" from TCCs.[156] On the other hand, the UN signs a MOU with the troop or police contributing countries. The revised draft model MOU establishes a slightly different assurance system; in the wording, the TCC must assure the UN it will exercise its jurisdiction.[157] In 2017, a Voluntary "Compact between the UNSG of the United Nations and the Government of […]: Commitment to eliminate sexual exploitation and abuse" was introduced and, as of May 2023, was signed by 106 MS.[158] The compact further affirms the responsibility of the TCCs to hold perpetrators "to account" and formalizes the will to deepen the collaboration between TCCs and the UN regarding investigations.[159]

Although restricting its actions, the existing agreements allow the UN to launch investigations regarding members of the civilian component or civilian members of the military

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O'Brien, *Criminalising Peacekeepers: Modernising National Approaches to Sexual Exploitation and Abuse*, 2017, at 33.

[152] Giles supra note 57 at 150.

[153] Mudgway supra note 11 at 1455.

[154] Model SOFA supra note 122 at article 48. "The UNSG of the United Nations will obtain assurances from governments of participating States that they will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving the peace-keeping operation."

[155] Defeis supra note 10 at 207.

[156] Jayden Leeuwen, "Addressing the Gap: Accountability Mechanisms for Peacekeepers Accused of Sexual Exploitation and Abuse," *Victoria University of Wellington Law Review* 50 (June 3, 2019): 135-156 at 143.

[157] Mudgway supra note 11 at 1455; UNGA, "Revised draft model memorandum of understanding," (June 12, 2007), A/61/10 (Part III) [hereinafter Draft MOU], at article 7 quinquiens-1. "Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations peacekeeping mission]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes or offences."

[158] UN, "Compact between the UNSG of the United Nations and the Government of […]: Commitment to eliminate sexual exploitation and abuse," (2017) [hereinafter Voluntary Compact]; UN, "MS Signatories to the Voluntary Compact with the UNSG of the United Nations on the Commitment to Eliminate Sexual Exploitation and Abuse', conduct.unmissions.org," (2023), https://conduct.unmissions.org/sites/default/files/compact_countries_list_25_may_2023_0.pdf.

[159] Mudgway supra note 11 at 1459.

component via its internal structure: the Office of Internal Oversight Services (OIOS).[160] A TCC can choose to collaborate with the OIOS to investigate the behavior of members of its contingent. The OIOS inquiries do not amount to a State-led criminal inquiry preliminary to criminal proceedings; however, they can result in various types of sanctions, such as the repatriation of the individual to their country of origin or if there is proof that criminal practices are widespread throughout the contingent, the repatriation of the entire contingent.[161] An OIOS investigation cannot substitute itself for a State-led inquiry, and it is important to recall that an investigation completed by a State does not necessarily translate into legal proceedings.[162] In other words, an allegation against a contingent member could be substantiated and justify the repatriation of the individual without resulting in criminal proceedings in the country of origin. According to Burke and Odello, perpetrators held responsible by their State of origin tend only to face administrative or disciplinary measures accompanied -when relevant- with minimal imprisonment.[163] Conscious that solutions to fill this accountability gap must be found, the UNSG had to find ways to influence MS to exercise their criminal jurisdiction. From 2016 on, the UNSG adopted the "Name and Shame" strategy; in other words, it started publicly naming the country of origin of members of national contingents alongside the case status.[164] The United Nations Security Council (UNSC) Resolution 2272 provided the framework for the UNSG to order the repatriation of an entire contingent in case of widespread SEA allegations against their members while giving the possibility to decline future deployment.[165] Additionally, the UNGA authorized the UNSG to withhold payment for the peacekeepers under investigation and re-direct the money to the Trust Fund established by the UNSG in Support of Victims of SEA.[166]

Many criticisms focus on TCCs' retention of criminal jurisdiction. The standards required by contributing States in matters of justice and due process seem to be incompatible with the situation of most host State courts. Therefore, it seems very unlikely that a State would

[160] Model SOFA supra note 122 at 47-a "If the accused person is a member of the civilian component or a civilian member of the military component, the Special Representative/Commander shall conduct any necessary supplementary inquiry."
[161] Defeis supra note 10 at 197.
[162] Leeuwen supra note 156 at 141.
[163] Odello and Burke supra note 15 at 839.
[164] Leeuwen supra note 156 at 143.
[165] *Ibid* at 143.
[166] *Ibid* at 143.

voluntarily relinquish its jurisdiction over its nationals, hence the tendency to turn to the UN for alternatives.[167]

2.2.b. Barriers to the Accountability of UN Officials and Experts on Missions

When discussing the immunities enjoyed by UN personnel, one must remember that the immunity enjoyed is based on the notion of functionality and differs from the usual immunity granted to State representatives based on reciprocity.[168] This immunity is in place to prevent the host State from taking actions that could interfere with the mission.[169] Article VII of the CPIUN provides that experts on missions benefit from immunity during their mission, covering their words spoken or written as well as any of their acts and rendering them immune to arrest and detention.[170] This immunity also covers their baggage, papers, and correspondence.[171] UN officials and experts enjoy a similar regime of immunity. Experts on missions, along with their functional immunity, are considered inviolable while on their mission.[172] In practice, this implies that if they are on mission, they cannot be arrested or detained regardless of the context in which the act occurred.[173] The usual practice is that the host State must receive a waiver of immunity or a statement from the UNSG claiming that the actions of the individual concerned were not part of their functions.[174] The SOFA also foresaw allegations against UN personnel and established a mechanism: if a civil claim is received, the Head of Mission must be notified and will determine whether the act was part of official functions, which will result in either the discontinuation of the proceedings or their continuation.[175] The investigations preceding the decision on the waiver of immunity are supposed to focus on the context in which the conduct allegedly took place, to determine whether it is part of the functions of the individual; nevertheless, in practice, the decision to waive immunity seems to be based on the veracity of the allegation.[176] The investigations led by the UN gradually exceeded their original mandate; rather than focusing on determining whether functional immunity applies, these investigations establish "whether there is sufficient evidence to cooperate with local authorities."[177] This

[167] *Ibid* at 144; Odello and Burke supra note 15 at 846-47.
[168] Odello and Burke supra note 15 at 846.
[169] *Ibid* at 842.
[170] *Ibid* at 842.
[171] *Ibid* at 842.
[172] Freedman supra note 53 at 968.
[173] *Ibid* at 968.
[174] Miller supra note 18 at 86.
[175] *Ibid* at 87.
[176] Freedman supra note 53 at 967.
[177] *Ibid* at 967.

deviation tends to turn what is supposedly a functional immunity into an absolute one.[178] Theoretically, the immunity of UN personnel covers their actions as part of their official functions, as opposed to absolute immunity, which would shield individuals from proceedings regardless of when the alleged actions occurred. The crucial point is that as the immunity of these categories of personnel is strictly functional and SEA could never be part of their functions for the UN, their immunity should necessarily be waived.[179] Moreover, these mechanisms also assume that the host country has a functioning legal system, which is not always true.[180]

Odello and Burke attribute part of the responsibility for the accountability gap to abuse in matters of immunities, resulting in a *de facto* impunity for perpetrators.[181] The absence of prosecution by any State[182] is the main problem faced when attempting to address SEA by UN civilian personnel.[183] Similar to the argument made by Leeuwen, Odello and Burke discussed earlier as regards the unlikeliness of a State voluntarily relinquishing its jurisdiction in a situation where the standards of local courts do not meet their criteria, the UN is unlikely to waive the immunity of one of its officials or experts on mission if due process and human right standards are not guaranteed.[184] Human rights standards bind the UN;[185] the UN protects the alleged perpetrators based on the presumption of innocence principle and the respect for their rights.[186] In turn, this often leads to the absence of prosecution. The organization admitted that rarely removing immunities led to widespread impunity.[187] Host States have no possibility to counterbalance the decisions taken by the UN if it fails to comply with its obligations related to the waiver of immunity of its personnel nor if it refuses to cooperate with the host States' investigators.[188]

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[178] *Ibid* at 967.
[179] *Ibid* at 963.
[180] *Ibid* at 964; Miller supra note 18 at 87.
[181] Odello and Burke supra note 15 at 839-40.
[182] State of origin, of residence or host State.
[183] Odello and Burke supra note 15 at 840.
[184] Freedman supra note 53 at 972; Leeuwen supra note 156 at 144; Odello and Burke supra note 15 at 846-47; Quénivet supra note 4 at 665.
[185] Charter of the United Nations, (June 26, 1945) [Hereinafter The Charter] at Chapter I, 1-3: "The purposes of the United Nations are: […] To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."
[186] Odello and Burke supra note 15 at 842.
[187] UNGA supra note 30 at §22.
[188] Freedman supra note 53 at 967.

2.2.c. Solutions to Overcome the Barriers Created by Immunities

Some particularly gross misconducts by civilians serving with the armed forces prompted domestic legislation changes to downplay the negative aspects of immunity, such as the introduction in 2000 of the Military Extraterritorial Jurisdiction Act in the US following a case in the 1990s in which US contractors had been accused of running a prostitution ring.[189] However, this Act is still perfectible as it was designed to address potential criminal misconduct of civilians serving with military forces but not civilians serving an IO.[190] New Zealand adopted the Crimes Act 1961 to prevent their diplomats from being immune to all laws.[191] A New Zealander diplomat committing a crime as described under New Zealand law abroad would still fall under the jurisdiction of New Zealand courts.[192] Similarly to the American Act, the Crimes Act 1961 does not apply to the cases of international civil servants. An extension of these frameworks could be imagined for UN officials and experts. Comprehending the current application of the regime of immunities, which has been at times labeled abusive, is crucial to grasping the nexus between immunities and the accountability deficit in the case of SEA by UN personnel. Nonetheless, immunities and the abuse of these can only partly explain this deficit. Another element contributing significantly to the accountability are the difficulties related to the exercise of jurisdiction over behaviors committed while working for the UN. These difficulties prompt a broadening of the scope of this study to discuss alternative forums where territorial considerations may not restrict jurisdiction.

3. CRIMINAL LIABILITY ON THE INTERNATIONAL PLANE

This subsection aims to explore the possibilities offered by international courts for enforcing accountability of UN personnel suspected of SEA.

[189] Ladley supra note 119 at 85.
[190] *Ibid* at 86.
[191] *Ibid* at footnote 6.
[192] *Ibid* at footnote 6.

3.1. The International Criminal Court

Giles concluded that integrating UN peacekeepers into the jurisdiction of ad hoc tribunals and hybrid tribunals would leave a gap in all these settings where such a tribunal had never been or will never be established, therefore including these personnel into the jurisdiction of the International Criminal Court (ICC) would be the most efficient alternative.[193] International crimes are under the jurisdiction of the ICC; these crimes are actions aiming at oppressing, subjugating, or even destroying a population.[194] There are several criteria a crime must meet to be considered as falling under the jurisdiction of the ICC. Under the Rome Statute, a case could be considered inadmissible in front of the ICC based on four conditions: if a State is already investigating or prosecuting the individual; an investigation has been conducted, and the State decided that no further actions were required; the individual has already been tried; or the alleged crimes were not grave enough.[195] However, if no State is willing or able to launch proceedings, the Court can declare the case admissible.[196] Even though SEA could qualify as an international crime, it is improbable that SEA by UN personnel would be, as it might be frequent and widespread without aiming to oppress or destroy a particular population.[197] If the assessment of the Office of The Prosecutor (OTP) was strictly based on a quantitative method, SEA would not pass the threshold as the allegations tend to be isolated events.[198] Nevertheless, supposing all these allegations are considered together, they represent many victims.[199] In a certain way, the mode of evaluation of the gravity of crimes adopted by the OTP confirms this position, as the OTP takes into consideration "the extent to which the crimes were systematic

[193] Giles supra note 57 at 150, 179.
[194] Freedman supra note 53 at 977.
[195] Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute] at article 17-1.
[196] *Ibid* at article 17-1.
[197] Freedman supra note 53 at 977.
[198] Melanie O'Brien, "National and International Criminal Jurisdiction over United Nations Peacekeeping Personnel for Gender-Based Crimes against Women" (University of Nottingham, 2010) at 315.
[199] See UN, "Allegations reported for entities other than peacekeeping operations and special political missions (United Nations staff members or United Nations related personnel)," *un.org*, updated in 2024. https://app.powerbi.com/view?r=eyJrIjoiMTZiYTY3MmItMDQ0Zi00ZWRkLWE5MmUtYjIwODQ3NzMyYU2IiwidCI6IjBmOWUzNWRiLTU0NGYtNGY2MC1iZGNjLTVlYTQxNmU2ZGM3MCIsImMiOjh9, [hereinafter Dataset presenting allegations in PKOs and SPMs]; UN, "Allegations reported for peacekeeping operations and special political missions," conduct.unmissions.org, updated in 2024. https://conduct.unmissions.org/sea-data-introduction [hereinafter Dataset presenting allegations in NMS]; UN, "Allegations reported for peacekeeping operations and special political missions (implementing partners)," *un.org*, updated in 2024. https://www.un.org/preventing-sexual-exploitation-and-abuse/sites/www.un.org.preventing-sexual-exploitation-and-abuse/files/ip_aug-2024.xlsx [hereinafter Dataset presenting allegations in NMS against Implementing Partners]. Based on the data collected by the UN since 2008 for mission settings and since 2017 for NMS, there have been close to 4,800 alleged victims for whom a report was transmitted to the UN.

or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims."[200] On the question posed by the circumstances and scale of the misconducts as regards other proceedings launched by the ICC, Giles swiftly answered that given the unequal balance of power in which those misconducts took place and the particular vulnerability of the beneficiaries, "UN peacekeeper misconduct is arguably no less severe than the other crimes that fall under the ICC's authority."[201] To assess whether a crime reaches the level of gravity necessary to be adjudicated in front of the ICC, the OTP established a method to select cases based on "the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges," creating a gravity threshold.[202] To evaluate the seriousness of the crimes, the OTP considers the context in which these occurred, whether these "are of concern to the international community as a whole," the nature and scale of the crimes, the level of vulnerability of the victims, the way they were committed, and their impact.[203] A particular attention paid by the OTP to the effect of the absence of accountability could also be of interest.[204] Giles argued that because of the nature of the crimes, UN peacekeepers already fell into the jurisdiction of the ICC; in other words, cases of SEA could be framed as an international crime.[205] The argument rested upon the idea that under specific circumstances, rape can be categorized as a genocide, a war crime, and a crime against humanity.[206] However, ordinary crimes perpetrated in the international arena do not necessarily amount to international crimes.[207] International crimes are particular because of the objectives behind their perpetration and their systematic aspect.[208] This argument emphasizes how the status of UN peacekeepers and, by extension, of UN personnel is an aggravating factor.[209] UN staff members enjoy a particular status.[210] O'Brien advocated for prosecuting "crimes that do shock the conscience of

[200] OTP, "Policy paper on case selection and prioritization," (September 15, 2016) at §40.
[201] Giles supra note 57 at 182.
[202] OTP supra note 200 at §34.
[203] *Ibid* at §35-41.
[204] O'Brien supra note 198 at 322.
[205] Giles supra note 57 at 179.
[206] *Ibid* at 180-81.
[207] Cassesse, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) as cited in Freedman supra note 53 at 977.
[208] Freedman supra note 53 at 977.
[209] O'Brien supra note 198 at 317, 320. O'Brien argued in favor of the prosecution of peacekeepers under international criminal law and before the ICC based on the status of the individual being a peacekeeper, "a representative of the UN and the international community."
[210] UNSG, "Status, basic rights and duties of United Nations staff members," (July 21, 2016), ST/SGB/2016/9 at Regulation 1.1 (a) "Staff members are international civil servants. Their responsibilities as staff members are not national but exclusively international." UN staff members are intrinsically different due to their association with the UN, they represent the organization and its objectives.

the international community," considering that the number of victims should not be a redhibitory criterion, particularly for crimes committed by peacekeepers that should necessarily be considered grave.[211] One case in the jurisprudence of an ad hoc tribunal -the ICTFY- could support the qualitative approach to assess the gravity of crimes: Prosecutor v. Furundzija.[212] Ashkin qualified this case as "an enormous moral and legal victory both for the Yugoslavian Tribunal and for women worldwide."[213]

An additional argument favoring using the ICC to prosecute UN personnel for SEA is that the Rome Statute provides a framework for individual criminal responsibility.[214] In addition, the Court's jurisdiction is not barred by any immunities and considers the engagement of the responsibility of superiors for failing "to exercise control properly."[215] Based on these dispositions, the ICC could launch proceedings against personnel across categories regardless of their immunity but could even focus on high UN Officials for having failed in their obligations to prevent international crimes and for having prevented investigation and prosecution by not transmitting cases to authorities. Another argument in favor of the ICC is that incorporating UN peacekeepers into the ICC jurisdiction does not deprive States of their sovereign power to exercise their jurisdiction; the ICC would exercise here a complimentary jurisdiction only if MS fail to prosecute peacekeepers.[216] The drafters of the Rome Statute did not intend to exclude peacekeepers from the ICC jurisdiction; indeed, the initial draft of the Statute included a mention that would exclude peacekeepers from the ICC jurisdiction;

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[211] O'Brien supra note 198 at 320.
[212] O'Brien supra note 198 at 316.
[213] Kelly D. Ashkin, "Commentary: The International War Crimes Trial of Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes Hague International Tribunals: International Criminal Tribunal for the Former Yugoslavia," *Leiden Journal of International Law* 12, no. 4 (1999): 935-56 at 936, 955. Amidst criticisms accusing the OTP of wasting the limited resources of the ICTY, a legal case was filed for a single instance of sexual violence involving one victim and one individual who, although not the perpetrator, was present at the time and failed to intervene. In addition to being groundbreaking because of the interpretation of gravity adopted by the OTP, this trial is the first of its kind as it is "the first international war crimes trial in history to focus almost exclusively on the actus reus of rape."
[214] Rome Statute supra note 195 at article 25: "(1) The Court shall have jurisdiction over natural persons pursuant to this Statute. (2) A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. (3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court […]."
[215] *Ibid* at article 27-2, article 28-2: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person"; "(2.) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."
[216] Giles supra note 57 at 179, 182.

however, facing fierce opposition, this mention was not in the final text of the statute.[217] However, in theory, such a mechanism is meant to hold accountable leaders responsible for international crimes rather than individual crimes.[218]

An issue arose with the will to use the ICC, the case of countries members of the UN but not parties to the Rome Statute. According to Giles, this is a non-issue as the ICC can assert jurisdiction based on a referral by the UNSC to the ICC prosecutor; therefore, whether the peacekeepers who have committed inappropriate acts are from a country that is party to the Rome Statute is irrelevant as long as the Security Council recognizes the criminal conduct and makes this referral.[219] Without a UNSC referral, the individual responsible must be a citizen of a State that is a party to the Rome Statute, or the offense must have taken place within the borders of a State that is a party to the agreement.[220]

Since resorting to the ICC to prosecute SEA by UN personnel would require significant adjustments to the Court, establishing a new court specifically focusing on crimes committed by UN personnel could be justified.

3.2. Establishing a New Court

This sub-section examines the opportunities for accountability provided by new courts, whether established as an ad hoc tribunal with a broader mandate beyond adjudicating criminal matters involving UN personnel or explicitly created to handle such cases.

3.2.a. Ad Hoc Tribunals

Ad Hoc Tribunals have been considered a forum that might be able to address SEA by UN personnel and specifically peacekeepers; however, this would have limitations as these tribunals are not systematically created in the intervention zones of the UN. Furthermore, Ad Hoc Tribunals have limited jurisdiction.[221] Some tribunals, such as the ICTFY or the International Criminal Tribunal for Rwanda, attempted to engage the individual responsibility

[217] Geert-Jan G. J. Knoops, *The Prosecution and Defense of Peacekeepers under International Criminal Law*, International and Comparative Criminal Law Series (Ardsley, NY: Transnational Publishers, 2004) at 3 as cited in Freedman supra note 53 at 180.
[218] Cassesse supra note 207 as cited in Freedman supra note 53 at 977.
[219] Giles supra note 57 at 183.
[220] O'Brien supra note 198 at 233.
[221] *Ibid* at 232.

of peacekeepers who had allegedly committed crimes under international law.[222] In a very different manner, the Special Court for Sierra Leone, in its constitutive document, affirmed the primary jurisdiction of the sending State over the misconduct of peacekeepers; nevertheless, the Statute also established that in a situation in which the sending State would be unwilling or unable to prosecute or investigate and with the support of the UNSC the court would have the authority to engage proceedings -a jurisdiction not unlike that of the ICC.[223] These examples clarify the options that could be chosen to address SEA by UN personnel.

Another form of ad hoc body would be the Claims Commission established in the Model SOFA, composed of three members appointed respectively by the UNSG, the TCC, and jointly by both.[224] Using this mechanism would have the disadvantage of being costly and slow -which might explain why it is only rarely used- but the advantage is to provide a forum for all allegations.[225] To be able to use it, the provision establishing it in the SOFA should be amended since, as of now, it can operate only "when a provision in the Model SOFA prevents the courts of the host-State from assuming jurisdiction" and it should be modified to accommodate situations in which "there is no other available forum in the host State to handle the claim."[226] Nevertheless, such a Commission would not necessarily appear fair to all due to the parties' involvement in the disputes as judges.[227] Furthermore, criticisms have been waged against these mechanisms for their ambiguity and confidentiality.[228]

These arguments indicate an inadequacy of ad hoc tribunals to systematically handle SEA by UN personnel and point toward an alternative direction: establishing a new court.

3.2.b. Specific UN Court Dedicated to the Prosecution of UN Personnel

As it seems like MS are unwilling to prosecute their own, the UNSG had suggested in one of its annual reports that States hosting a peacekeeping mission should be provided with a

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[222] Giles supra note 57 at 166-67.
[223] *Ibid* at 167.
[224] Miller supra note 18 at 88; Model SOFA supra note 122 at article 51: "any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over with the courts of [host country/territory] do not have jurisdiction because of any provision of the present Agreement, shall be settled by a standing claims commission to be established for that purpose" and "The awards of the commission shall be notified to the parties and, if against a member of the United Nations peace-keeping operation, the Special Representative/Commander or the UNSG of the United Nations shall use his best endeavours to ensure compliance."
[225] Miller supra note 18 at 88.
[226] *Ibid* at 88.
[227] Kristen E. Boon, "The United Nations as Good Samaritan: Immunity and Responsibility," *Chicago Journal of International Law* 16, no. 2 (2016): 341-85 at 362; Mompontet supra note 65 at 54. The participation of the UN and the TCC could raise questions regarding the fairness of the process.
[228] Mompontet supra note 65 at 54.

subsidiary jurisdiction to prosecute in such cases.[229] Ladley discussed the idea of an on-mission UN court that could decide on immunity and prosecute alleged perpetrators to put an end to impunity.[230] He pointed out that such a structure would avoid potential abuse in local courts in which the UN would have been reticent to let their personnel be prosecuted because of due process and human rights standards.[231] These courts could be based on treaties established separately for each mission or through a UNSC resolution or an international convention together with a specific criminal code for UN service.[232] This arrangement could also allow States to retain jurisdiction when they see fit, just as is the case for the ICC and the notion of concurrent domestic jurisdiction.[233] In addition to the instruments mentioned above, such a mechanism would necessitate a statute to establish the scope of such courts specifically regarding what crimes would fall under its jurisdiction but also an international treaty to decide where the sentence would be served; this, in turn, would require domestic legislation.[234] In its current state, this proposition, although an option for mission settings, such as PKOs and SPMs, would not directly apply to NMS. Nevertheless, extending the jurisdiction of such a forum beyond PKOs and SPMs should be considered. Establishing a new court has the advantage of allowing for initiatives, thereby tailoring the jurisdiction of this forum to the needs of both the UN and its MS. Currently, the only forums extending to all UN personnel -except for members of military contingents and implementing partners- are the administrative tribunals of the organization meant to resolve employment disputes. Realistically speaking, it might be laborious to establish a court with broad jurisdiction without encroaching on States' prerogatives.

Given the numerous obstacles to criminal accountability, the UN appears to have turned to another form of accountability.

[229] Grady supra note 55 at 46.
[230] Ladley supra note 119 at 88.
[231] *Ibid* at 88.
[232] *Ibid* at 88.
[233] *Ibid* at 88.
[234] *Ibid* at 88.

4. ACCOUNTABILITY WITHOUT CRIMINAL LIABILITY

As mentioned previously, accountability can extend beyond legal approaches. It can mainly translate into the UN's disciplinary approach, but it can also be reflected in the approach focusing on victims.

4.1. The Rationale Behind the Adoption of a "Disciplinary Approach" by the UN

Leeuwen argues that because of the limitations faced by the UN in its battles against unaccountability, a viable alternative to criminal accountability emerged in the shape of direct non-legal accountability.[235] However, it does not solve all the issues linked with SEA by UN personnel, and it overlooks the underlying causes of SEA.[236] Nonetheless, this alternative brings a vital sense of moral retribution.[237] Currently, the options at the UN's disposal to address SEA remain scarce. The UN cannot ensure legal accountability by itself due to practical constraints. Still, it has used a method of sanction in the past, consisting of the repatriation of an individual peacekeeper and a ban from future operations.[238] Without a better solution, the UN can also sanction perpetrators of SEA through dismissal and withholding of payments. The organization also recently adopted a method to sanction States unwilling to comply -publicly naming and shaming them. Unfortunately, this remains circumvented for TCCs. Leeuwen exposed a couple of criticisms targeting measures taken by the UN, but also criticisms to the SOFA in matters of accountability.[239] Smith contended that repatriation of UN personnel does not effectively guarantee that justice has been delivered and seen delivered, punish the perpetrator, or restore the UN's reputation in the community; however, repatriation can help prevent further incidents of SEA.[240] It is necessary to nuance the last claim; indeed, repatriation of UN personnel eliminates the risk that the specific individual or contingent constituted for the community but does not prevent future SEA by any other individual. From a legal standpoint, repatriation can

[235] Leeuwen supra note 156 at 135.
[236] Valorie Vojdik, "Sexual Abuse and Exploitation by UN Peacekeepers as Conflict-Related Gender Violence," in *International Human Rights of Women*, ed. Niamh Reilly (Springer, 2019), 405-21 at 410.
[237] Leeuwen supra note 156 at 136.
[238] Giles supra note 57 at 164.
[239] Leeuwen supra note 156 at 144.
[240] Sarah Smith, "Accountability and Sexual Exploitation and Abuse in Peace Operations," *Australian Journal of International Affairs* 71 (April 10, 2017): 405-22 at 406-07 as cited in Leeuwen supra note 156 at 144.

be seen as "guarantees of non-repetition of the wrongful act," but only for the individual or the contingent who/which was repatriated because of his wrongful actions.[241] Burke supported the revision of the UN Model SOFA based on the NATO-provided SOFA to give foreign military and peacekeepers functional immunity instead of absolute immunity.[242] The NATO SOFA considers various jurisdictions: exclusive, concurrent, primary, and secondary, depending on the circumstances.[243] It establishes that the TCC retains jurisdiction over acts pertaining to official duties or impacting only the TCC; otherwise, it falls under the jurisdiction of the host State.[244] Burke praises the balance achieved by this SOFA and considers it applicable to UN missions.[245]

The UN, conscious of its limitations in matters of legal accountability, explored ways to provide victims with nonlegal accountability.

4.2. The Non-Legal Accountability Approach Centered on Victim

Along with the appointment of the then-new UNSG, a new strategy for approaching SEA emerged, centering the actions on the victim rather than the perpetrator.

4.2.a. Victims' Rights Advocate (VRA)

As the UN, and specifically the UNSG, was aware of the existing accountability gap, new measures were proposed in 2017 in a report from the UNSG Office titled: "Special measures for protection from sexual exploitation and abuse: a new approach."[246] This report is a landmark in addressing SEA by UN personnel as it introduced two fundamental propositions: the appointment of the VRA and asking permission from the MS to withhold payment to TCCs to encourage them to exercise their criminal jurisdiction.[247] As soon as the VRA was appointed,

[241] Martina Buscemi, "Misconduct Committed by (Civilian) Private Contractors in Peacekeeping Operations: The Direct and Indirect Responsibility of the United Nations," *Journal of International Peacekeeping* 23, no. 3-4 (2020): 176-202 at 198.
[242] Roisin Burke, "Central African Republic Peacekeeper Sexual Crimes, Institutional Failings: Addressing the Accountability Gap International Organisations and the Rule of Law," *New Zealand Journal of Public and International Law* 14, no. 1 (2016): 97-128 at 116.
[243] *Ibid* at 116.
[244] *Ibid* at 116.
[245] *Ibid* at 117.
[246] UNGA supra note 28.
[247] Leeuwen supra note 156 at 145.

it was criticized for not delivering on promises it had never made.[248] As rightly pointed out by Leeuwen, the VRA, as proposed by the UNSG in its report, was never made to be given the power to investigate[249] or sanction peacekeepers; in other words, the VRA was not thought of as a mechanism to ensure legal accountability but merely as a tool to provide a different form of accountability directly to the victims.[250] Nevertheless, the VRA was not completely disconnected from any potential legal proceedings as its Terms of Reference specified one of its missions was to engage with MS and follow up on any progress made in investigating or launching legal proceedings against alleged perpetrators.[251] The first VRA said that with this position's creation, the UN shifted from focusing on conduct and discipline towards victims' rights and dignity.[252]

This effort undertaken by the UNSG is aligned with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UNGA in 1985, which prescribes supporting victims to aid their recovery and support them through any judicial process.[253]

4.2.b. Trust Fund in Support of Victims of Sexual Exploitation and Abuse[254]

Although part of a non-legal accountability mechanism, the VRA and the Trust Fund should not be dismissed, and their enhancement should be considered.[255] This Trust Fund was established in 2016 by the UNSG and was funded by nineteen MS in 2019, in addition to payments that may have been withheld from civilian, military, and police personnel.[256] These payments are withheld when the OIOS substantiates an allegation of SEA.[257] These are sums due to TCCs as payment for the deployment of their troops.[258] Reparations are based on the principle that one should replace what has been broken or taken, in other words, redressing wrongs.[259] The term is used to discuss situations when one should make amends and pay

[248] *Ibid* at 148.
[249] Here, it is important to remind the reader that a specific UN office is charged with leading investigations in all cases of UN personnel misconduct: the OIOS.
[250] Leeuwen supra note 156 at 149.
[251] Connors supra note 51 at 503.
[252] *Ibid* at 6.
[253] Leeuwen supra note 156 at 148.
[254] Later referred to as the Trust Fund.
[255] Leeuwen supra note 156 at 149-50.
[256] Connors supra note 51 at 506.
[257] *Ibid* at 9.
[258] UN, "Contribute to the Trust Fund," un.org, (2024), https://www.un.org/preventing-sexual-exploitation-and-abuse/content/donate-trust-fund.
[259] Susan Sharpe, "The Idea of Reparation," in *Handbook of Restorative Justice*, ed. Gerry Johnstone and Daniel W. Van Ness (Taylor & Francis, 2007) at 24, 37.

damages, often overlapping with restitution, compensation, damages, and remedies.[260] Reparations aim at positively impacting the victim rather than further punishing the offender.[261] Frequently, and especially in western civil law, reparations take the shape of financial compensation attributed to individuals.[262] Reparations can be material or symbolic -although those two can be mixed as material reparations can bear a symbolic meaning.[263] Under this conception, the Trust Fund provides victims with a form of reparation for their suffering by providing assistance and support through UN and non-UN entities.

5. STRUCTURE OF THE WORK AND METHODOLOGY

5.1. Method

This research adopted a quantitative approach based on the analysis of a variety of documents. Specifically, the answer to the research question is informed by a review of relevant normative instruments, work of scholarship, documents belonging to the wide range of UN publications, and case laws adjudicated by international and domestic courts.

The normative instruments include foundational international treaties such as the UN Charter or the CPIUN and bilateral treaties binding upon the UN and its MS such as the SOFA, the MOU, or Headquarters (HQ) agreements; additionally, when relevant, the research is informed by domestic legislation. This analysis is further informed by UN instruments such as resolutions, draft conventions, codes of conduct, and reports, helpful in understanding UN practices and international obligations. This thesis analyses the rare case laws to provide insights into the practical enforcement of accountability for UN personnel perpetrators of SEA. Due to the specificity of the subject, the research relies on a broad range of documents that may address only indirectly accountability for SEA and discuss accountability of the UN and of its personnel in a broader manner. By adopting this approach, the research intends to elucidate the

[260] Ruti G. Teitel, *Transitional Justice*, 1. issued as paperback (Oxford: Oxford Univ. Press, 2000) at 119 and Elmar Weitekamp, *Restorative Juvenile Justice: Repairing the Harm of Youth Crime*, ed. Samuel G. Bazemore, Gordon Bazemore, and Lode Walgrave (Monsey, NY: Criminal Justice Press, 1999) at 75 as cited in Sharpe supra note 259 at 24.
[261] Sharpe supra note 259 at 26.
[262] Gerry Johnstone, ed., *A Restorative Justice Reader: Texts, Sources, Context* (Cullompton, UK ; Portland, Or: Willan Pub, 2003) at 11 as cited in Sharpe supra note 259 at 27.
[263] Sharpe supra note 259 at 27.

multifaceted difficulties in enforcing accountability for UN personnel involved in SEA. In other words, the research aims to understand the discrepancy between what seems to be the norm and its application.

To develop a broad understanding of the handling of SEA cases across all UN settings, this thesis will also rely on the analysis of data collected by the UN relative to how these were handled.[264] Three specific datasets are used: one collecting allegations reported in mission settings -PKOs and SPMs-, the second presenting the claims recorded in NMS against "United Nations staff members or United Nations related personnel," and the third relative to allegations against Implementing Partners in NMS. In addition, the information provided by the UNSG relative to updates on cases of SEA, either referred to MS or notified by States, was extracted from an annual UNSG report. This extraction is meant to facilitate the visualization of the outcome of the allegations. Exploiting this data will be particularly interesting in determining the significance of SEA committed by UN personnel not part of a military contingent and in assessing the organization's handling of these allegations. The figures included in Chapter 4 are created through the software Tableau using the aggregated dataset.

Several factors have limited this research. Although the UN data is a unique compilation of information, as already mentioned, these datasets have significant flaws. They have been criticized for their data collection methods and inconsistencies between the datasets, making comparing data *prima facie* challenging. In addition, the way in which data is sorted differs between databases. For instance, one dataset tends to see an aggregation of victims and perpetrators under the same "report." While another assigns ID numbers to victims and perpetrators to identify recurrent victims or perpetrators, particular attention was paid to avoid duplicating claims in the revised dataset. Furthermore, the language, particularly relative to the personnel classification, was standardized to be coherent throughout the revised dataset. All in all, efforts were made to mitigate the effects of these inconsistencies on the aggregated dataset. Additionally, the data analyzed in this research was collected from January 2017 to June 2024, with dates selected to align with the start of data collection periods and to ensure coherence.

Moreover, the difficulty of finding case laws regarding UN Personnel before Courts for SEA may impact the research findings. Identifying individual case laws was complex. Indeed, UN data is anonymized to protect the privacy of both alleged victims and perpetrators;

[264] See Dataset presenting allegations in PKOs and SPMs supra note 199; Dataset presenting allegations in NMS supra note 199; Dataset presenting allegations in NMS against Implementing Partners supra note 199; UNGA, "Criminal accountability of United Nations officials and experts on mission. Report of the UNSG," (July 26, 2023), A/78/248.

therefore, it cannot point towards specific cases. Also, due to the sensitive nature of the act, the victim's age, and standard judicial practices, most cases are either unpublished or difficult to locate. Moreover, it appears that a very low number of allegations resulted in a trial, further reducing the possibility of finding relevant case law. For this thesis, case law was identified by researching key terms in news sources, which provided the necessary information to locate official court records and rulings. Particularly, the PACER platform was used to buy access to court rulings and documents relative to US courts.

5.2. Structure of the Work

The research is articulated around four chapters. One tackles the issue of responsibility and who must bear the responsibility when UN personnel commit crimes. To do so, it will explore two options: the attribution of responsibility to the UN, and the responsibility and role of the States. The following chapter challenges whether immunity prevents accountability, clarifying the scope of the immunity granted to the UN and its personnel. This clarification allows one to examine how immunity is enforced in practice and what is done to mitigate its negative consequences. Then, a chapter is dedicated to reviewing the responses to the allegations of SEA. Informed by rare cases that resulted in prosecution, it attempts to offer a comprehensive assessment of the handling of SEA perpetrated by UN personnel. Finally, this research concludes by exposing key findings alongside the implications of its results for future policies and research.

CHAPTER 2 – WHO ANSWERS FOR UN PERSONNEL CRIMES? A TWO-FOLD ANALYSIS.

This chapter explores the complex yet crucial subject of responsibility and accountability for UN personnel who commit criminal acts to broaden the perspectives on responsibilities related to SEA by UN personnel. It focuses on establishing the criteria for holding accountable entities handling SEA allegations. First, the UN's potential responsibility in SEA cases is discussed in an analysis rooted in the existing theoretical framework and jurisprudence. Eventually, the chapter focuses on the State, its role in ensuring the implementation of effective accountability measures, its limitations, and its responsibility regarding SEA cases.

1. MAPPING THE RESPONSIBILITY OF THE UN

This section is dedicated to exploring the UN's responsibility in cases of SEA. First, it examines the basis for attributing responsibility to the UN for a wrongful action. Second, it extends the analysis to the case of SEA, wondering whether there is an internationally wrongful act or omission of the UN in cases of SEA. Finally, building on past jurisprudence, this section identifies forums where the UN's responsibility can be determined.

1.1. Theoretical and Legal Foundations of UN Responsibility

Understanding the theoretical and legal framework governing the responsibility of IOs, particularly the UN, is of the utmost importance to determining whether the UN could be held responsible for SEA cases. While it is unlikely that SEA would result from direct orders by the leadership or be perpetrated in the performance of UN personnel's duties, the UN's responsibility might still be at stake.

1.1.a. The Theory of UN Responsibility and its Application

There are two conflicting viewpoints on the responsibility of IOs, although one of them seems to have been defeated. On the one hand, it has been argued, particularly in the past, that IOs could not be held responsible for any actions as they should be considered "vehicles for their member states."[265] On the other hand, others have argued in favor of the existence of IO's responsibility based on its existence being deemed separate from its membership.[266] Arguing the latter implies acknowledging that IOs have a separate legal personality, an opinion that has been broadly accepted by the international community.[267] Even though, in the past, many authors considered that if IOs had a personality, this was only "very limited" and "conditional."[268] A major case in matters of IO legal personality was the International Tin Council affair in the 1980s.[269] While the claimants argued that the Council had no legal personality different from its membership; the United Kingdom (UK) Courts found that the Council did have a distinct legal personality.[270] For the purposes of this research, we will argue that an IO can be held responsible for its actions as it is separate from its membership while not refuting that MS may still be responsible for the actions and omissions of an IO. Embracing the concept of dual attribution entails accepting that more than one party can be responsible for the same wrongful action.

The UN's legal personality was confirmed in an advisory opinion of the International Court of Justice (ICJ) in 1949.[271] Precisely, the Court answered the following question: "[D]oes the Organization possess international personality?" in those words:

> Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the

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[265] Clyde Eagleton, "International Organization and the Law of Responsibility," *Receuil des Cours* 76, (1950-1) at 319 as cited in Jan Klabbers, "Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act," *European Journal of International Law* 28, no. 4 (December 31, 2017): 1133-61 at 1136.
[266] Klabbers supra note 265 at 1136.
[267] David J. Bederman, "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel," *Virginia Journal of International Law* 36, no. 2 (1996): 275-378 at 277.
[268] *Ibid* at 343.
[269] See Ilona Cheyne, "The International Tin Council," *The International and Comparative Law Quarterly* 36, no. 4 (1987): 931-35 at 931-32. The International Tin Council was an entity created by the International Tin Agreement of 1981 and was supposed to operate for five years from July 1st, 1982, and had 23 MS. It aimed at stabilizing the world market of tin; nevertheless, in 1985, the Council ran out of money and collapsed, leaving approximately £200 million in debt. MS were unable to find an agreement to pay off the debts left by the organization, and several lawsuits in front of the British court ensued.
[270] Romana Sadurska and C. M. Chinkin, "The Collapse of the International Tin Council: A Case of State Responsibility," *Virginia Journal of International Law* 30, no. 4 (1990): 845-90 at 855-56.
[271] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949 174 at 174-89.

> collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.[272]

The Court further explained how the Charter and practice created the legal personality of the organization.[273] In a 1996 report, the UNSG qualified the IOs' responsibility as a "reflection of the principle of State responsibility," claiming that IOs' responsibility stems from their "international legal personality and their capacity to bear international rights and obligations."[274] As a result, if an IO breaches an international obligation, resulting in damages, the organization becomes liable.[275] In other words, the UNSG recognized how the responsibility of an IO -including the UN- derived from its legal personality.[276]

In 1999, the ICJ published an advisory opinion on the immunity of a Special Rapporteur of the Commission on Human Rights. In doing so, it provided more details on the responsibility of the UN, establishing that the organization may be held responsible for the actions of its agents while on duty.[277] Similarly, but limited to members of contingents, the UN has recognized responsibility for third-party claims related to loss or damage of property as well as death or personal injury caused by personnel at his disposal if these were the result of the performance of services.[278] Nevertheless, the UN strictly rejects the engagement of its responsibility in case of misconduct occurring outside of the scope of the services required from the personnel provided by TCCs while affirming that this responsibility remains with the sending

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[272] *Ibid* at 178.
[273] *Ibid* at 178-79: "by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its members; and by providing for the conclusion of agreements between the Organization and its Members. Practice -in particular the conclusion of conventions to which the Organization is a party- has confirmed this character of the Organization […]."
[274] UNGA, "Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters," (September 20, 1996), A/51/389 at §6.
[275] *Ibid* at §6.
[276] Boon supra note 227 at 349.
[277] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion: I.C.J. Reports 1999, 62 at §66. "Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their officia1 capacity. The United Nations may be required to bear responsibility for the damage arising from such acts […]."
[278] UNGA, "Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment," (August 27, 1997), A/51/967 at article 9.

government.[279] These sources demonstrate a position on the attribution of responsibility of the UN for the actions of its agents; it appears that the organization draws a line based on the context in which the acts took place. Nevertheless, in discussions relating to the responsibility of the UN in SEA affairs, the Zeid report reads: "[u]ltimately, the United Nations is accountable for its peacekeeping operations. It is thus incumbent on the Organization to attempt to minimize instances of sexual exploitation and abuse in its peacekeeping missions."[280] This interpretation of the UN's responsibility broadens the scope by not limiting the organization's responsibility to the performance of duties. This understanding is somewhat in line with the concept of accountability for actions of members of contingents beyond the scope of duty, with the sending entity being responsible for the conduct of its contingent.[281] Following this thought, the UN could be responsible for its agents, particularly the international staff they are deploying.

1.1.b. The UN Liability for Third-Party Claims

The UN clarified the issue of its liability in UNGA resolution 52/247 discussing temporal and financial limitations of third-party liability. Following the trend set by the UNSG, it recognized third-party liability "for personal injury, illness or death, and for property loss or damage (including non-consensual use of premises) resulting from or attributable to the activities of members of peacekeeping operations in the performance of their official duties" while denying any liability "in relation to third-party claims resulting from or attributable to the activities of members of peacekeeping operations arising from 'operational necessity.'"[282] According to this resolution, claimants have up to six months to come forward with their case, and the compensation is capped at USD 50,000.[283] This resolution solely covers compensation for material prejudice caused by operational necessity while overlooking moral prejudice.[284] While it acknowledges the rights of the individuals to a remedy for their injuries, it overlooks the misconduct of peacekeepers outside of their official duties.[285] On a more optimistic point, while not granting compensation to victims of SEA by peacekeepers, the resolution does not

[279] *Ibid* at article 9: "Article 9, Claims by third parties. The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this Memorandum. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims."
[280] UNGA supra note 19 at §38.
[281] UNGA supra note 278 at article 9.
[282] UNGA, "Third-party liability: temporal and financial limitations," (July 17, 1998), A/52/247 at §5-6.
[283] Mompontet supra note 65 at 58.
[284] *Ibid* at 58.
[285] Boon supra note 227 at 356.

prevent it.[286] The notion of liability and compensation for a prejudice interrogates the intention behind the Trust Fund. While the Trust Fund is not advertised as a compensation mechanism but as a mechanism to provide assistance, it is partly funded by voluntary contributions from MS and partly by withheld payments intended for TCC, because of substantiated claims against their personnel.[287] This usage of withheld payments questions the destination of the fines imposed on "*civilian personnel,*" according to the data disclosed by the organization, as of June 2024, three allegations in PKO context resulted in the imposition of financial sanction on the perpetrator.[288]

It seems crucial to mention that the recognition of the legal liability of the organization does not impact the immunity enjoyed by the organization.[289] Mompontet argues that the UN should compensate the victims even when the acts were perpetrated outside of the functions of the personnel.[290] The settlement of the dispute is, in the end, solely dependent on the willingness of the UN to assume responsibility, as the UN can decide to waive its immunity. Although problematic from the point of view of the victims' rights protection, the limited responsibility of the UN answers significant political and pragmatic constraints, all oriented towards ensuring that the UN can carry out its functions as freely as possible.

The notion of the UN responsibility is complex and arises from various normative documents. Conscious of the necessity to clarify the situation and ensure that IOs are not enjoying impunity, the International Law Commission (ILC) drafted an instrument enabling it to frame IOs' responsibility. Although not a ratified normative instrument, the ILC work has gradually gained influence in various courts.

1.1.c. Legal Framework and Principles Underpinning the Responsibility of the UN

The ILC codified customary international law and general principles in the 2011 Draft Articles on the Responsibility of International Organizations (DARIO). The DARIO considered that IOs could be responsible for internationally wrongful acts.[291] According to this instrument, internationally wrongful acts can consist "of an action or omission" which would be

[286] Mompontet supra note 65 at 59.
[287] See UN supra note 258. Between 2016 and 2024, the UN Trust Fund in Support of Victims of Sexual Exploitation and Abuse received UD 935,000 in withheld payments intended for TCCs.
[288] *Ibid* as of now, there seems to be no information informing the public of the destination of these fines.
[289] Maria Vicien-Milburn, "Promoting the Rule of Law Within the United Nations," *The International Lawyer* 43, no. 1 (2009): 51-57 at 51.
[290] Mompontet supra note 65 at 49.
[291] UN, *Yearbook of the ILC*, (New York, Geneva, 2011), A/CN.4/SER.A/2011/Add.1 (Part 2) [hereinafter DARIO] at §87 article 3.

"attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization."[292] The international wrongfulness of an act of an IO is assessed based on principles of international law.[293] This understanding is coherent with the notion of primary obligations mentioned earlier.[294] When an IO fails to act in accordance with its obligations under international law, regardless of the origin of the obligation, it is considered in breach of that obligation.[295] This principle is not retroactive; therefore, the IO had to be bound by this obligation at the time of the action.[296] While the DARIO particularly highlights the right of injured States, injured IOs or other States or IO to bring a claim against an IO it also specifies that it "is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization."[297] Klabbers noted limitations to attributing actions or omissions to an IO, notably the complexity of the attribution based on IO law and the difficulty of identifying the IO's obligations under international law.[298] Omissions can be distinguished into two categories: intentional or negligent.[299] The Cholera case, in which troops deployed within the scope of a UN mission allegedly imported cholera in Haiti, resulting in a Cholera outbreak in the country, has been considered a negligent omission.[300]

According to Articles 6 and 7 of the DARIO, an IO -like the UN- can be held responsible for the conduct of its organs and agents, or organs and agents put at its disposal by another IO or by a state. Beyond this assessment of the UN's obligations, there is also the question of whether the UN could be responsible for unauthorized acts of their personnel. In theory, an IO could be responsible for organs and agents' conduct even if this would exceed authority or contravene instructions.[301] Nevertheless, this specific article mentions actions "in an official capacity and within the overall functions of that organization." The wording of the article and the absence of a definition of "official capacity" or "overall functions" cultivates a form of confusion on the exact scope of IOs' responsibility. In 2011, the UN Secretariat argued, while responding to the ILC's comments on the draft articles, that an act of UN employees

[292] *Ibid* at §87 article 4.
[293] *Ibid* at §87 article 5.
[294] Klabbers supra note 265 at 1136.
[295] DARIO supra note 291 at §87 article10.
[296] *Ibid* at §87 article11.
[297] *Ibid* at §87 articles 43-50.
[298] Klabbers supra note 265 at 1134.
[299] Alan R. White, *Grounds of Liability:* Allegations reported for peacekeeping operations and special political missions *the Philosophy of Law* (Oxford [Oxfordshire] : New York: Clarendon Press ; Oxford University Press, 1985), at 23 as cited in Klabbers supra note 265 at 1137.
[300] Boon supra note 227 at 361 as cited in Klabbers supra note 265 at 1137.
[301] DARIO supra note 291 at §87 article 8.

contravening the organization's internal rules could not engage the UN's responsibility.[302] It is important to note that according to the articles, attributing responsibility to an IO does not affect individual responsibility under international law.[303]

Giorgio Gaja, the special rapporteur, collected in 2007 the comments from various entities -States, and IOs- on the first version of the DARIO. The report emphasized the lack of practical experience on which the articles were based and further encouraged MS to share any relevant cases that could enhance the articles.[304] Several commenters deplored how the draft articles did not pay enough attention to account for "the great variety of international organizations" argument countered by invoking the level of generality of the articles.[305] Comments have also been made in the early stages on aligning the DARIO with the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA); while not lambasting it, UNESCO warned the ILC not to "adhere too strictly to those articles"[306].

While the theoretical framework admits attribution of responsibility for an act to the UN, there are still specific criteria and conditions to hold the UN responsible.

1.2. Criteria and Conditions for Engaging the UN's Responsibility in SEA Cases

This part illustrates the criteria and conditions for attributing an act to the UN while wondering whether the organization can be found responsible for an internationally wrongful act in matters of SEA. It aims to identify how an act can be attributed to the UN while examining the UN's actions to determine whether they acted against their international obligations.

[302] UNGA, "Responsibility of international organizations: Comments and observations received from international organizations," (February 17, 2011), A/CN.4/637Add.1 at §18. The comment of the Secretariat on draft article 32 reads: "[t]he Secretariat notes that the terms and conditions of employment are governed by the internal rules of the Organization and their violation would therefore not entail the international responsibility of the Organization."
[303] DARIO supra note 291 at §87 article 66.
[304] UNGA, "Fifth report on responsibility of international organizations," (May 2, 2007), A/CN.4/583 at §5.
[305] *Ibid* at §7.
[306] ILC, "Comments and observations received from international organizations," (2006): 125-145, A/CN.4/637 at 127-28.

1.2.a. Identifying International Wrongful Acts

The DARIO defined an internationally wrongful act as a breach of international obligation.[307] To hold an entity responsible, this entity must have obligations. Klabbers, drawing from Hart's work, discusses the obligations that could justify holding an IO responsible and distinguishes between two forms of obligations: primary obligations and secondary ones.[308] The first type would stem from international law, but there might only be a few, while the second type would refer to obligations arising from the organization's mandate.[309] International obligations binding the UN are a debated subject. As Mégret and Hoffmann argue: "[i]f the United Nations routinely calls on States to adhere to the strictest international human rights standards, it can hardly exempt itself from that call."[310] Nevertheless, this does not prove that the UN may be obligated to respect international human rights standards. Scholars have discussed potential international obligations binding the UN, notably obligations in matters of international human rights standards; such discussions have been fuelled by the growing number of governance-like tasks entrusted to the UN.[311] Some discussions have, notably, crystallized around two bodies of law: international human rights law and international humanitarian law.[312] The variety of settings in which the UN is deploying personnel complexifies the discussions, as each setting may require the application of different bodies of law depending on the situation. Traditionally, the main issue is that IOs such as the UN are neither States nor parties to international human rights treaties, and States are the traditional entities with obligations relative to human rights.[313] Then, whether international human rights law gained the status of customary law could also change the assessment of UN obligations

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[307] DARIO supra note 291 at §87 articles 10-11.

[308] Herbert L. A. Hart, *The Concept of Law*, 1st ed (Oxford: New York: Clarendon Press: Oxford University Press, 1961) as cited in Klabbers supra note 265 at 1136.

[309] Klabbers supra note 265 at 1136. To support his argument, Klabbers compared the obligations of an IO originating from its mandate to the responsibility of individuals in high positions who might be responsible for actions without being able to pinpoint a direct obligation but "by virtue of their position."

[310] Frederic Mégret and Florian Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities," *Human Rights Quarterly* 25, no. 2 (2003): 314-42 at 336.

[311] *Ibid* at 314; Klabbers supra note 265 at 1135.

[312] See Robert O. Weiner and Fionnuala Ni Aolain, "Beyond the Laws of War: Peacekeeping in Search of a Legal Framework," *Columbia Human Rights Law Review* 27, no. 2 (1996): 293-354 as cited in Mégret and Hoffman supra note 310 at 331. Generally, relying on international humanitarian law is insufficient and unsatisfactory as it does not consider how the UN differs from other "parties" to a conflict.; UNSG, "Observance by United Nations forces of international humanitarian law," (August 6, 1999), ST/SGB/1999/13 at 1.1, 5.3: The UNSG clarified in 1999 how international humanitarian law could apply to UN forces. It is quite restrictive and only refers "to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement." Nevertheless, the Bulletin also mentions obligations relative to the protection of civilians in those terms: "[t]he United Nations force shall take all feasible precautions to avoid, and in any event minimize, incidental loss of civilian life, injury to civilians or damage to civilian property."

[313] August Reinisch, "Securing the Accountability of International Organizations," in *International Organizations*, ed. Jan Klabbers, 1st ed. (Routledge, 2017): 535-53 at 539; Mégret and Hoffmann supra note 310 at 320.

relative to human rights standards.[314] It is generally recognized that, at least in principle, the UN is required to operate in accordance with customary international law.[315] This thesis does not argue that States are not primarily responsible for upholding human rights standards but merely that the situation and powers entrusted to the UN can justify the extension of these obligations to the organization. There are three different but not mutually exclusive conceptions explaining how the UN could be considered to have international human rights obligations.[316] There is the "External", the "Internal" and the "Hybrid" conceptions.[317] Based on the "External" conception human rights standards bind the UN because these have become customary international law.[318] The "Internal" conception relies on the fact that the UN has been entrusted with promoting human rights standards, and therefore, these standards bind the organization.[319] The "Hybrid" conception considers human rights standards bind the UN "to the extent that its members are bound."[320] The level of control the UN may be required to exercise over individuals could create "a potential for, and a duty to avoid, human rights abuse."[321]

Going beyond positive obligations under international law, Klabbers suggested considering "role responsibility."[322] Under this conception, an IO would be bound by obligations based on its functions, and therefore, a breach of obligation could occur when an IO does not fully realize its mandate.[323] Nevertheless, it was also argued that the failure of the UN to actively promote human rights -as prescribed in its mandate- is not necessarily a human rights violation but that it could merely be a violation of the UN internal order.[324] Klabbers justified the addition of obligation stemming from the mandate of an IO for the sake of clarity

[314] Reinisch supra note 313 at 539.
[315] See Henry G. Schermers and Niels Blokker, *International Institutional Law: Unity within Diversity*, 3rd rev. ed (The Hague ; Boston : Cambridge, MA, U.S.A: M. Nijhoff ; Sold and distributed in the U.S.A. and Canada by Kluwer Law International, 1995) at 824 as cited in Reinisch supra note 313 at 540. While it is generally accepted, there have been debates on whether customs bound the UNSC, and the analysis of the Charter led to contradicting conclusions.
[316] Mégret and Hoffmann supra note 310 at 317-18.
[317] *Ibid* at 317-18.
[318] Schermers and Blokker supra note 315 at 824, 986 as cited in Mégret and Hoffmann supra note 310 at 317. This argument is based on the fact that almost all States participated through their representatives in the drafting of human rights standards instruments intended to create a universal law.
[319] Mégret and Hoffmann supra note 310 at 317; Zenon Stavrinides, "Human Rights Obligations under the United Nations Charter," *The International Journal of Human Rights* 3, no. 2 (June 1999): 38-48 at 38, 40 as cited in Mégret and Hoffmann supra note 310 at 317: "[i]t is self-evident that the Organization is obliged to pursue and try to realize its own purpose."
[320] August Reinisch, "Securing the Accountability of International Organizations," *Global Governance: A Review of Multilateralism and International Organizations* 7, no. 2 (July 28, 2001): 131-49 at 137-38, 141-43 as cited in Mégret and Hoffmann supra note 310 at 318.
[321] Mégret and Hoffmann supra note 310 at 322-23.
[322] Klabbers supra note 265 at 1135.
[323] *Ibid* at 1135.
[324] Mégret and Hoffmann supra note 310 at 315, 319.

as obligations of IOs under international law are not always easily identified; nonetheless, this does not clarify the situation. The issue with obligations under international law is the absence of an exhaustive list. Secondary obligations would not be more transparent, particularly in the case of the UN, one of the IOs with the broadest mandate. Moreover, many elements should be considered when assessing the realization of an IO's mandate: the international context, the compliance and support of its MS, and financial constraints.

To attribute responsibility to the UN for an action related to SEA, one needs to identify the organization's obligations and then examine the UN's handling and reaction to SEA to assess whether there were breaches of obligations. In the context of SEA, the UN is the direct employer of a share of the personnel it deploys and exercises a certain control over contingents. The organization has been accused in the past of attempting to hide cases of SEA.[325] The UN does not systematically refer cases for criminal proceedings, nor does it systematically waive the immunity of its personnel.[326] These elements depict a dark side of the UN. Nevertheless, the critical question is: do these constitute internationally wrongful conduct in any way? International human rights law provides that individuals are entitled to access a court and seek a remedy if they have suffered from wrongdoing.[327] Preventing the alleged victims from fully exercising their rights would be in breach with international human rights standards. Based on the Universal Declaration of Human Rights (UDHR), all human beings are entitled to "security of person"; slavery in all forms is prohibited, as well as torture or degrading treatments.[328] Building on these rights Article 8 establishes that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[329] Similar rights are granted by the International Covenant on Civil and Political Rights (ICCPR). Still, it also specifies that all parties to the Covenant must: "ensure that any person whose rights or freedoms as herein recognized are violated shall

[325] See Sandra Laville, "UN whistleblower who exposed sexual abuse by peacekeepers is exonerated," *theguardian.com*, (January 18, 2016), https://www.theguardian.com/world/2016/jan/18/un-whistleblower-who-exposed-sexual-abuse-by-peacekeepers-is-exonerated. In 2015, Anders Kompass, the then director of field operations for the Office of the High Commissioner for Human Rights in Geneva, disclosed to the French authorities the records of the various allegations and interviews related to SEA by members of their *Sangaris* Operation in Central African Republic. He shared these documents after witnessing the lack of actions of the UN. As a result, Kompass, the now whistleblower, was suspended by the organization. It took nine months for an internal investigation to clear him.

[326] For the UN to waive an individual's immunity, it requires a formal request. Nevertheless, evidence lead to conclude that an investigation and even a conviction can occur despite the official waiver of immunity, see Annex A and B cases no. 20, 21, 56, 72, 105, 124, 125, 129, 150, 158, 161.

[327] Rosa Freedman, "UN Immunity or Impunity? A Human Rights Based Challenge," *European Journal of International Law* 25, no. 1 (February 1, 2014): 239-54 at 241.

[328] UNGA, "Universal Declaration of Human Rights," (December 10, 1948), A/RES/217(III)A, [hereinafter UDHR] at articles 3-5.

[329] *Ibid* at article 8.

have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; [and] ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy [and] ensure that the competent authorities shall enforce such remedies when granted."[330] Therefore, when the UN fails to waive the immunity of a staff member against whom an allegation has been substantiated or does not refer a substantiated allegation to national authorities, the organization prevents the victim from accessing courts and remedies. Nevertheless, it is essential to add that some of these actions might be justified by obligations stemming from the same instruments. If the UN is obligated to respect the alleged victims' rights, it is under the same obligation to respect the alleged perpetrators' rights.[331]

1.2.b. In the Case of SEA, Is There an Internationally Wrongful Act Attributable to the UN

Generally speaking, links must exist between the conduct in question and the IO. The DARIO imagines several links reflecting an IO's different situations.[332] The conduct of an IO's organs or agents is attributable to the IO if these actions were done while performing its functions.[333] An act can also be attributed to an IO if it was the "conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization" if the latter organization "exercises effective control over that conduct."[334] A conduct can be attributed even when it exceeds the authority of an organ or agent of an IO or even when it contravenes instructions as long as "the organ or agent acts in an official capacity

[330] International Covenant on Civil and Political Rights, March 23, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] at articles 2, 7-8. The ICCPR reiterates the prohibition of slavery, servitude or forced labor as well as torture or degrading treatment.
[331] The UN cannot hand over an individual to national authorities that would subject this individual to treatment in breach of human rights standards. See UDHR supra note 328 at articles 9-11. These articles provide that any individual accused shall not "be subjected to arbitrary arrest, detention or exile" and that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." In addition, any individual shall be presumed innocent until proven guilty, and no one can be charged for actions that did not constitute a crime at the time of the commission of the act. See also ICCPR articles 9-10, 14-15 for similar provisions relative to the treatment of individuals accused of crimes.
[332] DARIO supra note 291 at §87 Chapter II.
[333] *Ibid* at article 6. The article further clarifies that it is up to the organization to define the functions of the organ or agent.
[334] *Ibid* at article 7.

and within the overall functions of that organization."[335] A last option stands, although unlikely, an IO could under the DARIO acknowledge and adopt a conduct as its own.[336]

The DARIO defines an organ of an IO as: "any person or entity which has that status in accordance with the rules of the organization," while an agent is to be understood as "an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts."[337] Historically, the term "agent" has been interpreted liberally; according to the ICJ, an agent is anyone through whom an IO can act; this individual could be paid or not, an official, a permanent employee.[338] This broad interpretation seems also to include implementing partners.[339] However, as evoked previously, the UN rejects its responsibility for the conduct of organs or agents acting in a private capacity.[340] The conception of off-duty and on-duty exposed by the UN is very likely to apply to UN personnel in general. In addition, this understanding of the agent could lead to issues as it greatly expands the responsibility of the UN. In SEA cases, UN personnel act in a private capacity, hence the absence of provisions to attribute responsibility to the UN for such acts.[341] Nevertheless, many scholars have pinpointed the UN's failures in the prevention realm, creating an environment conducive to SEA as personnel might believe such actions would go unpunished.[342]

It has been argued that the organization failed to prevent SEA by failing to enforce adequate prevention and training measures and consequently failing to protect populations.[343] Mompontet argued that these failures were breaches of the UN's obligation to protect populations.[344] António Guterres recognized and listed several factors explaining how the organization's negligence maintained a favorable environment for SEA.[345] Some even consider

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[335] *Ibid* at article 8.
[336] *Ibid* at article 9.
[337] DARIO supra note 291 at §87 art 2.
[338] ICJ supra note 277 at 177.
[339] See Buscemi supra note 241 at 179 for more information on the UN's and its implementing partners' responsibilities. Due to its wide range of activities, the UN has been increasingly outsourcing its activities.
[340] UNGA, "Report of the International Law Commission," (2004), A/59/10 at 107; On the question of what qualifies as off-duty versus on-duty status see UN, *United Nations Juridical Yearbook 1986*, (New York: 1994) at 300: "We believe that a soldier may be considered "off-duty" not only when he is 'on leave' but also when he is not acting in an official or operational capacity while either inside or outside the area of operations. […] We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operation."
[341] Mompontet supra note 65 at 59.
[342] *Ibid* at 59; Buscemi supra note 241.
[343] Mompontet supra note 65 at 60.
[344] *Ibid* at 60.
[345] UNGA supra note 28 at §12: "The persistence of sexual exploitation and abuse in the United Nations has also been compounded by several other factors: weakly enforced standards with respect to civilian hiring; little to no

that the UN has an "indirect" responsibility for not taking sufficient measures to prevent SEA by the personnel it is outsourcing part of its activities to.[346] Buscemi discussed the applicability of the provisions of the DARIO to the action of private companies supplying the UN with services in PKOs, especially using the notion of "agent."[347] Discussing this aspect is even more critical today as the latest UN PKOs have been large-scale and multidimensional missions requiring the UN to gradually and exponentially outsource activities.[348] Nonetheless, non-UN service providers must still comply with the UN Supplier Code of Conduct standards.[349]

Mompontet and Freedman contend that the UN, by being unable to provide an alternative mechanism in compliance with Article 29 of the CPIUN to the victims of SEA to settle their disputes, failed to uphold standards of protection of human rights.[350] Freedman adds that the lack of access to justice is another violation of the victim's rights.[351] Nevertheless, there have been debates regarding the consequences of non-compliance with these provisions, and it remains unclear what could be done. Boon argues that compliance with Article 29 of the CPIUN would be a condition for applying the immunities as laid out in the convention.[352] This argument has been raised in court before but was never successful.[353] It has been argued that the reason behind this non-recognition of the obligation of the UN, was partly to avoid the submersion of

system-wide screening of candidates for prior history of related misconduct; ignorance of the values and rules of the Organization; a lack of uniform and systematic training across all categories of personnel; weak civilian or uniformed leadership that fails to reinforce conduct and discipline; a sense of impunity among those who perpetrate these acts; and insufficient attention and a lack of sustained efforts on the part of the senior United Nations leadership and Member States, until provoked by crisis."

[346] Buscemi supra note 241 at 176.

[347] *Ibid* at 177.

[348] *Ibid* at 179.

[349] *Ibid* at 181.

[350] Mompontet supra note 65 at 59; Freedman supra note 53 at 963; Convention on the Privileges and Immunities of the United Nations, February 13, 1946, corrected in 1951, 90 U.N.T.S. 327 [hereinafter CPIUN] at article VIII section 29 of the Convention reads: "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." Foreseeing the disputes arising from the wide range of activities performed by the organization, the drafters of the CPIUN bound the organization to establish modes of settlement for situations in which the immunity of one of its agents would impede the course of justice.

[351] Freedman supra note 53 at 963.

[352] Boon supra note 227 at 335.

[353] *Ibid* at 355; August Reinisch and Gregor Novak, "International Organizations," in *International Law in Domestic Courts: A Casebook*, by André Nollkaemper and August Reinisch, Book, Whole (Oxford: Oxford University press, 2018), 170-97 at 188; In Georges v. United Nations, No. 15-455, (2nd Cir. August 18, 2016) at 2, the court was asked "whether the UN's fulfillment of its obligation under Section 29 of the CPIUN […] is a condition precedent to its immunity under Section 2 of the CPIUN." The court of appeal held "that the UN's fulfillment of its Section 29 obligation is not a condition precedent to its Section 2 immunity."; In Manderlier v. Organisation des Nations Unies et l'Etat Belge (Ministre des Affaires Étrangères), (Brussels Court of First Instance, May 11, 1966), JT n° 4553, 721-24 at 723, the argument was rejected by the Court on the basis of the unconditionality of the UN's immunity.

international courts with claims that IOs are in breach of their obligations.[354] As mentioned above, the UNSG recognized the organization's failure to prevent the apparition of this sense of impunity among perpetrators.[355] In addition, the CPIUN had established an explicit provision requesting the organization to cooperate with appropriate authorities to ensure there is no abuse of immunity for UN Officials.[356] Fighting this sense of impunity entails fully implementing this provision and determining suitable forums to exercise jurisdiction over the actions of the UN.

1.3. Identifying Forums Able to Attribute Responsibility to the UN

This section examines forums, including domestic and international courts, that have previously attempted to attribute responsibility to the UN. It will specifically address issues of attribution, separate from the issues of immunities discussed in the third chapter of this research.

1.3.a. The UN Facing Accusations in Domestic Courts

Witnessing the UN facing domestic courts is a rare occurrence.[357] Debates have emerged on the merits of having a domestic court adjudicating on issues of IO and international law, the main argument against being the fear of the multiplication of varying decisions leading to inconsistent interpretation of international law provisions.[358] The ICJ itself opposed having the UN face domestic courts.[359] There are concerns that if domestic courts can prosecute an IO, a State could exercise unilateral control over the organization and have courts making conflicting decisions.[360] Despite the concerns the UN has faced domestic courts, this discussion will

[354] Laure Laganier Milano, "Les immunités issues du droit international dans la jurisprudence européenne," *Revue trimestrielle des droits de l'homme* 76, (2008): 1059-81 at 1068 as cited in Mompontet supra note 65 at 57.
[355] UNGA supra note 28 at §12.
[356] See CPIUN supra note 350 at article V section 21: "The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article." There is no such provision in the CPIUN as regards experts on missions.
[357] Reinisch and Novak supra note 353 at 170.
[358] Hugh McKinnon Wood, "Legal Relations between Individuals and a World Organization of States," *Transactions of the Grotius Society* 30 (1944): 141-64 at 143-44 as cited in Henry G. Schermers and Niels Blokker, *International Institutional Law: Unity within Diversity*, 5th rev. ed (Leiden: Martinus Nijhoff Publishers, 2011) at 1034 as cited in Boon supra note 227 at 352.
[359] ICJ supra note 277 at §66: "However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts."
[360] Jan Wouters and Pierre Schmitt, "Challenging Acts of Other United Nations' Organs, Subsidiary Organs, and Officials," in *Challenging Acts of International Organizations Before National Courts*, ed. August Reinisch

mention two cases: Manderlier in front of Belgian Courts and the set of cases opposing the Mothers of Srebrenica to the UN and the Dutch State.

In 1966 and 1969, the UN and the Belgian State were in the docks in front of Brussels Courts for damages allegedly suffered by Manderlier due to abuses perpetrated by the UN troops in the Congo.[361] Both Courts declared the proceedings against the UN inadmissible; nevertheless, the Brussels Appeal Court concluded "[…]in the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations; and although this situation, which does not seem to be in keeping with the principles proclaimed in the Universal Declaration of Human Rights, may be regrettable, […] the judge of first instance was correct in declaring that the action brought against the United Nations was inadmissible."[362] Nonetheless, the likelihood of success of the argument relative to the UDHR has probably increased with the codification of International Human Rights Law.[363]

In the case opposing the Mothers of Srebrenica to the Netherlands and the UN, the claimants justified their resort to domestic Dutch Courts by the absence of any alternative mode of dispute settlement -despite the obligation of the UN to provide them with one-.[364] The case was first argued in front of The Hague District Court in 2008; the association Mothers of Srebrenica accused the State of the Netherlands and the UN of having failed to prevent the massacre of Srebrenica.[365] The Court declared itself "incompetent to hear the action instituted against the UN."[366] The Hague Court of Appeal upheld this position, stating that prosecuting the UN for failing to prevent genocide would undermine the regime of immunity enjoyed by the organization.[367] These judgments mainly focused on answering the question of whether Dutch Courts had jurisdiction over the UN. After the decision was confirmed by the Dutch

(Oxford University Press, 2010), 77-110 at 101, 109 and Daniël Grütters, "NATO, International Organizations and Functional Immunity," *International Organizations Law Review* 13 (April 13, 2016): 211-54 at 211, 238, 251 as cited in Dorothea Anthony, "Resolving UN Torts in US Courts: Georges v United Nations," *Connecticut Journal of International Law* 19 (June 22, 2018): 462-93 at 464.

[361] UN, "Part Three. Judicial decisions on questions relating to the United Nations and related inter-governmental organizations: Chapter VIII. Decisions of national tribunals," *United Nations Juridical Yearbook*, (1969): 235-44 at 236.

[362] *Ibid* at 237.

[363] Freedman supra note 53 at 982.

[364] Mothers of Srebrenica v. The State of The Netherlands and The United Nations, 200.022.151/01, (Appeal Court in The Hague, March 30, 2010) at §5.8.

[365] Mothers of Srebrenica v The State of The Netherlands and The United Nations, 295247/HA ZA 07-2973 (District Court in The Hague. July 10, 2008) at §2.2. Srebrenica had been declared by the UN a safe area, and the Dutchbat (a Dutch battalion under the UN flag) was based in the enclave; in July 1995, between 8,000 and 10,000 Bosnian Serbs citizens of Bosnia-Herzegovina were murdered. The claimants argued that the acts, as well as the inaction of both the UN and the State of the Netherlands embodied in the Dutchbat, are wrongful acts.

[366] *Ibid* at 1.

[367] Mothers of Srebrenica supra note 364 at §5.10.

Supreme Court in 2012, the case resumed solely against the Netherlands.[368] However, the UN responsibility kept being mentioned, particularly as the State of the Netherlands used it as a defence in front of the European Court of Human Rights (ECtHR), arguing that the actions or inaction of the Dutchbat in Srebrenica were the sole responsibility of the UN.[369] The Court of Appeal in 2017 stated that a State could not be held liable for acts not attributable to it based on the impossibility for the victims to hold the UN liable on grounds of immunity.[370] Following a thorough assessment of the situation, including a discussion on the exercise of control over the Dutchbat, the Court found the State partly responsible for the tragic events of Srebrenica.[371] This case is known for considering dual attribution of responsibility to an IO and a State.[372] If domestic courts cannot attribute responsibility to the UN, then international courts could offer more opportunities.

1.3.b. The UN Facing International Courts

International courts have discussed the attribution of responsibility to an IO in the past. One of the main cases was argued in front of the ECtHR against States in the context of the international intervention in ex-Yugoslavia but touched upon the attribution of responsibility to the UN. In Behrami and Behrami v. France and Saramati v. France, Germany and Norway, the Court concluded that the UNSC "retained ultimate authority and control" while NATO retained "effective command of the relevant operational matters."[373] It established that the United Nations Mission In Kosovo, due to its statute as a subsidiary organ of the UN, made the inaction of the mission "'attributable' to the UN."[374] This interpretation implies that the conduct was not

[368] Mothers of Srebrenica v The State of The Netherlands and The United Nations. 10/04437 (Supreme Court of the Netherlands. April 13, 2012).
[369] Stitching Mothers of Srebrenica and Others v. The Netherlands, (ECtHR, June 11, 2013) at §73.
[370] Mothers of Srebrenica v. The State of The Netherlands, 200.158.313/01, (Appeal Court in The Hague, June 27, 2017) at §11.2: "The fact that the rules laid down in international law could lead to the circumstance that the victims could not hold liable the UN (on grounds of immunity) and subsequently one of the UN Member States (on grounds of non-attributability) for certain acts and war crimes committed by the Bosnian Serbs, cannot be blamed on the State, and it does not follow that more should be attributed to the Member State than what it is liable for under the prevalent rules. This ground for appeal is unfounded, therefore."
[371] *Ibid* at §2.2.4, §11.2, §12.1.
[372] UNGA supra note 340 at 101. In preliminary commentaries of the ILC as regards the attribution of conduct it reads: "[a]lthough it may not frequently occur in practice, dual or even multiple attribution of conduct cannot be excluded. Thus, attribution of a certain conduct to an international organization does not imply that the same conduct cannot be attributed to a State, nor does vice versa attribution of conduct to a State rule out attribution of the same conduct to an international organization. One could also envisage conduct being simultaneously attributed to two or more international organizations, for instance when they establish a joint organ and act through that organ."
[373] Behrami and Behrami v. France and Saramati v. France, Germany and Norway, (ECtHR, May 2, 2007) at §140.
[374] *Ibid* at §143.

attributable to States and, therefore, they could not be held responsible for any violations.[375] An information note on the case further details: "[t]hat organization was a legal entity distinct from its member states and was not a contracting party to the Convention."[376] The ECtHR declined to interpret the European Convention of Human Rights (ECHR) in a manner that would subject the conduct of parties governed by UNSC resolutions before or during a UN mission aimed at maintaining international peace and security to the jurisdiction of the Strasbourg Court.[377] In the Court's opinion, deciding otherwise would constitute an interference within the UN's affairs which might impede the completion of its missions.[378] In other words, the Court concluded that while it could attribute the action to the UN, it could not act on such an attribution.

The interpretation of the situation has been criticized by scholars, particularly for failing to consider that an action could be attributable simultaneously to IOs and States.[379] Milanovic goes as far as saying that "the Court's entire chain of reasoning in Behrami consisted of a misapplication of general rules of international law, whether those of the law of international responsibility or the law of international organizations."[380] The ILC itself claimed that although the mention of the articles by an international judicial body was welcomed, the Court did not capture the intention of the drafters in its understanding of the situation.[381] The reasoning of the case was upheld and cited in other cases adjudicated by the ECtHR when it came to the attribution of conduct to an IO.[382]

With the evolution of the legal framework relating to the UN's responsibility, possibilities for holding the organization responsible for wrongdoings are expanding. Nevertheless, the barriers to these options remain solid. Turning towards holding States responsible could be an option to satisfy the desire for accountability.

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[375] *Ibid* at §152.
[376] ECtHR, " Information Note on the Court's case-law No. 97," (May 2007) at 2.
[377] *Ibid* at 3.
[378] *Ibid* at 3.
[379] Marko Milanovic, "Special Rules of Attribution of Conduct in International Law," *International Law Studies Series. US Naval War College* 96 (2020): 295-393 at 348.
[380] *Ibid* at 349.
[381] UN, "2932nd Meeting: Responsibility of international organizations", *Yearbook of the ILC I*, A/CN.4/SER.A/2007, 115-20 at 115 §4.
[382] See In Kasumaj v. Greece, (ECtHR, July 5, 2007) at 3. The court argued -based on its interpretation of the Behrami case- that the Court "was not competent ratione personae to review the acts of the respondent States carried out on behalf of the UN." For more mentions of the Behrami case see Berić and Others v Bosnia and Herzegovina, (ECtHR, October 16, 2007) at §29.

2. CONSIDERING THE ENGAGEMENT OF STATES: WHICH STATES AND HOW CAN THEY ACT TO ENHANCE ACCOUNTABILITY?

Failing to recognize the States' importance in handling SEA by UN-related personnel cases would be a mistake. States can play various roles in handling SEA allegations against individuals. The relationship between the State and the alleged perpetrator can be of various natures and may impact the State's level of involvement. The accused individuals can be part of a military contingent or simply nationals or residents of a State. The State could also be hosting a UN presence and be referred to as the host State. The variety of relationships leads to various potential actions taken by the State or against the State depending on its position relative to the alleged offender.

2.1. The Specificity of the Regime Applied to Military Personnel

In PKOs, members of military contingents provided to the UN by States remain under the exclusive jurisdiction of their States of origin. This specific regime of jurisdiction at the mission level is created through two instruments: the MOU and the SOFA. Both instruments are considered binding.[383] Precisely, Article 47-b of the model SOFA reads: "Military members of the military component of the United Nations peace-keeping operation 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/territory]."[384] The MOU was amended in 2007 to provide more details on the standards of conduct of deployed troops within missions and, if need be, the consequences of misconduct.[385] Modifications were made in 2020, further confirming the exclusive jurisdiction of TCCs while signatory governments assured the UN they would exercise jurisdiction over crimes or offenses.[386] The model SOFA entrusts the

[383] Bruce Oswald, Helen Durham, and Adrian Bates, *Documents on the Law of UN Peace Operations* (Oxford: Oxford Univ. Press, 2010) at 12 as cited in Sophia Genovese, "Prosecuting U.N. Peacekeepers for Sexual and Gender-Based Violence in the Central African Republic," *Brooklyn Journal of International Law* 43, no. 2 (2018): 609-38 at 634.
[384] Model SOFA supra note 122 at article 47-b.
[385] Draft MOU supra note 157.
[386] UNGA, "Manual on Policies and Procedures concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions," (August 31, 2020), A/75/121,

Commander of each contingent with the task of disciplining the troops;[387] in addition the Government is primarily responsible for undertaking investigations after reports of SEA.[388] Moreover, the Government must ensure that perpetrators are held accountable.[389] The rationale behind such a specific regime of jurisdiction can be explained by the will to respect States' sovereignty. Furthermore, finding countries willing to provide the UN with troops might be tricky without such a framework. Countries fearing for their sovereignty might be dissuaded from contributing. Nevertheless, the revision of the MOU formalized States' obligations towards the UN regarding their handling of SEA allegations against their military personnel. Although open to criticism for not leaving much room to maneuver for the UN, this framework has the merit of establishing a clear regime of jurisdiction consistently applicable in all UN peacekeeping missions where contingents are deployed. While discussing contingents seems irrelevant when discussing other categories, it could be argued that their potential impunity contributes to a permissive environment for SEA and, therefore, is of interest when discussing the accountability of all categories of personnel.

As demonstrated above, the regime of accountability applied to members of military contingents is straightforward, the sending State is the sole entity able to exercise jurisdiction. Nevertheless, its implementation might not be so straightforward. While States have exclusive jurisdiction over their military personnel, they may also exercise jurisdiction over other

193-204 at article 7 *quinquiens*: "(7.22) Military members and any civilian members subject to national laws of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations peacekeeping operation]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes or offences. (7.23) The Government further assures the United Nations that it shall exercise such disciplinary jurisdiction as might be necessary with respect to all other acts of misconduct committed by any members of the Government's national contingent while they are assigned to the military component of [United Nations peacekeeping operation] that do not amount to crimes or offences."

[387] Ibid at Chapter 9 article 7 ter: "(7.5) The Government acknowledges that the Commander of its national contingent is responsible for the discipline and good order of all members of the contingent while assigned to [United Nations peacekeeping operation]. The Government accordingly undertakes to ensure that the Commander of its national contingent is vested with the necessary authority and takes all reasonable measures to maintain discipline and good order among all members of the national contingent and to ensure compliance with United Nations standards of conduct, mission-specific rules and regulations and obligations under national and local laws and regulations in accordance with the status-of-forces agreement. (7.6) The Government undertakes to ensure, subject to any applicable national laws, that the Commander of its national contingent regularly informs the Force Commander of any serious matters involving the discipline and good order of members of its national contingent, including any disciplinary action taken for violations of the United Nations standards of conduct or mission-specific rules and regulations or for failure to respect local laws and regulations. […]."

[388] *Ibid* at article 7 *quarter*: "(7.10) It is understood that the Government has the primary responsibility for investigating any acts of misconduct or serious misconduct committed by a member of its national contingent. […]."

[389] *Ibid* at Chapter 9 article 7 *ter-sexiens*.

individuals either because these individuals are present on the State's territory or because they hold the State's nationality.

2.2. The Difficulties of the Enforcement of the Accountability Mechanism

As a general assessment, the current accountability mechanism meant to address allegations of SEA against all categories of UN-related personnel is challenging to implement due to various hindrances. This section will discuss the barriers to a State's exercise of jurisdiction while also discussing how extraterritorial jurisdiction has been exercised in practice.

2.2.a. Extraterritorial Jurisdiction in Theory

Prosecution of an individual in a host State might be delicate due to the necessity of respecting due process and human rights standards. Therefore, there is a need to explore the different jurisdictions that can be exercised in cases of SEA by UN personnel. For MS to prosecute their nationals, they may need to be allowed by their domestic laws to exercise extraterritorial jurisdiction. As mentioned previously, the exercise of jurisdiction is typically rooted in the principle of territoriality. Extraterritoriality entails that national laws are applied outside national territory based on various principles, notably the active personality principle, passive personality principle, protective principle, or universality principle.[390]

The active personality principle, also known as the nationality principle, relies on the fact that a State has the right to exercise its jurisdiction over its nationals; in other words, under this principle, a State can adjudicate crimes committed abroad by its nationals.[391] This principle implies that the relationship between the State and its nationals determines jurisdiction and that state authority follows nationals even abroad.[392] Scott argues that "exercising active personality jurisdiction may be a State's duty under international law" using the example of sexual tourism and the US domestic legal system.[393] Usually, active personality jurisdiction is limited to serious

[390] Ryngaert supra note 128 at 85.
[391] *Ibid* at 88.
[392] Mills supra note 128 at 198.
[393] Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms," in *Torture as Tort : Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 1st ed (Hart Publishing, 2001), 45-64 at 55.

crimes and the context of criminal law.[394] The passive personality principle is based on the victim's nationality.[395] Although traditionally contested, many States seem to have come to terms with this principle, specifically when the crimes in question are deemed terrorist.[396] According to Mills, the growing acceptance of the passive personality principle can be seen in the provisions of the International Convention for the Suppression of Terrorist Bombings of 1997 but also in a separate opinion of an ICJ' judge in the case of Democratic Republic of the Congo v Belgium in 2002.[397] The protective principle aims to target crimes that could jeopardize a State's sovereignty or national security, for instance, treason or espionage.[398] This concept has faced significant criticism for its vagueness and for being used to their advantage by certain states.[399] The universality principle implies that even without connectors between the crime/perpetrator/victim and the State willing to adjudicate, a State can exercise its jurisdiction when crimes fall into a particular category.[400] The development of this principle has been attributed to the aftermaths of the Second World War and the numerous trials for gross human rights offenses that profoundly influenced international criminal law.[401] In 2005, the Institute of International Law passed a resolution stating that a State can exercise jurisdiction over specific international crimes even without any other acknowledged grounds for jurisdiction in international law.[402] This principle has created inter-state tensions as it embodies the tension between the will not to let crimes under international law go unpunished while respecting the sovereignty of states.[403] Based on this theoretical framework, it seems that all principles of extraterritorial jurisdiction could be invoked to prosecute SEA, except for the protective one.

2.2.b. Extraterritorial Jurisdiction in Practice

As already mentioned, not all States are allowed by their domestic legislation to exercise extraterritorial jurisdiction in practice. The UN has urged its MS to extend their jurisdiction over "crimes of serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, at least where

[394] Ryngaert supra note 128 at 89; Mills supra note 128 at 198.
[395] Ryngaert supra note 128 at 92.
[396] Mills supra note 128 at 199.
[397] *Ibid* at footnote 45.
[398] Ryngaert supra note 128 at 96.
[399] Noah Bialostozky, "Extraterritoriality and National Security: Protective Jurisdiction as a Circumstance Precluding Wrongfulness," *Columbia Journal of Transnational Law* 52, no. 3 (2014): 617-86 at 617.
[400] Ryngaert supra note 128 at 101.
[401] Matthew Garrod, "The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality," *International Criminal Law Review* 12, no. 5 (2012): 763-826 at 763.
[402] *Ibid* at 764-65.
[403] *Ibid* at 765.

the conduct as defined in the law of the State establishing jurisdiction also constitutes a crime under the laws of the host State."[404] Following this resolution, information as regards the implementation of this provision into domestic laws was requested and the UNSG was tasked to provide a compilation of all information received.[405] The UNSG was unable to provide a comprehensive overview of the situation for all MS due to the low response rate. However, the compilation does illustrate the diversity of jurisdictional regimes among MS.[406] For example, Lebanon can only exercise jurisdiction based on the principle of territoriality, while others, like Canada, have seven grounds to exercise jurisdiction.[407] In other words, as of 2023, there are still instances in which there is no forum to hold accountable an alleged perpetrator due to limitations stemming from national legal frameworks.

Another important element to consider when discussing extraterritorial jurisdiction is the notion of mutual legal assistance, as the State exercising jurisdiction might be far away from the crime scene and, therefore, need assistance, particularly as regards the investigation, collection of evidence, and contact with the victims. The draft convention on the criminal accountability of UN officials and experts on mission foresaw the possibility to divide the different stages of the accountability mechanism, and the possibility of exercising extraterritorial jurisdiction while encouraging States to engage in mutual legal assistance at various stages. The GLE has encouraged the establishment of mutual legal assistance channels between States to ensure the preservation and transmission of evidence between the host State -gathering the evidence- and another State -able to launch proceedings-.[408] In some cases, dual criminality could be a prerequisite for mutual legal assistance or the consideration of extradition.[409] Dual criminality entails that the alleged action is a crime in both the host State and the State that would exercise extraterritorial jurisdiction.[410]

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[404] UNGA, "Criminal accountability of United Nations officials and experts on mission," (January 8, 2008), A/RES/62/63 at §3.
[405] UNGA, "Criminal accountability of United Nations officials and experts on mission," (December 18, 2015), A/RES/70/114 at §23.
[406] UNSG, "Summary table of national provisions," (September 1, 2023).
[407] *Ibid* at 5, 13. Canada can exercise jurisdiction based on territoriality, nationality (including for sexual offences), passive personality (applicable to terrorist actions), effects doctrine, protective principle, universality (based on a list of crimes), but also for "offences on marine vessels, aircraft or space-related, as well as offences committed abroad by Canadian officials, military or diplomatic personnel and, generally, persons that owe some form of allegiance to Canada."
[408] UNGA supra note 30 at §79.
[409] *Ibid* at §23.
[410] *Ibid* at §23.

2.3. The Responsibility of States …

This sub-section provides an overview of the various actions or elements that can justify holding a State responsible.

2.3.a. … for Actions Committed by their Agents when States are TCCs

This section aims to explore the potential responsibility of States for the actions of their agents -particularly military members- when they are deployed as a contingent within the scope of a peacekeeping mission. While these individuals may be under UN control, they remain agents or organs of their country of origin and they might have been off-duty at the moment when they allegedly misbehaved. An instrument can be used to provide clarity on the questions relative to State responsibility and was used as a model to write the DARIO, the DARSIWA.[411] The ILC aimed to codify and clarify how the responsibility of States could be engaged. These articles endeavored to define a breach of a State's international obligation as well as the possible legal consequences associated with such a breach. Similarly to DARIO, DARSIWA started by establishing the "elements of an internationally wrongful act of a State" in those words: "[t]here 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."[412] The second chapter of the DARSIWA provides the criteria that can justify the attribution of conduct to a State. Article 4 defines the notion of organ as "includ[ing] any person or entity which has that status in accordance with the internal law of the State" that can exercise "legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."[413] Notably, conduct is attributable to a State if it is the conduct of one of the organs of the State or the State itself, the "conduct of persons or entities exercising elements of governmental authority," or the "conduct of organs placed at the disposal of a State by another State."[414] The articles define an organ as "includ[ing] any person or entity which has that status in accordance with the internal law of the State."[415]

[411] UN, "IV. State Responsibility", *Yearbook of the ILC II Part Two*, (2011), A/56/10, 20-143.
[412] *Ibid* at article 2.
[413] *Ibid* at article 4.
[414] *Ibid* at articles 4-6.
[415] *Ibid* at article 4.

In addition, the DARSIWA provides that conduct can still be attributed to States if the person or organ "empowered to exercise elements of the governmental authority" exceeded its authority or contravened instructions.[416] Under Article 8, the State is responsible for actions "of a person or group of persons" if these are done under instructions, direction or control of a State.[417] The DARSIWA foreseen a situation in which the official authorities of a state might be absent or lacking, in this context, an action of a person or group "exercising elements of the governmental authority" could be considered an act of a State under international law.[418] Based on this instrument, it appears that military contingents are clearly organs of the State. The DARSIWA define the breach of an international obligation in a very similar fashion to what was proposed by the DARIO as the latter was inspired of the former.[419] The reading of these articles leaves an unanswered question: how could this apply to SEA?

It has been argued that SEA by peacekeepers should not be attributable to the State based on the provisions of the DARSIWA.[420] This argument is based on the idea that peacekeepers are acting under the command and control of a UN mission and not under the control of their State of origin.[421] Yet, this position is not satisfactory. Indeed, it refutes the theory of dual attribution supported by the decision in the case Mothers of Srebrenica v. the Netherlands. O'Brien endeavored to distinguish between what could be attributable to States and IO, arguing that SEA could not be committed as part of the operation and, therefore, could not be solely attributable to the organization.[422] Furthermore, the jurisprudence of the ECtHR provides insights into the Courts' position on the attribution of responsibility in the cases Behrami and Behrami v France; Saramati v France, Germany and Norway. The Court considered that TCCs "retain some authority over those troops (for reasons, inter alia, of safety, discipline and accountability)" while an IO -in this case NATO- have "command of operational matters."[423] In consequence, O'Brien concludes that the Court affirmed that a State could be held responsible for criminal actions of its military personnel resulting in rights violations, particularly when it is not linked to operational matters.[424]

[416] *Ibid* at article 7.
[417] *Ibid* at article 8.
[418] *Ibid* at article 9.
[419] *Ibid* at articles 12-15.
[420] Genovese supra note 383 at 632.
[421] *Ibid* at 632.
[422] O'Brien supra note 198 at 58.
[423] Behrami case supra note 373 at §138.
[424] O'Brien supra note 198 at 58.

2.3.b. … to Condemn Violence Against Women and Children[425]

This section argues that States have an obligation to criminalize violence against women and children under international law. As mentioned previously, all States do not criminalize SEA. This section will build on women's international human rights to advocate for this criminalization. Women's international human rights, a branch of human rights law focusing on ensuring the equal treatment of women and men and formalizing the norm of nondiscrimination of women, and has been criticized for its fragility.[426] The structure and institutions established by instruments formalizing women's international human rights are usually more fragile than those of their counterparts, and the obligations and procedures stemming from those tend to be weakly implemented.[427] In addition, it has been highlighted that States tend to fail to comply with their obligations resulting from these instruments.[428] While these instruments may be imperfect, this research argues that the States must comply with all the obligations they contain based on their commitments to do so.[429] One of the major instruments to consider is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) because of its broad adhesion by States.[430] Of particular relevance for this study is Article 6, which provides that to condemn discrimination against women, States "shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."[431] Moreover, considering the variety of domestic legislations on the subject, varying from country to country, one must remember Article 27 of the Vienna Convention on the Law of Treaties states that "a party may not invoke the provisions

[425] While this research does not negate that there are male victims of SEA, the majority of the identified victims are women or girls. See Dataset presenting allegations in NMS supra note 199. Out of the identified victims involving UN staff members or UN related personnel in UN entities other than PKO/SPM 86.2% are women or girls and 17.7% of all allegations concern children victims.

[426] Hilary Charlesworth, "Human Rights of Women," in *National and International Perspectives*, ed. Rebecca J. Cook (University of Pennsylvania Press, 1994), 58-84 at 59.

[427] Noreen Burrows, "International Law and Human Rights: The Case of Women's Rights," in *Human Rights: From Rhetoric to Reality*, ed. Tom Campbell (Oxford: Blackwell, 1986) at 93-95 and Theodor Meron, "Enhancing the Effectiveness of the Prohibition of Discrimination Against Women," *American Journal of International Law* 84, no. 1 (1990): 213-17 at 213 and Laura Reanda, "The Commission on the Status of Women," *The United Nations and Human Rights: A Critical Appraisal*, ed. Philip Alston (Oxford: Oxford University Press, 1992) at 274 as cited in Charlesworth supra note 426 at 59.

[428] Rebecca Cook, "Sectors of International Cooperation through Law and Legal Process: Women," in *The United Nations and the International Legal Order*, eds. Oscar Schachter and Chris Joyner (Cambridge: Grotius Press, 1994) at 24 as cited in Charlesworth supra note 426 at 59.

[429] See Charlesworth supra note 426 for a review of all the criticisms opposed to Women's International Human Rights by feminist critiques.

[430] See OHCHR, "Status of ratification Interactive Dashboard," indicators.ohchr.org, (February 21, 2023), https://indicators.ohchr.org/. The OHCHR reports 189 State parties to the convention and 2 signatory States.

[431] Convention on the Elimination of All Forms of Discrimination against Women, December 18, 1979, 1249 U.N.T.S. 13 at article 6.

of its internal law as justification for its failure to perform a treaty."[432] In conclusion, under this article most of the situations labeled as SEA should be criminalized under domestic laws. International Law of State responsibility for human rights violation develops "to require governments to take preventive steps to protect […] human rights, to investigate violations that are alleged, to punish violations that are proven, and to provide effective remedies, including the provision of compensation to victims."[433] Cook distinguishes between the actions of private persons infringing women's rights under international law for which a State may or may not be responsible and a situation in which a state is facilitating, tolerating, or excusing private violations of women's rights in which case the State can be held responsible.[434] In the words of the UN Committee on the Elimination of Discrimination Against Women: "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[435] States signatories of the Convention on the Rights of the Child have additional obligations when victims are children. This convention has a particular weight on the international scene as 196 States are parties to it.[436] This convention requires States parties to take measures to ensure legal protection of children from any kind of SEA.[437]

This research argues that States are responsible in the case of SEA by UN personnel and peacekeepers for tolerating these forms of violence.

2.3.c. … to Investigate and Prosecute

While arguing in favor of the TCC's retainment of exclusive jurisdiction, Genovese indicates that a failure to investigate and/or prosecute the SEA allegations waged against their personnel would put MS in breach of its obligation to exercise due diligence in preventing human rights abuse.[438] Recognizing this breach of obligation should lead to holding States liable

[432] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 at article 27.
[433] Rebecca J. Cook, "State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women." in *Human Rights of Women National and International Perspectives*, ed. Rebecca J. Cook (Philadelphia: University of Pennsylvania Press, 2012) at 229.
[434] *Ibid* at 229.
[435] UNHCR, "CEDAW General Recommendation No. 19: Violence against women," (1992) at §9.
[436] OHCHR supra note 430.
[437] Convention on the Rights of the Child, November 20, 1989, 1577 U.N.T.S. 3 at article 34: "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials."
[438] Genovese supra note 383 at 612.

for their failure.[439] Because of the binding provisions of the MOU and SOFA regarding the obligation for MS to discipline their peacekeepers, the failure to do so constitutes a breach of obligation.[440] Article 45 of the Model SOFA reads: "[t]he Government shall ensure the prosecution of persons subject to its criminal jurisdiction who are accused of acts in relations to the United Nations peace-keeping operation or its members which, if committed in relation to the forces of the Government, would have rendered such acts liable to prosecution."[441] The additions made to the MOU formalized the responsibility of TCCs in terms of discipline and investigation.[442] Moreover, on a broader scope, the UNGA, demonstrating of form of adhesion to these ideas, adopted the Declaration on the Elimination of Violence against Women which fourth article read: "States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: […] (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."[443] While resolutions are not binding, they can still indicate the prevailing trend among MS.

In practice, the only unit that can invoke State responsibility is an injured or interested State if the breached obligation was owed to "(a) That State individually; or (b) A group of States including that State, or the international community as a whole, and the breach of the obligation."[444] In other words, for a State to be held responsible for its wrongful actions, another State should invoke its responsibility. Considering the usually complex situation in which the UN can intervene -both in mission and non-mission settings- it is unlikely to see these States insist on holding other States responsible.

In conclusion, this chapter has reinforced the understanding of the complexities in ensuring accountability in cases of SEA. Notably, it has highlighted the challenges in holding the UN accountable, particularly the necessity of attributing specific conduct to the organization

[439] *Ibid* at 612.
[440] Bruce Oswald, Helen Durham, and Adrian Bates, *Documents on the Law of UN Peace Operations* (New York: Oxford University Press, 2010) at 12 as cited in Genovese supra note 383 at 634.
[441] Model SOFA supra note 122 at article45.
[442] UNGA supra note 386 at articles 7 *ter-quarter*, *sexiens*.
[443] UNGA, "Declaration on the Elimination of Violence against Women," (December 20, 1993), A/RES/48/104 at article 4.
[444] UN supra note 411 at articles 42-48.

and identifying a breach of international obligations. Similarly, holding States accountable presents significant difficulties. While States are expected to address allegations against members of their military contingents, they could extend their actions to cover all their nationals or residents through extraterritorial jurisdiction. Moreover, States have international obligations related to the handling of SEA allegations and preventing SEA altogether. However, the complexity of attributing conduct to an organization or State is just one of the obstacles to achieving accountability for SEA. Immunity, explored in the next chapter, may pose an even more significant challenge.

CHAPTER 3 – DOES IMMUNITY PREVENT ACCOUNTABILITY?

This chapter examines the consequences of immunity and interrogates whether immunity prevents accountability. To answer this question, the section discusses the immunity of both the UN and its Personnel. The research builds on the study of the provisions of various instruments from which UN and UN personnel immunity emerges. The section is also enlightened by the examination of cases that were adjudicated before different courts. Eventually, the chapter discusses the measures taken to prevent immunity provisions from enabling impunity. While evoking these mechanisms, the section also stresses the reasons supporting the limitation of the immunities regime.

1. IMMUNITY OF THE UNITED NATIONS AS AN ORGANIZATION

This section explores the immunity granted to the UN. It first discusses the reasoning justifying the existence of this immunity regime. Second, it analyses the instruments from which the UN's immunity emerged. Finally, it examines how both domestic and international courts have interpreted this regime of immunities and privileges in the past.

1.1. Rationale of the UN's Immunity

The immunity of the UN was not established in a vacuum. However, examples of IOs enjoying immunities and privileges appear to be scarce before the 1940s -probably because the explosion in the number and variety of IOs occurred later- issues of accountability caused by these immunities are not new and indeed accompanied the broadening of immunities granted

to IOs.[445] As the negative impacts of immunities were already known,[446] one can be sure that granting the UN immunities was based on a solid rationale. As the discussion relative to the UN's immunity is part of a broader discussion on IOs immunity, this section will build on both generic works examining the IOs immunity in general and discussions focusing specifically on the UN. The baseline arguments justifying the existence of immunities for IOs and the UN are no different; the main difference between the UN and others is often its broader scope of action as an all-encompassing organization tasked with a wide range of responsibilities.

At times, and despite the blatant differences between the two entities, IOs' immunities have been compared with States' immunities, probably because their scope is similarly broad. In theory, State immunities are a much easier concept to fathom, rooted in reciprocity and the sovereign existence of States immune from prosecution for their *acta jure imperii* -acts deemed governmental- but not for *acta jure gestionis* -also known as commercial-.[447] Despite their apparent differences, IOs and States privileges and immunities have similarities.[448] While State immunity is mainly rooted in its sovereign existence and the *par in parem non habet imperium* principle, the same cannot be said of IOs, hence the functional necessity theory.[449] The importance of IOs and the essential functions they perform are not questioned. However, their importance does not make them equal to States nor does it make them sovereign. Consequently, the immunity enjoyed by IOs and particularly the UN, despite its wide range of activities, cannot be defined in the same terms as those of States simply because these entities serve different purposes and are distinct. While recognizing the explanatory power of this argument, one must acknowledge its limitations based on the elements exposed above. If the IOs' immunity cannot be justified satisfactorily by the same arguments as those of States, one must look elsewhere. McKinnon Wood proposed three arguments advocating for the grant of immunity to IOs: protecting the organization from the potential bias of a national court, safeguarding IOs from unfounded lawsuits meant to undermine the actions of an organization,

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[445] Josef L. Kunz, "Privileges and Immunities of International Organizations," *The American Journal of International Law* 41, no. 4 (1947): 828-62 at 829-30 as cited in Jan Klabbers, ed., "Privileges and Immunities," in *An Introduction to International Institutional Law*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 131-52 at 133; Niels Blokker, "International Organizations: The Untouchables?," *International Organizations Law Review* 10, no. 2 (June 20, 2014): 259-75 at 262.

[446] Indeed, when creating the frameworks establishing the UN, drafters could rely on the previous experience of the League of Nations.

[447] Klabbers supra note 445 at 131; Freedman supra note 327 at 239: This conception embraces the notion of restrictive State immunity, it has evolved recently in this direction.

[448] Klabbers supra note 445 at 132.

[449] Blokker supra note 445 at 260: This Latin locution means "*An equal has no power over an equal*"; Klabbers supra note 445 at 132 fustigates Courts for having misconceived the nature of IOs by claiming they exercised sovereign powers.

and preventing the courts from deciding the consequences of an IOs actions which would undoubtedly lead to conflicting rulings.[450] The immunity granted to the UN must be considered as a way to protect the organization from external interference and prevent attempts to pressure the organization into behaving in a certain way. In other words, immunity guarantees the organization to realize its mission independently. The work of the drafters of the CPIUN concurs with this claim, as interferences from States were seen as a threat, while private tort cases did not retain much attention.[451] Although domestic courts interfering with an IO's activity may be problematic from the point of view of the completion of their missions, it would also reveal itself an issue for other MS, which may take a dim view of MS exercising jurisdiction over an organization supposed to be acting in the interest of all its members.[452] Nevertheless, it cannot justify the absence of a court able to hold IOs responsible for their action, particularly building on the allegory aforementioned between States and IOs' immunities.[453] States' immunities have safeguards in the form of their domestic courts being able to exercise jurisdiction over the actions of their States.[454]

The rationale behind the immunity granted to the UN is ambivalent. It relies partly on concepts borrowed from States' immunity -particularly relative to the distinction based on the nature of its actions- and a rationale motivated by functional necessity and ensuring the organization's independence. This ambivalence in the rationale has somehow translated into ambivalence in the legal framework at the roots of the regime of immunities and privileges granted to the UN.

1.2. Legal Framework Establishing IOs' Immunity

The UN's immunity stems from various documents, including the UN Charter, the CPIUN, and bilateral treaties such as the HQ agreement or, where relevant, the SOFAs.[455] In addition, some States also enshrined the principles of IOs immunities in their domestic

[450] McKinnon Wood supra note 358 at 143-44 as cited in Blokker supra note 445 at 272.
[451] Boon supra note 227 at 345.
[452] Blokker supra note 445 at 260.
[453] *Ibid* at 260.
[454] *Ibid* at 260.
[455] The Charter supra note 161; CPIUN supra note 350; Model SOFA supra note 122.

legislation. Despite their extreme similarities, the subtle differences in these documents have resulted in vastly different interpretations, which are discussed below.

1.2.a. Based on Conventions

The first document to take into consideration when discussing the UN legal framework is the UN Charter. The Charter is the foundational document of the UN and establishes the basis for the immunities and privileges of the organization that have later been refined through a convention. Article 105-1 reads as follows: "(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes […]," hence inviting to concur with the functionalists arguing that the immunity granted to the organization emerges from the functions entrusted to it by its MS.[456] The CPIUN complements the Charter by refining and precising the regime of immunity. While the Charter leaned towards functional immunity, the CPIUN leans towards quasi-absolute immunity, leaving it to the organization to decide whether it wishes to waive its immunity, thus generating debates on the nature of the immunity granted to the UN.[457] Article II section 2 reads: "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."[458] While this quasi-absolute immunity established in the CPIUN seems in dissonance with the dispositions of the Charter, Article 105-3 left it up to the UNGA to propose a convention or any other instrument detailing the scope of immunity enjoyed by the organization.[459] The Convention on the Privileges and Immunities of the Specialized Agencies (CPISA), which, as its name suggests, relates specifically to the Specialized Agencies part of the organization, defines the agencies' immunity in very similar terms to the immunity granted

[456] The Charter supra note 185 at article 105-1.
[457] Boon supra note 227 at 345.
[458] CPIUN supra note 350 at article II section 2; ILC, "Relations between States and international organizations (second part of the topic). The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat: Status, privileges and immunities of international organizations, their officials, experts, etc.," *Yearbook of the ILC II(1)*, (1985), A/C.N.4/L.383 Add. 1-3 at §16. In addition, the Office of Legal Affairs (OLA) has made it clear that this fell solely into the responsibilities of the UNSG and that no delegation of authority could give the power to waive the organization' immunity.
[459] The Charter supra note 185 at article 105-3.

to the organization by the General Convention.[460] The blatant difference between the CPIUN and the CPISA can be found in Article VII of the latter relative to "Abuses of Privileges."[461] This point is discussed in considerable detail later in the chapter.

In summary, while the Charter indicated a regime of privileges and immunities intrinsically rooted in the organization's functions, the CPIUN established unconditional and absolute immunity for the UN as the sole entity able to limit its immunity. These instruments are key in defining the regime of immunity and privileges granted to the UN, but they are not the only ones creating this regime, as they are complemented by specific bilateral treaties concluded by the UN with a State when conditions require it.

1.2.b. Based on Treaties or Agreements

Two situations require additional agreements to secure the UN's immunities and privileges. First, bilateral agreements organize the relationship between a State and the UN when the latter settles HQ within its territory. Second, agreements govern the cohabitation of the UN and a State when the former deploys a mission in the latter's territory: SOFAs. These documents provide more information on the immunity enjoyed by the UN on a case-by-case basis.

When establishing HQ on an MS territory, the UN and its agencies sign a specific agreement with the host State, ruling over the relationship between the organization and the State. One of the significant examples is the HQ agreement signed between the UN and the United States (US) when the UN established its HQ in New York.[462] This agreement is without prejudice to the CPIUN and should be considered a complement to the general convention, however, in case of a dispute based on two provisions, this agreement prevails over the CPIUN.[463] While federal, state, and local laws apply in the HQ district, the agreement ascertains

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[460] Convention on the Privileges and Immunities of the Specialized Agencies, November 21, 1947, 33 U.N.T.S. 261 [hereinafter CPISA] at article III section 4-10; See Blokker supra note 445 at 269, although specialized agencies were deemed similar enough to share a unique document laying out the regime of immunities they enjoy, there may be additional clauses referring to certain agencies based on their needs.

[461] CPISA supra note 460 at article VII.

[462] Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 11 U.N.T.S. 11 [hereinafter UN-US HQ Agreement]; While this instrument is of utmost importance such an agreement is not unique, the UN signed similar agreements with several States including Switzerland, see Accord sur les privilèges et immunités de l'Organisation des Nations Unies conclu entre le Conseil fédéral suisse et le Secrétaire général de l'Organisation des Nations Unies, July 1, 1946, RO 1956 1171. This agreement confirms the provisions of the CPIUN.

[463] UN-US HQ Agreement supra note 462 at article IX section 26: "The provisions of this agreement shall be complementary to the provisions of the General Convention. In so far as any provision of this agreement and any provisions of the General Convention relate to the same subject matter, the two provisions shall, wherever possible, be treated as complementary so that both provisions shall be applicable and neither shall narrow the effect of the other; but in any case of absolute conflict, the provisions of this agreement shall prevail."

the importance of UN regulations if such a law is deemed inconsistent with UN regulations aimed at fully realizing the organization's functions.[464] Under this agreement, the HQ district is made inviolable; the entrance into the HQ district of federal, state, or local officers or officials of the US is subject to the consent of the UNSG.[465] In other words, the host State cannot exercise jurisdiction over the organization, and its laws apply in the district as long as these are aligned with UN regulations, creating *de facto* immunity.

When establishing missions such as PKOs or SPMs, legal instruments are signed to standardize relationships between the UN and the host State. These legal instruments can take the form of a SOFA.[466] The agreement considers all possible scenarios regarding host States' accession to the CPIUN. This bilateral agreement is even more critical in settings where the host State may not be a signatory of the CPIUN.[467] Generally, all the provisions related to the immunities of the peacekeeping mission -considered an organ of the UN- aimed to reaffirm or establish the same level of protection granted by the CPIUN. The application of these immunities is limited spatially in the SOFA to the territory where the operation is conducted.[468] In the territory of State parties to the CPIUN, the SOFA reaffirms the provisions of the Convention in those words: "[t]he United Nations peace-keeping operation, its property, funds and assets, and its members, including the Special Representative/Commander, shall enjoy the privileges and immunities specified in the present Agreement as well as those provided for in the Convention, to which [host country] is a Party."[469] In the event of the establishment of a

[464] *Ibid* at article III section 7-8. Section 7-b reads: "[e]xcept as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district." Section 8 reads: "[t]he United Nations shall have the power to make regulations, operative within the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state, or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the headquarters district. Any dispute, between the United Nations and the United States, as to whether a regulation of the United Nations is authorized by this section or as to whether a federal, state or local law or regulation is inconsistent with any regulation of the United Nations authorized by this section, shall be promptly settled as provided in Section 21. Pending such settlement, the regulation of the United Nations shall apply, and the federal, state or local law or regulation shall be inapplicable in the headquarters district to the extent that the United Nations claims it to be inconsistent with the regulation of the United Nations. This section shall not prevent the reasonable application of fire protection regulations of the appropriate American authorities."
[465] *Ibid* at article III section 9.
[466] Model SOFA supra note 122.
[467] *Ibid* at footnote d. The model SOFA was drafted in 1990, at that time only 124 MS were parties to the CPIUN, hence the concerns of the drafters. As of now, there are 162 States parties to the CPIUN. For more information of the status of the CPIUN see UN, "1. Convention on the Privileges and Immunities of the United Nations", treaties.un.org, Updated August 02, 2024, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en.
[468] Model SOFA supra note 122 at article II §2: "Unless specifically provided otherwise, the provisions of the present Agreement and any obligation undertaken by [Government] E/ or any privilege, immunity, facility or concession granted to the United Nations peace-keeping operation or any member thereof apply in [the area of operations/territory] only."
[469] *Ibid* at article III §4.

peacekeeping mission in a State not party to the CPIUN, the SOFA reads: "[t]he Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the United Nations peace-keeping operation subject to the provisions specified in the present Agreement."[470] The privileges and immunities of the UN missions are then reinforced in those words: "[t]he United Nations peace-keeping operation, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations [as provided for in the present Agreement]/[in accordance with the Convention]. […]"[471] In conclusion, bilateral treaties complement broader conventions, ensuring that the UN and its personnel receive consistent levels of protection in all areas of intervention.

1.2.c. Based on Domestic Legislation

While most provisions concerning the UN's immunities in its MS territory are comprised within the CPIUN or HQ agreements, some States have domestic acts aiming to anchor the UN's immunities and privileges in their domestic legal system. These instruments differ from the HQ agreements as they are generic and not based on the fact that a State is hosting an IO. The States that legislated on the matter did so to respect the obligations brought upon them by the UN Charter relative to the legal personality and the privileges and immunities of the UN in all its MS territories.[472] This section focuses on two States that legislated domestically to apply the principles of the CPIUN: the UK and the US.[473]

The UK has a set of documents regulating the legal existence of IOs, particularly the UN. The most generic one is the International Organizations Act of 1968, which established the core principles of the existence of IOs in the UK legal system, notably providing the basis for immunities and privileges.[474] The Act "apply to any organisation declared by Order in Council

[470] *Ibid* at article III §3.
[471] *Ibid* at article IV §15.
[472] J. W. Bridge, "The United Nations and English Law," *International and Comparative Law Quarterly* 18, no. 3 (1969): 689-717 at 694; UN Charter supra note 161 at art 104-105: "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes." and "(1) The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment 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."
[473] While this section focuses only on a very limited selection of documents other States legislated in a similar manner such as Canada: Foreign Missions and International Organizations Act, December 05, 1991, S.C. 1991, c. 41 at Part II; India: The United Nations (Privileges and Immunities) Act, 1947, Act No. of 1947; or Australia: International Organisations (Privileges and Immunities) Act 1963, as amended on September 20, 2023, Act No. 78 1963. This list is in no way exhaustive, and only aspire to show how the US and the UK are not the sole State that took this path.
[474] International Organisations Act 1968, July 26, 1968, 1968 c. 48 at Schedule 1 Part I.

to be an organisation of which - (a) the United Kingdom, or Her Majesty's Government in the United Kingdom, and (b) any other sovereign Power or the Government of any other sovereign Power, are Members."[475] The Order in Council must "(b)provide that the organisation shall, to such extent as may be specified in the Order, have the privileges and immunities set out in Part I of Schedule 1 to this Act."[476] The 1968 Act provides a basis to define the scope of immunities enjoyed by an IO and it is up to the Order in Council to specify it. As regards the UN specifically, two instruments are of utmost interest: the Specialized Agencies of the UN (Immunities and Privileges) Order of 1974 and the United Nations and International Court of Justice (Immunities and Privileges) Order of 1974.[477] The former provides that "[e]xcept in so far as in any particular case it has expressly waived its immunity, the Organisation shall have immunity from suit and legal process. No waiver of immunity shall be deemed to extend to any measure of execution."[478] The latter contained sensibly the same provisions.[479]

The US has the International Organizations Immunities Act of 1945.[480] This instrument defined IO as "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. […]"[481] Under this Act, the president could withdraw or withhold the immunities or privileges granted to an organization by the said act if abuse of these privileges and immunities by the IO has been observed.[482] The

[475] *Ibid* at 1-1.
[476] *Ibid* at 1-2-b.
[477] Specialized Agencies of the United Nations (Immunities and Privileges) Order 1974, August 1, 1974, no. 1260; United Nations and International Court of Justice (Immunities and Privileges) Order 1974, August 1, 1974, no. 1261.
[478] Specialized Agencies of the United Nations (Immunities and Privileges) Order 1974 supra note 477 at Part II §6.
[479] United Nations and International Court of Justice (Immunities and Privileges) Order 1974 supra note 477 at Part II §6.
[480] International Organizations Immunities Act, December 29, 1945, 22 USC Chapter 7 Subchapter XVIII.
[481] *Ibid* at §288.
[482] *Ibid* at §288: "The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter."

UN was designated as an IO in Executive Order 9698.[483] The Act provides that "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[484] Although instituting broad immunities for the UN, aligning them to the immunity accorded to foreign states, this Act also allows the US President to sanction abuse of privileges.

Treaties, Conventions, and domestic legal acts established a rather broad regime of privileges and immunities for the UN and its agencies or subsidiary organs. The courts' interpretation of this legal framework helps one better understand its implications.

1.3. Conflicting Court Rulings

As seen above, there are conflicting takes relative to the theory explaining the immunity of IOs and by extension of the UN. This section draws from case law going beyond cases against the UN to expand the general reasoning on IOs' immunities. While IOs, and specifically the UN, enjoy broad immunities, it did not prevent various courts -both domestic and international- from giving an opinion on the application of immunities. Just like the defenders of IOs' immunities predicted, these rulings and local interpretations are characterized by their diversity and sometimes conflicting nature, rendering it impossible to predict the outcomes of such cases.[485]

Judges have considered the UN's immunity absolute based on an interpretation of Section 2 of the CPIUN.[486] Such a position was notably argued by the Brussels Civil Court in 1966, a Court that concluded that although Article 105 of the Charter provided for a more restrictive view of the organization's immunities, the CPIUN later established a broader scope of immunities not limited to the functional needs of the UN.[487] The US District Court for the

[483] Executive Order 9698, February 19, 1946, 11 FR 1809, 3 CFR, 1943-1948 Comp. at 508.
[484] International Organizations Immunities Act supra note 480 at §288-a.
[485] Klabbers supra note 445 at 135.
[486] August Reinisch, *International Organizations before National Courts*, 1st ed. (Cambridge University Press, 2000), at 332 as cited in Freedman supra note 53 at 243.
[487] Manderlier v. Organisation des Nations Unies et l'Etat Belge supra note 353 at 723: "Given that this immunity is unconditional and has been so since the convention in 1946; that it has not been repealed, either conditionally or definitively, by the declaration of 1948;" [author's own translation from French] and "Given that jurisdictional immunity is the absolute privilege of the one who enjoys it; that it can only be removed by a regular modification

Eastern District of New York was even more explicit on its stance relative to the UN's immunity arguing that: "[u]nder the Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases."[488] It specified that "employment relationship with its internal staff is not 'commercial activity'"; therefore, even under a restrictive conception of the organization's immunity, the Court could not exercise jurisdiction over such acts.[489] In 1978, the US District Court of the District of Columbia, arguing that IOs and States were in different positions as regards immunities, rejected the possibility of exercising jurisdiction over an IO based on the American Foreign Sovereign Immunities Act of 1976.[490] The Court claimed that: "[t]he Court is persuaded that international organizations are immune from every form of legal process except insofar as that immunity is expressly waived by treaty or expressly limited by statute. The Court is further persuaded that this Court has jurisdiction over lawsuits involving international organizations only insofar as such jurisdiction is expressly provided for by statute."[491] In other words, the Court concluded it does not have jurisdiction over the actions of an IO, thus arguing absolute immunity for the organization in front of US domestic courts. The Court went as far as pleading for immunity of IOs in front of domestic courts based on the fact "that international organizations must be free to perform their functions and that no member state may take action to hinder the organization" and that "[d]enial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies."[492] These decisions showcase how various courts adhered to reasonings granting IOs absolute immunity.[493]

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of the law that granted it; and that the courts are not judges of the appropriateness, for the beneficiary, of invoking it;" [author's own translation from French].

[488] Boimah v. UNGA, 664 F. Supp 69, (EDNY July 24, 1987).

[489] *Ibid*.

[490] Broadbent v. Organization of American States, 481 F. Supp. 907, (DDC March 28, 1978). The Court had first considered adjudicating the case but decided otherwise after a thorough review of the facts.

[491] *Ibid*.

[492] Broadbent v. Organization of American States, No. 78-1465, (DDC January 8, 1980) at C.

[493] See also Mendaro v. World Bank 717 F.2d 610 (D.C.Cir.1983), at 615-16 "[T]he purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide." and Mothers of Srebrenica v The State of The Netherlands and The United Nations supra note 368 at 4.2 "The latter provision [Article II, section 2 of the CPIUN], which elaborates on Article 105 § 1 [of the Charter], has rightly been construed by the Court of Appeal - applying Article 31 of the Vienna Convention on the Law of Treaties - as granting the United Nations the most far-reaching immunity from jurisdiction, in the sense that it cannot be summoned before any domestic court of the countries that are party to the Convention [on the Privileges and Immunities of the United Nations]," at §4.3.14: "The UN is entitled to immunity regardless of the extreme seriousness of the accusations on which the Association et al. base their claims."

While the immunity enjoyed by the UN seems to have been considered a "*stumbling block*" for years, the UN often brandishes its immunity as you would a shield in battles, resulting in a quasi-absolute immunity for the organization; there is a growing tendency for courts to limit this immunity.[494] The US Supreme Court sent a clear message to all IOs when ruling in Jam v. International Finance Corporation, that torts to individuals caused by IOs must be redressed.[495] While the courts' aforementioned decisions support an absolute conception of IO immunities, some rulings went in another direction. Indeed, a limited number of cases support the functional theory of privileges and immunities.[496] In 1969, the Labor section of the Rome Court of First Instance ruled in the case opposing Giovanni Porru and the Food and Agriculture Organization (FAO) of the UN; while the case primarily dealt with a labor dispute, it had to discuss the regime of immunities and privileges due to the FAO being in the docks.[497] The Court ruled that IO immunity could only apply to public law activities, which would amount to acts carried out for *iure imperii*, while it could not apply to private actions.[498] This amount to the level of immunities granted to the UN to those of the States.[499] The Court concluded that the actions of an IO to organize its internal structure fall within its functions and, therefore, the FAO should enjoy immunity for cases related to its internal structure.[500] The District Court of New York, in 1996, built on the allegory between States' immunities and UN immunities, distinguishing between what it calls restrictive immunity and absolute immunity.[501] While in the particular case, it upheld the immunity of the organization, it justified it in those words: "even if the immunity available to the United Nations and its officials is only restrictive immunity, the immunity still applies because the nature of the acts complained of by the plaintiff are the exercise of governmental functions rather than private commercial activity."[502] The ECtHR in Stitching Mothers of Srebrenica also seems to be tilting in favor of the functional need theory.[503] Typically, the ECtHR claims its inability to exercise jurisdiction over IOs, but

[494] Viterbo Annamaria and Spagnolo Andrea, "Of Immunity and Accountability of International Organizations: A Contextual Reading of 'Jam v. IFC,'" *DU*, 2019, 319-30 at 319. The usage of "stumbling block" to designate IOs immunity was borrowed from: Jan Klabbers, "The EJIL Foreword: The Transformation of International Organizations Law The EJIL Foreword," *EJIL* 26, no. 1 (2015): 9-82 at 14 by Viterbo and Spagnolo.
[495] Jam et al. v. International Finance Corporation, No. 17-1011, (United States Court of Appeals for the District of Columbia Circuit, February 27, 2019) [hereinafter Jam v. IFC]; Viterbo and Spagnolo supra note 494 at 319-20.
[496] Klabbers supra note 445 at 133.
[497] Giovanni Porru v. Food and Agriculture Organization of the United Nations, (Rome Court of First Instance (Labour Section), June 25, 1969), United Nations Juridical Yearbook 1969, 238-39 at 238.
[498] *Ibid* at 239.
[499] *Ibid* at 239.
[500] *Ibid* at 239.
[501] Askir V. Boutros-Ghali, 933 F. Supp. 368, (SDNY, July 29, 1996) at A. It notably distinguishes between *jure gestionis* and *jure imperii*.
[502] *Ibid* at A.
[503] Stitching Mothers of Srebrenica and Others v. The Netherlands supra note 369.

when the situation allows, it can identify States parties both to the ECHR and the organization and hold them accountable for failing to prevent the organization they are parties to from violating the provisions of the said convention.[504] In the case mentioned above, the applicants argued that the UN's immunity was functional and that it was up to courts such as the ECtHR to determine if the situation warranted the invocation of the functional need.[505] The applicants considered that their right to access justice had been violated because of the immunity granted to the UN.[506] The Court acknowledged that the immunity of the UN -amongst others- negatively impacted the victims' chances to access a court; nevertheless, it refused to consider the responsibility of the UN in the matter and focused on the State of the Netherlands.[507] The Court, in the end, concluded that the torts reproached to the UN were linked to the activity of the UNSC under Chapter VII of the Charter and, therefore, were part of the critical mission of the UN concluding that "that in the present case the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate."[508]

While the theories on which the courts based their arguments differ, the outcomes of the cases seem strikingly similar. Immunities of international organizations—especially those of the UN—are consistently upheld.

Immunities granted to the UN are broad in scope, and no courts can truly exercise jurisdiction over the organization. Based on the discussion above, it is safe to conclude that while compromise must be found to limit the immunities granted to the UN, domestic courts of MS should not be the forum to do so.[509] Moreover, linking this reasoning to the previous chapter, which notably discussed the responsibility of the UN, this section identifies immunity as the biggest hindrance to holding IOs accountable for their wrongdoings. Continuing the reasoning and the attempt to find ways to hold an entity accountable for cases of SEA leads this research to discuss the immunities granted to individuals working for the UN.

[504] Klabbers supra note 494 at 72; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2011) as cited in Klabbers supra note 494 at 72.
[505] Stitching Mothers of Srebrenica and Others v. The Netherlands supra note 410 at §122.
[506] *Ibid* at §121.
[507] *Ibid* at §137-38.
[508] *Ibid* at §154, §169.
[509] Klabbers supra note 445 at 135.

2. IMMUNITY OF THE UN PERSONNEL

This sub-section examines the immunity granted to UN personnel. It analyses the legal instruments from which the regime of immunities stems before distinguishing the differences depending on the category of personnel to which an individual belongs to. Ultimately, this sub-section focuses on the implications of the UN Personnel immunity regime in practice.

2.1. Legal Framework Establishing UN Personnel's Immunity and Privileges

Like the organization's immunity, UN personnel's immunity stems from various normative documents. This section examines provisions relative to immunities in instruments such as the UN Charter, the CPIUN, the CPISA, the SOFA, and domestic acts. The justifications for the immunities enjoyed by UN personnel are closely aligned with the rationale for the immunity granted to the organization. Both aim to prevent interference and prioritize the successful completion of the UN's mission.

2.1.a. The Convention on the Privileges and Immunities of the UN and its Specialized Agencies

The UN Charter states that "[r]epresentatives 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."[510] The UNGA was then invited to refine the scope of officials' immunity.[511] The Charter fails to mention experts on mission or any other category of UN personnel. The CPIUN provides that the UNSG is the sole authority allowed to determine who falls into the category of UN Officials and is also expected to communicate a list of names to all its MS.[512] The CPISA refines this position, establishing that each specialized agency is responsible for communicating a list of officials with MS.[513]

[510] The Charter supra note 185 at article 105-2.
[511] *Ibid* at article 105-3.
[512] CPIUN supra note 350 at article V section 17.
[513] CPISA supra note 460 at article VI section 18.

Based on the CPIUN, "Officials of the United Nations shall: (a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; […]."[514] Parallelly, the CPISA defines the immunity of its officials in very similar terms.[515] Contrary to the Charter, the CPIUN offers clarifications as regards immunities enjoyed by experts on missions for the UN. The convention reads that "[e]xperts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded: (a) Immunity from personal arrest or detention and from seizure of their personal baggage; (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations; […]."[516] The CPISA does not mention experts on missions. Both documents grant to officials immunity *Ratione functionae*, confined to official acts but not limited in time, the CPIUN extends this to experts.[517] Even more precisely, a UN Legal Liaison Officer explained in a letter the difference between the acts performed by officials "in their official capacity" and the idea of being "on-duty", the former referring to actions performed "on behalf of the United Nations."[518]

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[514] CPIUN supra note 350 at article V section 18, the full article reads: "Officials of the United Nations shall: (a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; (6) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations; (c) Be immune from national service obligations; (d) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration; (e) Be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned; (f) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys; (g) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the' country in question."; ILC, "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat: Representation of States in their relations with international organizations," *Yearbook of the ILC II*, (1967), A/C.N.4/L.118 Add. 1-2 at §335-1: An internal memorandum from 1964 circulated by the Office of Legal Affairs (OLA) provided that the immunity granted to UN Officials applied vis-à-vis both the "home country" and the "country in which he is serving."

[515] CPISA supra note 460 at article VI section 19.

[516] *Ibid* at article VI section 22.

[517] UN, *Juridical Yearbook*, (New York, 1968) at 213 as cited in ILC supra note 458 at §55. A memorandum of 1968 from the General Counsel of UNRWA supports the existence of immunity *Ratione functionae* based on section 18 of the CPIUN in those words, "when acting in their official capacity, the acts of the official are in effect the acts of the United Nations itself, and the nationality of the official is totally irrelevant. […] Admittedly, there can be borderline cases in which it may be disputed whether the act is "official" or "non-official" and, as the employer, the agency must reserve the right to make this decision."

[518] UN, Juridical Yearbook, (New York, 1977) at 247-248 as cited in ILC supra note 458 at §57.

The UNSG, the Assistant Secretaries-General, and their families are entitled to immunities equivalent to those granted to diplomatic envoys in international law.[519] In a similar fashion, the CPISA grants the same level of protection to "executive head of each specialized agency, including any official acting on his behalf during his absence from duty."[520] The Vienna Convention on Diplomatic Relations of 1961 established the norms relative to the immunities of diplomatic agents, which stated that "[t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention.[…]"[521] His or her residence and papers should also be inviolable.[522] While a diplomatic agent enjoys immunity from the criminal jurisdiction of the host State, they are not immune from the jurisdiction of the State that sent them.[523] In the case of the highest UN officials, it remains unclear if a State could retain jurisdiction over them as the sending entity is not a State. This is an even greater issue considering the inability of the UN to exercise jurisdiction.[524] The Vienna Convention establishes limitations to this immunity for action relative to privately owned immovable property in the host State, for action related to a succession process, and for commercial action not falling in the scope of their functions for the sending State.[525] Based on international law, diplomatic immunity relies on reciprocity and consent principles.[526] The immunity granted to UN officials and experts is not based on reciprocity or not even consent -unlike typical diplomatic relations.[527] This immunity regime is very broad and protective and not designed to cover thousands of individuals as part of a large deployment.[528] The immunity enjoyed by a diplomatic agent such as an envoy can be waived; two types of waiver exist: a waiver of immunity from jurisdiction for civil or administrative proceedings and, if need be, a waiver of immunity for the execution of the judgment, both types need to be express.[529] The convention

[519] CPIUN supra note 350 at article V section 19.
[520] CPISA supra note 460 at article VI section 21.
[521] Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. 95 at article 29.
[522] *Ibid* at article 30.
[523] *Ibid* at article 31; Ladley supra note 119 at 83: The sending State can investigate and potentially prosecute their diplomats even when the offense was committed abroad.
[524] ILC supra note 458 at §71-73: There have been debates on whether senior officials performing their functions in their country of nationality would be excluded. While the UN argued the negative, several States argued that a State could exclude its nationals based on the provisions of international law. This fact is evoked later in the chapter when discussing the immunities and privileges of UN personnel based on the provisions of domestic legislation.
[525] Vienna Convention on Diplomatic Relations supra note 521 at article 31.
[526] *Ibid* at article 9-1: "The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State."
[527] Odello and Burke supra note 15 at 846.
[528] *Ibid* at 847-48.
[529] Vienna Convention on Diplomatic Relations supra note 521 at article 32.

confirms that the immunity subsists even after the agent is no longer in function.[530] Nevertheless, "it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State," and they must refrain from interfering in the internal affairs of the host State.[531]

The Charter, the CPIUN, and the CPISA provide the cornerstone instruments establishing the usual regime of immunity applied throughout the UN and should be seen as the first source to study that matter. Nevertheless, conditions may require additional agreements to palliate gaps in the system that may be caused by MS not being parties to the CPIUN or CPISA.

2.1.b. Specific of mission settings: Status of Forces Agreements

One of the most common documents tackling the subject of UN personnel's immunities is SOFAs. In the previous section, we explained how SOFAs enshrine the immunities granted to the organization in mission settings. The SOFA also establishes the regime of privileges and immunities accorded to UN personnel working for the mission, building on the standards established by the CPIUN. Particularly, the SOFA distinguishes personnel based on their status and role in the mission, "[t]he Special Representative, the Commander of the military component of the United Nations peace-keeping operation, the head of the United Nations civilian police, and such high-ranking members of the Special Representative/Commander's staff" are granted privileges and immunities equivalent to those of diplomatic envoys.[532] Nevertheless, in this context, it seems like the list of personnel enjoying this level of protection might be up for discussion with the Government.[533] Recalling the provisions of the CPIUN, the SOFA establishes that "[m]embers of the United Nations Secretariat assigned to the civilian component" serving in a PKO are to be considered as UN Officials and consequently should be granted the same immunities provided to UN Officials by the CPIUN.[534] The SOFA further specifies that "[m]ilitary observers, United Nations civilian police and civilian personnel other than United Nations officials whose names are for the purpose notified to the Government by the Special Representative/Commander shall be considered as experts on mission […]."[535] The SOFA considers locally recruited personnel as well and provides that their immunity is based

[530] *Ibid* at article 39.
[531] *Ibid* at article 41.
[532] Model SOFA supra note 122 at §24.
[533] *Ibid* at §24.
[534] *Ibid* at §25.
[535] *Ibid* at §26.

on Article V Section 18 a, b, and c of the CPIUN if not otherwise decided by the SOFA.[536] The agreement specifies that "[a]ll members of the United Nations peace-keeping operation including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue even after they cease to be members of or employed by the United Nations peace-keeping operation and after the expiration of the other provisions of the present Agreement."[537] In other words, SOFAs establish four categories of personnel along with four levels of protection based on the category to which they belong. Higher Officials and decision-makers of missions are granted a level of protection equivalent to diplomatic envoys, UN Secretariat staff are to enjoy UN Officials' scope of immunity, while MOs, UN CIVPOL, and other staff not considered UN officials are to be treated as experts on missions. Finally, locally recruited personnel are accorded functional immunity.

It appears that the SOFA, although borrowing language from the CPIUN, demonstrates the wide variety of agents involved in UN missions and how the category of personnel to which they belong impacts the scope of immunity they will enjoy.

2.1.c. Domestic Legislation

Domestic legislation confirms the privileges and immunities accorded to UN-related Personnel, as it does for the organization's immunity. This section discusses the UK and US domestic legislation provisions relative to the privileges and immunities of UN-related personnel.

The UN and ICJ Order of 1974 clarifies the waiver of immunity for higher UN officers.[538] The order confirms the diplomatic immunity granted to high officers as they are immune from suit and any legal process regardless of the context in which the act occurred.[539] Nevertheless, the UK limits this immunity if a high UN officer is "a citizen of the United Kingdom and Colonies or a permanent resident of the United Kingdom."[540] It leaves one wondering whether such officers would still be granted functional immunity as it is confirmed for all officers that they are immune "from suit and legal process in respect of things done or

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[536] *Ibid* at §28; CPIUN supra note 350 at article V section 18-a,b,c: "Officials of the United Nations shall: (a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; (b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations; (c) Be immune from national service obligations; […]."
[537] Model SOFA supra note 122 at §46.
[538] United Nations and International Court of Justice (Immunities and Privileges) Order 1974 supra note 477 at §15. Also, it seems like the UK prefer referring to officers when conventions tend to use the term "officials."
[539] *Ibid* at §15-a.
[540] *Ibid* at §15-2.

omitted to be done by them in their official capacity."[541] Experts are immune "from suit and legal process in respect of things done or omitted to be done by them in the course of the performance of their missions."[542] They are also immune from "personal arrest or detention" during their missions and journeys relative to their mission.[543] These provisions are more or less aligned with the one laid out in the broader International Act of 1968, except the provision related to the limitation of the immunity granted to high officers who are UK citizens or permanent residents.[544]

Based on the International Organizations Immunities Act UN "officers and employees […] are immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such […] officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned."[545] Unlike the UK, there is no intention of depriving these officials of their immunity. Moreover, this act does not mention different categories of personnel such as high officials, officials, or experts and only discusses "officers and employees."

The comparison of both acts shows the differences in terms of details included in such documents. It also demonstrates the different interpretations of the provisions set out in the CPIUN. While the US generally refers to UN employees or officers, the UK more or less follows the distinctions established by the CPIUN. The generality of the International Organizations Immunities Act could lead to confusion as other instruments suggest the existence of a significant number of personnel categories enjoying different regimes of immunities.

2.2. Different Categories Imply Different Regimes of Immunities

As already mentioned, and as the SOFA indicates, agents working for the UN belong to various categories. This variety complexifies the understanding of immunities as each category of personnel is subjected to different provisions establishing its immunity. Determining these categories clarifies the scope of their respective immunities. This sub-section is in no way

[541] *Ibid* at §16.
[542] *Ibid* at §17-a.
[543] *Ibid* at §17-b.
[544] International Organisations Act 1968 supra note 474.
[545] International Organizations Immunities Act supra note 480 at §288d-b.

exhaustive but it attempts to capture and demonstrate the variety of categories of UN Personnel and the implication of such variety through a discussion focused on a selection of categories.

While the SOFA identifies two components constitutive of a peace-keeping mission, the civilian component and the military component, and acknowledges how these components can help distinguish personnel categories, this is insufficient.[546] Based on the instruments already evoked above -CPIUN, SOFA- several categories of UN personnel can be identified, including the highest UN representatives, UN officials, UN experts on missions, and locally recruited personnel.[547] However, in the peace-keeping context, the variety of personnel performing services for the UN can be even more significant, including members of contingents, MOs, UN CIVPOL, international civil servants employed in UN HQ, in the field, or even by a specialized agency in addition to locally recruited staff.[548] While these can fit into the categories evoked above, characteristics proper to their occupation can result in differences in the extent of the immunity they enjoy.

UN officials are all personnel employed by the UN -including UNVs -except for locally recruited staff assigned to an hourly rate.[549] UN officials and, more generally, international civil servants are not a homogeneous category; the position of the personnel within their respective organizations impacts the scope of immunities and privileges granted to them.[550] All in all, UN officials seem like a formalized category of personnel and somewhat easy to identify.

Experts on missions is more of a catch-all category, including personnel necessary for the UN to carry out its mission but not enjoying the status of UN officials. Consequently, determining who qualifies as an expert on a mission for the UN can be challenging, as it includes all personnel under contract with the UN to carry out specific tasks, typically within a defined time frame.[551] In mission settings, there is a particular category of experts: UN Military Experts on Missions; this category includes members of the military performing duties for the UN as individuals.[552] Although they are militaries still in service, they do not depend on their government when occupying these positions. Their functions can include "undertak[ing]

[546] Model SOFA supra note 122.
[547] CPIUN supra note 350; Model SOFA supra note 122.
[548] Françoise Hampson and Ai Kihara-Hunt, "The Accountability of Personnel Associated with Peacekeeping Operations," in *Unintended Consequences of Peacekeeping Operations*, by Chiyuki Aoi, Cedric De Coning, and Ramesh Chandra Thakur (Tokyo Paris: United Nations University Press, 2007), 195-220 at 196, 198-201.
[549] UNGA supra note 93; UNGA supra note 30 at §7; CPIUN supra note 350 at Article V section 17: Based on the CPIUN, the UNSG must communicate a list of UN Officials to the Governments of its MS.
[550] Hampson and Kihara-Hunt supra note 548 at 199-200.
[551] Anthony J. Miller, "United Nations Experts on Mission and Their Privileges and Immunities," *International Organizations Law Review* 4, no. 1 (2007): 11-56 at 12.
[552] Hampson and Kihara-Hunt supra note 548 at 199; DPKO, "Guidelines: United Nations Military Observers (UNMO) in Peacekeeping Operations," (March 2017), Ref. 2016.25 at 14.

observation, reporting, liaison or advisory tasks in support of the mission mandate."[553] The Department of Peace Operations, formerly known as the Department of Peacekeeping Operations, made it clear that MOs serving in a contingent did not qualify as a UN Military expert on mission and listed three job titles included in this category: UN MOs, UN Military Liaison Officers, and Military Advisers.[554] MOs are bound by rules of conduct established by the UNSG, including the Zero Tolerance Policy in SEA matters.[555] CIVPOL officers like MOs work for the UN as individuals serving or retired from a national police force.[556] It is unclear whether they remain under the disciplinary jurisdiction of their State of origin and might depend on the domestic laws of the said State.[557] Based on the UN's understanding, CIVPOL officers enjoy the status described in Article VI of the CPIUN, like any other UN military experts on missions.[558] As they are considered experts on missions, their immunity should only apply to acts perpetrated in performing their functions, and the UNSG has the power to lift such an immunity to let them be subjected to the host State's jurisdiction.[559]

The structure and intricate categories of UN Personnel prevent one from quickly grasping the extent of the immunities and privileges granted to each category of personnel. While the UN provides insightful information on the composition of each category of personnel, it is not systematically sufficient, and matters may end up before judges. Having established a clear understanding of the diverse categories of UN personnel, it is now crucial to explore the practical implications of their immunity regime and the way they have been interpreted.

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[553] DPKO supra note 552 at 14.
[554] *Ibid* at 14.
[555] *Ibid* at §35-36.
[556] DPKO, "Selection Standards and Training Guidelines for United Nations Civilian Police (UNCIVPOL)," (May 1997) at 6-8 as cited in Hampson and Kihara-Hunt supra note 548 at 199.
[557] Hampson and Kihara-Hunt supra note 548 at 199.
[558] DPKO, "Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers," (2003), DPKO/CPD/DDCPO/2003/001 at §8.
[559] *Ibid* at §8: "Civilian police officers and military observers enjoy the status of "experts performing missions" for the United Nations, under Article VI of the 1946 Convention on the Privileges and Immunities of the United Nations. In accordance with that status, they enjoy inter alia immunity for the purposes of the official acts they perform. These privileges and immunities are granted in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General has the right and the duty to waive the immunity of any individual in any case where, in the Secretary-General's opinion, the immunity would impede the course of justice. Such a waiver shall be without prejudice to the interests of the United Nations. Civilian police officers and military observers are, however, subject to the jurisdiction of the host country/territory in respect of any criminal offences that may be committed by them in the host country and any disputes/claims of a civil nature not related to the performance of their official functions." Additionally at §28: "If the misconduct committed by a civilian police officer or military observer amounts to an alleged criminal offence, the Secretary-General has the right and the duty to waive the immunity, if applicable, of the individual(s)concerned, if in his opinion the immunity would impede the course of justice. The United Nations and the host country shall agree on whether or not criminal proceedings are to be instituted."

2.3. Examining the Implications of UN Personnel's Immunity in Practice

This subsection builds upon the Courts' rulings to explore the nature of the immunities accorded to UN personnel and question the nature of the immunity granted to UN staff members.

2.3.a. Courts' Opinions on the Immunity of UN Personnel

Courts have interpreted the immunity granted to UN personnel in various cases, ranging from entitlement fraud to physical violence to traffic incidents. Unfortunately, cases of sexual violence are rarely considered, and therefore, other types of cases must be examined to understand the extent of the immunities accorded to UN Personnel. This section builds upon a selection of cases illustrating the usual arguments made by courts to justify upholding their immunity.

The first case that brought UN staff in the docks to discuss his immunity was a dispute opposing William Ranallo to Walter Donnelly in a US Court in 1946.[560] The scope of immunity enjoyed by Mr. Ranallo was the subject of discussion in this case. Mr. Ranallo was employed as a chauffeur for the UNSG and was charged with exceeding the speed limit in a car owned by the UN while driving the UNSG to a conference.[561] The defense based its argument on the fact that Mr. Ranallo was performing his duties as the UNSG's driver when the actions he was accused of were committed.[562] The case is particularly interesting for this study due to the judge's arguments. The Court concluded that the question of immunity should be dealt with after discussing the facts before the Court.[563] At this time, the judge determined that the US executive branch had not certified that immunity from suit was justified in the public interest; therefore, the judge ruled that the judicial branch retained jurisdiction to address this

[560] Lawrence Preuss, "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case," *American Journal of International Law* 41, no. 3 (1947): 555-78 at 555, footnote 15. According to Preuss, there were previous cases that brought UN Staff before US Courts. Nevertheless, there had been no plea of immunity in these cases. These cases were similar to Ranallo's case as they concerned speeding matters. Andrew Jackson was fined for speeding, as was Rafik Asha. David Sisson was fined as well as an "assistant to the Security Officer of the United Nations, appearing before the Court, had stated: 'The United Nations does not intend to ask immunity for chauffeurs and other staff employees. They are subject to the laws as well as anyone else.'"
[561] *Ibid* at 556.
[562] *Ibid* at 556.
[563] 67 N. Y. S. (2d) 31, 35 as cited in Preuss supra note 560 at 557: "upon the facts in this case, the defendant is not entitled to immunity as a matter of law without a trial of the issue of fact and is accordingly required to plead to the Information before the Court."

question.[564] The Court did not negate the necessity of granting immunity to officials but simply pleaded in favor of the limitations of this immunity. The judge justified his position by saying that unrestricted immunity would "flouts the very basic principle of the United Nations itself, which in its preamble to its Charter affirms that it is created to give substance to the principle that 'the rights of all men and women are equal.'"[565] Based on this understanding, the only means to reconcile the principles governing the UN to the principles of immunity is to protect the officials only when they are performing core functions of the UN and not tasks that could be considered logistics.[566]

Courts have also ruled on the status of experts on missions and its definition to identify whether acts were perpetrated while performing their functions. In the Mazilu case, the ICJ considered that experts on missions are "persons (other than United Nations officials) to whom a mission has been entrusted by the Organization" and to whom immunities and privileges are granted to guarantee "independent exercise of their functions."[567] This conclusion is built on a reflection acknowledging that the CPIUN does not assert a definition of experts on missions but points out that experts are not UN officials and that to be covered by Article VI Section 22, they must be performing UN missions.[568] The records and *travaux préparatoires* of the CPIUN do not provide guidance on how to define the category.[569] Based on the wording of section 22, and particularly the description of the scope of immunities to be granted to experts, the Court concluded that: "[t]he experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission."[570] The Court attempted to provide a non-exhaustive list of the past missions entrusted to experts, such as mediation, preparation of reports or studies, investigations, provision of technical assistance work, or work in Commissions or other similar bodies.[571] In the end, it concluded that Mr. Mazilu was an expert on mission, and this conclusion was also used later in

[564] Preuss supra note 560 at 562.
[565] 67 N. Y. S. (2d) as cited in Preuss supra note 560 at 566.
[566] *Ibid* at 567.
[567] Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, [hereinafter Mazilu Case] 177 at §52. See §1 for context on the case. The ICJ was requested to give an advisory opinion after a different emerged between the UN and the Government of Romania as regards the scope and application of the immunities and privileges granted to Mr. Dumitru Mazilu for his role of Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.
[568] *Ibid* at §45.
[569] *Ibid* at §46.
[570] *Ibid* at §47.
[571] *Ibid* at §48.

the Cumaraswamy case.[572] It also established that mission was to be understood in a general sense "embrac[ing] in general the tasks entrusted to a person, whether or not those tasks involve travel."[573] Moreover, as the Mazilu case ruled, in the absence of any reservations by a State to the CPIUN, experts could invoke their immunities even in their State of nationality or residency.[574] With the Cumaraswamy case, the -exclusive- authority of the UNSG to determine whether actions were performed within the scope of the mission entrusted to an expert was challenged by the Government of Malaysia.[575] The UNSG and its legal counsel argued that the UNSG had exclusive authority on this subject.[576] The Court's conclusion on the subject is much more nuanced; while it seemed that the UNSG assessed the situation correctly and was right to assert that Mr. Cumaraswamy was acting within the scope of his functions as an expert, it limited its argumentation to say that the UNSG had a "pivotal role to play."[577] Although it supports the importance of the UNSG in this decision-making process, it does not assert the exclusive authority of the UNSG over this situation and even invites the treatment of such affairs on a case-by-case basis.[578]

The first case invites a distinction between actions carried out to fulfill the organization's core functions and any other actions performed by an individual in the course of their duties. The second case, in addition to clarifying the definition of an expert on mission, challenges the authority of the UN Secretary-General to determine whether an individual qualifies as such unilaterally.

2.3.b. Questioning the Nature of the Immunity of UN Personnel

Discussing immunity implies mentioning the differences between immunity *Ratione Materiae* and immunity *Ratione Personae* and apply it to UN Personnel's immunity.

Immunity *Ratione Personae* implies that an individual's actions are immune due to the public nature of their acts.[579] The immunity is limited in time but absolute in scope.[580] Immunity

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[572] *Ibid* at §60; Cumaraswamy Case supra note 277 at §43.
[573] Mazilu Case supra note 567 at §49-50.
[574] *Ibid* at §51; this was further confirmed in Cumaraswamy Case supra note 277 at §46 "experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside."
[575] Cumaraswamy Case supra note 277 at §32.
[576] *Ibid* at §33.
[577] *Ibid* at §50, §56.
[578] *Ibid* at §52 "The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. […]"
[579] Boon supra note 227 at 262.
[580] Rosanne Van Alebeek, "Personal Immunity," in *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, ed. Rosanne Van Alebeek (Oxford University Press, 2008), 158-99 at 161.

Ratione Materiae recalls the principle of functionalism explained above, the actor and the conduct are to be taken separately.[581] Immunity *Ratione Materiae* is limited in scope but not in time.[582] While diplomatic immunity can be justified based on a functional rationale, diplomatic and functional immunities are not equal as diplomatic immunity is broader in scope -including private acts-.[583] In principle, functional and diplomatic immunities are considered differently before courts. Functional immunity implies determining whether the acts were part of the individuals' functions; diplomatic immunity prevents any inquiry without a waiver.[584] It suggests that the analysis of courts' rulings is likely the most conclusive element to determine what type of immunity is indeed granted to UN personnel.

It is common to see conclusions from domestic courts that recognize the absolute immunity of the UN.[585] However, UN personnel's immunities, although extremely broad, are still rooted in functionalism, and the *Ratione materiae* principle seems to have been embraced in most cases.[586] Nevertheless, the rationale to justify immunity has been stretched thin, particularly in traffic incidents. It is difficult for public opinion to accept that UN personnel can be exempt from the consequences of their actions, especially when the infraction occurred during non-core missions, such as driving the UNSG to a conference. Although senior UN employees enjoy diplomatic immunity, this is not true for all UN Personnel, as Sections 20 and 23 of the CPIUN specify how their immunity only covers acts committed while performing their functions. These sections clearly state that neither UN officials nor experts are granted immunity for themselves but rather to guarantee the free-of-interference completion of the mission entrusted to them by the UN. In the end, upholding immunity for cases such as traffic incidents or physical assault would amount to assuming that sanctioning these would interfere with the organization's affairs.

This section has been an opportunity to better define and delimit the scope of UN personnel immunity based on its legal framework. It demonstrates the diversity in terms of personnel categories and the immunity they are accorded. Courts also ruled and proposed

[581] Boon supra note 227 at 262.
[582] Van Alebeek supra note 580 at 161.
[583] *Ibid* at 161.
[584] *Ibid* at 162; ILC supra note 458 at §56: The OLA affirmed the exclusive authority of the UNSG to determine what was defined as an official act of its personnel in a letter by the OLA to the Permanent Representative of the United States discussing the case People of the State of New York v. Mark S. Weiner in 1976. The letter highlighted the risks associated with having domestic Courts "overrul[ing] the Secretary-General's determination that an act was 'official,'" then potentially leading to an immense number of cases waged against the UN in the various States in which it operates.
[585] Van Alebeek supra note 580 at 263.
[586] Boon supra note 227 at 263.

varying interpretations. Based on the knowledge collected, this section leads to wonder whether there are any means to limit this immunity.

3. PREVENTING IMMUNITY FROM BECOMING IMPUNITY

This sub-section discusses strategies for balancing the necessary immunity accorded to the UN and its personnel with the need for accountability and access to justice. To achieve this balance, several options have been pursued, such as the mechanism allowing for a waiver of immunity, the different policies adopted by the UN to prevent abuses of immunity, and finally, the work of the Sixth Committee on the matter. Eventually, and building upon the chapter's findings, it argues for the limitation of the immunities granted to the UN and its personnel.

3.1. Balancing Immunity with Accountability and Access to Justice

This sub-section reviews mechanisms to limit abusive use of privileges and immunity while attempting to ensure accountability for wrongful actions. It pays particular attention to the practice of waiver of immunity in the UN and the various policies adopted by the organization to limit abuses of immunity resulting in *de facto* impunity. Finally, this section discusses the contribution of the Sixth Committee, discussing strategies to prevent immunities from hindering accountability mechanisms.

3.1.a. Waiving the Immunity of UN Personnel or of the Organization

One option to prevent immunity from leading to unaccountability is to waive immunity. This waiver can target the organization and its agencies or personnel's immunity. Various sections of the CPIUN and CPISA establish such a procedure. Article II, section 2 of the CPIUN provides that the UN can waive its immunity; nevertheless, such a waiver does not allow for execution measures. Regarding UN Personnel, Article V Section 20 and Article VI Section 23 provide that the UNSG has the right and duty to waive the immunity of both officials and

experts when their immunity hinders justice.[587] While in mission settings, members of contingents remain under the exclusive jurisdiction of the sending State, the SOFA provides that "[i]f the accused person is a member of the civilian component or a civilian member of the military component, the Special Representative/Commander shall conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceedings should be instituted."[588] The SOFA establishes functional immunity as it provides that the Special Representative or Commander should assess whether the alleged actions of a member of the civilian component are related to official duties and decide whether the proceedings can continue.[589]

UN personnel immunity can be waived for various motives by the UNSG. The UN Dispute Tribunal (UNDT) had to rule over a conflict regarding a waiver of immunity between the UNSG and a high UN Conference on Trade and Development official. The officials in question—and his wife—were accorded diplomatic immunity based on their position in the organization.[590] The dispute originated from a breach of a rental agreement between on the one hand Mr. and Mrs. Kozul-Wright and on the other hand their landlord.[591] After failing to resolve the dispute amicably, the Permanent Mission of Switzerland to the UN Office in Geneva requested a waiver of immunity for the matter to be brought before Geneva Courts.[592] Despite the refusal of Mr. Kozul-Wright to settle the dispute outside of courts and his demand to the

[587] *Ibid* at article V section 20, article VI section 23; ILC supra note 458 at §16, the OLA stressed in 1969 that "the Secretary-General's authority with respect to the Organization's privileges and immunities (of which those applicable to officials are, of course, only a part) is not essentially a personnel matter and, without an express provision on this point, no such delegation could be inferred from the delegation of powers relating to administration of the Staff Regulations and Rules on appointment and selection of staff."
[588] Model SOFA supra note 122 at §47-a.
[589] *Ibid* at §48: "If any civil proceeding is instituted against a member of the United Nations peace-keeping operation before any court of [host country/territory], the Special Representative/Commander shall be notified immediately, and he shall certify to the court whether or not the proceeding is related to the official duties of such member: (a) If the Special Representative/Commander certifies that the proceeding is related to official duties, such proceeding shall be discontinued and the provisions of paragraph 51 of the present Agreement shall apply. (b) If the Special Representative certifies that the proceeding is not related to official duties, the proceeding may continue. If the Special Representative/Commander certifies that a member of the United Nations peace-keeping operation is unable because of official duties or authorised absence to protect his interests in the proceeding, the court shall at the defendant's request suspend the proceeding until the elimination of the disability, but for not more than ninety days. Property of a member of the United Nations peace-keeping operation that is certified by the Special Representative/Commander to be needed by the defendant for the fulfilment of his official duties shall be free from seizure for the satisfaction of a judgement, decision or order. The personal liberty of a member of the United Nations peace-keeping operation shall not be restricted in a civil proceeding, whether to enforce a judgement, decision or order, to compel an oath or for any other reason."
[590] CPIUN supra note 350 at article V section 16.
[591] Kozul-Wright v. Secretary-General of the United Nations, UNDT/2017/076/Corr. 1, (UNDT, September 13, 2017) at §4-6: They had initially signed a lease contract for three years and fifteen days. They left the apartment earlier as they were allowed to by their three-month notice clause entitled to UN officials and proposed a new tenant, which the landlord refused for various reasons. When they left they ceased any payment to their landlord.
[592] *Ibid* at §7-8.

organization to reject the request for waiver based on his understanding that the dispute was related to official functions, the UNSG decided to waive his immunity and let him appear before courts.[593] Later, after a Geneva Court ruled on the matter, the UN was requested to lift Mr. Kozul-Wright's immunity to allow for the execution of the judgment.[594] Mr. Kozul-Wright brought the dispute to the UNDT, arguing that his immunity should not have been lifted. This case gave the occasion to the UNDT to justify the waiver of immunity and explain in which conditions one should be requested and granted.[595] The decision of the UNSG to waive one's immunity knows constraints linked to the necessity "to facilitate the proper administration of justice and the observance of police regulations, as well as to prevent abuse of privileges and immunities. These are not just vague maxims of courtesy towards the host country, but legally-binding obligations for the United Nations."[596] The UNDT also confirmed the waiver of immunity and asserted how the "lease of an apartment for a staff member's personal accommodation is eminently a private matter."[597] It then went on to argue "that, although diplomatic immunity indeed covers both official and private dealings, its *raison d'être* remains enabling the Organization's agents to discharge their functions in adequate conditions. The Secretary-General will naturally, and rightly so, bear in mind the connection or impact of a given incident with the staff member's official duties when considering whether or not to lift an agent's immunity."[598]

Driving incidents have also been a source of cases launched against UN personnel. In 1967, the UN reported that the UNSG would decide on a case-by-case basis about the waiver of immunity.[599] The UNSG decisions appear to be based on the distinction between private purposes and official duties considering the necessity to preserve the organization's independence.[600] It seems that the UNSG policy on the matter does not systematically preclude the organization from issuing a waiver of immunity.[601] And more importantly, the report claims

[593] *Ibid* at §9-13.
[594] *Ibid* at §19, §24.
[595] *Ibid* at §44, §47-48.
[596] *Ibid* at §44.
[597] *Ibid* at §48.
[598] *Ibid* at §47; Kozul-Wright v. Secretary-General of the United Nations, 2018-UNAT-843, (UNAT, June 29, 2018) at §64. Although the UNSG was successful in the first ruling, it appealed the decision by arguing that the UNDT should have never considered the dispute in the first place as it is an executive or policy decision and not an administrative one.
[599] ILC supra note 514 at §270.
[600] *Ibid* at §270: "Where the journey was one taken solely for private purposes, the United Nations has not intervened unless, at the least, it appeared that the nature of the measures taken were such as to affect the independent operations of the United Nations itself."
[601] *Ibid* at §270 "This consideration has also been of central importance in deciding whether or not immunity should be waived in cases where a criminal charge was laid against an official who was driving on official business."; ILC supra note 458 at §17, the report discussing the practice of waiving of immunity by the UNSG

that based on a study of cases in which UN officials "have been arrested, detained in custody, or charged, following driving accidents in which they were involved. […] The issue of the personal convenience of the individual staff member has not entered into the matter."[602]

The Kozul-Wright case illustrates how the UNSG should distinguish between private and official acts and decide to waive immunity based on this distinction. This case is only one example out of a non-negligeable number of cases.[603]

3.1.b. Preventing the Misuse of Immunity

Conventions are the first safeguard against abuse of immunities. Both the CPIUN and the CPISA contain a clause regarding abuses of privileges and their prevention. The CPIUN reads: "[t]he United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities, and facilities mentioned in this Article."[604] While this section is of utmost importance, it seems to relate only to the privileges granted by Article V and, therefore, only to officials as they are the article's focus. Parallelly, the CPISA includes a complete article on the issue of abuses of privileges, providing a broader scope of actions to prevent these abuses.[605] The CPISA does not put the responsibility on the UNSG but instead on State parties to the Convention to convene consultations between that State and the specialized agency to determine the veracity of the abuse and determine ways to avoid repetition.[606] If both parties cannot find common grounds, then the question can be brought to the ICJ based on the provisions relative to the settlement of difference.[607] If the ICJ confirms this abuse, "the State

highlighted how the latter did so while being "guided by a general sense of justice and equity." This would be coherent with the Ranallo case abovementioned.

[602] ILC supra note 514 at §270.

[603] Amnesty International, "So does it mean that we have the rights Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo," *Eur 70/010/2004*, (2004), Frederick Rawski, "To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations," *Connecticut Journal of International Law* 19, 103-32 as cited in Ladley supra note 119 at 85, see for instance, the case of a CIVPOL officer who allegedly assist the rape and smuggling of a young girl in Kosovo, and the allegations against a Finnish civilian staff who killed a women in Timor Leste. As regards the latter, the UN initially refused to waive its immunity before reconsidering his decision. Nevertheless, he was still released and returned to his home State.

[604] CPIUN supra note 350 at article V section 21.

[605] For more information on the origin of this provision see: Ana Sofia Barros and Cedric Ryngaert, "Abuse of Privileges and Immunities (Article VII Sections 24-25 Specialized Agencies Convention)," in *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary*, ed. August Reinisch (Oxford University Press, 2016), 467-74, at 467. Such a provision finds its roots in an MOU of the International Labour Organization from 1945, prior to the CPIUN. It was the first of its kind to figure in an international instrument.

[606] CPISA supra note 460 at article VII section 24.

[607] *Ibid* at article VII section 24, article IX section 32: "All differences arising out of the interpretation or application of the present Convention shall be referred to the International Court of Justice unless in any case it is agreed by

party to this Convention affected by such abuse shall have the right, after notification to the specialized agency in question, to withhold from the specialized agency concerned the benefits of the privilege or immunity so abused."[608] It seems like the CPISA gives much more latitude to States to force the UN to comply with its obligations and effectively prevent abuses of immunities. While one may wonder why such a provision is not included in the CPIUN, which would apply to the UN more generally, the answer may be straightforward. While Special Agencies can cope with MS withholding the benefits of the privilege or immunity as their functions are confined, the UN and mainly the Secretariat cannot allow for such thing as it may effectively hinder its independence and ability to carry out its functions. The broad functions, responsibilities, and political tensions linked to the missions undertaken by the Secretariat may be jeopardized if the MS could challenge the UN this way.

Once this provision is known, one question remains: what could constitute an abuse of privileges? One case before the International Labor Organization Administrative Tribunal relative to an employment affair provided "that when recruiting its officials an international organization must ensure that their status complies with the laws of the host State governing the residence of aliens, failing which it may be held to have abused the privileges and immunities conferred upon it and upon its staff members."[609] Such a conclusion implies that an IO would be abusing its privileges and those of its personnel when not following the host State laws. Nevertheless, this conclusion could be problematic under the provisions of the UN-US HQ agreement, allowing the UN not to respect local laws when these are against one of its principles -even though such a dispute has to be settled eventually.

The Secretariat argued that "[t]he observance of police regulations and the prevention of abuse of any of the privileges granted to officials under Article V, have been secured chiefly through administrative means e.g., by means of the United Nations staff rules and administrative instructions. To a large extent, moreover, since the official has enjoyed the privilege or immunity concerned only through the intermediary of the United Nations, the Organization has been able to control the manner and extent of the exercise of each privilege

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the parties to have recourse to another mode of settlement. If a difference arises between one of the specialized agencies on the one hand, and a member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court and the relevant provisions of the agreements concluded between the United Nations and the specialized agency concerned. The opinion given by the Court shall be accepted as decisive by the parties."

[608] CPISA supra note 460 at article VII section 24.

[609] Mr. I. T. v. World Health Organization, No. 3141, (ILOAT, July 04, 2012) at §36, §38. The Tribunal then cleared that it was not up to this instance to decide whether privileges were abused in those cases and whether the agency was in breach of its obligations stemming from its HQ agreement signed with Switzerland.

or immunity, and thereby prevent any abuse."[610] Such an argument suggests that UN officials abuse their privileges by not obeying local regulations. It also already defends the organization from accusations as it claims that its internal regulation requires the staff member to comply with its obligations under local laws.

While these safeguards can contribute to preventing impunity, they might not be sufficient. The waivers are highly dependent on the will of the UNSG and even maybe on public opinion, which renders them unpredictable. Furthermore, it seems unlikely that private claims could be successful regarding abuses of immunity by the UN or UN personnel. This mechanism seems to be State-centered. In consequence, solutions must be sought.

3.2. Arguing for the Restriction of Immunities

Building on the chapter's findings, the following sub-section argues for clear limitations of the immunities regime accorded to the UN and its personnel. While the UN and its personnel require protection from interference by States to fulfill their functions, human rights and UN values should still be upheld and prioritized for the mission to make sense.

3.2.a. Arguments for the Limitation of the Organization's Immunity

While the most recent rulings seem to favor applying the functional need theory rather than affirming absolute immunity for the UN as an organization, this does not necessarily mean that the functional theory is without flaws.[611] Functionalists argued that UN immunity was necessary to enable the organization to fulfil its functions free from external interference; although it suggests limitations to the regime of immunity, the broad scope of the UN's missions turned the organization's immunity into a close to absolute one.[612] Furthermore, an essential issue with functionalist theory resides in its subjectivity; the observer -in most cases, a magistrate- determines where to draw the line.[613] However, in the case of the UN, as the UN is

[610] ILC supra note 514 at §338.
[611] Klabbers supra note 510 at 14.
[612] *Ibid* at 14; Klabbers supra note 445 at 131: Klabbers further expanded its ideas by asserting that the functionalist theory could not apply to States since the wide range of functions they have to fulfill would lead to the establishment of a very broad regime of immunities, the same logic applies to the UN.
[613] Klabbers supra note 445 at 134. In this sense, a judge is asked to give their opinion on whether the immunity built by various documents covers the act under their scrutiny.

the sole entity able to waive its immunity, it is also responsible for determining what is part of its functions.

The functionalist approach is always biased in favor of the organization and might lead to downward slides regarding rights protection.[614] Given that this situation is certainly not optimal and satisfactory, particularly from the alleged victims' standpoint, scholars have developed reasonings to justify holding IOs accountable for their actions. Some borrowed from constitutionalism and the rule of law and claimed that IOs must adopt liberal constitutional thought, respect human rights, and be held accountable if need be to be considered legitimate.[615] With the growing scope of activities attributed to the UN and its status as a public authority, one must understand that it can also commit wrongs, and as a public authority, it should be held accountable.[616] Moreover, IOs, more than any other entity, should not enjoy impunity in case of rights violations, a debate that crystallized over the Mendaro v. World Bank case in 1983.[617] The case revolves around an employment-related grievance between Susana Mendaro and the World Bank initially adjudicated in a district court.[618] Mendaro complained of sexual harassment and discrimination by World Bank colleagues, and shortly after, her position was terminated.[619] The complainant filed a complaint with the Equal Opportunity Commission, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia, all of which dismissed the charges based on a lack of jurisdiction due to the immunities enjoyed by the World Bank.[620] The issue with these dismissals is that they left the complainant with no means to seek legal redress.

Ultimately, it comes down to how much the international community, especially the members of the UN, values human rights in relation to the importance they place on protecting the organization from any interference.

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[614] *Ibid* at 136.
[615] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2007) as cited in Klabbers supra note 510 at 72.
[616] Blokker supra note 445 at 261; Benedict Kingsbury, "The Concept of "Law" in Global Administrative Law," *EJIL* 20, no. 1 (2009) 23-57 as cited in Klabbers supra note 510 at 72.
[617] Klabbers supra note 445 at 135.
[618] Monroe Leigh, "Mendaro v. World Bank. 717 F.2d 610," *The American Journal of International Law* 78, no. 1 (1984): 221-23, at 221.
[619] Brief for Applicant at 12, Mendaro v. International Bank for Reconstruction and Development, World Bank Administrative Tribunal (1984) at 11-12, 14 as cited in Megha Bhouraska (1986) "MENDARO V. THE WORLD BANK," *NYLS Journal of International and Comparative Law* 7, no. 2, (1986): 475-86 at 480.
[620] Bhouraska supra note 619 at 480.

3.2.b. Arguments for the Limitations of UN Personnel's Immunity

While the reasoning behind the immunities accorded to UN personnel is perfectly reasonable, their application, which leads to a lack of accountability, is not ideal. While protecting the UN and its personnel from interference harming the fulfillment of the UN's mission is commendable and probably necessary, it should not be to the detriment of the respect of victims' rights and the right to access justice. This reasoning concurs with the argument elegantly presented by the *juge de paix* in the case opposing Joseph Avenol to his wife in a private matter case.[621] Avenol was the second SG of the League of Nations and enjoyed protection in front of courts which he argued this immunity extended to judgment of private law matter, in this case an order of a court compelling him to pay a monthly allowance to his ex-wife.[622] The judge argued that his immunity did not protect him from such a ruling in those terms:

> Avenol's argument is too simple .... If we were to decide that Avenol is covered by diplomatic immunity before the courts of the sixty States, Members of the League, we should have reached a decision which is ... palpably contrary to all the notions of law which have been gradually imposed on the human conscience since the ages of barbarism and which have become the universal charter for all civilized actions - a decision that Avenol is placed above the law, higher than the heads of States .... It would follow that all the agents and officials of the League of Nations from the humblest to the highest could, by their private acts, infringe the rights of their neighbours by entering into contracts which they are free to violate .... It is not possible that the Covenant of the League of Nations ... which governs the highest moral and judicial authority in the world, entrusted with the establishment of the law of nations, should provide the world with an astonishing example of a provision which is in such flagrant contradiction to the sacred and profound sentiment of justice.[623]

In Avenol's case, the judge considered that the immunities of the highest representative of the League of Nations could not be absolute as this would not be in accordance with the principles established in the Covenant of the League. Another opinion, although dealing with the immunity of State representatives and being a dissenting one, adds to this argument by

[621] Blokker supra note 445 at 263.
[622] *Ibid* at 263.
[623] Avenol v Avenol, (Juge de Paix, XVIe Arrondissement de Paris March 8, 1935) as cited in Blokker supra note 445 at 263.

asserting that immunity is "an exception from the general rule that man is responsible legally and morally for his actions" and "as an exception it has to be narrowly defined."[624] The ICJ concurred with the necessity to be careful with the scope of immunity granted. The Court recognized the importance of the immunity of UN Officials and emphasized the "greatest possible weight" it had to be given in domestic courts while acknowledging it could be set aside "for the most compelling reasons."[625] Nevertheless, this advisory opinion does not give any more precision as to what are these compelling reasons.

Such broad immunities also question equality in front of courts; while it seems sensible to offer protection for official acts leading to negative consequences, UN personnel should never escape justice for their private actions. There is no situation in which SEA could be an official act, and therefore, if the immunity is genuinely functional, it should never prevent accountability. For SEA, UN Personnel should be appearing before courts like any other individual would. While McKinnon Wood said that it is "not desirable that the organization should present itself to the populations of its constituent States as something alien, privileges and ceremonious, but rather that it should be accepted as something necessary and natural which exists to serve their interests and in which they have as much a part as in their national institutions."[626]

To conclude, preventing immunity from turning into impunity is not easy. Immunity is one factor favoring impunity for crimes committed by UN Personnel together with not only the inability of States to exercise extraterritorial jurisdiction, the inadequacy of the legal framework, but also the difficulty in attributing responsibility for an action to an actor. Court rulings and legal instruments demonstrate the difficulty of defining the regime of immunities accorded to the organization and its personnel. Sometimes, rulings can also illustrate a form of confusion relative to how the immunities regime should be applied. In addition, the variety of documents and their diverse origins complexify this regime by establishing slightly different provisions based on the category of personnel the individual belongs to. This chapter shows the tension between the necessary protection of the UN and its workers to guarantee the good performance of their duties and the protection of fundamental human rights. What emerges from

[624] Arrest Warrant of 11 April 2000 ((Democratic Republic of the Congo v. Belgium), Dissenting opinion of Judge Al-Khasawneh (February 14, 2002), 95-99 at §3.
[625] ICJ supra note 326 at §61.
[626] McKinnon Wood supra note 358 at 162 as cited in Preuss supra note 560 at 578.

this chapter is the tendency to favor the protection of the organization and its staff over the protection of individuals' rights. This is justified by the essential character of the UN mission -in the broader sense-. With the emergence of new challenges and the expansion of the tasks entrusted to the UN, the question of immunities and their negative consequences will continue to generate concerns.

CHAPTER 4 – RESPONDING TO ALLEGATIONS OF SEA: BETWEEN AMBITIOUS DISCOURSES AND LOW NUMBER OF STATE-LED INVESTIGATIONS AND TRIALS.

This chapter builds on the notions already explored regarding individual criminal responsibility, UN responsibility, and MS Responsibility for SEA. Not only does this chapter feed from the knowledge set out in Chapters 1 and 2 but also on the conclusions of Chapter 3 on the immunities granted to the UN and its personnel. The previous chapters serve as a foundation for understanding how these concepts may influence the handling of SEA allegations. This chapter illustrates the handling of SEA by UN personnel by presenting instances in which allegations of SEA were brought up against UN personnel. An overview of the allegations received by the UN between 2017 and 2024 is provided to contextualize the case studies selected. Building on the cases and key elements examined in previous sections, this chapter discusses the concrete obstacles to accountability in the cases under study, in addition to challenging the usual assumptions on the subject. Notably, it discusses the impact of an insufficient involvement of States as well as the repercussions of UN methods on accountability. Eventually, it provides a critical overview of the current accountability mechanism in place by exploring the perception of the victims and the relevance of administrative and disciplinary measures in the broader accountability process.

1. EMPIRICAL ANALYSIS OF THE HANDLING OF SEA ALLEGATIONS: CONTEXTUAL ELEMENTS AND CASE STUDIES

This sub-section provides an overview of the allegations received and handled by the UN before examining specific cases to analyze how these were handled. Furthermore, the outcomes of the procedure for all potentially involved actors: victims, perpetrators, and, when relevant, the UN are considered. The first case informs about a notion of organizational accountability as it focuses on the allegations received by the UN relative to the World Health Organization (WHO) intervention in the Democratic Republic of the Congo (DRC) between

2018 and 2020. Eventually, two cases illustrating the success of individual criminal accountability are presented.

1.1. SEA is a Widespread "Cancer" in the UN System[627]

There seems to be a widespread assumption that SEA allegations arise from PKOs and that most perpetrators are members of military contingents; this is particularly conspicuous when reviewing journalists' articles or most academic publications.[628] This sub-section aims to invalidate the assumption by comparing all allegations and demonstrating that most perpetrators are not members of military contingents. This assumption can hinder the advancement of accountability measures for all SEA cases by neglecting a significant share of perpetrators in future policies and international commitments, thereby creating inadequate policies. António Guterres himself acknowledged and deplored this bias in those words: "[s]exual exploitation and abuse is not a problem of peacekeeping, it is a problem of the entire United Nations. Contrary to the information spreading that this is a question related to our peacekeeping operations, it is necessary to say that the majority of the cases of sexual exploitation and abuse are done by civilian organizations of the United Nations, and not in peacekeeping operations."[629] To support this claim, this section employs visuals to illustrate how most allegations arise from NMS and that most perpetrators work for implementing partners. The

[627] UN, "Secretary-General's remarks to Security Council consultations on the situation in the Central African Republic," *un.org*, (August 13, 2015), available at: https://www.un.org/sg/en/content/sg/statement/2015-08-13/secretary-generals-remarks-security-council-consultations-the-situation-the-central-african-republic. The former UNSG Ban Ki-Moon following the allegations against UN Personnel in CAR qualified SEA by UN Personnel of a "*cancer in our system.*"

[628] See for instance: Ndulo supra note 54; Mudgway supra note 11; Bonnie Kovatch, "Sexual Exploitation and Abuse in UN Peacekeeping Missions: A Case Study of MONUC and MONUSCO," *The Journal of the Middle East and Africa* 7, no. 2 (2016): 157-74; Laville supra note 325; BBC, "UN's MINUSMA troops 'sexually assaulted Mali woman'," *bbc.com*, (September 26, 2013), available at: https://www.bbc.com/news/world-africa-24272839#:~:text=At%20least%20four%20UN%20peacekeepers,in%20the%20country%20in%20J uly; Kevin Sieff, "U.N. says some of its peacekeepers were paying 13-year-olds for sex," *washingtonpost.com*, (January 11, 2016), available at: https://www.washingtonpost.com/world/africa/un-says-some-of-its-peacekeepers-were-paying-13-year-olds-for-sex/2016/01/11/504e48a8-b493-11e5-8abc-d09392edc612_ story.html; Skye Wheeler, "UN Peacekeeping has a Sexual Abuse Problem," *hrw.org*, (January 11, 2020), available at https://www.hrw.org/news/2020/01/11/un-peacekeeping-has-sexual-abuse-problem. The reasons behind this tendency to focus on military personnel are unclear but may be attributed to the particularly shocking nature of some allegations. See Dataset presenting allegations in PKOs and SPMs supra note 199: Based on the data provided by the UN, one allegation involved 63 members of the Gabonese contingent and 50 victims, out of which 10 were children.

[629] UNSG, "Address to High-Level Meeting on the United Nations Response to Sexual Exploitation and Abuse," (September 18, 2017), available at: https://www.un.org/sg/en/content/sg/speeches/ 2017-09-18/secretary-generals-sea-address-high-level-meeting.

visuals hereinbelow have been generated using the data collected by the UN on their webpage "Data on Allegations: UN System-wide."[630] For the purpose of this study, three particular datasets are used and combined: "Allegations reported for entities other than peacekeeping operations and special political missions (United Nations staff members or United Nations related personnel)," "Allegations reported for peacekeeping operations and special political missions," and "Allegations reported for entities other than peacekeeping operations and special political missions (implementing partners)."[631] Based on how the UN collects and organizes data, the distinction between mission settings and NMS is clearly marked. None of these datasets are communicating on the UN website. Because these datasets are presented separately on the UN website, obtaining a holistic view of the situation at first glance is difficult. Furthermore, although the broad categories of personnel deployed by the UN in all these settings remain largely similar, the datasets use different terminology to categorize UN-related personnel, making it even more complex to utilize them together. For simplification purposes, the consolidated dataset uses eight broad categories of UN-related personnel: UN Personnel, Police, Government Provided Personnel, Government Personnel, MOs, Military Staff Officers and Military Contingents Personnel, and Other.[632] The dataset combines the information on all allegations reported from January 2017 to June 2024.[633]

[630] UN supra note 8.

[631] Dataset presenting allegations in PKOs and SPMs supra note 199, Dataset presenting allegations in NMS supra note 199; Dataset presenting allegations in NMS against Implementing Partners supra note 199.

[632] The overall category of UN Personnel includes all internationally recruited staff (including consultants, contractors, and UNVs) and locally recruited staff (including consultants or contractors). Police include all types of police forces, as the datasets do not provide information on the exact nature of their contract. Information that could influence the category to which they could belong. The category Other contains all allegations for which the perpetrator is labeled as: "Unknown," "Other," "Vendor Employee," or "Non-UN Forces." When an allegation identified more than one perpetrator in different categories, the two alleged perpetrators were counted separately. How the UN has collected this data greatly complexifies the exploitation of this material. For one, while reports of allegations in NMS are compiled to present one line per victim, allegations reported in SPMs and PKOs group both victims and perpetrators into one allegation.

[633] This is justified by the fact that the allegations in NMS were first collected and published in 2017, while allegations of PKOs have been collected electronically since 2008. Therefore, it can also include allegations reported in 2017 for years prior. This selection allows for a coherent comparison between all categories of personnel and settings.

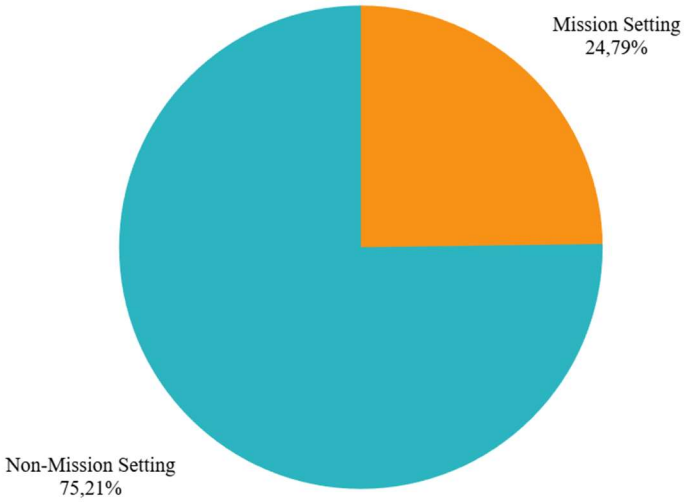

Figure 1. Distribution of Alleged Victims of SEA by Setting.

This visual compares the victims reported in mission settings to those in NMS. This visual includes all allegations reported in mission and NMS regardless of the categories of personnel. Therefore, it also includes the reports against UN implementing partners in both settings. It supports the statement made by the UNSG claiming that SEA was an issue for the entire organization and not only peacekeeping missions by challenging the preconceived idea that blue helmets were the object of most of the allegations. Moreover, it coincides with Buscemi's reflections on the necessity for the UN to take responsibility for failing to prevent the perpetration of SEA by its partners.[634]

[634] Buscemi supra note 241.

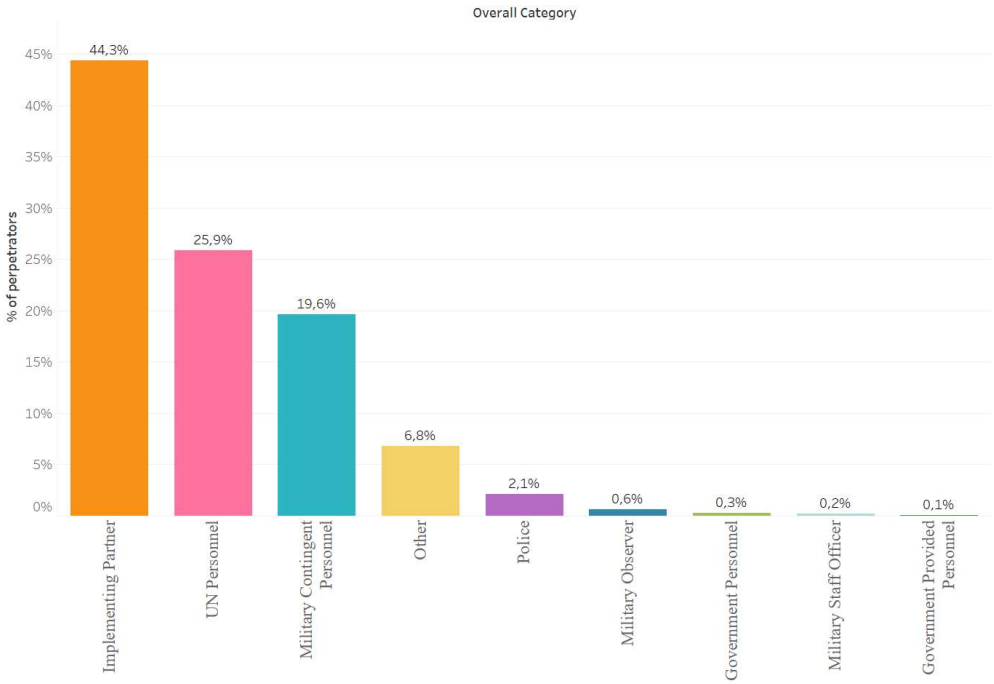

Figure. 2. Distribution of alleged perpetrators by Personnel Category from January 2017 to June 2024 across all settings.[635]

The data indicates that between January 2017 and June 2024, implementing partners' staff represented almost half of the identified alleged perpetrators of SEA. Moreover, and despite the very shocking allegations brought up against members of military contingents targeting a significant number of individuals in one report, there are more alleged perpetrators of SEA who belong to the category "UN Personnel" than "Military Contingent Personnel." This justifies the necessity of looking beyond only analyzing the handling of SEA allegations involving members of military contingents and fully supports the UNSG's statement.

1.2. WHO Sex-for-Jobs Scandal: what about Organizational Responsibility?

This sub-section examines elements related to the significant number of SEA allegations reported against UN staff working for a WHO mission in DRC. It also analyzes the organization's handling of those allegations to determine where responsibility lies in this case.

[635] Dataset presenting allegations in PKOs and SPMs supra note 199; Dataset presenting allegations in NMS supra note 199; Dataset presenting allegations in NMS against Implementing Partners supra note 199.

1.2.a. Elements of the Case

As the UN agency responsible for international health-related issues, WHO may be required to intervene in various dire situations where an epidemic may have struck a State or region, the Sex-for-Jobs scandal arose in such a setting. Between August 2018 and June 2020, WHO intervened in DRC, intending to contain the tenth Ebola crisis.[636] While WHO was intervening, UN services collected a significant number of allegations of SEA supposedly committed by personnel related to WHO. To shed light on the accusations and the organization's handling of these, the WHO Director-General, Dr. Tedros Adhanom Ghebreyesus, commissioned an independent report.[637] In a way, such a report shows the readiness of the organization to assess its methods for handling SEA cases. Interviews with WHO higher-ups, presumed victims, and alleged perpetrators, as well as a desk review of documents at their disposal, informed the authors of this report.[638] It found 83 allegations of SEA, out of which nine could be instances of rape, and the committee was able to identify 84 alleged perpetrators.[639] According to the alleged victims, they were promised jobs by WHO staff or partners in exchange for sex.[640] These allegations concern both local and international workers alike.[641]

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[636] WHO, "Final Report Independent Commission on Allegations of Sexual Exploitation and Abuse during the Response to the 10th Ebola Outbreak in DRC," (September 28, 2021) at §1-2, §21. The independent report particularly underlined the significant impact of the epidemic on the local communities, the Ebola epidemic coupled with the ongoing conflict in DRC had left the population in a particularly dire situation and very vulnerable.

[637] *Ibid* at §2.

[638] *Ibid* at §8, §10-13.

[639] *Ibid* at §107, §117, §121. At §133 the report establishes that there is a difference in terms of number of reports of SEA initially received and the number of presumed victims who came forward to recount potential SEA affairs. The authors believe that the victims initially perceived the organization's answer to the first allegations as lacking responsiveness and failing to acknowledge the seriousness of the situation from the first reports.

[640] *Ibid* at §105, §116, §118. Some victims were even already employed by the organization and allegedly coerced into having sex to receive the sums due to them for the completion of their mission, to keep their position or to get a better position within the Organization. Some claim they have been dismissed because they refused to yield to the advances they received. Some interviewed victims also assert they have been drugged or forced to get an abortion if the alleged intercourse had resulted in a pregnancy; Robert Flummerfelt and Nellie Peyton, "EXCLUSIVE: More than 50 women accuse aid workers of sex abuse in Congo Ebola crisis," *The New Humanitarian*, (September 29, 2020), available at: https://www.thenewhumanitarian.org/2020/09/29/exclusive-more-50-women-accuse-aid-workers-sex-abuse-con go-ebola-crisis, Robert Flummerfelt and Nellie Peyton, "Power, poverty, and aid: The mix that fuelled sex abuse claims in Congo," *The New Humanitarian*, (September 29, 2020), available at: https://www.thenewhumanitarian.org/analysis/2020/09/29/Power-poverty-aid-sex-abuse-claims-Congo-Ebola-res ponse as cited in Sumbal Javed et al., "Predators among Protectors: Overcoming Power Abuse during Humanitarian Crisis through Effective Humanitarian Diplomacy and a Gender-Transformative Approach," *AIMS Public Health* 8, no. 2 (2021): 196-205 at 198: the partners in question could include Médecins Sans Frontières, Oxfam, ALIMA, World Vision as well as UNICEF or IOM, other UN Agencies.

[641] WHO supra note 636 at §136.

The report highlights several factors that may have created an environment conducive to SEA. First, within this operation, most of the decision-making positions were held by men, and many workers were hired with a temporary contract, thus precarious contract. All these elements led to the establishment of an environment that favored abuses of powers and SEA.[642] In addition, most of the workforce was composed of men.[643] The report further criticized the mission's recruiting processes. The selection of these workers appeared to be non-competitive, and background checks were not performed, particularly in North Kivu, where local workers represented half of WHO personnel.[644] It also appeared during the review that WHO failed to implement its employment policies regarding training in matters of SEA. The training of WHO staff in matters of SEA was insufficient and came too late: training started five months after the intervention had begun and was completed by only a limited share of the personnel working in the DRC for WHO.[645] Of the 2,800 individuals deployed, only 371 completed their SEA training.[646] It appears that for the majority of the allegations, alleged perpetrators had not completed their SEA training.[647] In addition, the local population had not been well-sensitized to SEA either, implying that they were unaware that such demands from WHO staff or partners were forbidden or even illegal, depending on the context.[648] In addition, the report mentioned several allegations that have not been handled correctly; for example, errors made included failing to open an investigation due to misinterpreting WHO policy or delaying the opening of an investigation.[649] While this is a problem in itself, one can argue that this also contributes to creating an environment conducive to SEA, as potential perpetrators may be led to believe they can act freely never facing any consequences. The mishandling of allegations seems correlated with the fact that "not a single allegation of sexual exploitation was registered during the mission, but the investigation substantiated 83 allegations retrospectively."[650] The report exposed different examples of mishandling. In January 2021, WHO Director-General was notified of an allegation against M. Boubacar Diallo and requested "to defer any internal investigation until the publication of the conclusions of the Independent Commission."[651] The

[642] Javed et al. supra note 640 at 197-98.
[643] WHO supra note 636 at §26.
[644] *Ibid* at §70-71. Higher-ups within WHO were particularly concerned with this failure to systematically perform background checks because of the presence of armed groups in the region.
[645] *Ibid* at §74-78.
[646] *Ibid* at §75.
[647] *Ibid* at §76.
[648] *Ibid* at §77.
[649] *Ibid* at §58, §62-68, §80-81, §90-91.
[650] Jasmine-Kim Westendorf, "A Problem of Rules: Sexual Exploitation and UN Legitimacy," *International Studies Quarterly* 67, no. 3 (September 1, 2023): 1-13 at 5.
[651] WHO supra note 636 at §58.

report of the Commission was published in late September, leaving potential victims waiting and probably compromising the chances to collect evidence. It is difficult to know with certainty whether an inquiry was later opened in this case. Moreover, according to the commission's mandate, the review was not meant to replace investigations into specific allegations but rather to provide an overall review of the handling of SEA allegations.[652] In other words, the report at the initiative of the WHO Director-General is not meant to replace a proper investigation into the allegations by competent services. Another investigation was not launched as the alleged victim did not fit the category of a "beneficiary."[653] It is worth mentioning that based on WHO internal policies, the victim's status does not condition investigations, and therefore, an investigation can be opened regardless of the category to which the alleged victim belonged.[654] WHO officials further justified this decision not to launch an investigation because the alleged perpetrator and victim concluded an amicable agreement, and the staff member's contract was not renewed.[655] Nevertheless, none of the justifications above constitute a motive not to investigate based on the WHO March 2017 policy.[656] In addition, the report identified another breach of WHO's internal policy. It revealed a tendency amongst several organization departments to be reluctant to consider allegations not reported in writing.[657] Nevertheless, the WHO Policy did not preclude such a thing. The issue with not opening investigations is that it implies that there will be no referral to competent national authorities, as the usual UN policy is to first substantiate the allegations before referring them to MS adequate authorities. Moreover, without investigation, the UN cannot substantiate the allegation and eventually sanction its personnel. Therefore, accountability is impossible to achieve with no investigation and no referral. As of now, it is unclear whether any of these accusations resulted in criminal proceedings.

The context and facts relating to the significant number of SEA allegations against WHO Staff during the response to the tenth Ebola crisis in DRC invite one to reflect on the

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[652] *Ibid* at §3. "The objective of the Independent Commission is to conduct an impartial, independent and comprehensive review of the facts regarding allegations of sexual exploitation and abuse during the 10th response, to identify victims and any weaknesses in the current system within the organization in order to propose measures to prevent such behaviour in the future and, most importantly, to ensure that perpetrators of sexual exploitation and abuse are held accountable for their actions."
[653] *Ibid* at §62-68.
[654] WHO, "Policy on Preventing and Addressing Sexual Misconduct," (March 8, 2023). While the WHO policy insists on beneficiaries and children being potential victims of SEA, it also specifies that "[t]he minimum operating standards set out above are not intended to be an exhaustive list. Other types of sexual behaviour or misconduct may also be grounds for administrative action, disciplinary measures, including summary dismissal or termination of contract, inclusion in relevant screening databases, and/or referral to national or local authorities."
[655] WHO supra note 636 at §90.
[656] *Ibid* at §91.
[657] *Ibid* at §80.

responsibility of higher WHO Officials for their actions or omissions that led to the situation in DRC.

1.2.b. Individual Responsibility

After reviewing the report, it is evident that the WHO and its higher officials failed to adhere to the agency's internal policies. Based on these policies, WHO Higher-ups can be responsible for not observing WHO internal policies and not handling SEA allegations according to established standards. WHO internal policies prohibit SEA, establish reporting channels, and create obligations in terms of recruitment processes, staff training, and local population sensitization.[658] In addition, the policy specifies that WHO should initiate its "own fact-finding investigation" when an allegation is received and then decide whether or not to refer this case to the authorities; the disciplinary sanction resulting from this investigation is independent of the findings of any criminal proceedings.[659] It appears in the report that the WHO failed to implement this systematically. The report identifies several individuals responsible for ensuring the respect of UN standards and policies relative to SEA: the regional emergency director, the incident manager, and the Assistant Director.[660] By extension, the responsibility of other higher officials, such as the Director of the Regional Office for Africa or the WHO Director-General, could also be considered; nevertheless, they claimed that they were unaware of the reports of SEA allegations before these made the headlines.[661] These claims have not been confirmed or disproved, but these officials could only be responsible if they had known about the incidents and given clear direction not to investigate.[662] To a certain extent, the order to defer investigations on the allegation raised against Mr. Diallo questions the responsibility of the WHO Director-General. In a letter addressed to the Director-General, the Special Rapporteur on Violence Against Women deemed that this decision is "a failure to take immediate action in the face of the seriousness of the allegations and may have resulted in a

[658] WHO, "WHO Sexual Exploitation and Abuse Prevention and Response: Policy and procedures," (March 2017) at §15-c, 21, 23-25, 26. Based on WHO internal policies aiming at preventing and addressing SEA "prohibits the exchange of money, employment, goods, assistance of services for sex, including sexual favours or other forms of humiliating, degrading, threatening or exploitative behaviour of the people who receive WHO's services." WHO is responsible for making "available channels to facilitate the reporting of such violations, and is committed to ensuring prompt and effective response to SEA reports […]. In addition, WHO is committed to acting to prevent SEA from occurring in the first place by putting in place a communication and raising awareness plan, and monitoring/tracking information concerning SEA."
[659] *Ibid* at §36-37.
[660] WHO supra note 636 at §73.
[661] *Ibid* at §53.
[662] *Ibid* at §55.

negative consequence for the victims."[663] It also questions the way HQ based a decision not to investigate based on the category to which the alleged victim belonged and the existence of an amicable agreement between alleged victim and perpetrator. But also, the refusal to consider reports that were not in writing. WHO 2023 Policy on preventing and addressing sexual misconduct clarifies that "WHO has zero tolerance for sexual misconduct and inaction against sexual misconduct. This means that WHO staff and collaborators cannot stand by or ignore incidents of sexual misconduct. By simply becoming aware of an incident of sexual misconduct, specific responsibilities and meaningful actions are engaged on the part of WHO staff, collaborators, managers and supervisors, at all levels of the Organization."[664] WHO committed to reinforcing accountability "especially in relation to those in leadership and supervisory positions," and reinforced the obligation for staff members to report acts of SEA.[665] However, reporting is one thing, and for it to be meaningful, there is a need for further actions when required, including an investigation. The 2019 UN Protocol on the Provision of Assistance to victims of SEA requires the UN to provide support and assistance to alleged victims regardless of the credibility of the allegations or the affiliation of the alleged perpetrator.[666] This support can include legal assistance.[667]

The commission, in the report of 2021, still concluded that there was no element to hold high-ranking officials such as the Director-General, the Executive Director of health emergencies, or the Director of the regional office for Africa responsible for the mistakes made in handling SEA cases.[668] However, in the opinion of the independent commission, the responsibility to handle SEA lies in the African Regional Office Regional Emergency Director, the Incident Manager, and the Assistant Director-General for Health Emergencies.[669] The independent commission highlighted a failure to comply with WHO internal policy regarding the handling of SEA from the very first notification of SEA allegations.[670] The Office of the United Nations High Commissioner for Human Rights (OHCHR) special rapporteur on violence against women reckons that SEA perpetrated in a conflict-affected zone -the North Kivu- in parallel to a health crisis and an international intervention by a WHO-affiliated

[663] OHCHR, "Letter from the Special Rapporteur on violence against women to Dr. Tedros Adhanom Ghebreyesus, Director-General of WHO," (March 14, 2022), AL OTH 12/2022 at 4.
[664] WHO supra note 654 at 4.1.
[665] *Ibid* at 6.5.1., 6.5.5.
[666] OHCHR supra note 663 at 9.
[667] *Ibid* at 9.
[668] WHO supra note 636 at §60.
[669] *Ibid* at §73.
[670] *Ibid* at §95.

workforce could fall within the scope of international criminal law.[671] The argument of the special rapporteur relies on the scope of the abuses, suggesting that it may have been the work of a network.[672] If the WHO were a private company, violating its internal policies would be just that. However, given its mission and the broader impact of breaches of internal rules, such violations carry greater significance in the case of the WHO specifically because breaches can lead to violations of human rights for local populations.

1.3. Individuals in the Docks: Elkorany and Bourguet

Researching and finding case laws involving UN personnel, not members of military contingents, brought before courts for matters of SEA is a complex matter. This complexity may be the result of a combination of factors. Cases relative to sexual assault can, in certain countries, be adjudicated behind closed doors to preserve the victims' intimacy. Therefore, documents can remain under seal or be difficult to access. Another source of information would be the UN, which collects a significant amount of data on many phenomena. Relative to SEA allegations against UN-related personnel, the UN compiles all the information it has received from States on cases it has referred for criminal accountability in a dataset published annually. Although helpful, notably for acquiring surface-level knowledge of UN practices in terms of referral, the use of such a dataset in this study to identify case laws to review is limited. Its limits include the anonymization of the data and the reliance on States' goodwill to update the UN. The anonymization is explained by the necessary protection of the alleged victims and perpetrators, particularly their privacy but also to prevent retaliation against them. Moreover, the number of cases referred is low, increasing the complexity of finding these cases with little to no indications. Despite these challenges, some cases in which perpetrators were successfully tried can be identified. In particular, this research focuses on a case that brought Mr. Elkorany in front of the US Courts and Mr. Bourguet before the French Courts.

Mr. Elkorany began a career as an aid and development worker in the early 2000s and served the UN in different capacities between 2013 and 2018.[673] While at the UN, he worked

[671] OHCHR supra note 663 at 4-5.
[672] *Ibid* at 5.
[673] US Attorney's Office, "Former United Nations Employee Sentenced to 15 Years In Prison For Drugging and Sexually Assaulting Victims," (October 27, 2022).

for the United Nations Children's Fund, notably in Iraq.[674] Throughout his career -both in and out of the UN- Mr. Elkorany initially admitted drugging 19 women, out of whom 13 were sexually assaulted.[675] A victim first reported SEA to the UN in or around December 2016; after this allegation, it was quickly revealed that this was, in fact, not his first assault.[676] After receiving the first allegation and probably substantiating the claim, the UN referred the case to competent authorities, in this case, the US, as Mr. Elkorany is an American citizen.[677] A US investigation uncovered other instances of sexual assault or attempted sexual assault between 2009 and 2016 in at least three countries: the US, Iraq, and Egypt.[678] It appears that the US New York Southern District Court had no difficulty launching criminal proceedings against Mr. Elkorany, although most of these crimes were perpetrated outside the US, particularly in the Middle East.[679] This was rendered possible because some of his crimes were committed on US soil.[680] While proceedings were launched against him, he was not charged for all his crimes. His plea agreement admitted two counts: "making false statements to the FBI, concerning the complaint of Victim 1 that was made to the United Nations and the claim that her complaint was false," and "assault of an internationally protected person."[681] Although "[t]he plea agreement also contains admissions that Mr. Elkorany drugged and sexually assaulted 13 women, some on multiple occasions," and admissions "to drugging six other women on at least one occasion," his sentence was based on the two counts aforementioned.[682] After Mr. Elkorany had pleaded guilty, the US government identified another victim bringing the total count to 20 women who he at least drugged.[683] The Court argued that it was the correct instance to exercise

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[674] *Ibid*.
[675] US Attorney's Office, "Former United Nations Employee Pleads Guilty To Assault And False Statements Charges, Admits To Sexually Assaulting Thirteen Victims And Drugging Six More Victims," (May 24, 2022).
[676] *Ibid*.
[677] Annex A case 109. While the table is anonymized, the information provided in the table coupled with the low numbers of cases referred and resulting in criminal proceedings allow for the identification of the case. In the column presenting the updates provided by the State to which the case was referred, it reads, "Subject pleaded guilty to charges of sexual assault and lying to investigators and was sentenced to 15 years in prison." Although Mr. Elkorany's name is not mentioned it is credible that case 109 is in fact referring to Mr. Elkorany's case.
[678] US District Court Southern District of New York, "Sealed Indictment USA v Karim Elkorany," (October 29, 2020), S1 20-cr-00437-NRB at §2.
[679] United States of America v. Karim Elkorany, No. 20 CR 437 (NRB), (District Court Southern District of New York(DCSDNY). October 27, 2022) at 74.
[680] *Ibid* at 74. The accused was tried for acts committed in New Jersey and Washington, D.C.
[681] *Ibid* at 73-74; United States of America v. Karim Elkorany, No. S1 20 CR 437 (NRB), (DCSDNY. October 29, 2020) at §5, §15. The internationally protected person was Victim-2 and enjoyed this status as she was working as a contractor for the UN.
[682] *Ibid* at 74. For more information relative to the charges, see: United States of America v. Karim Elkorany supra note 685.
[683] United States of America v. Karim Elkorany, No. S1 20 CR 437 (NRB), (US Court of Appeals for the Second Circuit. May 29, 2024) at footnote 2 "The government identified one additional victim after Elkorany pleaded guilty, and Elkorany did not object to the inclusion of information regarding this victim in the PSR. In total,

jurisdiction for both counts, particularly for the one relative to the assault, "as the defendant committed the offense in question out of the jurisdiction of any particular state or district of the United States and was arrested in the Southern District of New York."[684] All victims were invited to speak in front of the Court or send written statements -some of whom did both-.[685] Because he drugged and assaulted these women outside the territory of the US, the consequences he faced were limited. As Judge Buchwald puts it:

> If Mr. Elkorany had committed these acts within the maritime or territorial jurisdiction of the United States, such as if he had committed this crime at an embassy in a foreign country, or a consular office, he could be imprisoned for any term of years or for life.[686]

Eventually, Mr. Elkorany received the maximum sentence for the crimes he pleaded guilty to under US laws, fifteen years, and he was ordered "to pay restitution to his victims in the amount of $15,083.76."[687] While this research does not aim to discuss whether the punishment he received was sufficient and proportional to his act, it can still question whether he was indeed held accountable for all his actions when he was only charged with one count of assault. Victim 1 also questioned why so many individuals who knew about Mr. Elkorany's crimes, and may have even received pictures of the women he drugged, faced no legal action.[688]

In this case, it appears that the UN acted per its internal guidelines and obligations to ensure Mr. Elkorany would be held accountable after the organization had received this first report. The organization referred the case to US authorities, and although no waiver of immunity was requested, this judgment was welcomed by UN high officials.[689] Nevertheless, Ambassador Chris Lus, US representative for UN Management and Reform called the UN to launch a comprehensive review of the handling of the allegations against Mr. Elkorany to determine "whether officials were aware of Mr. Elkorany's misconduct and failed to take

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Elkorany admitted to drugging and/or sexually abusing twenty women, but the charged conduct related to only two of those women."

[684] United States of America v. Karim Elkorany, No. 20 CR 437 (NRB), (DCSDNY. May 24, 2022) at 8-9.

[685] United States of America v. Karim Elkorany supra note 679.

[686] *Ibid* at 75.

[687] *Ibid* at 79-80; See United States of America v. Karim Elkorany supra note 683 at 2, 4. Although Mr. Elkorany appealed the decisions, the latter was affirmed.

[688] United States of America v. Karim Elkorany supra note 679 at 20.

[689] UNICEF, "Statement on the sentencing of Karim Elkorany," (October 27, 2022), *unicef.org*, available at: https://www.unicef.org/press-releases/statement-sentencing-karim-elkorany.

appropriate action, including ensuring the availability and accessibility of assistance to survivors."[690] At this time, it is unclear whether such a review has taken place.

This research has uncovered another case involving UN personnel appearing before courts for matters of SEA. The information available on this particular case is extremely dire and based on news sources as the French justice system tends to keep under seal cases involving minors for privacy purposes. Didier Bourguet was a French national working as a senior logistics officer for the UN.[691] In October 2004, he was arrested by the Congolese police before being handed over to French authorities to answer allegations accusing him of abusing minors.[692] He appeared before French Courts for the alleged rape of 23 minors while he was working in the CAR (1998-2000) and the DRC (2000-2004), in addition to counts of corruption of minors and possession of pornographic images.[693] After his arrest, he admitted to the police having had sexual intercourse with approximately 24 girls as young as 12, who he paid $10 or $20 each time.[694] Mr. Bourguet declared deliberately choosing minors.[695] He reiterated this confession on camera in 2018, estimating he had sexual intercourse with 20 to 25 minors; journalists collected information on potential victims of Mr. Bourguet, who had never been heard either by the UN or French authorities, and transmitted all information to French authorities.[696] There is still no update from French justice of whether any proceedings could be launched on this matter. Based on French law, French authorities still retain the legal right to prosecute these offenses if new evidence arises since the statute of limitations has not expired yet.[697] At his trial, his defense relied on the fact that these girls did not say "no," based on the understanding that the absence of a "no" implied consent.[698] The public prosecutor, in his closing argument, refuted this line of defense by highlighting how the economic situations of

[690] Ambassador Chris Lu, "Statement by Ambassador Chris Lu, U.S. Representative for UN Management and Reform, Following the Sentencing of Karim Elkorany," (November 8, 2022), available at: https://usun.usmission.gov/statement-by-ambassador-chris-lu-u-s-representative-for-un-management-and-reform-following-the-sentencing-of-karim-elkorany/.
[691] Sam Collyns, "UN Sex Abuse Scandal," PBS, (2018), video, 00:53, available at: https://www.amazon.com/gp/video/detail/B08DG1ZM27/ref=atv_dp_sign_suc_3P at 00:10:27.
[692] *Ibid* at 00:07:00.
[693] Le Figaro, "9 ans de prison pour un ancien de l'ONU accusé de viol Figaro," *lefigaro.fr*, (September 11, 2008), available at: https://www.lefigaro.fr/actualites/2008/09/11/01001-20080911ARTFIG00493-affaire-bourguet-ans-de-reclusion-requis-.php.
[694] *Ibid*.
[695] *Ibid*.
[696] *Ibid* at 00:49:20. The producers of the documentary transmitted these new elements to the French authorities but it does not seem like there have been new developments since.
[697] *Code de procédure pénale*, as amended on April 23, 2021 (France) at article 7. The statute of limitations for the rape of a minor is 30 years from the time the victim reaches the age of majority. If the alleged perpetrator commits a similar offense (rape, assault, or sexual violation) against another victim before the expiration of this period, the statute of limitations for the first crime is extended to match the statute of limitations for the most recent offense.
[698] Le Figaro supra note 693.

these girls created the coercion necessary to classify his actions as rape.[699] In other words, this position supports the argument refusing the exclusion of transactional or survival sex from the definition of SEA. In the end, French authorities were able to gather enough evidence only to convict him for the rape of two minors.[700] This limited conviction could be attributed to the authorities' alleged difficulty in identifying the victims.[701] Eventually, Didier Bourguet was sentenced to nine years in jail and eight years of compulsory treatment.[702]

These cases are exceptional in several aspects. WHO cases do not seem to have resulted in legal consequences for alleged perpetrators thus far; nevertheless, the attention they received is not typical and may be attributed to the high number of alleged victims. In spite of the absence of legal accountability, the alleged victims seem to have been recognized as such and proposed assistance, even though this assistance could be criticized. The cases of Elkorany and Bourget are exceptional because they resulted in trials and convictions while most allegations appear to fade into oblivion. Nevertheless, although some level of accountability could be reached in all three cases, it remains unclear whether one should be satisfied with these outcomes. While the WHO commissioned a review of its handling of SEA allegations, it is still unclear whether the WHO ensured that competent authorities investigated separately all allegations. In the other two cases, the sentences—for different reasons—do not fully reflect the extent of the crimes the accused had admitted to. Building on the cases described above, the following sub-section delves into the barriers to accountability identified in those cases.

2. HOW CAN INVOLVED ACTORS HINDER ACCOUNTABILITY?

This section aims to elucidate what hindrances to accountability can be identified based on the cases analyzed above and potentially nuance some of the hypotheses exposed in the previous chapters. First, the role of MS in eliminating the remaining barriers to accountability for perpetrators of SEA is evoked. Second, the negative impacts accompanying the UN's actions are discussed.

[699] *Ibid.*
[700] Collyns supra note 691 at 00:10:49.
[701] FIDH, "Un 'casque bleu' condamné par la justice française," (September 15, 2008), available at: https://www.fidh.org/fr/regions/afrique/rdc/Un-casque-bleu-condamne-par-la.
[702] Le Figaro supra note 693.

2.1. The Lack of Involvement of MS

Ultimately, individual criminal accountability is primarily a matter for States to decide on. The UN has no institutions able or allowed to prosecute individuals, and sovereign entities like MS retain judicial powers. Necessarily, eliminating barriers to the accountability of UN Personnel in matters of SEA requires the involvement and willingness of MS to sign and implement conventions or treaties as well as to exercise jurisdiction when cases are referred to them even though the crimes may have been committed outside of their territory. In other words, there is a need for greater flexibility in handling SEA as a criminal matter, a flexibility that the draft convention for the accountability of UN officials and experts could provide. Commitments are voluntary, and the UN can hardly force a State to act a certain way. Although the UN is at the service of its MS, it could, through a binding UNSC resolution, request all MS to exercise their jurisdiction over their nationals. Such a resolution would prevail over any bilateral or multilateral agreements.[703]

The Convention for the Accountability of UN Officials and Experts on Mission has not been signed or discussed seriously since its drafting. There is no sign that MS are going to move on to sign such a convention anytime soon. As explained in Chapter 1, the convention would not solve all issues regarding accountability, but it would certainly contribute to improving the accountability deficit. While the convention did not meet the adhesion one hoped for, 106 MS still signed the voluntary compact on preventing and addressing SEA. While this compact shows the good faith of many MS to act to ensure perpetrators are held accountable, the compact is not binding and qualifies as soft law.[704] It provides that signatory MS commit to "[t]ake disciplinary measures and/or undertake criminal prosecutions as appropriate to hold nationals accountable for acts of sexual exploitation and abuse under national law, whether such acts involve United Nations civilian personnel that are nationals of the Member State or personnel provided by the Member State, and ensure that all such measures are enforced."[705] In addition, it commits to "[e]nsure that existing obstacles to the criminal prosecution for crimes involving sexual exploitation and abuse committed by its nationals are removed, including through any necessary legislative reform, and in situations where culpable individuals have left their

[703] Odello and Burke supra note 15 at 844.
[704] Audrey L. Comstock, "The UN Voluntary Compact and Peacekeeping Abuse: Assessing a Soft Law Solution for Sexual Exploitation and Abuse," *The International Journal of Human Rights* 27, no. 3 (March 16, 2023): 471-97 at 471.
[705] Voluntary Compact supra note 158 at 5.

national service, and ensure that any obstacles to the provision of effective remedies for victims of sexual exploitation and abuse committed by its nationals while in service of United Nations operations are removed," and "[e]nsure that all appropriate disciplinary and judicial decisions and remedies are enforced."[706] While not binding, the commitments of the compact are ambitious and were probably rendered possible precisely because this was soft law and not hard law, creating obligations for MS.[707] It is clear that non-binding agreements have their disadvantages, but "they can pave the path for meaningful changes through norm building."[708]

States have a share of responsibility in handling SEA allegations, but more often than not, they must do so in cooperation with the UN.

2.2. The Impact of UN Actions

This section critically discusses the UN's methods and policies in handling allegations. It explores the inherent shortcomings of its investigations before exploring its policy and practice regarding referral for criminal accountability.

2.2.a. Limitations of their Investigations

This sub-section discusses issues related to UN-led investigations. Particular attention is given to the mission of the OIOS as a privileged actor in this field due to its facilitated access to crime scenes, alleged perpetrators, and alleged victims. The differences between its investigations and criminal investigations are also evoked. Investigations are a key element in the accountability process as they often constitute the first step of the accountability procedures after an allegation is reported. Without this necessary step, no further action is possible.

The OIOS was established in 1994 as an internal yet independent organ.[709] It aims to investigate "reports of violations of United Nations regulations, rules and pertinent administrative issuances."[710] The UN Victims' Rights Statement reinforces the responsibility of the UN to investigate when they receive a report of SEA under the UN's human rights policy

[706] *Ibid* at 5.
[707] Comstock supra note 704 at 480-81.
[708] *Ibid* at 480.
[709] UNGA, "Review of the efficiency of the administrative and financial functioning of the United Nations B," (August 12, 1994), A/RES/48/218 B at §2.
[710] *Ibid* at §5-c(iv).

framework.[711] The conclusions of their investigation are then conveyed to the UNSG, who may refer the case to one of its MS for criminal accountability and/or implement disciplinary actions.[712] The initial documents discussing the scope of the OIOS-led investigations remained vague referring to "reports of violations of UN regulations" while not mentioning crimes by name except for fraud.[713] In 2004, the OIOS established a two-fold classification of the matters subject to investigation one considered high risk and the other cases of lower risk.[714] It was only in 2005, two years after the publication of the Zero-Tolerance Bulletin, that SEA was added to the high-risk category, also known as Category I.[715] Based on various reports, such cases must be handled carefully by trained and experienced professional investigators.[716] Since 2019, the OIOS has been the sole oversight service in the UN handling SEA allegations.[717] The investigations completed by the OIOS are administrative procedures separate from disciplinary action.[718] As mentioned above, disciplinary actions are the prerogative of the UNSG.

The UN-led investigations have been criticized for both not meeting the standards established by MS and for "unrealistic" standards of evidence required by HQ.[719] Although

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[711] UN, "Your Rights As a Victim of Sexual Exploitation or Abuse Committed by United Nations Staff or Related Personnel," (2023) at 3-a: "*You have the right to submit a complaint of sexual exploitation or abuse by United Nations staff or related personnel to the United Nations, which has the responsibility to refer your complaint for investigation.*"; Marie Deschamps et al., "Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic," (December 17, 2015) at iv.

[712] *Ibid* at §5-c(iv).

[713] UNSG, "Establishment of the Office of Internal Oversight Services," (September 7, 1994), ST/SGB/273 at §16-17.

[714] UNGA, "Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations," (February 10, 2004), A/58/708 at §26-27. The OIOS classifies in category I high-risk matters which might be serious criminal cases, these could be: "Serious or complex fraud, Other serious criminal act or activity; Abuse of authority or staff; Conflict of interest; Gross mismanagement; Waste of substantial resources; All cases involving risk of loss of life to staff or to others, including witnesses; Substantial violation of United Nations regulations, rules or administrative issuances; Complex proactive investigations aimed at studying and reducing risk to life and/or United Nations property" and cases of lower risk part of a second category as: "Personnel matters; Traffic-related inquiries; Simple thefts; Contract disputes; Office management disputes; Basic misuse of equipment or staff; Basic mismanagement issues; Infractions of regulations, rules or administrative issuances; Simple entitlement fraud."

[715] UNGA, "Report of the Office of Internal Oversight Services on strengthening the investigation functions in the United Nations," (April 21, 2005), A/RES/59/287 at §6.

[716] *Ibid* at §7; UNGA supra note 714 at §26.

[717] JIU, "Review of the state of the investigation function: progress made in the United Nations system organizations in strengthening the investigation function," (2020), JIU/REP/2020/1 at §87.

[718] *Ibid* at §11: "Investigation vs. disciplinary action: Investigations are administrative in nature. Investigation is a fact-finding exercise, not a punitive undertaking. Therefore, other actions such as disciplinary proceedings do not fall under the mandate of the investigation function. A clear segregation between investigations as part of the internal oversight function on the one hand and disciplinary action as part of management on the other hand is essential for ensuring the independence, objectivity and impartiality of the investigation function."

[719] Thelma Awori et al., "Final Report Expert Mission to Evaluate Risks to SEA Prevention Efforts in MINUSTAH, UNMIL, MONUSCO, and UNMISS," (November 3, 2013) at 3; Marie Deschamps et al. supra note 711, Westendorf supra note 650 as cited in Jasmine-Kim Westendorf and Elliot Dolan-Evans, "Introduction," in *Sexual Exploitation and Abuse in Peacekeeping and Aid: Critiquing the Past, Plotting the Future*, ed. Jasmine-Kim Westendorf and Elliot Dolan-Evans (Bristol: Bristol University Press, 2024 at 5.

essential, these investigations differ from criminal ones in their methods and standards of evidence; in consequence, results may not be systematically usable in courts of law. One of the solutions would be to professionalize the UN investigations further to allow for the use of the evidence gathered in a criminal proceeding.[720] The Zeid report suggested in 2005 to prefer experts in military law coming from the TCC to take part in the investigation of members of contingents, ensuring the standards followed during the field investigation would meet the "requirements of national law so that further action can be taken if it is concluded that misconduct has occurred," this argument could also apply to allegations against UN personnel not members of military contingent.[721] Moreover, specific investigation methods for sexual violence exist for international cases.[722] In a protocol relative to the documentation and investigation of sexual violence as a crime or violation of international law commissioned by the UK Foreign & Commonwealth Office, the importance of respecting the chain of custody of evidence was underlined, while differences in the rules governing the chain of custody from one jurisdiction to another were noted.[723] For an investigation to be considered before courts, the quality of the evidence revealed by the investigation must allow the judge to ascertain an individual's guilt "beyond reasonable doubt."[724] Data used in a criminal investigation will be evaluated to assess their credibility and reliability, consequently requiring a certain level of investigative skills.[725]

In 2005, MS and particularly TCCs have criticized the investigative mechanisms adopted by the missions for being biased: the investigation did not presume that the troops acted in accordance with their obligations, but also the evidence gathered by the UN and transmitted to the national authorities for further actions was often insufficient by domestic standards.[726] In addition to not collecting enough evidence, the UN has tended not to share all its documentation to avoid third-party claims.[727] The GLE suggested leaving the evidence gathering to the host State to prevent the lack of sufficient evidence.[728] Once the host State would have completed its mission it could hand over its findings to a second State in charge of the prosecutions of

[720] Miller supra note 18 at 83; JIU supra note 717 at §306; UNGA supra note 19 at §31.
[721] UNGA supra note 19 at 4.
[722] Xabier Agirre Aranburu, "Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases," *Leiden Journal of International Law* 23, no. 3 (2010): 609-27 at 617.
[723] Sara Ferro Ribeiro and Danaé van der Straten Ponthoz, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, (UK Foreign & Commonwealth Office: 2017) at 199.
[724] Aranburu supra note 722 at 617.
[725] *Ibid* at 620.
[726] UNGA supra note 19 at §28.
[727] *Ibid* at §28.
[728] UNGA supra note 30 at §79.

individuals.[729] Although this could appear like a solution, it would certainly not be suitable for every situation. Some States may not accept using investigations carried out by another State, or simply some States struck by crises may not be in a situation enabling them to conduct investigations. Furthermore, in the case of sexual violence, there seems to be an additional obstacle identified by Aranburu in "the reluctance to investigate sexual violence" observed in various police rooted in a "lack of awareness and sensitivity" and the taboo relative to this kind of affairs.[730] Investigations on SEA by UN personnel exist in a context in which sexual violence is too often disregarded or minimized regardless of the identity of the perpetrator or victim. The testimony of one of the victims of Mr. Elkorany supports the call for professionalism in the interviews as she criticized UN interviewers for asking invasive and inappropriate questions.[731] Such a testimony is highly problematic as it may discourage victims to come forward by fear of being subjected to humiliating interviews after surviving an already traumatizing event.

To be usable in a court of law, the OIOS investigations should be up to the standards of investigations established by MS. This may require establishing standards in collaboration with MS to facilitate the transfer and usage of evidence collected by the UN in domestic courts. Nevertheless, doing so may require pooling more funding, as upholding high standards will eventually be much more costly for the organization and, consequently, for the MS. In other words, the UN depends on the willingness of its members to implement higher standards.

2.2.b. Incoherence in the Decisions to Refer Cases to MS

The UNGA requested the UNSG in 2005 "to ensure that, in case of proven misconduct and/or criminal behaviour, disciplinary action and, where appropriate, legal action in accordance with the established procedures and regulations will be taken expeditiously, and requests the Secretary-General to ensure that Member States are informed on an annual basis about all actions taken."[732] This request was reiterated in substance in 2007.[733] In other words, once the UN has investigated an allegation and identified that the personnel against whom the allegation was reported might have committed criminal actions, the UNSG should inform his State of nationality or any MS able to launch proceedings of the details of the case. This referral is essential as the UN has no means to exercise jurisdiction and relies on its MS to enforce individual criminal responsibility. Without referrals, the chances for the victims to see their

[729] *Ibid* at §79.
[730] Aranburu supra note 722 at 612.
[731] United States of America v. Karim Elkorany supra note 679 at 53, 75.
[732] UNGA supra note 715 at §16.
[733] UNGA supra note 404 at §9.

aggressors held accountable are seriously compromised. Nevertheless, it is up to the State concerned to decide whether to launch proceedings.

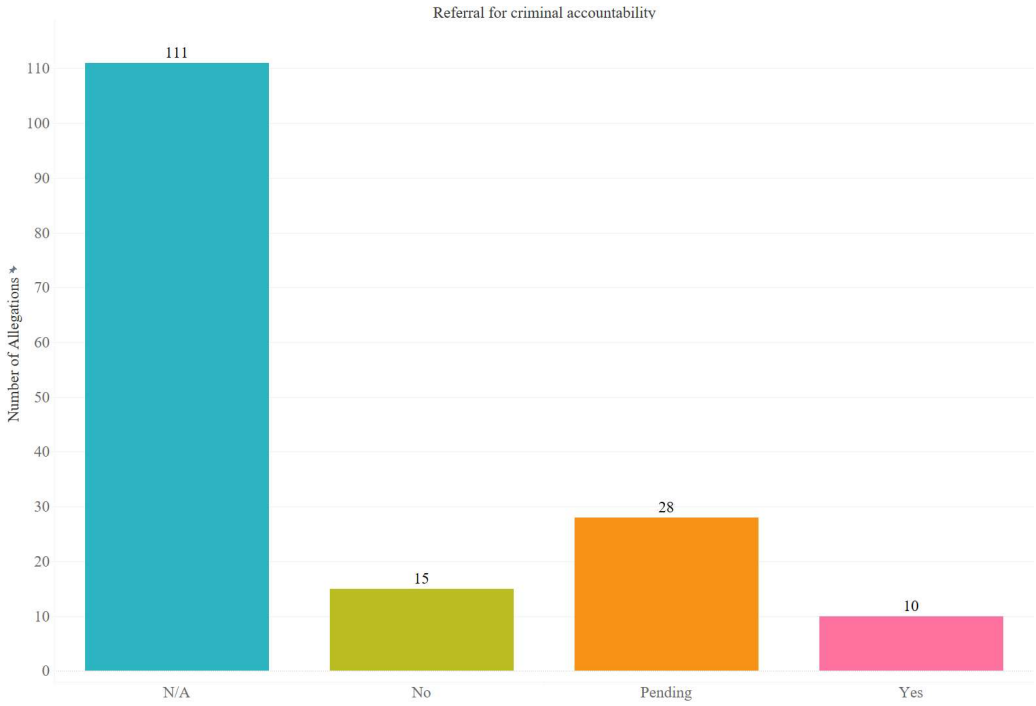

Figure 3. The number of allegations collected in mission settings referred to MS for criminal accountability[734]

One of the datasets previously mentioned, focusing on mission settings, includes a column indicating whether a case has been referred for criminal accountability.[735] The figure above shows how many allegations were referred to MS for criminal accountability. The category "N/A" includes mostly unsubstantiated allegations and allegations that did not require referrals, such as those against members of contingents who are investigated by their sending state and remain under their exclusive jurisdiction, but also allegations of actions that constitute SEA but do not qualify as a crime. This figure and related dataset raise questions. For one, the number of referrals is low. In addition, out of the fifteen allegations not referred for criminal accountability eight were substantiated. All of these allegations were labeled as sexual abuse, one case of sexual assault and seven of rape. All victims but one were children. These abuses took place in various missions and were perpetrated by various categories of personnel. There are no apparent reasons to justify that the UN did not refer these cases to national authorities,

[734] This graph is based on the number of allegations reported and not on the number of perpetrators or victims. The personnel categories included are: Government Provided Personnel, MOs, and UN Personnel excluding members of military contingents.
[735] Dataset presenting allegations in PKOs and SPMs supra note 199.

even though all factors indicate that these cases are likely to be criminal. Additionally, the UN did not provide more information on the organization's method of referring a case to a MS.

Based on the annual information transmitted by the UNSG to the UN 6th Committee in 2023 there is a broad difference between the number of allegations and the number of cases referred to national authorities throughout the years.[736] Between 2017 and 2022, the UN only referred 28 cases to national authorities.[737] Of these referrals, eleven resulted in actions from the State ranging from launching an investigation to sentencing.[738] While it might be difficult to understand why these allegations that were substantiated and justified UN internal sanctions did not result either in an investigation or in criminal proceedings, the answer could be prosaic: difficult access to victims or perpetrators, difficulty related to the collection of evidence and even sporadically jurisdiction issues. Generally, this very low number of referrals can be explained by more than a potential lack of willingness to handle SEA allegations or a will to shield personnel from any consequences. As already mentioned, this low number of referrals can be due to the laws of a State not criminalizing a behavior or even because the UN may have identified that the State able to engage in proceedings may do so not respecting UN values in terms of protection of human rights. Additionally, the victim may not be willing to cooperate or file a formal complaint; all of these could prevent MS from launching proceedings.[739]

The UN is bound by its Charter to uphold human rights, which can sometimes put the organization in a very ambivalent position: on the one hand, its obligations to protect its personnel as an employer and as the UN from human rights violations, and on the other hand, its similar obligations towards the alleged victims. No matter the situation, one should never request the UN to compromise regarding human rights. Therefore, this is not what this thesis contends, but rather that solutions must be found to ensure UN obligations are satisfactorily fulfilled from both perspectives. Nevertheless, these justifications do not seem to hold in all cases. Based on the dataset focused on mission settings, similar allegations to those not referred for criminal accountability were referred throughout the years.[740]

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[736] See Annex A.
[737] *Ibid*.
[738] *Ibid*.
[739] *Ibid*. For case n° 207, the MS "indicated that it could not initiate legal action in the absence of a complaint from the victim, and that the fact that the alleged crimes had occurred outside of its jurisdiction posed additional difficulties, both in terms of gathering evidence and in having access to the victim."
[740] *Ibid*. Personnel in various missions (UNMISS, MINUSCA, MINUSMA, MONUSCO, UNAMID, UNMISS) were referred for criminal accountability for crimes of rape and sexual assault. Victims were children or adults and perpetrators belonged to different categories of personnel such as: vendor employee, UNV, contractor, MO, international staff member, or locally recruited personnel.

2.2.c. Is Immunity to Blame for the Accountability Deficit?

The information on cases referred to States by the UNSG and cases for which the UNSG had been notified of investigations or prosecution illustrates how a request for a waiver of immunity is not systematically requested.[741] When cases are referred to States by the UN, requests for waivers of immunity are non-existent. The absence of a waiver does not prevent investigations and criminal proceedings. Four of the 38 cases referred to States between July 2007 and July 2023 resulted in criminal proceedings. One of those four cases is Karim Elkorany's case.[742] It is also interesting to note that the immunity enjoyed by Mr. Elkorany as a UN worker was not mentioned by the Court, although it is certain that he was working for the UN and enjoying immunity, at least when he lied to the FBI. In ten cases, the State launched investigations, once again, without requesting a waiver of immunity. Parallelly, when it comes to cases launched by the State for which the UNSG was notified afterward, the request for a waiver seems to be more common. The necessity for the waiver of immunity to be express has been asserted in the past. MS receiving a referral from the UN may be under the impression that such a referral qualifies as an express waiver of immunity for the personnel concerned. Out of the twenty-one cases of SEA involving UN officials or experts for which the UNSG received a notification from MS between July 2016 and July 2023, the MS requested a waiver of immunity for seven of them.[743] Based on the information received by the UN, only one of these seven cases resulted in a conviction and sentence. However, two cases resulted in a conviction without requesting a waiver of immunity.[744]

Based on the information provided by the UNSG, it seems like the immunity accorded to UN officials and experts does not systematically hinder accountability. It is unclear whether the MS to which a case is referred considers this referral an express waiver of immunity issued by the UNSG. Nevertheless, it seems incoherent with including a column to specify the status of the waiver in a table issued by the office of the UNSG. The States concerned could have reckoned that because this conduct could not have fallen within the UN official or expert's scope of functions, therefore, based on the functionality doctrine, no waiver was required.

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[741] *Ibid*.
[742] *Ibid*. Although his name is not mentioned in the table provided by the UNSG, there is enough information to understand his case is the one being mentioned. Indeed, the referral year, the summary of allegations and the information received by the MS on the status of the allegations and proceedings correspond (e.g. 2017; "Alleged sexual abuse of adults"; "Subject pleaded guilty to charges of sexual assault and lying to investigators and was sentenced to 15 years in prison").
[743] See Annex B.
[744] *Ibid*. One of those cases ruling was later overturned in appeal but it had initially resulted in the conviction of the individual (case 124).

Both the UN and MS share responsibility for the persistent accountability deficit in cases of SEA perpetrated by UN Personnel. MS have the power to make international commitments and exercise jurisdiction over cases. In parallel, the UN should enhance its investigation and referral procedures. More broadly, the entire accountability process may need to be reconsidered.

3. ACCOUNTABILITY PROCESSES CALLED INTO QUESTION

This section considers the other factors contributing to the accountability deficit, going beyond immunity and the difficulty in attributing responsibility. It particularly exposes the consequences of victims' lack of information and the deterring aspect that an accountability mechanism can have in victims' minds.

3.1. Draining and Occult Accountability Processes for the Victims

Reports of allegations are a requirement to enforce an effective accountability process. Nevertheless, it appears that the sensitization of victims and potential victims has not been sufficient or satisfactory. This leads to victims not reporting the abuse they experienced because they lack knowledge of the reporting channels.[745] Such a situation is one of the factors leading to under-reporting and, consequently, an underestimation of the issue, eventually resulting in a lack of involvement of the parties to find a durable solution for lack of incentives. Some issues are relatively simple and linked to accessibility. Underreporting can be related to a miscommunication in the organization. For instance, in many zones in which the UN intervenes, multilingualism is ordinary; this requires that all materials are translated, considering both language and culture to ensure that information is available and understandable to as many people as possible.[746] If victims are not at the origin of the reports of SEA, whistleblowers can

[745] Collyns supra note 691 at 00:42:40.

[746] Emily Elderfield and Ellie Kemp, "'We Don't Have a Word for That': Issues in Translating PSEA Communication," in *Sexual Exploitation and Abuse in Peacekeeping and Aid: Critiquing the Past, Plotting the Future*, ed. Jasmine-Kim Westendorf and Elliot Dolan-Evans (Bristol: Bristol University Press, 2024), 169-83 at 169; Collyns supra note 709 at 00:42:40: In this documentary, the journalist takes the examples of the letterbox which is supposed to be used by the alleged victims to transmit their written complaint to the organization. First, the alleged victims interviewed claimed they had not been made aware of the existence of this letterbox. Second,

also reveal the scope of the abuses to the public. Nevertheless, they expose themselves to retaliation from the organization by doing so.[747] It has been suggested that the victims should be relieved of the pressure inherent to their participation in the accountability procedures to avoid the harmful effects of reporting, such as using more bystanders and third-party reporting but this would require enhancing guarantees of non-retaliation. Victims are free to choose whether they want to be involved in the accountability process; nevertheless, their decision will likely influence the outcome of the procedure.[748] Some victims may be deterred from reporting abuse out of fear of losing the UN support they might be depending on.[749] In addition, the fact that the UN is the entity collecting reports of abuse against its personnel could be dissuasive for the victims and harmful to the efficacy of the investigations. As seen in the WHO case, the power given to the organization to freely choose what case to investigate may also be a problem.

The accountability mechanisms themselves are not enticing for victims and probably were not always thought of with the victims' interests at their core. Sarah Martin qualified the accountability process as "mysterious, opaque and often hostile" for victims of SEA.[750] The investigations are too often "looking for weaknesses in the survivor's report, assessing the credibility of witnesses and finding ways to exclude cases from organizational responsibility."[751] While victims should play a pivotal role in the accountability processes, they are too often left behind once the allegation is escalated to national authorities and potentially never informed of the outcome of their claim.[752] Victims can be reluctant to engage in the

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the inscription on the letterbox was in English and French and not in local languages, rendering reporting even more complex.

[747] Sarah Martin, "Reflections on 20-plus Years of Protection from SEA Work," in *Sexual Exploitation and Abuse in Peacekeeping and Aid: Critiquing the Past, Plotting the Future*, ed. Jasmine-Kim Westendorf and Elliot Dolan-Evans (Bristol: Bristol University Press, 2024): 19-33 at 24. Several examples come to mind: Martina Broström was fired from UNAIDS or Miranda Brown and the OHCHR; Laville supra note 325. In addition, one could also consider Anders Kompass, who was initially suspended for sharing information about allegations targeting French soldiers in CAR.

[748] UN supra note 711 at 4-a-b: "(a) You have the right to decide whether to participate or cooperate in any United Nations processes and proceedings, including those resulting from the fact that you are a victim of sexual exploitation or abuse. (b) If you decide not to participate or cooperate at any point, this choice may affect the outcome of the investigation, including whether the offender is held accountable."

[749] Martin supra note 747 at 24.

[750] *Ibid* at 23.

[751] *Ibid* at 24. See: Rodolphe Mukundi and Robert Flummerfelt, "EXCLUSIVE: WHO sex abuse victims say help is too little too late," *The New Humanitarian*, (March 8, 2023), https://www.thenewhumanitarian.org/investigations/2023/03/08/exclusive-who-sex-abuse-victims-say-help-too-little-too-late. She added that it was the case for the investigations carried out relative to the WHO scandal in DRC.

[752] Jasmine-Kim Westendorf, *Violating Peace: Sex, Aid, and Peacekeeping* (Ithaca: Cornell University Press, 2020) as cited in Martin supra note 747 at 24; Awori et al. supra note 719 at 13-14: "The initiator and investigator often remain unaware of final decisions, leading to frustration and even insecurity due to the presence of the potential perpetrator in mission even after several years."

accountability process if they do not see the benefits they could get from it.[753] The cost-benefit balance may be tilting towards being costly both materially and morally, therefore not encouraging victims to take action after being abused.[754] The price for accountability may be too high for many victims who, after undergoing traumatizing events, have to put themselves in potentially as traumatizing investigations and proceedings. In other words, the UN must work on victims' perceptions of handling cases to convince alleged victims to report abuses. The only way to truly better victims' perceptions is to handle allegations better. Victims seem to lack trust in the UN or any relevant authority to act in their best interests or to hold alleged perpetrators accountable. The victims' statements in Mr. Elkorany's case are unequivocal:

> I've never expected Elkorany to be held accountable for his actions, but when I found out he had raped others, I felt I had to try to stop him from hurting more. He was drugging and assaulting women with impunity, protected by his status as a UN employee and his location in a country where it was unlikely any woman would report him to the authorities. […] The fact that it took three and a half years from the time the investigation began to bring charges against Elkorany and another two years to bring the case to conclusion, had a devastating impact on my life. But it wasn't just the delays. Every step of the way, it was apparent that my best interests wasn't a part of the equation in this system. […] Why must I sacrifice my own life for nearly six years in order for Elkorany to be held accountable? I was a voiceless cog in the machine, necessary to keep the wheels turning, but crushed along the way.[755]

The victim also recalls that Mr. Elkorany raped another victim after she had reported him and after the beginning of the investigation against him.[756] In other words, the environment created by the UN and MS invites perpetrators to believe in their impunity, so much so that even under investigation, they are not deterred from committing SEA again. In some ways, the outcome of Mr. Elkorany's case does not encourage victims to come forward. Despite the great sacrifice of all the victims who testified, on paper Mr. Elkorany was not held accountable for

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[753] Sabrina White, "Accountability Advocates: Representing Victims," in *Sexual Exploitation and Abuse in Peacekeeping and Aid: Critiquing the Past, Plotting the Future*, ed. Jasmine-Kim Westendorf and Elliot Dolan-Evans (Bristol: Bristol University Press, 2024), 114-29 at 122.
[754] Hae Yeon Choo, "The Cost of Rights: Migrant Women, Feminist Advocacy, and Gendered Morality in South Korea," *Gender & Society* 27, no. 4 (August 2013): 445-68 as cited in White supra note 753 at 122.
[755] United States of America v. Karim Elkorany, supra note 679 at 15-19.
[756] *Ibid* at 20.

all his actions, only for a fraction of them. This could undermine the trust the victims put in the organization and in the accountability mechanism in general.

The perception of the victims on the lack of consideration given to the protection of their rights in proceedings was supported in 2013 by a report in those words describing within missions: "a culture of extreme caution with respect to the rights of the accused, and little accorded to the rights of the victim."[757] It also added that "[t]he predisposition towards confidentiality and the respect for the rights of staff appear to [be] out of balance with the need to take decisive action in the judgement of offenders."[758] This report influenced the change in the language used by the UN to discuss SEA and contributed to an increased focus on the victims.[759] While the organization particularly under the impulse of the current UNSG has claimed to adopt a victim-centered approach, the UN might not be ready for what it implies.[760] Naik and Westendorf argued that "[b]eing survivor-centred and being accountable as an organization are intrinsically linked; putting survivors first means putting organization second, allowing complaints to come to the fore irrespective of the cost to an organization's reputation and budget."[761] Adopting such an approach also requires rethinking the accountability mechanism to eliminate conflict of interest and "ensur[e] that cases of misconduct are handled by those without vested interests, meaning ombudsman-type models."[762] As of now, the UN has failed to prioritize mechanisms that acknowledge the organization's responsibility or the responsibility of the bystanders.[763] Implementing a victim-centered approach implies

[757] Awori et al. supra note 719 at 3.
[758] *Ibid* at 14.
[759] Sabrina White and Leah Nyambeki, "Victims' Rights and Remedial Action," in *Sexual Exploitation and Abuse in Peacekeeping and Aid: Critiquing the Past, Plotting the Future*, ed. Jasmine-Kim Westendorf and Elliot Dolan-Evans (Bristol: Bristol University Press, 2024), 46-61 at 50-51. Notably, it reduced the reference to false allegations and restoration of the organization's image.
[760] UNGA supra note 28.
[761] Asmita Naik and Jasmine-Kim Westendorf, "Missing the Mark in PSEA," in *Sexual Exploitation and Abuse in Peacekeeping and Aid: Critiquing the Past, Plotting the Future*, ed. Jasmine-Kim Westendorf and Elliot Dolan-Evans (Bristol: Bristol University Press, 2024), 79-92 at 85.
[762] Michael Warren, "Professional Healthcare Regulation Explained," *Professional Standards Authority for Health and Social Care*, (April 10, 2023) as cited in Naik and Westendorf supra note 761 at 86.
[763] Jane Connors, "The Imperative of Prioritizing Victims' Rights," in *Sexual Exploitation and Abuse in Peacekeeping and Aid: Critiquing the Past, Plotting the Future*, ed. Jasmine-Kim Westendorf and Elliot Dolan-Evans (Bristol: Bristol University Press, 2024), 93-107 at 103: "Where individual accountability is concerned, it focuses on the individual perpetrator of the wrong."; UNGA, "Special measures for protection from sexual exploitation and abuse," (February 14, 2024), A/78/774 at §22. While the UNSG recognizes that the responsibility for SEA is shared across the UN system, he does not recognize an organizational responsibility. In particular, he identifies the responsibility of "leaders and individuals, both uniformed and civilian." He also stresses how "[a]ll entities must have clear and robust policies, processes and procedures in place to respond swiftly to allegations of sexual exploitation and abuse. They must ensure transparency by making information on allegations and actions taken against perpetrators accessible." He also reaffirms the commitment of the organization across settings to strengthen accountability. Nevertheless, he never evokes the responsibility of the organization for failing to implement their policies meant to prevent SEA. Leadership responsibility is essential, but when insufficiencies are identified across all settings the problem is probably systemic rather than dependent on the failure of individuals.

considering accountability from the victims' point of view and not exclusively focusing on the perpetrator's accountability.[764] In other words, SEA accountability should involve not only the relevant authorities and perpetrators but also the victims, ensuring they receive the answers they are owed regarding the violation of their rights.[765] Embracing the victim-centered approach also implies going beyond the image restoration narrative. The efforts put in improving the handling of allegations and the accountability mechanism should not be fueled by a desire to preserve or restore your image but rather by a profound dedication to the respect of the victims' rights.[766] This stance will lead to meaningful changes by making space to question organizational responsibility.

With the VRA, Senior Victims' Rights Officers advocated for the victims' rights and dignity and "have the complex task of managing victims' expectations in a landscape where support and assistance are frequently unavailable."[767] Remarkably, the UNSG underlined in a report how legal aid that could contribute to holding perpetrators accountable was often time unavailable.[768] The systemic neglect of victims' access to support severely limits their ability to seek justice and remedies for the harm they have suffered.[769] Nevertheless, their action is significantly hindered by a lack of financial and human resources, and a vast area of operations.[770] Their role is still unknown for most both within and outside the UN system.[771]

3.2. Can Disciplinary Sanctions Be Considered as Accountability Measures in the Absence of Criminal Accountability?

This section discusses the merits of disciplinary sanctions and their legitimacy as an accountability mechanism in situations where criminal accountability is impossible. This

[764] Connors supra note 763 at 102-03.
[765] *Ibid* at 102-03.
[766] UNGA supra note 763 at §87. Although the victims have gained a centrality in the narrative relative to SEA by UN Personnel, this still remain fragile. In 2024, the UNSG wrote: "Sexual exploitation and abuse harms individuals and undermines the impact, integrity and credibility of the entire Organization, our missions, agencies, implementing partners and uniformed contributors."
[767] *Ibid* at 102.
[768] UNGA, "Special measures for protection from sexual exploitation and abuse," (February 15, 2021), A/75/754 at §34. "Accountability, including the resolution of paternity and child support claims for children born of sexual exploitation and abuse, remains challenging, and legal aid is largely unavailable."
[769] White supra note 753 at 119.
[770] Connors supra note 763 at 102; White and Nyambeki supra note 759 at 53: the lack of financial resources may be traced back to the fact that "[t]he victim assistance mechanism has never had any regularly allocated budget."
[771] *Ibid* at 101.

includes both cases for which the conduct would be in breach of the UN internal rules but not qualify as a crime and cases that are impossible to refer to a State for criminal accountability due to human rights concerns.

First and foremost, it is essential to recall that SEA is an all-encompassing category only pertinent to the UN. Because this definition is not aligned with international law or various domestic laws, forbidden conducts under UN internal rules are not necessarily crimes. Nevertheless, a breach of internal rule -in place to uphold the UN's values, ethics, and morality- can lead to sanctions for the individual. These sanctions are decided after the internal investigation discussed previously is completed. In these cases, questions on "the threshold of what needs to be investigated and how, plus what levels of evidence are required to justify disciplinary accountability action" remain.[772] The UN cannot exercise criminal jurisdiction, but it can enforce disciplinary sanctions based on administrative procedures as an employer. The disciplinary measures targeting civilian personnel are the responsibility of the UN Office of Human Resources Management in the Departments of Management acting on behalf of the UNSG.[773] When these disciplinary measures concern members of military contingent or police contingents, then the UNSG can only request the repatriation of the personnel -or the unit if the allegations are widespread- as they remain under the responsibility of their sending State for any disciplinary action during their deployment.[774]

The UNSG has a wide range of sanctions at his disposal. Some of these sanctions are interim measures intended to be enforced while an ongoing investigation is pending. It appears that most of the time, the interim measure is an administrative leave until the investigation is completed.[775] Once the investigation has been completed, the UNSG may decide on final measures. These measures are proportional to the gravity of the conduct. The UN Staff Regulations and Rules establish a list of disciplinary measures which can be enforced at the discretion of the UNSG.[776] While drafting this list, the organization differentiates disciplinary

[772] White and Nyambeki supra note 759 at 52.
[773] UN, "Factsheet UN Action to Counter Sexual Exploitation and Abuse and Other Forms of Misconduct in Peacekeeping and Special Political Missions," (n.d.) at 3; UN, "Staff Regulations and Staff Rules, including provisional Staff Rules, of the United Nations," (2023), ST/SGB/2023/1 [hereinafter UN Staff Regulations and Rules] at rule 10.1.c "The decision to investigate allegations of misconduct, to institute a disciplinary process and to impose a disciplinary measure shall be within the discretionary authority of the Secretary-General or officials with delegated authority."
[774] *Ibid* at 3; UNSC, "Resolution 2272 (2016)," (March 11, 2016), S/RES/2272 at §1.
[775] UN Staff Regulations and Rules supra note 773 at rule 10.4.a, 10.4.c: "(c) Administrative leave shall be with full pay except (i) in cases where there are reasonable grounds to believe that a staff member engaged in sexual exploitation and/or sexual abuse, in which case the placement of the staff member on administrative leave shall be without pay, or (ii) when the Secretary-General decides that exceptional circumstances exist which warrant the placement of a staff member on administrative leave with partial pay or without pay."
[776] *Ibid* at rule 10.2.

measures from administrative measures.[777] Disciplinary measures can consist of: "(i) Written censure; (ii) Loss of one or more steps in grade; (iii) Deferment, for a specified period, of eligibility for salary increment; (iv) Suspension without pay for a specified period; (v) Fine; (vi) Deferment, for a specified period, of eligibility for consideration for promotion; (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion; (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7 (Notice of termination), and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations; (ix) Dismissal."[778] Administrative measures are "(i) Written or oral reprimand; (ii) Recovery of monies owed to the Organization; (iii) Administrative leave with full or partial pay or without pay pending investigation and the disciplinary process pursuant to staff rule 10.4."[779] Under the 2003 Zero Tolerance Bulletin, SEA as a serious misconduct, justifies disciplinary measures, including summary dismissal.[780] The UN must respect due process throughout a disciplinary procedure. Staff must be officially notified of allegations against them and be given the right to respond.[781] The measures must always be proportional to the misconduct, and the staff member has the right to contest and appeal the imposition of the sanction in front of the UN Administrative Tribunal.[782]

To ensure non-repetition of SEA by its personnel, the UN created a database to collect the names of perpetrators for which a UN investigation has substantiated the allegations: ClearCheck.[783] It is essential to highlight that, although essential, guarantees of non-repetition are not sufficient on their own to ensure that a perpetrator has been held accountable to its victim. This database allows UN recruiters to ensure that the organization would not hire candidates already known for SEA, including individuals "who left employment for any reason during a related investigation."[784] This implies that even when the staff leaves before the

[777] *Ibid* at rule 10.2.b.
[778] *Ibid* at rule 10.2.a.
[779] *Ibid* at rule 10.2.b.
[780] UNSG supra note 9 at §3.2.a
[781] UN Staff Regulations and Rules supra note 773 at rule 10.3.a "The Secretary-General may initiate a disciplinary process where the findings of an investigation indicate that misconduct may have occurred. No disciplinary measure may be imposed on a staff member following the completion of an investigation unless the staff member has been notified, in writing, of the formal allegations of misconduct against the staff member and has been given the opportunity to respond to those formal allegations. The staff member shall also be informed of the right to seek the assistance of counsel in the staff member's defence through the Office of Staff Legal Assistance, or from outside counsel at the staff member's own expense."
[782] *Ibid* at rule 10.3-b/c.
[783] UNGA, "Practice of the Secretary-General in disciplinary matters and cases of possible criminal behaviour, 1 January 2022 to 31 December 2022," (November 20, 2023), A/78/603 at §21. This database is also used for sexual harassment cases.
[784] Connors supra note 763 at 93.

investigation is completed, the said investigation must be completed.[785] Since its creation in June 2018 and until November 2023, 36 UN entities have started using it, and 558 names of individuals have been entered in the database for which the organization had evidence they committed SEA.[786] The UN is still exploring means to better its database, particularly, finding ways to link ClearCheck to the Misconduct Disclosure scheme created by the Steering Committee for Humanitarian Response "to facilitate sharing, among participating international non-governmental organizations, of screening information about individuals found to have committed misconduct relating to sexual exploitation, sexual abuse or sexual harassment, for the primary purpose of making informed recruitment decisions."[787] This steering Committee is an alliance outside of the UN, and their initiative differs from ClearCheck, which makes their interconnection particularly challenging.[788] However, connecting both initiatives is crucial considering the connection between the UN and the humanitarian, development, and aid world.

It would be wrong to consider that disciplinary sanctions are not a type of accountability measure. Nevertheless, these measures directly target the perpetrators and do not consider accountability to the victims. In some ways, criminal accountability, although focusing on the perpetrator, is also about the victim who can be granted reparations. Disciplinary sanctions are meant to punish the perpetrator and protect the organization.

This chapter rooted the concepts discussed in the previous chapters in the reality of SEA allegations against UN Personnel. The case laws under study show how the current framework is inappropriate for effectively and satisfactorily handling all allegations reported to the UN. SEA is widespread across all settings, requiring a holistic approach to be eliminated and for all perpetrators to be held accountable. This section has demonstrated how, contrary to popular belief, members of military contingents were not the most represented category of alleged perpetrators. The WHO case illustrates how an organization's numerous insufficiencies can create an environment conducive to SEA. The cases of Mr. Elkorany and Mr. Bourguet, although exceptional, are only a partial success in terms of accountability *to* the victims. They are a perfect example of the limitations linked to not resorting to extraterritorial jurisdiction and facing difficulties in collecting evidence. Indeed, MS could still make significant commitments

[785] Dataset presenting allegations in NMS supra note 199. The NMS database makes it unclear whether or not all investigations are completed regardless of the resignation or separation of the staff.
[786] UNGA supra note 783 at §22.
[787] *Ibid* at §24.
[788] *Ibid* at §25.

to enhance UN personnel's accountability, particularly relative to the signature of the Convention meant to improve their accountability. The UN has room for improvement as regards the treatment of the victims to encourage them to report the abuse they might have experienced at the hands of UN personnel. Moreover, UN investigative methods need revision as they satisfy neither the MS nor HQ expectations. Referral procedures need clarification as they seem disproportionately low compared to the number of allegations the UN receives yearly. Based on the findings of this chapter, it appears that the barrier constituted by immunity may not be as solid as once imagined, but it certainly plays a role in the perception one can have of the accountability of UN personnel. Eventually, the accountability of UN personnel must be rethought to incite victims and bystanders to report incidents. Facilitating reporting should be a priority because they are the foundation of any accountability procedure. Only by improving its handling of allegations can the UN convince parties to come forward and report. The UN must move beyond its ambitious declarations and adopt a truly victim-centered approach, applying these principles in implementing accountability.

CONCLUSION

"The UN is not a superpower. It has only its moral authority, and if you undermine that, you're finished."[789] The accountability deficit in matters of SEA has become a pressing issue in the post #MeToo era, as its mediatization highlighted the failure to adequately address SEA amidst growing public aversion to sexual violence. With this sword of Damocles hanging over the UN in mind, this research aimed to answer two interrelated questions: is the UN incapable of enforcing UN personnel accountability for SEA? What are the impediments to implementing a robust accountability mechanism for UN staff in the case of SEA? This thesis sought to address the gap in knowledge regarding the accountability of UN officials and experts by investigating the elements at the root of the accountability deficit. It diverges from the typical scope of studies of UN-related personnel accountability by extending it beyond the focus on peacekeepers. Notably, this work shed light on the normative framework permitting accountability of UN personnel qualifying as UN officials or experts on missions as defined by the CPIUN, eventually revealing its gaps. Several aspects and conceptions of accountability were explored to address these guiding questions. Individual accountability and, mainly, individual criminal accountability were discussed first. After highlighting the challenges of enforcing robust accountability mechanisms to ensure individual accountability for SEA, this thesis explored the potential benefits and obstacles of holding the UN or States responsible for their shortcomings in handling SEA allegations. Ultimately, case studies were analyzed to illustrate the elements abovementioned in practice.

The UN's role is crucial for enforcing individual accountability in various forums because the organization is at the origin of the definition of SEA. The definition adopted by the UN is broader than international law and domestic legislation, resulting in gaps in the accountability mechanisms.[790] There are legitimate concerns relative to the breadth of the UN definition; nevertheless, it has the merit of fully addressing the extent to which a power imbalance can undermine consent, which is crucial in determining whether an act constitutes sexual violence. Remarkably, the debate crystallized on the notion of agency some pinpoint in

[789] Jasmine Westendorf, "WHO workers are accused of sexual exploitation and abuse. That hurts everything the U.N. does," *washingtonpost.com*, (October 5, 2021), available at: https://www.washingtonpost.com/politics/2021/10/05/who-workers-are-accused-sexual-exploitation-abuse-that-hurts-everything-un-does/.
[790] Brown supra note 29 at 504; Quénivet supra note 4 at 666.

acts labeled as sexual exploitation by the UN.[791] This research, contrary to some feminist perspectives, argued that in most situations, women engaging in transactional sex with UN personnel are not exercising their agency but are coerced by circumstances into having sexual intercourse with personnel who are taking advantage of their position as UN workers. In other words, the inherent power imbalance between UN workers and most of their victims means that the perpetrators cannot legitimately claim that the victims consented. Nevertheless, in practice, this Zero-Tolerance policy resulted in perceived gaps. Because the definitions are not aligned with most domestic legislation, many allegations reported to the UN may not be considered criminal by any State but only subject to a disciplinary sanction from the UN. Ultimately, local laws and UN internal policies are binding upon UN personnel. Still, violations of one may not qualify as a violation of another and, therefore, not result in the same type of sanctions. Due to this gap, victims may think that justice has never been served. In addition to these definitional inconsistencies, legal processes encounter pragmatic challenges that the draft Convention on the Accountability of UN Officials and Experts on Mission attempted to tackle. The exercise of States' jurisdiction over SEA cases is not straightforward, mainly due to the unique circumstances surrounding UN presence in a State territory. The convention envisioned a system in which flexibility is encouraged to prevent criminal behavior from going unpunished. While the host State would retain primary jurisdiction over crimes committed in its territory, other States would have the possibility to support the first State or to take over the criminal proceedings entirely or partially.[792] Favoring domestic jurisdiction is driven by pragmatic elements, amongst others, facilitating access to victims and evidence and guaranteeing that victims will see justice be done. Although pivotal, the convention still generates issues. Implementing this convention will result in inconsistencies in the sanctions imposed on perpetrators as it relies on domestic legislation to define criminal behavior and the corresponding penalties.[793] In addition, it creates inequality among victims, who, depending on the State they are in, may not see their abuse recognized or have to experience varying standards of evidence. Currently, the convention has not been signed by any MS. This underscores that although the UN is a critical actor in ensuring the accountability of its personnel, the involvement of MS is decisive. Regardless of the convention's existence, accountability can only be achieved if States ensure that their domestic legislation allows them to launch criminal proceedings regarding actions committed abroad by individuals who could fall under their

[791] Odello and Burke supra note 15 at 840; Mudgway supra note 11 at 1457; McGill supra note 76 at 1.
[792] Quénivet supra note 4 at 665-66.
[793] Quénivet supra note 4 at 659.

jurisdiction for one reason or another. In other words, they must implement a legal framework to exercise extraterritorial jurisdiction; otherwise, they will contribute to the impunity of UN personnel. The ability of a State to exercise extraterritorial jurisdiction is even more crucial when the act was perpetrated in a conflict-affected State that may have a compromised judicial system, rendering it potentially incapable of engaging in criminal proceedings. While MS courts should be prioritized to secure criminal accountability, alternative entities on the international plane could be suitable, notably to downplay the absence of accountability at the State level. In particular, the ICC could be a valid option; however, in its current state, it is unlikely to cover all UN Personnel categories.[794] Consequently, establishing a new court may be preferable as ad hoc tribunals operate only in specific settings with limited jurisdiction.[795] A specific UN Court dedicated to prosecuting UN personnel could be a more viable option; nevertheless, it would require MS' support.[796]

While this research asserted that individuals should remain central to the accountability process, it did not mean other actors could not bear responsibility for wrongdoings related to SEA allegations. While the UN and States did not plan for SEA to happen, their responsibility can still be at stake for their way of handling allegations or their failure to control the personnel effectively. Attributing responsibility for actions or omissions to an IO like the UN is complex and challenging. Conscious of this complexity, the ILC drafted the DARIO to codify existing - but scarce- practice. According to these articles, an IO is responsible for the conduct of its organs and the actions of its agents while they are on duty. The extent to which the UN can be held responsible for the conduct of its off-duty personnel remains a subject of debate.[797] The international obligations binding the UN arise from various bodies of law. In particular, international human rights law binds the UN for three co-constitutive reasons: first, international human rights law has attained the status of customary international law, to which the UN is bound by principle; second, the UN's mandate to promote human rights standards obliges it to adhere to the same standards it advocates for; and third, the UN is bound to the extent that its MS are.[798] The UN is also bound by international treaty law, particularly by instruments such as the Charter and the CPIUN. Depending on the context, the category of personnel, and the missions of its workers, the UN might be bound by international

[794] Giles supra note 57 at 150,179.
[795] O'Brien supra note 198 at 232.
[796] Ladley supra note 119 at 88.
[797] UNGA supra note 340 at 300.
[798] Mégret and Hoffmann supra note 310 at 317-23.

humanitarian law.[799] The UN is expected to abide by its international obligations when handling the allegations of SEA against its personnel. However, how the UN addresses SEA allegations may sometimes violate these obligations, specifically if these hinder the alleged victims' access to justice. This would place the UN notably in breach of its obligations under the UDHR and ICCPR. Failing to refer substantiated cases to States for criminal accountability and failing to waive immunity may qualify as a breach of international obligation. Furthermore, a breach of obligation under international treaty law may also be identified in the failure of the UN to implement dispute settlement mechanisms as provided under Article 29 of the CPIUN.[800] While highlighting the UN's obligations and violations is insightful, taking action on these issues is more complex. Indeed, there is no ideal forum for adjudicating the attribution of responsibility to the UN. Domestic courts usually cannot rule on UN actions, likely resulting in conflicting judgments and greater confusion.[801] Meanwhile, international courts have not proven more effective despite having discussed the attribution of responsibility to an IO. In addition, the UN is constantly torn between its obligation to protect victims' rights and those of alleged perpetrators. Along with the UN, States are responsible as well for handling SEA. When a State is a TCC, it has specific responsibilities relative to its military contingent, as it retains exclusive jurisdiction over the members of its contingents based on bilateral treaties. While this has the merit of establishing a clear regime and avoiding confusion relative to what entity is responsible for launching proceedings, it does not guarantee that States will exercise their jurisdiction. However, the MOU and the SOFA affirm that States must discipline their peacekeepers. Regardless of this question, States may be considered responsible for the action or omission of members of their military contingent as they remain an agent or organ of this State while under UN control. Nevertheless, this does not question the possible dual attribution of conduct -to the State and the UN-. States are responsible for enforcing legal accountability mechanisms, but this may be impeded by immunity regimes and a lack of ability to exercise extraterritorial jurisdiction. In practice, the latter is rarely used by States. Just as with the UN, States have obligations towards the alleged victims of SEA based on international human rights standards, particularly women's international human rights law and treaty law. Based on the CEDAW and the Convention on the Rights of the Child, States have the responsibility to condemn violence against women and children, particularly traffic and exploitation. In the particular case of SEA,

[799] Weiner and Ni Aolain supra note 312 as cited in Mégret and Hoffmann supra note 310 at 331; UNSG supra note 312 at 1.1, 5.3.
[800] Mompontet supra note 65 at 59; Freedman supra note 53 at 963; CPIUN supra note 350 at section 29.
[801] McKinnon Wood supra note 358 at 143-44 as cited in Schermers and Blokker supra note 315 at 1034 as cited in Boon supra note 227 at 352; ICJ supra note 277 at §66.

States can be held responsible for facilitating, tolerating, or excusing private violations of women's rights.[802] Not acting to fill the SEA accountability gap is a form of unjustified indulgence for the benefit of the perpetrators. Ultimately, the issue of human rights violations is that one State needs to hold another State responsible.

The regime of immunities and privileges accorded to the UN and its personnel has been identified as an obstacle to accountability in general. Although drawing an analogy between State and UN immunity is tempting, the rationales behind these two regimes differ. Immunity is not granted on the principle of reciprocity but to protect the organization from State interferences that could be detrimental to the UN mission.[803] A rich legal framework established the broad immunity regime accorded to the organization. The various instruments establishing this regime resulted in slightly different forms of immunity. While the UN Charter tilts towards functional immunity, the CPIUN and the CPISA opted for a quasi-absolute immunity for the organization. Additionally, bilateral treaties between the UN and States are signed to tailor the immunity granted to the organization in specific situations. Based on these documents, although the UN enjoys immunities in front of all courts, it is still bound by all local laws -as long as these laws are in accordance with UN values-. This regime of immunity has been interpreted by courts, ultimately resulting in conflicting court rulings.[804] On the one hand, some courts affirmed the absolute immunity of IOs based on the preeminence of the CPIUN over the UN Charter, as the former was drafted to specify the latter's provision. The only exception to this *de facto* absolute immunity is a potential waiver of immunity. On the other hand, some courts have leaned towards limiting IO immunity, favoring the functionality principle. These rulings were based on arguments related to the need for IO to redress torts caused to individuals and the distinction between public law and private activities. Similar to UN immunity, UN personnel's immunity has been the subject of debate. This immunity regime originates from the same documents that establish the organization's immunity. UN personnel are granted varying levels of protection depending on the category of personnel they belong to. The variety and intricacy of the categories of personnel - UN officials and higher officials, experts on missions, and locally recruited personnel- generated confusion on the exact scope of immunity granted to them. Most UN personnel -except for higher officials- are immune from legal proceedings relative to acts performed within the scope of their official capacity. Legal advisors explored how to define the notion of on-duty and off-duty, in addition to mission, to determine official

[802] Cook supra note 433 at 229.
[803] Klabbers supra note 445 at 131; Freedman supra note 327 at 239.
[804] Klabbers supra note 445 at 135.

capacity.[805] In theory, since UN personnel's immunity is limited to acts that serve the organization's interests rather than personal ones, it is functional in nature. Case laws adjudicated by domestic and international forums have informed this research on the precise scope of immunity. One of the arguments raised in courts was that preliminary discussion was required to determine whether acts fell within the scope of an individual's functions. By doing so, it aimed to reconcile the values driving the UN action with the essence of immunity, curtailing the immunity of personnel to their actions performed for core functions of the organization rather than mere logistics. This reaffirmed the necessity of prioritizing the organization's interests over those of UN workers. The ICJ reaffirmed the necessity of limiting personnel's immunity to the performance of their function and nuance the exclusive authority of the UNSG in deciding who could be granted immunities for their actions, advocating for a case-by-case analysis. In all forums, functional principles for UN personnel immunities still dominate. This immunity regime is not without safeguards aimed at finding a balance to prevent immunity from becoming impunity. Waiver of immunity and specific measures to prevent the misuse of immunity, such as staff rules and regulations, are these safeguards. The waiver of immunity concerns both the organization and its workers. In the case of UN staff's immunity, the UNSG is expected to waive it if the immunity hinders the course of justice. This right is not only a right of the UNSG but also a legal obligation if personnel are abusing their immunities to serve their personal interests. The UNSG has demonstrated the ability to distinguish between private activities and official duties when deciding whether to waive an individual's immunity. Nevertheless, it remains dependent on the UNSG's will. The fact that the UN is both a party and a judge in this matter is presumed to be detrimental to the perception of the accountability mechanism. Given the current legal framework, the UN is responsible for defining the scope of its functions and is the only entity able to waive its immunity. Recalling the legal framework allowing for the denunciation of abuses of privileges, the State-centered approach chosen in the mechanism is unsuitable for private claims. It is, therefore, likely to exclude SEA. To serve its original purpose of protecting the UN from interference, immunities must be clearly limited to prevent human rights violations that risk undermining the UN mission altogether. Protecting staff and preventing them from becoming pawns in the political chessboard of a State seeking to influence UN decisions is commendable. Still, it should not be at the expense of potential victims and their right to justice. Logically, SEA can never be considered part of a UN worker's

[805] UN supra note 518 at 247-48 as cited in ILC supra note 458 at §57.

mission for the organization; therefore, with a regime dominated by functional immunity, a UN worker cannot, in good faith, be shielded from justice by their immunity.

This research demonstrated how, contrary to popular belief, SEA is widespread across settings where the UN is present and not solely within PKOs, consequently justifying broadening the scope of most studies relative to the UN and SEA allegations. The cases under study illustrated the two types of responsibility: organizational and individual. The WHO Sex-for-jobs scandal illustrates how intervention independent from any PKOs and military personnel could still be riddled with accusations of SEA regardless of the category of personnel they belonged to. Furthermore, this case interrogates the responsibility of higher officials who, although aware of the allegations, failed to act. Given the significant number of allegations reported and the implications of their handling, it suggests that SEA allegations against WHO personnel in the DRC could be considered a systemic issue rather than isolated incidents. Case laws illustrating individual criminal accountability illustrated how complex holding perpetrators accountable is. Notably, it stressed the complexity relative to the exercise of jurisdiction, access to evidence, and victims; all necessary elements to carry out criminal proceedings effectively. These cases illustrate how these hindrances lead to, at best, partial accountability, with a perpetrator only recognized guilty for a fraction of his alleged crimes even though he may have confessed them. All cases illustrated how States and the UN could be hindrances to accountability. By failing to advance the draft convention on accountability of UN officials and experts and favoring a soft law agreement like the voluntary compact, States failed to address the normative gap relative to UN officials and experts' accountability. The UN can undermine accountability both by deciding not to conduct an investigation and by proceeding with one. Although essential, UN investigations are limited, notably due to their lack of professionalism and difficulty meeting States' standards regarding evidence. Consequently, the evidence it collects tends to be insufficient for criminal proceedings. MS have also criticized UN investigations for, in substance, failing to uphold the presumption of innocence for alleged perpetrators. Additionally, the disproportionately low number of referrals of allegations for criminal accountability compared to the number of reported alleged perpetrators raised questions relative to UN practices. Despite being unable to adjudicate a case due to a lack of adequate forum within the organization, the UN plays a central role in ensuring its personnel is held criminally accountable by reporting substantiated allegations to MS. When this referral is not possible; the UN investigations are still essential as they lay the ground for the organization to decide on sanctions or an entry in ClearCheck. Without an investigation, referrals or UN sanctions are impossible. Based on the low number of case laws and referrals

in cases of SEA, it is difficult to ascertain whether immunity constitutes a genuine obstacle to accountability. Nevertheless, immunity does not appear as a significant obstacle to criminal proceedings in cases referred to States by the UN and those launched independently by States. Eventually, the whole accountability process may need adjustments. The current mechanism can deter alleged victims from reporting abuses due to an insufficient sensitization of victims, lack of language inclusiveness, and fear of losing UN support. These factors resulted in an accountability deficit due to a lack of reports. Furthermore, victims are often unaware of any developments in their cases, therefore never seeing justice being served. Enhancing victims' perceptions of UN accountability mechanisms implies one central action: improving the handling of SEA allegations. Part of the accountability mechanism implemented by the UN rests upon disciplinary measures. In cases where legal accountability may not be reachable either because no State can exercise jurisdiction or because the action is not criminal, other options in the shape of disciplinary sanctions are an interesting means to achieve accountability. Nonetheless, these remain measures directed towards the perpetrator rather than *to* the victims. This research adopted a broad concept of accountability, understanding how its legal aspect intersects with a broader sense of moral obligation, particularly in the case of the UN, the guardian of international human rights. Eventually, the UN must find a delicate balance between protecting alleged perpetrators' and victims' rights.

While this research attempted to provide the reader with a complete picture of the issues linked to the normative gaps relative to ensuring the accountability of UN officials and experts on missions, it overlooked how variations in victimology affect perpetrators' accountability. Notably, it left out the gender or age of the victims, although these could produce various effects on the outcome of allegations. This research discussed the accountability deficit, assuming that all victims faced the same obstacles, principally based on women's perceptions. Although most victims of SEA are indeed women and girls, men and boys can also be victims. Men or boys victims of SEA could be facing additional legal obstacles to obtaining accountability proper to their gender. These could be worth studying in the future. In addition, the findings of this research are impacted by the quality of the data at its disposal, and the UN data have been criticized in the past.[806] The number of case laws at one's disposal when studying the accountability of UN officials and experts is an additional hindrance to developing general remarks on the subject.

[806] Grady supra note 55.

In conclusion, this research suggests that achieving accountability for SEA by UN personnel requires comprehensive changes at the UN and State levels to fill the normative gaps hindering accountability enforcement. Without revising the UN's investigation methods and referral policy while encouraging greater collaboration between States to initiate criminal proceedings, there will be no meaningful advancements toward accountability. In the absence of action from the UN or its MS, the scandal will continue eroding the image of the UN, putting its mission in jeopardy because of the confidence crisis it contributes to. From a global perspective, such a lack of accountability can only deepen the mistrust towards the UN and possibly all IOs, jeopardizing all IOs' missions even more. Only by addressing these issues can the UN and its MS guarantee that all UN personnel perpetrators of SEA are held accountable to their victims, hence securing justice and reaffirming the organization's role as the guarantor of international norms.

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ANNEX A - ADDITIONAL INFORMATION RECEIVED FROM STATES ON REFERRALS OF SEA ALLEGATIONS BY THE UN TO MS SINCE JULY 1, 2007. (EXTRACTS OF A/78/248) [807]

Case no.	Referral year	UN entity	Type of crimes	Summary of allegation	Information received on status of investigation/prosecution	Request for waiver of immunity	Information received on jurisdictional or evidentiary obstacles
1	2008	UNMIL	SEA	Alleged rape of a minor	No information received from MS	No	No information received
3	2008	UNMIS	Sexual Abuse	Alleged rape and physical assault of an adult	No information received from MS	No	No information received
14	2010	MONUC	SEA	Alleged sexual exploitation and abuse of a minor	No information received from MS	No	No information received
18	2010	MINUSTAH	SEA/physical assault	Alleged sexual exploitation and abuse of a minor; alleged physical assault of a minor	Disciplined by Member State's police. Criminal case was dismissed by national authorities	No	No information received
62	2015	MONUSCO	SEA	Alleged rape of a minor	No information received from MS	No	No information received
69	2015	MONUSCO	SEA	Alleged sexual exploitation and abuse of a minor	Criminal proceedings initiated by MS. Disciplinary action resulted in sanction of reduction in rank. UN informationmed MS that it does not consider sanction commensurate with act.	No	No information received
76	2015	UNAMID	SEA/physical assault	Alleged sexual and physical assault of an adult	No information received from MS	No	No information received
77	2015	UNMIL	SEA	Alleged sexual exploitation and abuse of a minor	No information received from MS	No	No information received
78	2016	Secretariat	Corruption/fraud SEA	Alleged solicitation and acceptance of bribery payments and soliciting sexual favours; alleged sexual assault of an adult	No information received from MS	No	No information received
89	2016	Secretariat	SEA	Alleged sexual abuse of an adult	Investigation initiated by MS	No	No information received
109	2017	UNDP	SEA	Alleged sexual abuse of adults	Subject pleaded guilty to charges of sexual assault and lying to investigators and was sentenced to 15 years in prison.	No	No information received
111	2017	MONUSCO	SEA	Alleged sexual abuse of a minor	Investigation/proceedings initiated by Member State	No	No information received
125	2017	UNOCI	SEA	Alleged sexual abuse of a minor	No information received from MS	No	No information received
137	2018	MONUSCO	SEA	Alleged rape of a minor	Investigation initiated by MS	No	No information received
138	2018	MONUSCO	SEA	Alleged sexual abuse of a minor	Investigation initiated by MS	No	No information received
140	2018	MONUSCO	SEA	Alleged fraudulent solicitation of sexual favours; alleged bribery of a nationa official	No information received from MS	No	No information received

[807] UNGA supra note 264.

142	2018	UNIOGBIS	SEA/physical assault	Alleged sexual abuse of two minors; alleged physical assault of two minors	Investigation/criminal proceedings initiated by MS	No	No information received
145	2018	UNHCR	SEA	Alleged sexual abuse of an adult	No information received from MS	No	No information received
146	2018	MINUSMA	SEA	Alleged sexual abuse of an adult	Investigation initiated by MS	No	No information received
147	2018	MONUSCO	SEA	Alleged sexual abuse of an adult	No information received from MS	No	No information received
153	2018	MONUSCO	SEA	Alleged sexual abuse of an adult	Criminal proceedings and disciplinary proceedings initiated by MS	No	No information received
154	2018	UNHCR	SEA	Alleged sexual abuse and exploitation of an adult and making of verbal threats connected to the issuance of humanitarian services to refugees	No information received from MS	No	No information received
156	2018	UN-Women	SEA	Alleged sexual abuse of an adult	No information received from MS	No	No information received
177	2019	UN-Habitat	SEA	Alleged sexual abuse of an adult	No information received from MS	No	No information received
203	2019	UNIOGBIS	SEA	Alleged sexual abuse of an adult	Investigation initiated by MS	No	No information received
207	2019	UNHCR	SEA	Alleged sexual exploitation and abuse of an adult	No information received from MS	No	Member State indicated that it could not initiate legal action in the absence of a complaint from the victim, and that the fact that the alleged crimes had occurred outside of its jurisdiction posed additional difficulties, both in terms of gathering evidence and in having access to the victim
208	2019	UNHCR	SEA	Alleged sexual exploitation and abuse of an adult	Investigation initiated by Ms	No	No information received
218	2020	UNISFA	SEA	Alleged sexual exploitation of an adult	No information received from MS	No	No information received
219	2020	MONUSCO	SEA/physical assault	Alleged sexual exploitation and physical assault of an adult	Member State indicated that it could not initiate legal action in the absence of a complaint from the victim	No	Member State indicated that it could not initiate legal action in the absence of a complaint from the victim
229	2020	Secretariat	SEA	Alleged sexual abuse of a minor	Investigation initiated by MS	No	No information received
230	2020	UNFPA	SEA	Alleged sexual abuse of an adult	No information received from MS	No	No information received
249	2020	MINUSCA	SEA	Alleged sexual exploitation and abuse of a minor	No information received from MS	No	No information received

252	2021	UNHCR	Corruption/fraud/SEA	Alleged fraud, corruption and extortion connected to the issuance of humanitarian services to refugees, alleged sexual assault of an adult	No information received from MS	No	No information received
284	2021	UNDP	SEA	Alleged sexual abuse of an adult	No information received from MS	No	No information received
313	2022	UNDSS	Sexual assault and harassment	Alleged sexual assault and harassment of an adult	No information received from MS	No	No information received
316	2022	OHCHR	Sexual assault/physical assault	Alleged sexual assault of an adult and a physical assault of an adult	No information received from MS	No	No information received
332	2022	MONUSCO	Sexual assault and harassment	Alleged sexual assault and harassment of an adult	Investigation initiated by MS	No	No information received
333	2022	UNICEF	Sexual assault and harassment	Alleged sexual assault and harassment of an adult	No information received from MS	No	No information received

ANNEX B - NOTIFICATIONS RECEIVED FROM STATES WITH RESPECT TO INVESTIGATIONS OR PROSECUTIONS OF CRIMES ALLEGEDLY COMMITTED BY UNITED NATIONS OFFICIALS OR EXPERTS ON MISSION SINCE JULY 1, 2016. (EXTRACTS OF A/78/248)[808]

Case no.	Referral year	UN entity	Type of crimes	Summary of allegation	Information received on status of investigation/prosecution	Request for waiver of immunity	Information received on jurisdictional or evidentiary obstacles
1	2016/17	UN-Habitat	SEA	Alleged sexual exploitation and abuse of minors	Investigation concluded with no charges	Yes	No information received
8	2016/17	UN Mission in Colombia	SEA	Alleged sexual harassment of adult who rejected solicitation of sexual favours	Investigation concluded with no charges	Yes	No information received
10	2016/17	UNIOGBIS	SEA	Alleged sexual assault and rape of minor	No information received; case considered inactive	No	No information received
19	2016/17	Department of Safety and Security	SEA	Alleged sexual abuse of a minor	No information received; case considered inactive	Yes	No information received
20	2016/17	IRMCT	SEA	Alleged sexual abuse of minors	Investigation concluded with no charges	No	No information received
21	2016/17	UNFCCC	SEA	Alleged rape of an adult	Convicted and sentenced	No	No information received
28	2017/18	MONUSCO	SEA	Alleged rape of minor	No information received; case considered inactive	Yes	No information received
53	2017/18	UNMISS	SEA	Alleged sexual exploitation of an adult	Case considered inactive	No	No information received
56	2017/18	UNFPA	SEA	Alleged sexual exploitation of an adult	Investigation ongoing	No	No information received
72	2017/18	MINURSO	SEA	Alleged sexual assault of an adult	Investigation ongoing	No	No information received
73	2017/18	MONUSCO	Sexual harassment	Alleged sexual harassment of an adult	Investigation concluded with no charges	No	No information received
98	2018/19	UNAMID	SEA	Alleged rape of a minor	Convicted and sentenced	Yes	No information received
104	2018/19	UNICEF	SEA	Alleged sexual abuse of a minor	Investigation concluded with no charges	Yes	No information received
105	2018/19	UNDP	SEA	Alleged sexual abuse of a minor	Case closed; outcome of investigation and prosecution under seal	No	No information received
124	2019/20	UNAMID	SEA	Alleged rape of a minor	Conviction overturned upon appeal.	No	No information received
125	2019/20	UNAMID	SEA	Alleged abduction and rape of an adult	Case closed; charges dropped	No	No information received
129	2019/20	UNMISS	SEA	Alleged rape of a minor	Case closed; charges dropped	No	No information received
150	2020/21	MONUSCO	SEA	Alleged rape of a minor	No information received; case considered inactive	No	No information received
158	2020/21	UNMISS	SEA	Alleged rape of a minor	No information received; case considered inactive	No	No information received
161	2021/22	MONUSCO	SEA	Alleged SEA	Investigation ongoing	No	No information received
177	2021/22	MONUSCO	SEA	Alleged rape of a minor	Investigation ongoing	Yes	No information received

[808] UNGA supra note 264.