United Nations Security Council and Accountability: Targeted Sanctions and Peace Operations, 1999-2014

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DECLARATION

I declare that the thesis entitled "**United Nations Security Council and Accountability: Targeted Sanctions and Peace Operations, 1999-2014**" submitted by me for the award of the degree of **Doctor of Philosophy** of Jawaharlal Nehru University is my own work. The thesis has not been submitted for any other degree of this University or any other university.

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Dedicated to My Family

Whose Love, Affection and Support stands before me as a Source of Strength

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List of Acronyms

ADB	Asian Development Bank
AfDB	African Development Bank
AFRC	Armed Forces Revolutionary Council
AIIB	Asian Infrastructure Investment Bank
ASEAN	Association of Southeast Asian Nations
ASG	Assistant Secretary General
ASR	Articles on State Responsibility
AU	African Union
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
BRICS	Brazil, Russia, India, China and South Africa
CDU	Conduct and Discipline Unit
CDT	Conduct and Discipline Teams
CICC	Coalition for the International Criminal Court
CSR	Corporate Social Responsibility
DARIO	Draft Articles on the Responsibility of International Organizations
DFS	Department of Field Support
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of Congo
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

ECI	European Court of First Instance
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECOMOG	Economic Community of West African States Monitoring Group
ECOWOS	Economic Community of West African States
EEC	European Economic Community
EGC	General Court
EU	European Union
FAO	Food and Agriculture Organization
FRY	Federal Republic of Yugoslavia
HR	Human Rights
HRC	Human Rights Committee
ICISS	International Commission on Intervention and State Sovereignty
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
INGOs	International Non-Governmental Organizations
ITC	International Tin Council
G7	Group of Seven (Canada, France, Germany, Italy, Japan, Britain, United States and European Union)
G8	Group of Eight (G7 plus Russia)
GAP	Global Accountability Project
GAL	Global Administrative Law

GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HAP	Humanitarian Accountability Partnership
IAEA	International Atomic Energy Agency
IBRD	International Bank of Reconstruction and Development
IBSA	India, Brazil and South Africa
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IDB	Inter-American Development Bank
IFC	International Finance Commission
IFIs	International Financial Institutions
IHL	International Humanitarian Law
ILO	International LabourOrganization
IMF	International Monetary Fund
IGOs	Intergovernmental organizations

IO	International Organization
IOIA	International Organizations Immunities Act
IR	International Relations
JEM	Justice and Equality Movement
KFOR	Kosovo Force
MDBs	Multilateral Development Banks
MERCOSUR	Argentina, Brazil, Paraguay, Uruguay, Venezuela and Bolivia
MFN	Most Favoured Nation
MINUSTAH	United Nations Stabilization Mission in Haiti
MNCs	Multinational Corporations
MOU	Memorandum of Understanding
MONUC	United Nations Organization Mission in the Democratic Republic of Congo
MPRI	Professional Resources Incorporated
NAC	North Atlantic Council
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organization
NCC	National Contingent Commander
NGO	Non-Governmental Organization
NLD	National League for Democracy
OAU	Organization of African Unity
OECD	Organization for Economic Cooperation and Development

OHRM	Office of Human Resources Management
OIOS	Office of Internal Oversight Services
OLA	Office of Legal Affairs
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
OSCE	Organization for Security and Cooperation of Europe
P-5	Permanent Five
PMSCs	Private Military and Security Company
R2P	Responsibility to Protect
RUF	Revolutionary United Front
RwP	Responsibility while Protecting
SAPs	Structural Adjustment programme
SEAs	Sexual Exploitation and Abuse
SLM	Sudan Liberation Movement
SOFA	Status of Forces Agreement
SRSG	Special Representative of the Secretary General
TCCs	Troop Contributing Countries
TNCs	Transnational Corporations
TTPs	Techniques and Procedures
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone

UNASUR	Union of South American Nations
UNDP	UN Development Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	UN High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNITA	The National Union for the Total Independence of Angola
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in Sudan
UNOMS	Office of United Nations Ombudsman and Mediation Services
UNOPS	United Nations Office for Project Services
UNOSOM I	United Nations Operation in Somalia I
UNPKF	United Nations Peacekeeping Forces
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTAET	United Nation Transitional Administration In East Timor
UNTSO	United Nation Truce Supervision Organization
US	United States
USA	United States of America

USG-DFS	Under-Secretary General, Department of Field Support
USG-DPA	Under-Secretary General, Department of Political Affairs
USG-DPKO	Under-Secretary General, Department of Peacekeeping operations
USSR	Union of Soviet Socialist Republics
VRS	Bosnian Serb Army
WFP	World Food Programme
WHO	World Health Organization
WMD	Weapons of Mass Destruction
WTO	World Trade Organization

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CHAPTER 1
Introduction

The aim of this study is to examine the issue of accountability of the United Nations Security Council (UNSC) in the light of the organization's growing role in world affairs in the post-Cold War era. The principle of accountability has undergone noticeable evolution over the past several centuries with gradual shift from non-democratic systems[1] to democratic ones. One of the pillars of the democratic model of governance is the availability of different accountability mechanisms (like voting, parliamentary debates, judicial review etc.) to hold power or authority holders accountable. Because of the practices that embeds accountability in every sphere of democratic governance, it is nearly impossible to conceive democracy without accountability. However, since the modern international system considers nation-states as the sole legitimate units to govern people, the relevance of accountability remained within the domestic boundaries. In this sense, the nature of international system also influenced the scope of accountability.

The state centric international system has undergone massive change in the 20th century with the increase in the number of international organizations (IOs) and the simultaneous expansion of their mandate in various functional domains. Yet, many of the world's most influential IOs have been created with an unrepresentative power oriented structure. IOs like Bank for International Settlements (BIS), IMF, World Bank, one of UN's principal organ- UNSC etc. all showcase power oriented representation. The unequal participation (resulting from the power based representation) not just reflect in formal provisions like voting rights in Bretton Woods institution or veto in UNSC but also in practices like informal 'green room' meetings in World Trade Organization (WTO). Given these unequal structures of representation and participation, accountability remained an affair between the powerful members and the concerned international organization (IO). One of the ways by which the powerful member states could make IOs accountable was their financial contribution.

[1] Events like the end of Colonialism, decline of feudalism, fall of communism in former Soviet Union, challenge to monarchies and dictatorships witnessed recently in the form of Arab Spring in Middle East since 2011etc. have elevated the norm of accountability at much higher pedestal.

One on hand, the structural factors[2] laid down the base for IOs to act without being accountable to majority of stake holders like weaker states, civil society actors, individuals etc. while on other hand, the functional factors opened the entire gamut of unacceptable unaccountability gap that loomed large when IOs operate. In the latter half of the 20th century, IOs like International Monetary Fund (IMF) and World Bank have frequently engaged with the developing world on development as well as balance of payment related matters. Such engagement has not always been uncontroversial. Issues like IMF's controversial conditional loans e.g. during Asian Financial Crisis of 1997, assistance recipient states like Thailand alleged harsh treatment; several World Bank development projects invoking environmental or displacement concerns e.g. decades long Narmada Bachao Movement in India against World Bank funded Sardar Sarovar Project in Gujarat; anti-WTO protests in Seattle in 1999 etc. are a testimony of this troubled engagement.

The concern over lack of accountability of IOs is not just restricted to governmental organizations but extends to private sector as well. In the 20th century, the growing web of liberal capitalist model has placed several Multinational Corporations (MNCs) in a very dominant position vis-à-vis states. Certain MNCs have turnover greater than GDP of some countries, similarly, certain MNCs like Walmart have workforce greater than population of some countries (Nicolson 2002). The capitalist profit making spirit has not just expanded the scope of operations of MNCs but also found loopholes to maintain profit margin higher by relocating businesses. These relocation strategies have been mooted because of the prevalence of weak corporate regulations and abundance of cheap workforce in several third world countries like China, Taiwan, Vietnam etc. Unsurprisingly, the vulnerabilities of the workforce in the third world caused by the laxity in labor laws and weak political will spilled into human rights (HR) violations. One of the controversial incidents was the revelation of nearly sub-

[2]Most IOs structurally privilege few members over others representing influence of power for e.g. veto power of permanent five (P-5) members of UNSC, weighted voting in Bretton Woods institutions etc. In other cases, like World Trade Organization (WTO) where each state is admitted as equal in theory, informal practices like green room meetings end up according significant agenda setting power to few powerful economies. Same is also true for regional variants for e.g. Asian Development Bank (ADB) was created in 1966 on the model of World Bank and thus replicates weighted voting determined by capital subscriptions. In recent times, several initiatives are taken by China and one of the most prominent, both in terms of membership and resources, being Asian Infrastructure Investment Bank (AIIB) that became operational in 2015. Following the custom of most financial IOs, AIIB too represents the weighted voting with China bearing the largest share as many influential economies (e.g. US, Japan etc.) have refused to become its member.

human conditions that the factory workers of (youth icon brand) Nike were kept. This incident ignited the famous anti-sweat shop movement[3].

Given that accountability already became an acceptable norm in the liberal democratic municipal orders (across East and West), relatively unaccountable way of IOs functioning became a matter of grave concern. Among all different variety of IOs that exist today, accountability of UN seemed a crucial matter due to various reasons. In the universe of IOs, the UN occupies center stage due to its context of origin, membership, structure, mandate, nature of evolution and wide affiliations. As the only universal organization with a monopoly over legitimate use of force to maintain international peace and security, it is expected to be the problem solver of the world and operate like a role model for the rest of the IOs. Therefore, the issue of UN accountability is not just an end but also a means to alter the ways in which other IOs operate.

Various significant authorities like International Law Association (ILA) have pioneered the idea that 'power entails accountability'.[4] It implies that although accountability is relevant in all settings yet it makes most sense in relation to a powerful authority (an authority whose decisions and actions impact others)[5]. Unarguably, in the paraphernalia of UN, the UNSC is the most powerful organ. However, one limitation on its effectiveness is the necessity of consensus among P5 members. In the absence of such great power consensus due to ideological clashes between US and USSR, the Cold War period has been dubbed as a period of UNSC's paralysis. Thus, due to such lack of activities by UNSC during this phase, the notion of accountability made little sense.

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[3]See DeWinter, R.(2006), "The Anti Sweat Shop Movement: Constructing Corporate Moral Agency in the Global Apparel Industry", *Ethics and International Affairs*, 15(2).

[4] For Detailed Account See Chapter 2; International Law Association (2004), Final Report, *Accountability of International Organizations*, Berlin Conference

[5] A philosophical basis for holding powerful entities accountable can be derived (through analogy) from the J.S. Mill's seminal contribution- 'On Liberty' in which he differentiates between self-regarding and other regarding actions. To balance liberty with order, he pronounces that a legitimate societal regulation or interference on individual liberty must emanate only in case of other regarding actions. Most actions of IOs are other regarding.

The end of Cold War relieved UNSC from the clutches of bipolar politics and consequent deadlock. Coincidently or resultantly, the post-cold war civil war situations in various parts of the world offered an opportunity to UNSC to be active unlike previously. As a response to it, UNSC indiscriminately used sanctions as a tool to maintain international peace and security. Similarly, peace operations turned more robust, ambitious and controversial when they shed their traditional character which relied on principles of consent of host state, impartiality and non-use of force except in self-defense. Unfortunately, it is the civilians who bore the brunt of sanctions as well as peace operations which also eroded UN legitimacy. Contributing significantly to such problematic state of affairs is the absence of mechanisms to hold UNSC accountable for its decisions and actions.

In a liberal democratic set up, accountability is an outcome of the consensus that authorities exercising power over citizens are responsible for their decisions and actions. The contradiction appeared clear wherein IOs decisions and actions impact citizens of different countries but unlike the democratic set up, accountability provisions found missing. Given the mismatch between the prevalence of accountability in domestic systems and the virtual absence of any effective means of securing IO accountability, the academic and policy making community found itself pressed hard to fix this problem. This study aspires to build on this significant issue of IO Accountability. The term IO accommodates organizations of various categories - Intergovernmental organizations (IGOs), International Non-Governmental Organizations (INGOs), MNCs etc. Although the accountability of other types of IOs is an important dimension of international accountability, scope of this study is restricted to IGOs.

Unarguably, the status of UN in the existing framework of IOs is unprecedented. Among wide range of other tasks, the UN is assigned with the most complicated but essential function of maintaining international peace and security. To attain such an ambitious objective, the UNSC (comprising the five great powers) is given the prerogative to decide when (Article 39 of the UN Charter) and how (Article 41 and 42 of the UN Charter) to act. Traditionally, the UNSC has acted through the mechanism

of collective security[6] but in other cases, it has also resorted to sanctions and peace operations to fulfill its mandate. However, the intricacies of post-cold war especially the instances of state collapse spilling into civil war and resulting in violations of HR pushed UNSC to widen its tools of engagement. The Iraq[7] debacle rebuffed the theory of sanctions being harmless and effective alternative to war. Therefore, targeted sanctions were mooted.

Alongside, it was becoming clear that the utility of traditional peace operations (based on principles of consent, impartiality and non-use force except in self-defense) is declining in situations where there is no peace to keep. For instance, the struggle of peace keeping force in Somalia- United Nations Operation in Somalia (UNOSOM I formed in 1992)- is an evidence to the limits of traditional peace operations. Consequently, the UNSC upgraded the potency of peace operations in various forms like robust peacekeeping, peace enforcement, peace building etc. Both the targeted sanctions and non-traditional peace operations brought the UNSC in direct contact with the individuals. In the former, it is those individuals that are listed on the sanctioned committee and in the latter case, it is the population of the host state where peace keeping personnel as representatives of UNSC operate.

Contradictory it may sound (as both these measures were claimed by UNSC as civilian friendly) targeted sanctions and non-traditional peace operations caught in the controversy of HR violations. The source of controversy in case of targeted sanctions was not just the listing of individuals on various sanctions committees[8] especially

[6] A system of collective security implies identification of an aggressor state and then rest of the states takecollective action to repel the aggressor.

[7] In response to Iraq's occupation of Kuwait in 1990, UNSC imposed economic sanctions on Iraq to force withdrawal from Kuwait, compel it to pay reparations and disclose as well as eliminate Weapons of Mass Destruction (WMD). The effects of sanctions fell disproportionality on civilians like rise in child morality, higher rates of malnutrition, shortage of medicines, lack of clean water set. in Iraq post sanctions. With the deteriorating situation, UNSC passed resolutions 706 (1991) and 712 (1991) to allow trade of oil with food and medicines. In 1997, the Oil for Food programme was strengthened by expanding the scope of export of oil from $1.6 billion USD to $5.2 billion USD. However, the programme turned controversial when allegations of corruption surfaced during 2004-2005.

[8] Sanctions Committees are created by UNSC to maintain an account of those that are targeted through sanctions. The 1267 committee, also known as 'ISIL (Da'esh) Al Qaeda and Associated Individuals Committee' is one of such committees formed to target individuals and entities associated with terrorism. Most of other committees are country specific covering states like Angola, Libya, Mali, Somalia, Sudan, South Sudan, Haiti, Afghanistan etc.

1267 committee formed in 1999 but also the absence of any venue to challenge the legality of the sanctions[9]. The peace operations turned extremely controversial when peace keepers (both military and civilian) were found accused of exploiting the host population they were expected to protect. Such state of affairs undermined the UNSC's claim that targeted sanctions and peace operations are specially designed tools to maintain international peace without negatively impacting the civilians. Thus, the shift from comprehensive to targeted sanctions and the belief that peace operations can serve a great deal to handle intricacies of intra-state[10] conflict showed signs of disappointment. These solutions were criticized for neither being efficient nor legitimate.

The aim of this work is to examine the theoretical and legal questions pertaining to the field of IO accountability; explore why UNSC accountability has become a matter of great concern in the post-Cold War period especially since 1999; analyze the relationship between the UNSC and HR law; to evaluate the functional areas, namely targeted sanctions and peacekeeping operations, in which the accountability of the UNSC has been most strongly called for; and to critically scrutinize the mechanisms adopted by the UN to address the alleged accountability gap. The year 1999 bears a significance for two reasons. First, the UNSC instituted 1267 committee in 1999 as a response to the problem of terrorism and listed large number of individuals on the sanctions list which denied them the right to fair trial. Second, since 1999 the reporting of the peace keepers misconduct especially sexual exploitation and abuse (SEAs) against host population has shown significant rise. Some of the controversial (due to peace keepers misconduct) peace operations like Guinea (25th June 1999), Sierra Leone (22nd October 1999), Democratic Republic of Congo (DRC) (30th November 1999) etc. were initiated in 1999 and since then the issue of peace keepers abuse only magnified.

[9] For detailed discussion, See Chapter 4.

[10] The term intra-state conflict can be interchangeably used with failed states or civil war situations. In the field of international relations, it is a term commonly used to refer conditions of lawlessness and conflict within various states mostly resulting in separation and formation of new countries e.g. civil war in former Yugoslavia in 1990s leading to the formation of several new republics, 22 years long civil war in Sudan resulting in the creation of South Sudan in 2011. Though not in all cases, separate nation is born e.g. civil war in Rwanda in 1994.

Although accountability is a concern for all sorts of IOs but given the seriousness of the abuse emanating from the UNSC's functioning, this study focuses on the latter. Since UN is a complex organization with multiple organs and departments, this work shall limit itself to examining the functioning of the UN Security Council's instituted targeted sanctions and peacekeeping operations, both of which showcase direct involvement of the UNSC with individuals, bypassing state authority. The targeted sanctions result when the UNSC decides to include an individual or entity into comprehensive list maintained by the sanctions committee. The UNSC is not required to take prior approval from the state of nationality of the sanctioned individual or entity before sanctioning and thus it surpasses the state authority. In case of peace operations, state authority is a complicated affair because in most instances of failed states or intra-state conflicts, a clear authority does not exist. The task of UNSC authorized peace keepers in some of these regions is not just to ensure cessation of hostilities or monitoring ceasefire but facilitating the process of institution building so that a legitimate government may be elected. However, during such transition phase or peace building phase, the population of the host state comes under the direct authority of peace personnel.

Importantly, such engagement of UNSC at the level of the individual has triggered controversies owing to the violation of HR in at least two forms – first, the UNSC decision making process to add anyone on the sanctions list is opaque at best. In the beginning, it was totally unaccountable and sanctioned individual or entity did not have any resort to appeal causing a blatant denial of due process or fair trial rights. Unsurprisingly, this instigated immense criticism by academics, judicial bodies, civil society actors etc. Despite several reactive steps undertaken by UNSC[11] to address the alleged accountability gap, serious problems exist.; secondly, large number of peace operations showed incidents of peace keepers abuse. Some of the heinous crimes committed by the UN peace personnel in different missions include rape, human trafficking, illegal detention, killing, prostitution, damages to property etc. Thus, the end of Cold War did not turn out be a heavenly moment for millions of people across the globe. Instead, it opened up a whole gamut of new problems in the domain of international peace and security as well as HR.

[11] For detailed discussion [See] Chapter 4.

The collapse of bipolarity in the early 1990s produced relatively better conditions for organizations like the UN to play a greater role in global politics. Apart from the changed international structure, the changed nature of conflict in the post-Cold War period has necessitated the UN to respond differently from its traditional response to inter-state conflicts. Such increase in the activities of the UN has meant greater chances of its direct interaction with individuals; at the same time, it has also opened up a wider scope for tensions witnessed since 1999 (Arsanjani 1981: 134, Council of Europe 2013: 5, Dekker 2005: 84).

In the UN Charter, the UNSC has been bestowed with the primary responsibility of maintaining international peace and security. In the aftermath of the Cold War, innovative means like 'targeted or smart sanctions'[12] were engineered by the UNSC to deal with new challenges like global terrorism. Moreover, UNSC-authorized peace operations have undergone numerical expansion and deepened in character (from peacekeeping to peace building) in the post-Cold War era. Both the targeted sanctions and the peacekeeping missions have generated immense controversies on the grounds of human rights violations since 1999. Such a state of affairs poses serious challenge since IOs like UN possess the capability to adversely impact the citizens of different states without being held accountable for the consequences of their actions.

In other cases, UNSC is accused of undermining the rights and safety of host population due to sheer negligence for e.g. cholera outbreak in Haiti in 2010. The scourge of cholera in Haiti was brought by the UN peace keepers hailing from Nepal who are accused of contaminating major water resources utilized by the Haitian population. As on 2010, approximately 8 million Haitian constituting 7 percent of its population is impacted by the disease including deaths of more than 9000.[13] Given the

[12] Targeted sanctions or smart sanctions are measures undertaken by the sender, either state(s) or organizations like UN or European Union (EU), with a specific motive. Unlike, conventional comprehensive sanctions that were imposed on countries, these measures are aimed at specific targets, individuals or entities, to prevent its negative spillover on civilians. Most notable examples of such measures include asset freeze, travel ban and arms embargo.

[13] For detailed analysis, [see] Pillinger (2015), "It's not just for states anymore: Legal Accountability for International Organizations under the Framework Convention on Global Heath", *Global Health Governance*, 9(1): 114-130.

HR violations at such gross levels, calls for UNSC accountability is a natural corollary.

Nevertheless, the accountability in international realm has traditionally been obstructed by the practice of immunity. The concept of immunity is the foundation of modern day diplomacy between nation states. According to this practice, the representatives of a sovereign states cannot be prosecuted in the foreign nation and thus it restricts the legal jurisdiction of the states vis-à-vis ambassadors or diplomats of other nations. The practice is introduced to ensure that diplomats, ambassadors or representatives of states could function independently. Also, the sovereignty principle underpins this practice wherein a citizen of a country should be accountable to its own nation's legal systems. The practice of immunity has also been extended to the IOs. Both the IOs and its personnel are covered under the provisions of immunities. The legality and legitimacy of immunity becomes a problem when it hinders justice delivery system. In the context of IOs, their ever-expanding mandate especially since the 1990s has brought the issue of immunity to limelight.

The international legal framework offers a protective cover to IOs by providing immunities both to the IO as an entity and to its employees (officials and troops). The immunity from legal suit is a privilege that prevents trial of an IO and its employees if any third party makes a claim against them. Much of academic and the policymaking world considers the presence of immunity as the major hurdle leading to culture of unaccountability of IOs.[14] The UN Charter along with the *Convention on the Privileges and Immunities of the UN* adopted by UN General Assembly in 1946 is the most significant legal document in this context (UN 1946) The Convention comprising 8 Articles and 36 Sections was adopted by UN General Assembly(UNGA) on 13th February 1946. It details on the scope of immunities and privileges offered under the Convention and specifies the different category of people associated with UN e.g. representatives of member-states, UN officials, experts on mission etc. Importantly, the category of UN troops or blue helmets is found missing in the text as UN peace operations were not envisaged at the time of UN formation[15].

[14] For detailed discussion, See Chapter 2.

[15] For detailed discussion on 1946 Convention and practice of immunities See Chapter 2.

The roots of this Convention lie in the UN Charter which talks about the necessity of such provisions for the effective and independent functioning of the UN. Specifically, Article 105 of the UN Charter states:

> The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 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 (UN Charter Art. 105).

Domestic legal arrangements also play a critical role in providing immunities to IOs. For instance, the *International Organizations Immunities Act* (IOIA) of 1945 in the US grants to IOs the "same immunity from suit and every form of judicial process as is enjoyed by foreign governments" (Young 2012: 311). However, most countries have incorporated immunities and privileges of IOs in their legal system post the adoption of Convention by UNGA in 1946. For instance, the UK gave effect to this provision through Section 10 of the International Organizations Act, 1968. These provisions are also provided through the UN and ICJ (Immunities and Privileges) Order 1974/126 (Govt. of UK 1974). The order confers immunities and privileges on UN, its staff, officers and representatives of member states . In the developing world, India is one of the earliest countries that gave effect to this Convention.

Executing the 1946 Convention adopted by UNGA in 1946, Indian government post-independence enacted United Nations (Privileges and Immunities) Act, 1947 conferring said benefits on UN and its representatives as well as officials. The act also provided that in future if such provisions are to be accorded to any IO, it can be done with the notification in the official Gazette by the central government. Thus, the benefits of the 1947 Act, subject to the principle of *mutatis mutandis,* can be extended to other IOs (Central Government of India, UN Privileges and Immunities Act 1947). In 2016, India extended the UN privileges and immunities to International Finance Commission (IFC), its officials and representatives. IFC is one of the arm of the World Bank Group whose mandate is to look after the development related needs faced by the private sector in the developing world. Previously, India has extended

these benefits on other IOs- World Health Organization (WHO), IMF, International Civil Aviation Organization (ICAO), International Labor Organization (ILO), Food and Agriculture Organization (FAO), United Nations Educational Scientific and Cultural Organization (UNESCO) etc. (Reddy 2016). The relevance of immunities of IOs has also been reinforced in various court judgments across various levels.

The tension between IO immunities and the demand for justice came to surface in the *Mothers of Srebrenica et al v. State of the Netherlands and the United Nations (Case no. 10/04437)* Case[16], which was filed against the state of Netherlands and the UN for their failure to prevent the mass killing of Bosnian Muslims by the Serbs in 1995 despite their assurance of creating a "safe haven". The Supreme Court of Netherlands (on 13 April 2012) upheld the decision of the District Court of The Hague (2008) and the Court of Appeal of The Hague (2010) that UN enjoys absolute immunity from prosecution even in cases involving grave violations of HR (International Crimes Database website 2015).

The tension between the responsibility of the UNSC to maintain international peace and security on the one hand and the normative force of HR law on the other, has instigated academic debate on the need for binding the UNSC to human rights instruments. Although there are differing views over whether the UN is bound by HR law or not, there is an emerging consensus that it should be (Vradenburgh 1991, Lauterpacht 1993, Murphy 2000, Megret and Hoffman 2003, Olivier 2004, Paust 2010). The legitimacy of the UNSC's targeted sanctions as well as its peacekeeping missions are called into question when they tend to breach the HR of civilians on a massive scale.

Targeted sanctions are an innovative response mooted by the UN after the debacle of traditional economic sanctions in Iraq during the Gulf War in 1991. Even though targeted sanctions sought to identify individuals and institutions responsible for threatening international peace and security, they still generated controversy due to

[16] The applicants appealed through a foundation (Mothers of Srebrenica representing six thousand survivors) that was formed under Netherlands law with an intent to approach courts on behalf of the victims of massacre of Bosnian Muslims by Bosnian Serb Army (VRS) that took place in 1995 in Srebrenica, a UN designated safe area. For detailed account of Yugoslav wars *See* Chapter 5.

the lack of transparency and review mechanisms. Faced with intense criticism, UN created certain accountability mechanisms to ensure justice and fairness such as the 'Office of the Ombudsperson of the UNSC's 1267 Committee' in 2010. Although, the formation of this office as a concrete institutionalized response towards the demands for delisting[17] appears promising yet it suffers from faults like the final decision concerning delisting requires political consensus in the Committee. Each Sanctions Committee is composed of all 15 members of the UNSC. Following discussions with Ombudsperson based on the Ombudsperson's reports, the committee comprising representatives of member-states (both permanent and non-permanent) decides whether to delist or retain the concerned petitioner. Therefore, the important empirical question is to find out what percentage of the recommendations made by Ombudsperson for delisting is approved by the 1267 Committee[18].

UN peacekeeping operations have increased exponentially after the end of the Cold War (Hoffman and Megret 2005: 46, Arsanjani 1981: 134, Council of Europe 2013: 5, Dekker 2005: 84). However, a cause of increasing concern has been the violations of the rights of the citizens of host states at the hands of peacekeepers, including crimes like torture, killing, damage to property and sexual violence reported widely [since 1999]. The accused peacekeepers have escaped punitive measures owing to a lack of jurisdiction of both host state and the UN in conducting trial; the countries of origin have been quite reluctant to try their citizens for the crimes committed in other countries. Under criticism, the UN has introduced certain preventive (e.g. UN Model Code of Conduct for peacekeepers) and remedial measures (e.g. local claims review boards) to regulate the behaviour of peacekeepers, even though these measures have failed to effectively fill the accountability gaps (UN 1990, Zwanenburg 2008: 27).

[17]Delisting means an individual or entity sanctioned by UNSC gets removed from the comprehensive list of targets maintained by respective committee. The request for delisting can either be directly made by the petitioner or through his/her state of nationality or residence. To facilitate delisting, the Office of the Ombudsperson was created in pursuance to UNSC resolution no. 1904 (2009). The office is fully dedicated to address requests emanating from 1267 committee, a committee created to sanction individuals and entities accused of committing or facilitating terrorism. For other committees, the focal point processes the delisting requests.For detailed discussion [See] Chapter 4.

[18] For detailed study [See] Chapter 4.

Theoretical and Legal reflections on the question of IO accountability in general and UN in particular

The problem of IO accountability has traditionally been viewed from the prism of its constituent member states and the matter of debate has been the question, "Who is responsible for the acts of IOs – only IOs or member states or both?" The *Reparations Case (1949)* recognised the separate legal personality of UN and its status as a subject of international law (ICJ 1949). This signified that IOs can be held responsible for their acts while the secondary or concurrent responsibility of member states has been discussed at length in International Law Commission's (ILC) Draft Articles on Responsibilities of International Organizations (DARIO) promulgated in 2011 (ILC 2011).

Nonetheless, it is difficult to ensure accountability of IOs since they cannot be prosecuted under municipal law of any other country nor are they subject to any international body that may initiate proceedings against them. From the perspective of composition, IOs are comprised of both member states and its staff. The staff (both civilian and military) enjoys conventional immunity from prosecution while the secondary responsibility of member states as a legal matter has been recently concluded by ILC in DARIO in 2011. Member states allegedly make use of the separate legal identity of IOs and strategically pursue their national interest while the IO staff members also operate with a sense of impunity. Therefore, the end result is the absence of accountability of IOs despite their ever-increasing significance in world affairs (Stumer 2007, Council of Europe 2013, Schermers and Blokker 1995: 1007).

Events like the Iraq war in 1991, the North Atlantic Treaty Organization (NATO) led bombing in the Federal Republic of Yugoslavia (FRY) in 1999 etc. had a great bearing on the lives of individuals owing to the direct contact between citizens and the IO staff. The growing cases of criminal offenses by IO officials whether, civilian or peacekeepers, in the form of forced prostitution, drug trafficking etc. have instigated review of the state of IO accountability. The UNSC practice of designating individuals and entities (through 1267 Committee) belonging to the terrorist list has been viewed with deep skepticism in the 2004 UN Secretary General's report entitled

["High-Level Panel Report on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility" (UN 2004)].

The heart of the problem lies in the puzzling issue of how to make a collective accountable? Peter French distinguishes between two types of collectives – aggregate and conglomerate. The former is a mere collection of people that mirrors a fluid identity that changes with the change in the members. It is nothing more than the sum of its parts. On the other hand, the latter is more than the identity of its members e.g. Red Cross (French 1984: 5, 10). Conventional understanding regards IOs as bodies possessing distinct legal personality; hence neither the member states nor IO officials are deemed responsible for the acts committed in the name of IOs (Wilde 2006: 402).

The doctrine of separate legal personality opens a space for its abuse. Hoffman and Megret (2005) argue that accountability of the UN is essential for reasons like – it is both a moral and operational imperative to maintain UN credibility; to bring UN closer to the people; to act as a standard setting body etc. Accountability is multifaceted in character which at minimum entails sensitivity towards likely impact and readiness to be answerable. In practice, accountability falls between political responsiveness and legal responsibility. The political accountability which is a hallmark of a democratic order (i.e. executive is answerable to legislature) can also be traced at UN level i.e. accountability of UN towards UNGA. The legal accountability on the other hand is concerned more with the consequences of the decision making. The possibility of IO's legal responsibility is understood in the background of international responsibility of states (Klein 1998). However, the notion of legal accountability is rather perceived as being both narrow and heavy at the same time. Narrow owing to its material prejudice and "heavy because of its all-or-nothing approach to liability and the limited range of remedies it offers" (Hoffman and Megret 2005: 50). They are critical of the existing mechanisms, which are largely *ad hoc* in nature. They also regard the practice of forming codes of conduct or training programmes insufficient to address structural faults. As a solution, they propose an establishment of a UN wide office of Ombudsperson.

Realising the lack of an accountability model that may be applied to IOs, Keohane provides a model of accountability named 'Pluralistic Accountability' which includes

eight accountability mechanisms [19] (Keohane 2003: 1125-1126). The major shortcoming of this model is that accountability in such manner remains incidental and political in nature where member states attempt to control IOs through means like curtailment of finance. Hence, the scope of misusing the separate personality of IO remains open e.g. if a member state in the UNSC exercises veto, it remains a process of the organization and not a state act for legal matters. Similarly, if states act through the organization, it remains the act of the organization not the state, again regardless of the consequences (Wilde 2006: 401-403).

Although a majority of experts adhere to the view that IOs should have a separate legal status, some scholars such as Henry Schermers contest this on the basis of two major arguments. First, international law lacks any specific norm providing for limited liability of IOs and this absence calls for the secondary responsibility of member states (Schermers 1980). Secondly, the presence of limited liability clauses in some IOs imply that in IOs like the UN where such clauses do not exist, member states could be held liable for the acts of the IOs. However, such views are at odds with the majority view (which is also held by "Institut de droit international" based on the report of then member Professor Rosalyn Higgins in 1995) that there is an absence of any general principle whereby member states could be held accountable for legal liability for the acts committed by the organization (Higgins 1995, Wilde 2006: 402-403).

It is worth noting that the decision of the above-mentioned institute also took into consideration the following dilemma – 'the tensions existing between the significance of maintaining the independent responsibility of IOs on the one hand, and the pressing need to protect third parties dealing with such international organizations on the other hand' (Institut de droit international 1995: 273-274). The majority view suggests that the independent functioning of IOs can only be maintained if its members are not held accountable for its acts (Wilde 2006: 404). As Professor Higgins remarked:

> If members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision making by international

[19] For detailed analysis [See] Chapter 2.

> organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership (Higgins 1995: 288).

The supporters of the majority view argue that the justice to the affected parties is not compromised but will be pursued through measures like insurance, *ad hoc* guarantees from member states, etc. (Wilde 2006: 407).

No international tribunal or court enjoys jurisdiction to hear complaints against an IO and the IO's privileges and immunities isolate them from local legal jurisdiction. The Office of United Nations Ombudsman and Mediation Services (UNOMS) was created in 2008 after integrating the office of Ombudsman and Mediation Services.[20] The mandate of the office pertains to matters relating to employment within the UN. The modus operandi is the confidential, off the record and informal resolution of disputes. The office does not act like an advocate of any party but attempts to secure impartiality, due process and procedural fairness. Similarly, the Mediation services intends to reduce conflict by making conflicting parties to talk to each other and facilitates creative problem solving (UNOMS Website 2018). However, the major shortcoming of the office is that although it can hear complaints but its decisions are purely recommendatory (Wilde 2006: 409-410). Other IOs like IMF have justified lack of transparency on the grounds of the nature of their work. The nature of the Bretton Woods (IMF and World Bank) institutions puts them into a different category relative to rest of UN organizations. They have justified their opaque way of functioning on account of the sensitive nature of member states key financial and macroeconomic variables (Suzuki and Nanwani 2006: 183). Hence, it is reasonable to conclude that the provisions on the responsibility of IOs remain in a state of flux (Ginther 1988: 1336, 1339).

[20] This office has a history tracing back to 1993 when Ms. Anne Marie Demmar was appointed with the position of UNHCR (UN High Commissioner for Refugees) mediator. Later in 2002, office of Joint Ombudsperson for UN Development Programme (UNDP), United Nations Population Fund (UNFPA) and United Nations Office for Project Services (UNOPS) was created. The same year Office of Ombudsman was formed on 15 October 2002. During 2002-2007, Patricia Durrant served as the first UN Ombudsman, at Assistant Secretary General level.

One of the major hurdles that prevented the formulation of a clear legal framework for IO accountability is the immense diversity that IOs showcase which is also reflected in handbooks on the laws of IOs entitled "Unity in Diversity" (Schermers and Blokker 2003). Scholars like El Erian suggest that different categories of IOs (e.g. universal-regional) may stipulate different legal consequences (Klabbers 2013: 12-13). However, recent attempts signal a tendency towards crafting general legal principles of IOs to simplify the issue of accountability. The Final Report of the *International Committee on the Accountability of International Organizations* adopted by the ILA in 2004 is one of the most significant legal document on this matter (ILA 2004). ILA identifies accountability of IOs as a multifaceted phenomenon having four different forms – legal, political, administrative and financial[21] (Dekker 2005: 97-99).

It must also be noted that the issue of IO accountability is complex owing to its dependence on agency other than the states. The peacekeepers do not act (at least in a legal sense) as nationals of their countries but as agents of IOs who are tens of thousands in number. The blanket immunity or absolute immunity sought by IOs spills into violations of HR. Still, the IOs are likely to showcase themselves as bodies that act with caution after extensive deliberations and in good faith. Therefore, legal accountability should be strengthened for example by waiving immunities or through legal review by national and international court (Parish 2010).

The status of the UN as a superior legal and moral entity goes contrary to the recent incidents where the peacekeepers who are expected to be the saviours found guilty of worst HR crimes ever reported[22]. The UN is expected to maintain a higher standard than any other entity while operating in the international sphere. Therefore, accountability of UN is not just an issue of legality but also morality (Maogoto 2000). On similar lines, International Law Association (ILA) opines that the principle of 'power entails accountability' is an emerging normative force of global normative law that binds the functioning of UNSC (ILA 2004).

UNSC and Human Rights Law

[21] For detailed discussion [See] Chapter 2.

[22] For detailed study, [See] Chapter 5.

Article 24 of the UN Charter bestows upon the UNSC the power to maintain international peace and security (UN 1945). To support this, member states undertake to provide aid of all kinds like troop contribution, financial support, right of passage etc. to the UN under Article 43 of the UN Charter. Chapter VII of the UN Charter accords upon the UNSC the power to determine (Article 39) the circumstances signaling "threat to peace, breach of peace or act of aggression". On the basis of the diagnosis, UNSC can prescribe means to solve the crisis which may or may not involve use of force under Articles 41 and 42. Thus, the above provisions seem to offer a comprehensive legal framework to guide the functioning of the UNSC (UN 1945).

Since the end of the Cold War, UN has responded to situations of human rights crisis with measures like sanctions and extensive peacekeeping missions. Ironically, the UNSC's effort to protect human rights through sanctions and peace operations has itself violated human rights. As a result, the dilemma that has emerged is the necessity of maintaining international peace and security on the one hand and preventing collateral damage on the other. One of the most contentious questions that has emerged in this context is, "Are IOs, particularly UN, bound by the human rights law?" (Jacoiste 2010: 277). This debate is composed of two schools, one supporting the thesis that the UN is bound by HR law and the other relieving it from such restrictions[23].

Scholars seeking to bind UN to HR law contend that although UNSC's decisions prevail over any treaty obligation of member states (as per Article 103 of the UN Charter), it cannot take precedence over general international law (Alvarez 2003: 119; Orakhelashvili 2007). Irrespective of the Charter provisions, Article 103 cannot overpower the tenets of peremptory norms. In this context, Lauterpacht comments that "relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decision and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council

[23]For detailed study, [See] Chapter 3.

Resolution and Jus Cogens[24]" (Lauterpacht 1993: 407). Similarly, it has been argued that since human rights have achieved the status of *jus cogens*, Article 103 remains ineffective when it comes to matters related to HR like prohibition of genocide, torture etc. (Olivier 2004: 399).

Norms like human rights as well as humanitarian law are regarded as *jus cogens* and therefore as a matter of practice cannot be breached by UNSC when acting under Chapter VII. Judge Weeramantry of ICJ upheld this view in the *Lockerbie* case (ICJ 1992: 694-696). The Security Council's jurisdiction on matters of peace and security cannot be studied in isolation from the principles and purposes of the UN. The promotion of human rights is one of the inalienable purposes of the UN and thus UNSC cannot ignore it when acting under Chapter VII. Humanitarian law can be viewed as 'human rights law in armed conflicts' and the Council is bound by humanitarian law (Beck and Vite 1993: 94, Jacoiste 2010: 291). Rule of law is another crucial test that UNSC decisions must pass and if they contradict principles of rule of law, a peaceful world order is inconceivable (Gasser 1996: 880).

The political character of the UNSC is often projected as an excuse to relieve it from the tenets of the rule of law. Although the ICJ has traditionally shied away from its capacity of exercising judicial review of UN organs yet subtly, it has not completely closed the doors. The ICJ in itsAdvisory Opinionon the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276Case (1971),* posited that it does not have the jurisdiction to review decisions taken by the UN organs (ICJ 1971: 45). The Court remarked that —

> Undoubtedly, the Court does not possess powers ofjudicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the

[24] Jus Cogens or Peremptory Norms refers to "certain fundamental, overriding principles of international law, from which no derogation is ever permitted" (Brownlie 1998). For further explanation, [See] Brownlie, I. (1998), *Principles of Public International Law*, Oxford University Press.

> course of its reasoning, will consider these objections before determining anylegalconsequences arising from those resolutions (ICJ 1971: 45).

In the *Lockerbie Case (1998)*,Judge Robert Jennings while giving his dissenting opinion on the question of admissibility asserted that the UNSC acts does not enjoy immunity from review. In this context, he remarked —

> The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above law (ICJ 1998: 110).

These judgments show that ICJ started to realise the potential harm that a powerful UN organ like UNSC is capable of inflicting. Scholars like Ndulo (2009: 137) rejects the traditional position of the UN (relieving UN from the obligations of Geneva Conventions) and argues that such obligations never impede the functioning of the UN. Indeed, their observance accords greater legitimacy by enhancing a positive image of UN forces in conflict areas. However, it should be noted that UN has modified its conventional stance since signing the 1993 *Agreement on the Status of the UN Assistance Mission in Rwanda* that explicitly binds UN forces to the Geneva Conventions and the two additional protocols (UN 1993). The Agreement explicitly binds the UNAMIR (United Nations Assistance Mission for Rwanda) in the following words —

> The United Nations shall ensure that UNAMIR shall conduct its operations in Rwanda with full respect for the principles and spirit of the general conventions applicable to theconductofmilitarypersonnel. Theseinternational conventions include the four Geneva Conventions of 12 August 19492 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict (UN 1993: 18).

The concept of ‘delegated powers’ is an important route to understanding UNSC’s obligations. The UN Charter constitutes the common will of the member countries and the powers transferred to the UN cannot be higher than those possessed by its creators (Bedjaoui 1994: 46). Furthermore, De Wet (2004: 189) suggests that delegation of powers to the UN should be perceived as an ongoing interaction so that

the delegated power is constantly checked by the developments in *jus cogens*. Similarly, Brownlie (1995: 217) states that the UNSC acts an agent of all member states and not independent of their wishes; hence it is bound by the principles and purposes of the UN Charter. IOs like UN are projected as moral agents and hence it is bound by HR since the latter exist as a cluster of moral or ethical values (Erskine 2003).

Functionally speaking, UN has been the forefront organization in matters of promoting human rights treaties. It would be illogical if the resultant treaties bind other bodies while the promoter (here UN) escapes obligations (Fuller 1969: 215). Another theory propounded to tie the UN to human rights law is based on conceiving the UN Charter as a constitution. The founding documents of UN i.e. Charter is portrayed as a Constitution that contains a belief system binding upon its institutions. The question that emerges is that if UN Charter possesses the status of a Constitution then, "Does human rights law exist as an element of UN constitution?" (Fassbender 1998: 531-532). Scholars like Sohn (1982: 16-17) and Brownlie (1998) answer the above question in the affirmative.

Contrary to the above academics, the following scholars refute the argument that UN and other IOs are bound by the human rights law. Kelsen opines that UNSC is primarily a political organ that enjoys wide discretion concerning the maintenance of peace and security, which however is different from law enforcement. Article 39 authorises UNSC to maintain peace and ensure security which is not necessarily identical to restoration of law (Kelsen 1951: 294). International humanitarian law and human rights norms do not provide specific limits to the powers of the UNSC but lay down broad guidelines in the exercise of its powers. It is upto the UNSC to strike a balance between humanitarian law and human rights norms on one hand and the goal of maintaining peace and security on the other (Frowein and Krisch 2010: 711 in Jacoiste 2010: 316-317). According to Megret and Hoffman (2003: 314-316), IOs and UN particularly cannot prima facie be bound by human right treaties.

On the basis of Article 25 and 103 of the UN Charter, it is argued that UNSC has limitless powers. Article 25 of the UN Charter obligates members to carry out decisions of the Security Council while Article 103 provides that obligation of the

members towards UN Charter prevails over any other international treaty obligation on member states including human rights treaties. Therefore, it has been concluded that UNSC can act above international law since Chapter VII imposes no substantial limits on its power in matters of international peace and security (Oosthuizen 1999: 549). The status of the UN as an IO and not a state has been cited as a reason to relieve it from the obligations under the Geneva Conventions (1949). Traditionally, the UN Office of Legal Affairs has held the view that UN forces are bound just by UNSC Resolutions and not the Geneva Conventions. Furthermore, it has been argued that the UN is not in a position to become a party to the Geneva Conventions as it entails obligations made only for states (Amerasinghe 1996: 102-103).

Refuting the argument of moral agency and the implicit human rights obligations, scholars like Hart (1961: 181-182) contend that such expectations are based on a flawed logic of muddling law with morality. Hence, the moral considerations of the UN should not be regarded as mandatory legal duties. Kondoch (2005: 36) rejects the proposition that regards the UN Charter as a Constitution on the grounds that irrespective of special status of UN in the light of its superior powers in certain aspects; it was never conceived as a supranational organization. Moreover, a World Constitution stipulates legal expression of common values shared by all countries. This is a problematic claim for the UN Charter in the light of challenges faced by HR discourse grounded in cultural relativism[25] (Quenivet 2010: 601).

UNSC's Targeted Sanctions and the Issue of Accountability

Conventionally, the resort to economic sanctions has been considered as a humane way of handling a crisis without the need of blatant force and was supported by idealists like Woodrow Wilson. Sanctions include the interruption of economic relations and communications as well as the severance of diplomatic relations (Wallensteen and Grusell 2012: 207, Kondoch 2001). For the first 45 years of its existence, the UNSC imposed sanctions on just 2 occasions —Southern Rhodesia (1966-1979) and South Africa (1977-1994). However, if one extends this time-period

[25] Cultural relativism refers to an outlook that that all ethical or moral belief systems are equal and none can claim superiority over another. By extension, it implies that there is no existence of any objective criteria to determine right or wrong and thus any evaluation of right or wrong is nothing but a product of society.

till 2002, the number of UNSC sanctions including targeted ones become 14[26]. This implies that the decade of 1990s turned out to be deviant case that significantly added to the number of sanctions. Probably, that's the reason that Cortright and Lopez (2000: 13) called 1990s a 'sanctions decade'.

Moreover, the basis for invoking sanctions has also undergone change since the end of Cold War including reference to entities other than states i.e. individuals, institutions etc. Together, such factors have shown the effect of increased instances of UNSC's involvement at an individual level permeating the national sphere (Kanetake 2008: 114, Kulessa and Starck 1998: 144, Reinisch 2001: 851). Such a transformation of the role of the UNSC in the present era has led the scholarly community to declare UNSC as a "World Legislator" or "Global Law Maker" (Hudson 2007: 203, Finlay 2010: 489-490).

The use of economic sanctions by the UNSC has led to a hue and cry owing to their unintended consequences in the form HR violations. Former UN Secretary-General Boutros Boutros-Ghali termed sanctions as a "blunt instrument" (UN 1995). The criticism that the [Iraqi case] attracted played a critical role in pushing the UN to conceptualise sanctions differently in the form of "smart or targeted sanctions". Conventionally, sanctions were applied on entire countries while the new approach sought to target the individuals responsible for "deviant" policies of a country. The most important elements of sanctions include assets freeze and travel ban (Cortright and Lopez 2002, Wallensteen and Grusell 2012: 207-208).

The theory of targeted sanctions contains three purposes that may not be mutually exclusive while in operation – initiate bargaining for compliance by making individuals have personal stake in making their country comply; deprive resources to the target that may shift a balance of power creating difficulties for the concerned entity; threaten potential target by applying sanctions on some individuals and thus signalling to others who are not yet listed to modify their behaviour (Wallensteen and Grusell 2012). Targeted sanctions are principally conceived as a political and

[26]Southern Rhodesia (1966), South Africa (1977), Afghanistan (1999), Angola (1993), Ethiopia and Eritrea (2000-2001), Haiti (1993), Iraq (1990), Liberia (1993), Libya (1992), Rwanda (1993), Sierra Leone (1997), Somalia (1992), Sudan (1996), former Yugoslavia (1992).

preventive move than a punitive measure. Also, they are time bound and expected to be temporary in nature (Biersteker et al. 2001: 7).

Nonetheless, the advent of targeted sanctions brought its own kind of problems. While the comprehensive sanctions were known for the humanitarian crisis, thetargeted sanctions trumped over HR. As the targets are individuals so that violations also happen to be of individual character. Thus, the targeted sanctions did not really solve the problem but merely substituted one with the other. The major point of criticism on targeted sanctions has been the violation of right to access court or denial of fair trial rights or breach of right to remedy.

The targeted sanctions are castigated not just because of the legitimacy lacuna but also, they are termed ineffective. Thelack of clarity on the reasons for listing could prevent reform since the targetsmay fail to grasp what is to be reformed.This is because the body responsible for identifying targets — sanctions committee— works secretly. The ineffectiveness may also result if there a time lag between the deviant and the imposition of sanctions (Heckathorn 1990). Moreover, there is lack of clarity on what is to be monitored.At times, influential targets are chosen with a hope that they may succeed in changing the behavior of a state. However, the capacity of the targeted individual in influencing a nation's policy is dependent upon his/her place in the hierarchy of administration (Reinisch 2001: 851, Wallensteen and Grusell 2012). Thus, the overall scheme of targeted sanctions is surely different from the comprehensive sanctions but then so are the problems associated with it.

The practice of sanctions assumed critical shape in 1999 when a resolution was passed by the UNSC (No.1267) putting pressure on the Taliban regime to hand over Osama Bin Laden in connection with the 1998 attacks on US embassies in East Africa (UNSC 1999). The naming of the individual (Osama Bin Laden) in the above-mentioned resolution was not a matter of controversy but the extension of travel ban and asset freeze on individuals accused of financially supporting Al Qaeda after 9/11 attacks instigated critical responses. The relative lack of scrutiny during 2001-2002 in the phenomenon of listing individuals provided sufficient ground for the legal challenges (Biersteker and Eckert 2009: 6-8).

The judicial machinery in different parts of the world (like Europe, US, Pakistan, Canada, Turkey etc.) and at various levels has been quite active in addressing such legal concerns, hence creating a culture of *mechanism of Judicial Review*. One of the path breaking judgments on this issue was made by the European Court of Justice (ECJ) in the *Kadi II* case. In 2001, the Al Qaeda Sanctions Committee also known as 1267 Committee added Saudi businessman Yassin Abdullah Kadi's name to the consolidated list of individuals and groups associated with Al Qaeda and Taliban implying asset freeze along with travel ban. The ECJ asserted its right to review in the light of the fundamental rights guaranteed by the EU implying that the sanctions infringe fundamental rights, specifically right to be heard and the right to avail judicial review. The significance of the verdict is to be gauged also from the viewpoint of the dualist approach adopted by ECJ emphasizing the autonomy of EU's legal order from international law (Kokott and Sobotta 2012). Thus, the judicial system has emerged as an important *mechanism* to ensure accountability of UN.

Driven by criticism, Security Council has sought to bolster *transparency* (as a mechanism of accountability) in decision making procedures of the sanctions committee. Accordingly, the UNSC passed a Resolution No. S/RES/1822 (UNSC 2008) that permitted humanitarian exceptions to sanctions and established a procedural focal point where delisting and derogation requests could be submitted. The UNSC also sought to ensure that the listed individuals' nationality and host country were notified. The resolution also urged countries to provide a list of reasons for which the concerned individual or group is listed, the summaries of which were to be uploaded on the Sanctions Committee's website (UNSC 2008). Nonetheless, the uploaded summaries have been described by the General Court in the *Kadi II* case as "general, unsubstantiated, vague and unparticularised" which lack evidentiary standards (ECR 2010: 157). In an attempt to institutionalise transparency, the Office of 'Ombudsperson' was created in 2010 that sought to impartially review the requests for the removal of names from the list created by the Committee (UNSC 2009). However, the General Court has opined that this office lacks final decision making capability and ultimately removal of names requires a political consensus in the Sanctions Committee (ECR 2010: 128).

An interesting political process (can be referred to as a *mechanism of political accountability*) has unfolded in which the UNGA has taken initiative through its Resolutions questioning unilateral economic sanctions, such as the US arms embargo on Cuba, setting the culture of accountability. Inspired by such initiatives, other UN bodies like the Sub-Commission on the Promotion and Protection of Human Rights urged the Human Rights Commission to recommend to the Security Council that import of civilian goods especially food and pharmaceutical supplies should not be hindered. The task of securing the accountability of the UNSC has been shared by a variety of non state actors like Amnesty International owing to their increased voice in the post-Cold War period. Scholars like Kanetake (2008) call such dynamics as *mechanism of community accountability* where elements of civil society, like epistemic communities, seek to ensure accountability of decisions taken by the UNSC. One such method is the critical review of such decisions that may disturb the public reputation of the UNSC and may even make execution of decisions more difficult.

UN Peacekeeping Missions and the Issue of Accountability

The last decade of the twentieth century has brought to surface both quantitative (increase in numbers) as well as qualitative (from peacekeeping to peace building) changes in the area of UN peacekeeping (Shraga 2000, Dekker 2005: 84, Stumer 2007). However, the matter of controversy is not the change per se but the large scale HR violations that it has brought forth in missions like Congo, Eritrea, Kosovo, Somalia, Liberia etc. (Murphy 2006, Shraga 2000, Odello 2010, Ndulo 2009). Thus, the cause of concern is the impunity with which UN peacekeepers operate since they are accorded immunities that cushion deviant behaviour. The UN cannot prosecute its own officials or peacekeepers; at best, it could suspend the staff and send them back home to face prosecution.

The clash between the provisions of immunity and the need for IO accountability surfaced in the *Mandelier v. United Nations and Belgium case* (1966). Mr. Mandelier, a Belgian national, owned property in Katanga, Congo; his property was ransacked and burned by Ethiopian troops operating as UN peacekeepers. Mr. Mandelier demanded compensation for the loss from the UN. Although his claims were rejected by the Court of First Instance and later by Court of Appeals of Brussels on the ground

that IOs are immune from its jurisdiction (Court of First Instance of Brussels 1966, Court of Appeals of Brussels 1969), it is worth noting that in this judgment, the Court of Appeals deplored the existing state of affairs since in the Court's view it goes against the *Universal Declaration of Human Rights* (Zwanenburg 2008: 23-24).

The human rights law has also been strengthened in the international plane wherein right to remedy has also become a part of it. In practice, it entails claims for reparation and duty to account for the damage inflicted on third parties (Dannenbaum 2010: 120). The UN has responded to the issue of accountability gap by adopting both redressal and preventive measures. The redressal mechanisms include the *UN Model Status of Forces Agreement* (SOFA); *Local Claims Review Boards*; *Office of Internal Oversight Services* (OIOS); and prosecution in countries of origin. The UN Model SOFA is concluded between the UN and the host state. It has two main features – privileges or immunities; and claims settlement (UN 1990, Zwanenburg 2008: 27).

The Model SOFA was realised in conformity with Article 29 of the *Convention on the Privileges and Immunities of UN 1946*. However, the practice is at odds with the promise since the originally mooted [Standing Claims Commissions] have not been formed; instead UN has created "local claims review boards". The Standing Claims Commissions are a part of the UN Model SOFA signed between the host state and UN as a means to settle disputes or claims yet UN has never created such commissions. The major flaw in the review boards is their lack of inclusiveness as they do not include representatives of the host state. Moreover, the UN has restricted the scope of entertaining private claims on the grounds of "operational necessity" and "limited liability" (UN 1946, Zwanenburg 2008: 28-30).

Among all forms of HR violations, the cases of large scale sexual violence have attracted the strongest criticism. On matters relating to sexual violence, the *Office of Internal Oversight Services* (OIOS) has emerged as a significant investigative agency buttressing the accountability system. The OIOS is a central UN wide mechanism formed in 1994 to "enhance oversight functions, in particular with regard to evaluation, audit, investigation and compliance." One of its explicitly stated aims is to bring about "a culture of accountability" (Pallis 2006: 888-889, UNGA 1993).

The scope of human rights violations has undergone unprecedented growth and intensity since the Sierra Leone and Congo operations in 1999. Following calls by Save the Children and UN High Commissioner for Refugees (UNHCR) in countries like Sierra Leone (1999), Congo (1999) and Liberia (2003) etc. coupled with investigations of OIOS, the General Assembly passed a Resolution 57/306 requesting the Secretary-General to report on such crimes. The department of peacekeeping reported 24 cases in 2003 and disciplinary action was taken against the personnel. Even greater international outcry was witnessed in the *United Nations Organisation Mission in the Democratic Republic of Congo* (MONUC) when cases of large scale sexual violence were reported. Statistically, 121 cases were reported by the Secretary-General in 2004 across missions which are more than double the 53 allegations reported in 2003. The Secretary-General reported a staggering 340 cases of sexual abuse in 2005. The number dropped in 2007 with total 59 cases reported across missions. The UN explained this drop as a result of progress made in creating legal framework as well as the result of awareness campaigns (Ndulo 2009: 142). The drop reported should not hide the fact that huge number of cases goes unreported. Moreover, later in 2007, 800 peacekeepers were suspended in Cote d'Ivoire on grounds of engaging in sex relates crimes with minors (Ndulo 2009: 143).

In cases of abuse by the peacekeepers, the UN lacks jurisdiction to prosecute the concerned staff on its own. At most, UN can send the concerned staff back home with the hope that the staff will be prosecuted in the country of his origin. Establishing a central monitoring mechanism in order to track the process as well as outcome is one suggestion made to ensure prosecution (Murphy 2006: 532, 542).

As a preventive measure, the UN has responded to the problems of abuse by peacekeepers by promulgating documents containing codes of conduct to be followed during operations. Such documents include UN *Model Code of Conduct*; 1999 *Bulletin on the Observance by UN Forces of International Humanitarian Law*; Secretary General's 2003 *Bulletin* that aimed at protecting civilians from sexual abuse; Special Committee on Peacekeeping Operations 2005; Prince Zeid Al-Hussein's appointment as a personal advisor to the UN Secretary-General to deal with the problem of peacekeepers' abuse (Odello 2010: 351, UN 2003, UN 2005). Although a *UN Model Code of Conduct* exists for peacekeepers, it remains ineffective

due to factors such as differences in the legal system of countries. Therefore, scholars suggest the creation of a proper UN Court with a special criminal code (Ladley 2005).

Recognising the seriousness of the growing incidents of sexual violence, then UN Secretary General Ban Ki Moon stated "The United Nations, and I personally, are profoundly committed to a *zero-tolerance policy* against sexual exploitation or abuse by our own personnel. This means zero complacency. When we receive credible allegations, we ensure that they are looked into fully. It means zero impunity" (UN peacekeeping website 2015). The policy provides a three pronged strategy– prevention of misconduct; enforcement of UN standards; and remedial action.

Since accountability has different meaning at different levels and in different contexts, it is important to specify the idea of accountability explored in this study. In the context of IOs, scholars like Keohane (2002:14) use the term 'accountability' in two ways – internal and external. The former implies accountability of IOs towards member states while the external accountability is oriented towards stakeholders like transnational advocacy networks (Koenig-Archibugi 2004: 236). The internal accountability is also referred to as political accountability where the member states could exercise control by measures like voting rights, withholding funds etc. The external accountability is one in which the question of harm suffered by third parties and the remedies available are the focus. This view regards accountability as an ongoing process and conceives accountability from the perspective of stakeholders than those who have formal authority over it (Reinisch 2001: 134, Dahl 1999: 23). The external accountability is defined as "accountability to people outside the acting entity, whose lives are affected by it" (Keohane 2002: 14-15). This study uses the term accountability in reference to external accountability i.e. UNSC's accountability to individual victims.

The intent is to address the literature gap in which the accountability of IOs and particularly UNSC is envisaged from the perspective of those stakeholders that bear the impact oftheir decisions or actions but lack mechanisms to raise their concerns. Unlike traditional approaches that conceive IOs in relation to their member-states, this approach explores the relationship between UNSC and individuals in a paradigm of external accountability.

The increased role of UNSC in the post-Cold War period directly impinging upon the conditions of individuals specifically through tasks like targeted sanctions and peacekeeping operations has already been academically acknowledged (Kanetake 2008: 114, Kulessa and Starck 1998: 144, Reinisch 2001: 851). Moreover, there is already a consensus in the academic community that perceives the problem of accountability deficit in UNSC sanctions regime and peacekeeping missions as a part of the broader issue of accountability gap of IOs in general (Muller 2006, Jacoiste 2010: 279). These scholars have already raised critical voice on the status quo and commented on the lack of accountability in the functioning of UNSC. Acknowledging the above problem, this study is crucial to elaborate on the problem of accountability gap that sustains along with ever expanding role of UNSC in global affairs.

As Hoffmann and Megret (2005: 49-50) put it, "Nothing is more contradictory than UN transgressing human rights law". This study is necessary to establish the emerging consensus on the application of human rights law on the functioning of IOs in general and the UN in particular, which now appears a matter of utmost urgency. Moreover, this study is essential in order to understand the different ways in which human rights have been violated by UNSC in the post-Cold War era.

This study is also essential to understand change and adaptation in the functioning of IOs. Both the smart sanctions and the peacekeeping missions are not mentioned in the UN Charter but can be explained as creative responses implemented by the UN to deal with challenges not envisaged during the formation of the Charter.

It must be noted that the work on IO accountability is largely perceived either from the prism of their accountability to the member states or the internal mechanisms such bodies created with an aim to raise transparency. This study aims to elaborate on the idea of accountability from the stakeholders' approach. These stakeholders are not the member states but the individuals impacted by the IO activities. This study also challenges the conventional understanding of IOs as problem solvers in the light of the growing abuse exercised in its name.

In terms of scope, the study is structured to reflect upon the changing dynamics of the UN and the idea of accountability in the 21st century. The literature on accountability covers all types of IOs – universal, regional, financial, International nongovernmental organizations (INGOs) etc. In order to keep the scope limited, this study engages with the problem of IO accountability in the context of UN. Within UN, the issue of accountability has surfaced in different organs and bodies; this study is limited to understanding accountability of UN in the context of the UNSC. The study leaves out matters of accountability pertaining to internal functioning of UN like managerial accountability. This work focuses upon the dynamics between UNSC and people in general that are influenced by its decisions and leaves out traditional approach towards accountability featuring dynamics between member states and UN. In terms of the time period, this study largely focuses upon the functioning of UNSC between 1999 and 2014. It was in 1999 that UNSC passed a resolution number 1267 targeting individuals (by invoking its mandate to maintain international peace and security) generating controversies on account of HR violations. Moreover, cases of HR violations by UN peacekeepers have been increasingly reported since Sierra Leone and Congo operations in 1999. From the perspective of mechanisms, the study shall be limited to analyzing as to why the accountability mechanisms created prior 1999 failed to prevent HR violations and how effective are mechanisms formed post 1999. Initially, this study was mooted to cover the developments for a period of one decade (1999-2009) but in the light of the formation of the 'Office of Ombudsperson of the UNSC's 1267 Committee' in 2010; its scope has been expanded to one and a half decade (1999-2014) in order to assess the effectiveness of this Office as a mechanism of UNSC's accountability.

Keeping in view the aforesaid aim, rationale and scope, this study attempts to answer the following research questions. How does the international legal framework accommodate the issue of IO accountability in general and UN in particular? Are IOs in general and UN in particular bound by the obligations of human rights law? Why has the accountability of UNSC become a matter of serious concern post-1999? Who are the accountability seekers or holders in the post Cold War era especially since 1999 and how are they different from the ones during the Cold War period? Why have innovative measures like targeted sanctions and peacekeeping missions authorised by the UNSC resulted in large scale human rights violations? What are the

mechanisms adopted by the UN to deal with the problem of accountability deficit in both targeted sanctions and peacekeeping operations? How effective are these mechanisms in meeting the expectations of accountability holders? The study answers these research questions and tests the below mentioned hypotheses.

1. The growing irresoluteness of the international community concerning the inviolability of the human rights regime has resulted in a United Nations Security Council that is more responsive to the demands for accountability.

2. Although human rights violations have been reported in case of both targeted sanctions and peace keeping operations, the accountability mechanisms created in the latter case are likely to be weaker than those in the former owing to the presence of immunities accorded to peacekeepers.

The process of conducting the research or the research methodology includes qualitative research methods. The study answers the research questions by making use of extensive secondary sources - books, journals, published articles, thesis and dissertations etc. The primary documents in the form of resolution of IOs, their reports, court judgments, legislative acts etc. have been adequately incorporated. Interviews of the field visit (New York) have been employed to add first hand primary dataand to put in a better perspective of the working of the UN as well as the various accountability mechanisms set up by it. Internet is also used to update the research content.

The structure of the book includes six chapters including respective chapters on introduction and conclusion. The Chapter 1 entitled as- 'Introduction'- provides the background of the study along with the brief on the themes of the chapters that the rest of the thesis contains. This chapter also touches upon the research methodology, relevance, scope and rationale of the study. The Chapter 2 entitled as- 'International Organizations and the Issue of Accountability in the Post-Cold War Era: Theoretical and LegalReflections' deals with various theoretical strands and legal debates concerning the issue of UN accountability. It problematises the traditional provisions of international legal framework pertaining to the matter of IO accountability by showing evidences of the disservice to the cause of UN that such provisions have

done. It highlights the distance between the traditional provisions and the needs of the contemporary times. The Chapter 3 entitled as 'United Nations Security Council and Human Rights Law' analyses the relationship between UNSC and human rights law by covering arguments against and in favour of binding UNSC to this branch of international law. Specifically, it focuses on the reasons for the emerging consensus that emphasize the HR obligations on IOs especially UN. The Chapter 4 of this study is entitled as- 'The Issue of Accountability and UN Targeted Sanctions since 1999'. This chapter studies the evolution of targeted sanctions since 1999 as a means to tackle new challenges like terrorism by UNSC. It identifies the ways in which the practice of targeted sanctions has violated HR law. Finally, it examines the effectiveness of mechanisms adopted by the UN to address accountability gap. The Chapter 5 entitled as -'The Need for Accountability and UN Peacekeeping Operations since 1999'deals with the peacekeeping operations since 1999 as almost all of them represent HR violations at a massive scale. The focus is to identify reasons for such violations and evaluation of accountability mechanisms (both redressal and preventive) created by the UN. The Chapter 6 is a 'Conclusion'. It summarises the thesis by highlighting key findings of the research and conclude by showing the scope for further research.

CHAPTER 2

International Organizations and the Issue of Accountability in the Post-Cold War Era: Theoretical and Legal Reflections

Introduction

This chapterexplores and establishes the conceptual framework concerning IO accountability from the perspective of International Relations (IR) as well as International Law (IL) scholarship. It exploresthe reasons for the increasing insistence on IO accountability in recent years contrary to the conventional wisdom that IOs are problem solvers and must enjoy benign power. Given the state centric focus of IR along with the similar premise of IL, significant light is put on the factors that complicate the question of IO accountability. Finally, the chapter covers the contemporary developments or responses in the field of IL and global governance to address the gap of IO accountability.Overall, this chapter looks at the problem of accountability in a post-state centric global context wherein IOs are persistently flexing their muscles.

1. Accountability of International Organizations: A Conceptual Framework

Accountability at a systemic level needs to be reconceptualised in a manner that domestically oriented expectations are modified to meet the realities of world politics. Theoretical attempts have been made to understand the problem of accountability at the international level; however their focus remains on political accountability. Conventionally, accountability has been conceived as an aspect of a democratic set up. Dahl (1999) stipulates five criteria of a democratic polity – effective participation, voting equality, enlightened understanding, control of the agenda, and inclusion of adults. Ku and Jacobson (2003) conclude that four of these five criteria except enlightened understanding can be met only at the national level. Thus, the model of accountability created by Dahl for a domestic setting is inapplicable in case of international institutions in particular and world politics at large (Keohane 2003: 1122).

The democratic accountability picture at the global level is blurred due to the relative absence of a 'global public' when viewed in comparison to a domestic set up where we have a domestic public. The presence of such a 'global public' would requirea well-defined political structure along with an 'imagined community' encompassing global diversity (Anderson 1983). Instead, a loose global civil society exists with multiple voluntary associations but nowhere close to the imagination of a global public. As a result, we are left with two options – first, to accept the dictates of undemocratic IOs as a price for managing globalization with a hope hanging upon the intergovernmental networks as intermediaries pursuing accountability of IOs. Second, demand the strengthening of national sovereignty based on the insight that democracy is achievable only at the national level (Keohane 2006: 77-78). Both these options produce sub optimal results as globalisation offers advantages that states are not equipped to make use of without international institutions. To combine interdependence with a lack of accountability is to create a deadly combination. But before we start discrediting globalisation and reverting toreorienting ourselves exclusively to the national level, it is important to create mechanisms of accountability at the global level so that the benefits of globalisation are reaped appropriately (Keohane 2006: 77-78).

Accountability as a matter of necessity has been raised from different political positions. When the WTO was formed in 1995, left wing NGOs castigated it as a body with unaccountable bureaucrats while in 2000, few politicians with rightist orientation demanded that bureaucrats running IOs must be subject to better scrutiny (Wolfe 2012: 7). The flipside of the high publicity that the term accountability has attracted is that it has become a magic concept and its invocation is enough to highlight its significance (Pollitt and Hupe 2011). Contrary to such belief, the idea of accountability has remained unclear (Wolfe 2012: 7). This is despite that the investigations on the concept of accountability is not a new phenomenon.

The concept of accountability has been a subject of inquiry since ancient times i.e. during ancient Greece system (Borowiak 2011). In modern times, certain events like 18thcenturyAmerican Constitutional debates marks the phase of its epitome. Others like Baume (2011)locate its emergence to the political thought of Jeremy Bentham on liberal democracy. Other set of scholars perceive the need for accountability to

maintain respect for rule of law as the administrative agencies (since they do not clearly fi into the separation of powers scheme) could trample rule and harm rights of citizens (Dicey 1885, Dyzenhaus 1999: 11)

To appreciate the nuances involved in the concept of accountability, one must move beyond the conventional sanctions based approach that emphasizes punishment (Borowiak 2011: 7, Bovens 2007) as it fails to consider the different ways (including informal ones) through which it operates. Beyond conventional approach that conceives accountability with vertical ontology, it is important to recognize new outlets of accountability i.e horizontal accountability and polycentric networks. From the vantage point of IOs, accountability is more about to mandate than the traditional democratic version or in relation to socio-economic justice (Drake 2012: 25).Elaborating it, Drake remarked -

> The pertinent area of analysis for those concerned with IO accountability is whether an organization actually does what it says it will do, and whether it uses the mechanisms available to it in an appropriate way (Drake 2012: 25).

In this approach, the logical corollary is to bifurcate accountability into two parts- substantive and procedural. To sharpen our perception on accountability, it needs to be differentiated from similar looking terms or related concepts as it has already added a lot to the confusion. The notion of legitimacy is closely connected to the concept of accountability. Most scholars (Borowiak 2007, Bäckstrand 2008, Kaufmann & Weber 2010, Curtin & Senden 2011) regard accountability as a variable bolstering legitimacy. Specifically, in the context of international realm, Goodhart (2014) argue that calls for making IR more accountable instead constitute demand for greater legitimacy. This is so because there may be accountable actors that operate transnationally but they may still fall short of adequate legitimacy due to the absence of democratically elected system.

Accountability is also closely associated with transparency. Transparency has two dimensions- internaland external. The former entails participation in decision making while the latter means to what extent people that are not formally related to

organization or simply put outsiders know about the organization (Bonzon 2008: 759). In most cases, transparency becomes an issue when IOs are criticised for the lack of external transparency in their working models (Bonzon 2008). Transparency is important because making an organization accountable without having reliable information is impractical (Steets 2004: 12). Nevertheless, it must be clearly understood that transparency alone is not enough to make organizations accountable (Vayrynen 2003: 185, Halle e al. 2011: 4).

Often, accountability is confounded as answerability. The latter means a duty to be answerable for decisions as well as actions which exist as a salient aspect of a broader issue of accountability (Newell 2008: 124). Lagasse (2010) illustrates this in the context of defence.Accountability in terms of transparency is a problematic proposition as far as defence establishments are concerned. In these situations, instead of people holding military leaders directly answerable, a system exists in which people hold their democratic representatives accountable and the latter hold defence personnel accountable.

Another closely related term with accountability is responsibility. While the accountability originally relates to the rendering an account, concept of responsibility entails a richer and broader connotation (Martin 1996: 2). It presumes that actions or inactions of an individual or entities have repercussions which spills into responsibility — atleast moral if not strictly legal. Gregory explains the difference between responsibility and accountability as follows —

> much more so than accountability, responsibility will usually place a burden of choice on a person; it may sometimes give rise to agonising moral dilemmas; it always demands a capacity for reflective judgement. A person, official or whomever, may give an account of the choices made, but responsibility requires one to contemplate reasons for those choices and to live with the consequences that flow from them. In this sense, therefore, accountability is a necessary but by no means sufficient component of responsibility (Gregory (1995: 19).

Another subtle difference between these two related concepts is that accountability necessarily constitutes an element of answerability to someone but an individual may be responsible for something without being answerable to someone for it (Mulgan 1991).

Accountability is also different from 'inclusion'. The IOs like IMF, WTO, World Bank etc. have been criticised for not been considerate towards the citizens of the developing world. The NGOs, civil society movements, advocacy groups, individuals etc. have been at the forefront of these criticism. The inclusion centric critiques levelled against IOs are related to accountability but are not proper accountability critiques. Also, these criticisms may not necessarily indicate who is responsible for such exclusionary practices within IOs. At some point, it is states as actors in the IOs, appear as more convincing targets of non-inclusive IO functioning (Borowiak 2011: 146). The questions of inclusion and global justice need not be confused with IO accountability over a specific mandate (Drake 2012: 15).

Discussions on accountability should be based on the basic premise that "People dislike being held accountable. Everyone seeks to hold others accountable, but few of us really want to be held accountable ourselves"(Keohane 2006: 79).Generally speaking, people resist accountability since it involves a 'power relationship'. To be accountable implies that one's autonomy is constrained. It should not come as a surprise that power wielders whose urge for power is greater than an average citizen are more likely to resist accountability. Thus, accountability relationships inevitably involve conflict. Any thought of constructing an accountability model at the global level should be grounded on this insight (Keohane 2006: 79).

The democratic model applied domestically cannot be applied at the international level due to differing conditions. The modification of the democratic model in order to make it more suitable at the global level must begin with the recognition that 'information' plays a key role in facilitating international cooperation. Functionally speaking, democracy at the global level (in contrast to the domestic level) should have relatively less ambitious goals like preventing abuse of power (Held 2004). The notion of accountability at a global level must also embrace a multiplicity of actors beyond states like IOs, MNCs etc. The accountability model at the global level should

be designed within a 'pluralistic accountability' framework in which a variety of accountability mechanisms like fiscal, legal, market, peer, reputational etc. function (Keohane 2006:75).

Keohane's model conceives accountability as a relational concept between the power wielders and accountability seekers; it is effective when the latter possess relevant information as well as enjoy the ability to sanction the former (Keohane 2003: 1125-1126). Hence, the issue of accountability at the global level entails complex relations involving those who delegate power, those who make decisions, and those who feel the consequences. These relations are grounded on seven accountability structures– hierarchical accountability, supervisory accountability, fiscal accountability, legal accountability, market accountability, peer accountability and public reputational accountability (Grant and Keohane 2005).

Hierarchical accountability is one which is exercised over staff members by the superior executive heads of the organization. The powers of supervisory and fiscal accountability are enjoyed by the member-states over an inter-governmental organization. Accountability does not necessarily showcase superior-subordinate relationship. In this sense, peer accountability is one which is exercised by one organ of the organization over the other (Grant and Keohane 2005: 7-9). The idea of reputation as a mechanismof accountability (both for states as well as IOs) has been of interest among scholars. From the rational choice framework, Andrew Guzman (2008) argues that states keep their commitment as they have an incentive to be perceived as trustworthy. This enhances their image and increases the likelihood of cooperation from other states in future. In the cost-benefit analysis, states compare short term cost of compliance with the gains that will be attained in long term. Another explanation of states compliance is rooted in the 'reputation as esteem' approach that explains compliance as a result of feeling of obligation emanating from the fact of membership (Franck 1990). Given the increasing activities of IOs and more so due to its negative spillovers— like SEAs in peace operations, IMF conditionality based loans involving element of austerity measures having impact on citizens especially elderly as they face pension cuts etc.— scholarly attention has shifted towards examining the importance of reputation for IOs (Daugirdas 2014).

If an organization fails to discharge its responsibilities, there is sufficient ground to believe that it would comply if pressure is built through naming and shaming (Benner et al. 2004, Grant and Keohane 2005,Naiki 2009, Gillies 2010). The reputational concerns serves an activemechanism in securing compliance when legal enforcement is not possible. They have proved to be of vital significance in making NGO operations more accountable (Raggo 2011).

IOs face criticism for their failure – partial or complete – to carry out their mandate. NATO in Afghanistan (2001-2014),UN in a large number of peacekeeping missions (like DRC during 1999- till date), regional bodies like the African Union in Somalia (2007- till date), IFIs like IMF during the 1997 Asian Financial Crisis etc. to mention just a few examples. Two important questions arise – Does criticism influence the behavior of IOs?[27] If it does, can it act as an accountability mechanism? To answer these questions, it seems imperative to look at the role of criticism in state behavior. States try to avoid criticism as it has a negative influence on their reputation. Consequently, most incidents of compliance in international relations are carried out in the absence of coercive instruments. However, this is not to suggest that coercion is not applied at all. Incidents like WTO decisions, suspension or expulsion of members from IOs for violating norms i.e. Syria's suspension from Arab League in 2011 for not halting its crackdown on demonstrators, UN authorized sanctions etc. are not uncommon to notice in international affairs (Johnstone 2010).

It is well established that like states, IOs are capable of doing harm as well as good. Illegal or immoral acts of IOs have not been adequately addressed because the immunity of IOs prohibits prosecution. However, following the conclusion of the decades old project on Articles on State Responsibility (ASR) for Internationally Wrongly Acts in 2001,the ILC undertook another related but much needed assignment on establishing general framework covering the question of IO responsibility. It culminated in the form of ILC's Draft Articles on the Responsibility of International Organizations (DARIO)promulgated in 2011 with Giorgio Gaja as a Special Rapporteur. From the legal perspective,it is a promising attempt to fix the gap of legal accountability of IOs, however, it should be remembered that IOs are highly

[27]One of the instances where criticism played a critical role in unleashing innovation in IOs is the setting up of the Inspection Panel by the World Bank in 1993 after Sardar Sarovar project.

politicized bodies and any framework of legal accountability is likely to fall short of addressing the accountability deficit of IOs in a comprehensive manner (Johnstone 2010: 237). Given this background, it is worth asking whether factors like reputation may produce some sort of IO accountability.

It is easy to imagine that executive heads have an interest in keeping organizations on track as any deviant behavior on the part of theirsubordinatesimpacts their reputation. Just like these individuals, even member states avoid depletion of their reputation. However, it is easier to pass the buck in collective decision making and therefore reputational accountability may be relatively less effective in these situations. Nevertheless, it is interesting to investigate whether IOs as corporate bodies care about their reputation(Johnstone 2010: 238).

The Iraq case of 2003 seems to provide some answers. While UNGA, US President George W. Bush accused Iraq of several illegal acts- developing Weapons of Mass Destruction (WMDs), supporting terrorism, committing HR violations, misusing 'Oil For Foods' receipts for acquiring weapons etc. While the acting under UNSC resolution no, 1441 (2002), the UNSC soughtIraq's compliance (UN 1992). However, US did not seem impressed by the steps taken Iraq and thus sought coercive measures.At this point, US called for second resolution authorizing military measures that would be tantamount to war. There is a strong reason to believe that the second UNSC resolution in the context of Iraq was not tabled before the UNSC out of reputational concerns. Some members of the UNSC feared that a resolution authorizing heavily militarized intervention would lead to a severe reputational blow to the UN (Johnstone 2004). When President Bush of US was keen to introduce the aforesaid resolution, Spain and France urged him not to do so and France declared its intention to veto the controversial draft. Both France and Spains realized the futility of a vetoed resolution because it would do more harm to UN's credibility than no resolution (Johnstone 2010: 238).

Since the US had already made the decision to wage war against Iraq, it was felt that Bush should go ahead with the decision on the basis of the already passed and less controversial resolutions. Richard Haas, the then director of policy planning in the US State Department opined that —

> byavoidinga vote on the second resolution [n]ow we can argue that we are actingpursuant to the UN**,** in [Resolution] 1441. This is a way, I believe, quitehonestly, of preserving the UN'spotential viability in the future. We've notdestroyed it (Lehman 2003).

Thus, it can be argued that both US and France had an interest in preserving the credibility of the UNSC, which would be needed for dealing with crises elsewhere. It would be fair to assume that member states – especially the powerful ones – share an interest in preserving the reputation of the IOs atleast till the time informal bodies like G20 become more significant sites of decision making. Overall, it can be said that even if reputation acts as a moderate accountability device, it would relieve some burden from the legal dimension of accountability (Johnstone 2010: 239).Other accountability mechanisms proposed by Keohane and Grant have also been a matter of discussion.

An example of market accountability can be illustrated as follows. The UN Global Compact is a measure to make MNCs more responsive towards the interest of the general public by creating a system of rewards and punishment (Ruggie 2004). Markets act as an effective mechanism to hold powerful MNCs accountable. The MNCs are responsive towards the consumer market and fear consumer boycott. For instance, the tankers owned by the companies of high brand name are safer than those held by local entities (Mitchell 1994).

Accountability as a concept and practice showcases range. At times, accountability is exercised as a part of the regular proceedings while in other cases accountability requires strict monitoring and enforcement. At one level, accountability is reflected as answerability. Leaders and officials are expected to be answerable for the decisions and actions they take. The transparency level needs to be maintained in consonance with the needs of confidentiality over certain matters such as national security. Moreover, the thought of accountability is pointless in the absence of enforceability i.e. if political leaders can disregard a court ruling, this surely amounts to a mockery of democratic accountability (Caplan 2005: 464-465).

As a practice, accountability does not always require strict punitive provisions. At times, even disclosure of information is enough to create accountability e.g. such disclosure may result in resignation over conflict of interest or bring shame if the concerned individual or entity is obligated to divulge the truth in front of a truth commission. There are situations where accountability is sought in the absence of punitive mechanisms like obligation on the central banker to explain the reasons for interest rate adjustment in front of the parliamentary committee (Schedler 1999: 14, Caplan 2005: 465).

A trend is visible in international politics in which the term 'punishment' is getting extinct in the accountability discourse with its replacement with other more "acceptable" terms like regulation. The 2011 UNSC's Libyan intervention illustrates this point. The UNSC authorized Libyan intervention in 2001 was projected as a set of 'preventive' measures aimed at protecting civilians. Due diligence is paid to ensure that the resolution no. 1973 (2011) should not appear as a challenge to either Gaddadi administration or Libyan state (Blum 2013). Similarly, when EU imposed sanctions on Iran for its controversial nuclear programme, it was made clear that these measures were not meant to be against Iranians but would remain unless Iran comply (Press statement 2012).

This observation is not an isolated event but rather a represents a gradual move away from the lexicon of guilt to one of threat and responsibility. Instead of emphasising coercion, this new vocabulary prescribes steps as preventive or regulative in character. The legitimate use of force in IR is allowed either under self/collective defence or through UNSC authorisation with an aim to attain international peace and security. In case of measures not involving direct force like sanctions, the urge to punish the deviant state is no longer explicitly made and instead sanctions are portrayed as preventive or regulatory action (Blum 2013).

In consonance with this trend, the idea of punishing the state has been replaced by the trend towards punishing the individuals in the form of targeted sanctions.The authorisation of "preventive" military intervention in Libya was preceded by the individual measures like referral of Gaddafi's case to ICC, travel restrictions on Gaddafi's key officials and affiliates through UNSC resolution no. 1970 etc. (UNSC

2011). Thus, the current legal discourse now largely rules out the possibility of identifying criminal states, instead in a more benign form, criminality is associated with individuals who commit crimes in the name of the state. However, hidden behind such preventive or regulatory jargon is the act of punishment i.e. Christian Science Monitor suggest that EU's sanctions on Iran are meant to be punishment. It appears that the current legal discourse does not proscribe punishing states, instead it prohibits its admission (Jorgensen 2000).

Blum (2013: 60) argues that this shift in the vocabulary is driven by the broader agenda of privileging international peace and security over justice. Atleast four reasons can be identified that is causing this change —

> the fear that punishment may invite revenge and further punishment; an aversion to collective punishment;principle of sovereign equality as an organizing principle of the international system; the absence of international mechanisms to enforce a rule of international law (Blum 2013: 60).

The preference for the peace correlates with preference for prevention as punishment (even though a necessary aspect of justice) is expected to aggravate conflict. The major thrust of this change is to disguise the elements of retribution and punishment in a conceptual prim of prevention and regulation. Nonetheless, this substitution does not necessarily transform world into a conflict free zone.

Today's global system increasingly reflects joint and coordinated actions (like R2P[28] oriented interventions) than independent ones. The actions are shared by a plurality of actors or the existence of different actors while the question of responsibility in the international realm remains single actor centric. Various situations like the failure of the international community to militarily intervene and save people from mass atrocities demand the joint responsibility of states as well as of IOs.If two or more states along with an IO (i.e. UNHCR) undertake the responsibility of allocating

[28]Responsibility to Protect (R2P) is a refined version of the norm of humanitarian intervention in international affairs. The latter had been a source of controversy as some accused that powerful states use it as a pretext for their political motivated adventurism. The concept of R2P was put forth to strike a balance between the norm of inviolability of sovereignty and the desirability of protecting HR. For detailed study on R2P See pg.69.

refugees but one of them fails to fulfil this responsibility, then who should be held responsible –the underperforming entity or others too for the overall failure of the mission? Another situation could be when peacekeepers intervene under the banner of an IO and commit humanitarian crimes or human rights violations, then how to apportion responsibility between the troop contributing state, the authorizing IO and the accused peace keeper(s). Given the relevance of joint action, the probability of harm on the people has also multiplied and therefore the call for'shared responsibility or accountability'seems obvious(Nollkaemper and Jacobs 2013: 361-362).

In the words of Brownlie (2008), the state of international law on the question of shared responsibility is at best indistinct and does not offer clear guidance. The current HR law is state centric while variety of non-state actors especially IOs and MNCs influence the enjoyment of economic, social and cultural rights. Although certain developments have taken place at international level like Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)[29] yet these legal initiatives do not narrow the accountability gap in the globalized world (Vandenbogaerde 2016).

To address this gap, a new paradigm is needed that relaxes the assumption that claims for responsibility arise due to the acts of independent individual actors at a time. To undertake this task, one needs to be conscious of the content as well as the nature of obligation and the principles of responsibility likely to be applied (Nollkaemper and Jacobs 2013: 363).

Responsibility can be conceived in two stages – ex ante facto and ex post facto. The international community has certain obligations in various forms like R2P or the Stockholm Declaration 1972 towards preventing environmental damage. These fall in the category of ex ante responsibility as the emphasis is upon preventing abuse. The ex post constitutes situations where damage is already being done and the efforts are aimed at providing relief (Nollkaemper and Jacobs 2013: 365).

[29] The OP-ICESCR is an international treaty through which the victims whose social, economic and cultural rights are violated can petition at international level. It works on the principle of exhaustion of domestic remedies implying that victims can raise the issue internationally only if they fail to get justice within their country. This mechanism is available only to those individuals whose country has acceded to the treaty. The protocol is constitutive of 3 procedures — complaints procedure, inquires procedure, and inter-state complaints procedure.

The practice of joint or shared accountability are a common feature of working methodology adopted by variety of actors. In a democratic municipal order, ministers are collectively responsible for the decisions and actions of the government. The performance of different tasks in various domains i.e. economic, environmental, social etc. stipulates collective action by multiple bodies. In such projects, positioning of accountability becomes a mammoth task (Boston and Gill 2011).

Conceptually, shared responsibility is different from the conventional perspective on responsibility (individual responsibility). Shared responsibilityis based on the responsibility of multiple actors – States, IOs, individuals, MNCs –towards a single harmful outcome. The nature of the damage could be material or non-material. Importantly, the harm in question cannot be causally attributed to one entity. While the harm cannot be individually attributed by identifying a clear-cut causal link, the responsibility is shared (Nollkaemper and Jacobs 2013: 366-368). Various international activities like peace operations are reflective of situations where multiple actors like UN personnel, regional organizations, INGOs etc. are engaged in a completion of international assignments.

The concept of shared responsibility should be distinguished from the term 'shared accountability'. The latter constitutes a situation in which multiple actors are held to account for violation of international norms but they may not necessarily be formally [regulated by internationally wrongful acts]. The scope of international legal framework in covering all actors capable of committing international wrongfulness acts falls short of the requirement. Thus,[shared accountability is relevant for actors that might besubject to international obligations but fall outside the scope of the current international legal architecture on matters of responsibility] i.e. ASR (2001) and DARIO (2011) do not provide for establishing international responsibility for these actors. One such prominent actor are rebel groups that are bound by international humanitarian law but international law has not brought them into the fold of international responsibility arising out of international wrongful acts. Shared accountability may be attained through quasi-judicial and political processes with the motive of securingthe compliance of the actors involved in joint action(Nollkaemper and Jacobs 2013: 369).

There are a number of trends that have made the notion of shared responsibility a matter of significant attention. [First, the growing interdependence among various actors in global affairs. Second, an enhanced sense of moralization in global affairs due to relaxation of strict realist paradigm as a sole guideline to international conduct. Third, heterogeneity implying that multiple actors operate in global affairs. Fourth, enhanced permeability between national and international legal order i.e. recognition of individual as a subject of international law(Nollkaemper and Jacobs 2013: 370-378).

Some of the factors that complicates the issue is the phenomenon of blame shifting, problems in bestowing rewards, difficulty in applying sanctions in case of poor performance etc. Moreover, such situations engender dip in the overall performance as some might find no incentive to engage with full enthusiasm. Nonetheless, joint or collaborative work is a necessity of which no alternative seems possible. Thus, one must sharpen the tools of accountability (Boston and Gill 2011).

The notion of shared responsibility is not completely new to the international realm. The ICJ in the *Corfu Channel Case* (1947)[30] held Albania responsible for not apprising UK about the mines laid in the Albanian waters. At the same time, the Court also held Yugoslavia responsible for laying down the mines (ICJ 1947). In recent times, the idea of shared responsibility appeared prominently in the *Legality of the Use of Force Case* (1999) in which the conduct of NATO forces in Kosovo was adjudicated on the principle of shared responsibility of NATO member states. These cases among others as well as recent attempts by ILC (in the form of Articles on State Responsibility and Draft Articles on Responsibility of International Organizations) in addressing international accountability gaps signal some presence of shared responsibility in the international legal framework (Nollkaemper and Jacobs 2013: 379-381).

[30]The Corfu Channel Case addressed the issue of Albania's civil liability for placing mines in its sovereign waters which resulted in damages to UK's two naval destroyers. The matter was taken to ICJ by UK on 22nd May 1947 in which the Court found (despite that UK breached Albania's sovereignty over its territorial waters) Albania guilty of human and material loss. On 19th December, ICJ ordered Albania to pay compensation to UK.

Atleast two major factors can be identified that facilitate the domination of the conventional form of individual responsibility. In other words, these factors have prevented the development of the doctrine of shared responsibility in IR. The first factor is 'sovereignty' and second is the necessity of 'consent' of the parties involved in the conflict before most international dispute settlement systems. State practice based on sovereignty implies that states are quite reluctant to take responsibility for the acts committed by other states. States also refuse to shoulder the responsibility of the acts committed by private persons. Thus, states take responsibility only for their own acts which means those committed by the officials who represent states (Nollkaemper and Jacobs 2013: 386). Shared responsibility is also hampered by the necessity of obtaining *consent* in most international dispute settlement tribunals or courts. For instance, ICJ's jurisdiction under Article 36(2) over any international claim stipulates prior consent of the parties to the conflict. This constrains the ability of the ICJ to attribute responsibility to multiple actors, thereby excluding IOs from their jurisdiction. Moreover, only the disputes involving states are entertained at the ICJ and this further dilutes its ability to invoke the notion of shared responsibility (Nollkaemper and Jacobs 2013: 386).

The International Law Association (ILA) in its Final report- *Accountability of International Organizations*, Berlin Conference identified three levels of accountability. First, external or internal scrutiny of the way international organizations perform their functions. Second, liability for injury, damage, loss or death because of lawful acts.Finally, responsibility for unlawful acts (ILA 2004: 5). The last two rest on the idea of 'corrective function' by which the aggrieved party may resort to a legal body for justice. Such a system is conceived from the point of view of legal accountability.

The International Law Commission (2002: 77-80) defines the term responsibility as "legal consequences of noncompliance with an international obligation by conduct that is attributable to the organization". Chesterman (2008) explains the legal and political dimension of accountability from the element of 'obligation of reasoning'. Legal accountability rests on the necessity of reasoning before making an entity accountable. Contrary to this, political accountability can be attained arbitrarily that may not necessarily involve an obligation to provide reason to hold an entity

accountable e.g. voters are not required to give reasons when they chose to replace a government by electing another party.

Nonetheless, the collective security system cannot be placed so easily under a legal framework. Accountability under collective security system is a "multifaceted phenomenon that has legal, political, administrative and financial aspects" (Tsagourias and White 2013: 345). In this sense, accountability of UNSC is viewed much more than the accounting for acts of omission or commission. The accountability identified by ILA at first level is relevant as it entails monitoring "potential abuses of power by requiring those exercising power to explain and justify their actions and face any consequences"(Tsagourias and White 2013: 345).

It is also suggested that accountability at the international level needs to be conceived as a non-legal concept "without there necessarily being a formal control or disciplinary powers". Accountability by these scholars has been characterized as an 'intrinsically non-legal concept" (Curtin and Nollkaemper 2005: 16). Anne-Marie Slaughter (2001: 358) on the other hand describes "an essentially commonsense understanding of accountability, meaning that "those who exercise power on behalf of others can be held accountable if that power is misused or abused". Curtin and Nollkaemper (2005: 4) define the concept of accountability as "the process of being called to account to some authority for one's actions".

Different writers offer different typologies of the term 'accountability'. According to Caplan (2005: 464), accountability can be categorized into two types – horizontal and vertical. The former includes accountability among equal rank holders e.g. between judiciary or media and executive. Vertical accountability exists between unequal rank holders i.e. between employers and employees. In a domestic setting, the aim of accountability is to hold power wielders or public officials accountable for their decisions, action and the outcomes of the actions. Both sorts of accountability exist in international administrative missions. Horizontal accountability operates in the form of internal audits while vertical accountability prevails when the work of the administrators is scrutinized by the secretariat or the member states of the IOs. Nonetheless, the local populace is out of this scheme of accountability.

Accountability as a concept has a direction. Upward accountability is one which flows [from top to down]. It establishes a typical principal-agent relationship e.g. UN organs and member states holding peacekeepers accountable. Downward accountability is one in which the current of accountability flows [from bottom to up] in which the less powerful seek tohold authority holders accountable e.g. the election process in democracies. Horizontal accountability exists in case of mechanisms operating among equally powerful actors e.g. between UN peacekeeping missions and Ombudsperson or Office of Internal Oversight Services (OIOS) (O'Donnell 1998).

The notion of a 'Third UN' propounded by Thomas Weiss et al. (2009)seems relevant from the perspective of the research problem (lack of IO accountability) of this study. The Third UN constitutes actors (like NGOs, scholars, external experts, consultants, independent commissions etc.) that are "inside-outsiders" of the UN and, unlike the first and second UN, mirror greater fluidity. Since they are not employed directly by the UN, these actors have the freedom to offer honest suggestions and critiques of various UN activities. In fact, the veterans in the field of government, intergovernmental and public policy fields can propose more controversial but needed reforms, something which they could not suggest while in office (UN 2009).Although the concept of the Third UN is appealing from the prism of UN accountability, it is worth asking to what extent the third UN has democratized the UN as an organization? According to Weiss, democratization is a loaded term. At best, the UN has opened itself to different perspectives and conversations. Unlike the 1970s when NGOs were kept at bay, NGOs are now active in pointing out cases of Sexual Exploitation and Abuse (SEAs) during peacekeeping which serves the cause of UN accountability. The Third UN is helpful in explaining why states are not doing anything e.g. in Darfur. Through Third UN, explanation was demanded for inaction especially because it appeared that states act only when the national and global interest coincides (Personal Interview Weiss 2017). Thus, the third UN seeks accountability in various forms like answerability.

Since the end of Cold War, due weight is given to the perspective of different stakeholders who have a significant interest in ensuring that IOs remain accountable. Within this framework, Hoffman and Megret (2005) categorize accountability into three categories – political, traditional and legal. Political accountability (or

'shareholder's approach') exemplifies arrangements like UN's accountability to the General Assembly; other aspects of political accountability include proposals to reform Security Council or Civil Society participation in the decision making of UNSC. The traditional concept of international accountability (also referred as 'victims of prejudice' approach) implies responsibility to pay damages and pertains to the material dimension. Finally, the idea of legal accountability (or 'stakeholder's approach') accommodates all those directly or indirectly impacted by the body and shares interest in making the UN responsive.

From the view point of stakeholders, Keohane (2002:14) use the term 'accountability' in two ways – internal and external. Other scholars build on this differentiation. Internal accountability implies accountability of IOs towards member states while external accountability is oriented towards stakeholders like transnational advocacy networks (Koenig-Archibugi 2004: 236). Internal accountability is also referred to as political accountability where the member states exercise control by measures like voting rights, withholding of funds etc. External accountability is one in which the question of harm suffered by third parties and the remedies available to them are the focus. This view regards accountability as an ongoing process and conceives accountability from the perspective of stakeholders than those who have formal authority over it (Reinisch 2001: 134, Young 2000, Dahl 1999: 23).Therefore, need for external accountability in the context of UN emanates from undesirable, immoral and illegal decisions or actions made by UN.

Hoffman and Megret (2005: 44-45) conceive UNSC accountability in the framework of demands raised by civil society pushing UN to become more sensitive for the repercussions of its actions. These demands find their roots in the structural and operational limitations of UNSC. Structurally, UNSC proved incapable in preventing bloodshed in regions like Rwanda, Srebrenica etc. causing HR violations of gross magnitude. In its operations, quite early during Congo intervention (1960-1964), it was reported that UN forces had breached the IHL standards. However, the lowest point of UNSC's function has come up in the form of rampant cases of SEAs across missions. Given these developments, external accountability is sought whichKeohane (2002: 14-15) defines as "accountability to people outside the acting entity, whose lives are affected by it" .

Keohane (2003) concludes that internal accountability processes are relatively stronger than external accountability. However, Strange (1996: 197) states that "the multiple accountability of CEOs to shareholders, banks, employees, suppliers and distributors, not to mention strategic allies, means that like renaissance princes, they can usually divide and rule". Therefore, according to Susan Strange, the effectiveness of internal accountability cannot be taken for granted.

Jeni Whalan's work on the local accountability in peace operations resonate with the concept of external accountability proposed by Keohane. According to Whalan, the tragedy of peacekeeping is not when they fail to meet the mandate authorized by the UNSC but rather when they end up violating the most fundamental norms that the UN stands for. The UN response to this problem is multifold – creation of Conduct and Discipline Unit(CDU), pressuring troop contributing state in carrying out fair trial of the accused peacekeepers, zero tolerance policy etc. (Whalan 2016).

These efforts however represent a narrow perception of accountability aimed at preventing abuse and redressing misconduct. It misses a more meaningful idea of accountability conceived at the local level. The concept of 'local accountability' envisages accountability from the vantage point of the locals among whom the peacekeepers operate. It entails judging the conduct of peacekeepers to a set of standards and enforcing sanctions if they are found to be lacking in their responsibilities.The idea of local accountability shifts the debate on peacekeepers' accountability in various ways – from international to local, from moral to instrumental, from narrowly defined scope of prevention and redressal mechanisms to broad principles and guidelines (Whalan 2016).

The differentiation between the internal and external dimension of accountability can also be explained from the perspective of Transnational Corporations (TNCs). The age of globalization has accorded tremendous clout to TNCs, since these bodies exercise operations across boundaries and possess the capability of impacting societies in multiple ways. A neo-imperial theoretical strand perceives these bodies as agents reversing the trend of decolonization by hijacking the policy paraphernalia in developing world. The operation of TNCs in various countries is responsible for generating an organised response from the civil society in various forms like

environmental movements, consumer associations, labour movement, women groups and even the general public (Archibugi 2004: 1-4).

Such responses from civil society pertain to the demands for TNC accountability for the impact that it leaves on the society. According to Keohane (2003), such demands for accountability are different from internal accountability relationships in which the accountability seekers demand accountability in exchange for the delegation of authority. Contrary to this, the demand made by civil society or individuals on the TNCs is grounded in the paradigm of external accountability. This kind of accountability is rooted in the argument that a legitimate demand for accountability can be placed on the entity if that entity negatively impacts the accountability seekers. Clearly, such accountability relationships are different from the domestic democratic relationship based on the processes of election (Archibugi 2004: 1-4).

To sum up, the concept of IO accountability is far from being a simple ready to use conceptual tool that may be applied without clarification. The sources of complications are many — its domestic democratic connotation; its association with similar but different terms like responsibility, inclusion, legitimacy etc.; current practices in which multiple actors work together to solve a problem like peace operations; presence of internal and external stakeholders etc. The current discussion boils down to adapting IO accountability vis-à-vis those who are affected by its decision and actions, namely, external accountability. The next section discusses the factors that have made accountability of IOs a matter of utmost urgency.

2. Why the need for IO Accountability in general and UN in particular?

This section will highlight the systemic changes that having a bearing upon the calls for IO accountability. Primarily, the focus shall be upon the era after the end of bipolarity.

2.1 Changed International Structure

Eagleton (1950) argued that the historical rules of international law of responsibility are applicable to all subjects of international law. However, he regarded the case of international organizations like the UN as slightly complicated because the original

purpose of the UN Charter did not envisage a situation in which the UN may come in conflict with the rights of other entities. This argument is augmented by the fact that UN does not have its own army, navy or air power and therefore the possibility of causing injury to a third party was not imagined. Moreover, the organization had a small population, area and trade to administer. Overall, he predicted very marginal possibility of an IO act causing injury to others. Eagleton's prediction seems highly challenged in the light of the immense role that IOs play and the massive injuries they are capable of committing. Francisco V. Garcia-Amador, the first special rapporteur of the ILC, had a more realistic understanding of the role of IOs in world affairs and its legal implications. He asserted that the non-performance of obligations constitutes breach of international obligations and therefore invokes responsibility (UN 1956).

One of the general principles of law entails that an injury caused by an entity invokes a corresponding obligation. This condition has been a feature in case of private entities and progressively it has been expanded to cover government authorities. Internationally, this is reflected in the doctrine of state responsibility. In this background, there seems to be no cogent reason to not apply the same principle on IOs (Arsanjani 1981).

The early 20th century witnessed a renewed commitment towards strengthening the status and expanding the functional space for IOs. An act that nudges power away from states and pushes it into the court of IOs is perceived as inherently benign. Furthermore, acts that benefit IOs are conceived as symptoms showing progress of international law. The end of the Cold War has tremendously boosted the notion of strengthening IOs – especially the UN (which has been largely dormant during the phase of ideological rivalry between the US and the USSR). The functional perspective paved the way for the mushrooming of a wide variety of IOs creating regimes on issues like HR, climate change, finance, trade etc. However, the euphoria soon turned into skepticism given the pathologies that such institutions started to show. The desired objective of autonomous IOs bearing mandatesin favour of the common good came under intense scrutiny as questions of ideological bias, accountability deficit etc.gained prominence (Collins and White 2007).

Since the international realm has shown qualitative change where the conventional state-centric approach has eroded, it becomes necessary to identify the actors that share the space with states. Given the prominence of inter-governmental organizations in the contemporary era, it is easy to see why they occupy a place of prominence. However, the global realm has also witnessed the emergence of other actors like INGOs, networked partnerships, private regulators, informal groups (G7/8, G20) etc. This addition of diverse actors to the global sphere transforms the clear cut notions of accountability whereby the decision makers are held accountable by those for whom the decision is taken through a variety of institutional mechanisms like judicial review, elections etc. The increasing role of IOs in the international system is one of the crucial factors transforming the conventional nature of international law from an exclusive realm of states to one accommodating a multiplicity of actors (Wellens 2004: 1160).

The presence of global governance or global administration is evident across a diverse range of fields. Most notable instances include IMF, WTO, Financial Action Task Force, Kyoto Protocol, UN peacekeeping missions during 1999 to 2002 in Kosovo and East Timor, UNSC's sanctions committee etc. The creation and subsequent strengthening of these structures generate concerns of accountability since they are neither accommodated under the domestic legal framework nor are they subject to state centric international law (Chesterman 2008). The increasing influence of IOs since the end of the Cold War can be attributed to a mix of factors like rising instances of state collapse; forces of globalisation challengingthe monopoly of state authority within its territory; and the renewed willingness of UN to play a decisive role in world affairs (Mingst and Margaret 2000).

Global governance as a generic term encompasses interactions of various kinds and at various levels. It represents a move away from the statist model of governance where the government assumes exclusive control over different dynamics within its territory. Such a shift has altered the reality and the terms'governance' and 'government'are to be clearly distinguished. The complexity of globalization has expanded the space for the term governance which now operates at the global scale. Such expansion of space has also witnessed different modes of its operation i.e. rise of different actors acting in the realm of global governance (Scholte 2002).

State led multilateralism has, over the years,been significantly institutionalized as the IMF, BIS, WTO, World Bank etc. Such initiatives also exist in a less institutionalized form, namely G7/8 or G20 Summits. The state led process of transnational governance has also developed at the regional level in the form of regional organisations like the EU, ASEAN and MERCOSUR etc. (Scholte 2002: 288-289).

The scope of governance apart from becoming global has also permeated inside the state at the sub-state level. At local or municipal level, it can be noted that MNCs place premium on collaborating with the local government. On other matters like crime prevention, local authorities have pushed transnational connections to combat global criminal networks. The transformation of the field of governance also showcases governance by the private sector. The privatization of governance is visible in various shades like internet rules, telecommunication standards, and codes for humanitarian assistance etc. Collectively such developments mirror post-statist features wherein the state has not withered away but certainly loses its monopoly over governance (Scholte 2002: 288-289).

The forces of globalization have instigated a 'coordinated response', which is now regarded as the process of global governance. The embeddedness of IOs in the phenomenon of global governance has implications for the idea and practice of international accountability. The question of IO accountability has become further complicated as a result of its newly adopted way of functioning in collaboration with other authorities, namely 'networked governance or multi-sectoral partnership networks'. The scholarly community is divided in their evaluation of these initiatives from the yardstick of accountability and efficiency.

Annie Marie Slaughter reviewed the UN Millennium Report 2000 that talks about the desirability of goals like preventing conflict, promoting human rights, creating legitimate and effective framework of humanitarian intervention, strengthening peace operations, targeted sanctions etc. In order to achieve this end, the then UN Secretary General proposed the significance of creating 'coalitions for change' or 'global policy networks' including IGOs, NGOs, MNCs, national governments etc. According to Slaughter, despite it being a move in a right direction, it bluntly ignores the role of

national legislatures. This is surprising given the emerging importance of transnational networks like Central Bank Governors, Securities Commissioners etc. Despite all the imperfections that national leaders showcase (since they are bound by the immediate interest of their constituency rather than the long term national or global interest), national legislatures can act as a significant source of legitimacy and accountability for the process of global governance (Slaughter 2000).

From the viewpoint of the UN accountability, Slaughter (2000: 228) states:

> Recognizing the role of existing trans-governmental networks and working to integrate them with supranational and sub national actors will enhance the effectiveness of UN initiatives by reaching beyond the often insular diplomatic world of UN ambassador.

It should be noted that governance networks have been facilitated by the IOs that at times act as autonomous bureaucracies with an aim to tackle issues that cut across various levels. Hence, there is growing need to reconceptualise the notions of accountability and legitimacy in an era marked with the overlapping and competing authorities accommodating government and private actors (Backstrand 2006: 291). One of the notable efforts made to address this conceptual gap is in the form of One World Trust's project on accountability in the form of Global Accountability Project (GAP).

Many believe that one size fit all approach on the question of IO accountability is likely to be counterproductive. Accountability systems need to vary depending upon the issues, stakeholders and the context. Nevertheless, certain common factors can still play a role in effectively materialising accountability needs. The accountability model proposed by One World Trust are not a substitute but complementary to the existing national and international regulations, norms, standards etc. Although its applicability isprimarilycreated for IGOs, INGOs and TNCs but can be extended to other organizations. The framework of accountability in today's time needs to shift in favour of those who are at the receiving end of IOs activities — external stakeholders (Blagescu et al. 2005).

It is one thing to advocate accountability for IOs in theory while its practical application in absolute sense may not always be desirable. IO accountability as a feature of good governance has a limit because IOs cannot be accountable to all stakeholders with the same degree always. This may spill into accountability paralysis. It is advisable that prioritisation of stakeholders should be undertaken keeping in their influence, participation and responsibility. The GAP model conceives IO accountability in four dimensions — "transparency, participation, evaluation, and compliant and response mechanisms". Meaning accountability would occur if all these dimensions areeffective at the same time(Blagescu et al. 2005: 2).

The yardstick to measure the extent of organization's commitment towards accountability is the effectiveness of theaccountability mechanisms it constructs and the sort of reforms it carries out towards external stakeholders. This commitment can manifest in two ways —Embeddedness and Responsiveness. The former entails that the values of accountability need to seep into all functioning modalities of an organization. There should be clear understanding on accountability among the staff and necessary incentives as well as sanctions must operate to maintain its sanctity. The manifestation of accountability in the form of Responsiveness would include the likelihood on the part of the organisation to adjust according to the concerns of the stakeholders. Overall, an accountable organisation is one which that undertakes adequate pro-active and reactive measures to buttress the concerns of its key stakeholders especially those that exist outside of it — external stakeholders (Blagescu et al. 2005: 5)

To comprehend the issue of accountability in networked governance systems, it is imperative to understand the difference between input and output legitimacy. The former relates to the fairness of the procedures emphasizing participation, transparency and accountability. The latter emphasize upon problem solving capacity of the governance system (Scharpf 2001). The call for participation or input legitimacy in the global processes is grounded on the acceptance of a premise that common problems can be effectively solved in the presence of multiple stakeholders. The accountability mechanisms in decentralized, non-hierarchical, diffuse networks cannot be hierarchical in nature. The partnership networks rather need pluralistic accountability tools like professional peer accountability, reputational accountability, market accountability etc. (Backstrand 2006: 295, Witte et al. 2003: 75).

The partnership networks comprising public private mix of authorities are credited with the ability to bridge the gap between multilateral norms and local action by bringing together a diversity of actors– IOs, government, businesses and civil society. According to Haas, such partnerships are critical in filling the governance deficit, implementation deficit and participation deficit (Haas 2004). Others point out that partnerships have emerged in response to the inability of the government-oriented multilateral processes in dealing with the complex problems like climate change (Hall and Biersteker 2002, Andonova 2005: 4).

[Its] proponents also point out that the multi-sectoral public policy networks are an innovative institutional response to regulate present world affairs. These networks bring together public sector (governments and IOs), businesses and civil society on a wide variety of issues like climate change, corruption etc. (Benner et al. 2004: 191). Such networks not only enhance problem solving capacity of the stakeholders but improve societal participation while operating beyond traditional political and sectoral divisions (Wolf 2001). Observers like Keohane and Nye (2001) paint a more balanced picture of the global governance reality by concluding that the public-private networks are a response to the limits of traditional multilateralism. Nonetheless, they do not ignore the prevalence of a democracy deficit in such arrangements and suggest pluralistic models of accountability to address the problem.

Critics ridicule the idea of an arrangement being legitimate which is composed of unrepresentative elements – IOs, INGOs and TNCs (Ottaway 2001: 245). Similarly, critics like Philip G. Cerny state that globalization "is leading to a world in which cross-cutting and overlapping governance structures increasingly take private, oligarchic forms" that undermines the spirit of democracy (Cerny 1999: 2). Other critics regard such modes of governance inadequate since they lack proper accountability, reinforce neoliberal precepts and facilitate privatization of governance (Dodds et al. 2002: 2).

The changing conception of IOs as not always being benign translated into efforts towards creating a legal framework to structure their functioning like ILC's work on

responsibility of IOs, Constitutionalism, Global Administrative Law etc[31]. It reflects a foundational change in the ontology of international law beyond the Westphalian order based on nation states. The challenge to the unbridled powers of the IOs has come from states as well as non-state actors. For instance, World Bank was criticized for its lending decisions to finance ill-conceived projects; similarly, IMF was castigated for imposing Structural Adjustment programme (SAPs) as preconditions for its loans (Collins and White 2007).

Viewed from the perspective of institutional response, the post-cold war period witnessedthe bestowingof some sort of *locus standi* on individuals impacted by the functioning of international organizations. In sharp contrast to the tradition of IO unaccountability, the Multilateral Development Banks (MDBs), led by World Bank, introduced a mechanism of accountability. The MDBs include – apart from the World Bank – the Asian Development Bank (ADB), the African Development Bank (AfDB), the European Bank for Reconstruction and Development (EBRD) and the Inter-American Development Bank (IDB). The MDBs have responded to the critique of accountability deficit through the formation of inspection panels. Driven by the pressure generated by human rights and environmental advocacy groups, World Bank adopted an innovative mechanism –the World Bank Inspection Panel in 1991 – that allows citizens to petition the Bank against the proposals that affect them detrimentally (Fox 2000).

The inspection panel allows third parties to file complaints regarding violation of the Bank's internal policies and procedural requirements in designing, processing, or implementing MDBs funded projects. It has been opined that however significant this development appears, its importance for the Bank lies in terms of its operational effectiveness and consequently, the question of IO accountability remains a matter of organizations' internal law. (Suzuki and Nanwani 2006: 180-181, Cullet 2007: 9). Others like Gunther Handl opine that the incorporation of this channel of communication brings to surface the issue of international obligations on MDBs (Suzuki and Nanwani 2006: 181).

[31] For detailed analysis See from pg. 54.

The international arena in the contemporary era showcases two important features– multiplicity of 'influential' international actors especially IOs; and the ability of such actors to take decisions or actions that negatively impact individuals across countries. The ability of decision-making invokes the element of accountability and it is the presence of latter that accords legitimacy to the decision taken. Due to the multiplicity of actors, the process of decision-making has assumed an international dimension but unlike democratically elected government, the other global actors are not accountable via mechanisms like elections. In national systems, mechanisms like elections, right to protest etc. play a key role in facilitating accountability and providing legitimacy to the decisions taken by the national level decision making authorities. However, the global arena lacks the democratic polity along the lines of national structures which necessitates a reconceptualisation of the idea of accountability from the global perspective (Chesterman 2008: 39).

Global governance has been questioned in the academic world from the perspective of legitimacy, democracy and accountability. Although attempts are made to legitimize the sphere of global governance yet the contemporary situation is far [below adequate standards]. Taking cognizance of such events, scholars like Held (1995), Cerny (1999), Holden (2000) etc. have concluded that globalization is responsible for the crisis of democracy. With an aim to fill the gap of accountability under changed conditions, observers like Keohane (2006) have created pluralistic accountability models that are suitable to the diffused and non-hierarchical realm of global governance. Such conceptions of accountability are points of departure from the traditional idea of legitimacy and accountability rested in the domestic system which is operationalized by the mechanisms like elections.

The democratic deficit of the global governance can be attributed to the following two structural problems– first, many social relations have assumed global dimension while the practice of democracy is confined within the borders. Second, the forces of globalization have altered the notion of *demos* since people find affinity across borders on multiples lines i.e. sexual orientation, religion, class etc. Furthermore, cosmopolitan linkages have also taken shape wherein people bestow much faith in humanity i.e. collective efforts during disaster relief operations. Clearly, the

contemporary practice of state centric democracy does not recognise the arrival of the footprints of transnational demos (Scholte 2002: 290).

In the context of the UN, the post-cold war period has witnessed a transformed role of UN from being a predominantly interstate body to a far more complex authority] exercising quasi-government functions especially in international administrative missions like East Timor, Cambodia, Kosovo etc. (Simai 1995). The extensive powers exercised by the UN in such missions convinced scholars to call it a "sovereign power" (Chopra, 2000: 27-29) or a "state builder" (Cotton 2001: 127, 139). Therefore, the first line of argument in favour of desirability of IO accountability rests on the observation that the international realm has changed wherein IOs increasingly operate as influential actors (in a sense that they bear the capability to violate human rights) without clear provisions of accountability.

2.2 United Nations' Enhanced Role and Human Rights Violations

The UNSC has adopted the 'authorization method' to fulfill the task of maintaining international peace and security. This method is an adaptation of the Security Council in the wake of the failure of the realization of the idea of a standing UN army and the Cold War reality. As a result, in stressed situations, the UNSC authorizes states or groups of states such as 'coalition of the willing', using phrases such as 'with all possible means', to undertake the implementation of the collective security system. In the absence of an armed attack, the only way to legitimately resort to force is through the prior sanction of UNSC (Henderson 2014).

The collapse of bipolarity in the early 1990s produced relatively better conditions for UNSC to play a greater role in world affairs. Apart from the changed international structure, the post-Cold War problems like intrastate conflicts involving violation of human rights have also opened the scope of UN engagement with world problems in different ways. Greater UN involvement in solving global problems is also transforming its character from an intergovernmental body to a global governance institution (Hoffman and Megret 2005: 46). Such increase in the activities of the UN has meant greater chances of its direct interaction with individuals; at the same time, it has also created wider possibilities for tensions between the two (Arsanjani 1981: 134, Council of Europe 2013: 5, Dekker 2005: 84, Heupal et al. 2018). These

missions have also undergone extension in terms of the geographical area and even the strategically located Cold War time spheres of influence like Eastern Europe or Western Hemisphere have been brought under their fold (Malone and Wermester 2000: 37-38, Diehl 2000: 337).In fact, the increased capacity of IOs in the present times to detrimentally affect the states and individuals pushed the International Law Commission (as requested by UNGA) to draft articles on responsibilities of IOs[32] (Stumer 2007: 553).

Early post-cold war events like the Iraq war in 1991, the NATO led bombing in the Federal Republic of Yugoslavia (FRY) in 1999 etc. had a great bearing on the lives of individuals owing to the direct contact between citizens and IO staff. The growing cases of criminal offenses by IO officials whether, civilian or peacekeepers, in the form of forced prostitution, drug trafficking etc. in countries like Eretria, Cambodia, Macedonia, and Democratic Republic of Congo etc. have instigated a review of the state of IO accountability. The situation is even worse in case where UN has undertaken missions of territorial administrations like East Timor (Hoffman and Megret 2005: 43-45). The UNSC practice of designating individuals and entities (through 1267 Committee) as belonging to the terrorist list has been viewed with deep skepticism in the 2004 UN report entitled *"High Level Panel on Threats, Challenges and Change, AMore Secure World: Our Shared Responsibility"* (UN 2004).The call for greater IO accountability has been raised not just because of the increased IO activity since the end of the Cold War but also because of the unintended consequences this increased activity has produced, namely human rights violations.

UN peacekeeping missions have been plagued by the large number of scandals especially the ones involving the sexual abuse of the host population. The demands for accountability are targeted at UN who is not a party to international law. Moreover, the accused troops enjoy immunity from local laws and the only possible recourse to trial is at the home country, which rarely takes place. It must also be noted that UN itself is reluctant to name the troop contributing countries as it fears that this may result in halt in the supply of peacekeepers by the member states (Chesterman 2008: 42-43). UN accountability is sought not only in cases of acts of commission but

[32] For detailed analysis, See pg. 54.

also those of omission. The failure to act in Rwanda and Srebrenica serve as examples where UN's lack of political will spilled into human disaster (Hoffman and Megret 2005: 44).

Collective punishments are one instance in which IOs exercise direct influence on individuals thereby debunking the realist premise that IOs act only as a puppet of powerful states. The functioning of UNHCR in Kenya revealed instances where the refugees were punished by the body without instruction from the states. It has been observed that UNHCR administration over refugee camps in Kenya and Uganda constitutes serious cases of human rights violations of all categories civil, political, social, economic and cultural (Verdirame 2002: 266, 283).

There is a wide variety of ways in which human rights can be jeopardized by IO functioning. First, violations may occur as a result of the bureaucratic decisions made at the UN office. Second, a UNSC resolution which basically is a political act may constitute a breach of a human rights norm. Third, violations may occur as a result of direct operations of IOs like UN who, during its operations like peacekeeping or international administration, exercise effective control over the region. Fourth, acts of violation may occur 'internally', that is between the staff and the IO or it may occur 'externally' between the IO and the third party (Singer 1995: 53). In the latter category, Verdirame (2002) identifies five ways through which the IOs can jeopardize the human rights conditions of people living in different parts of the world (also calls them as external violation or violation of third party).

First, the IFIs like IMF, World Bank etc. are criticized for their role in disempowering the developing states, thereby disallowing them from discharging their function of promoting socio-economic rights (Deacon, 1999: 211, Stiglitz 2002). Second, the UN peacekeeping missions have often gone wrong in which the protectors themselves have been found guilty of committing a variety of crimes against the host population i.e. in Congo, Somalia etc. Taking cognizance of such a state of affairs, the UN Secretary General issued a bulletin in 1999 concerning application of international humanitarian law to UN forces (UN 1999). Third, the decision on sanctions by UNSC on "deviant" states often violates the socio-economic rights of that state's population (Verdirame 2002: 270). Human rights violations also take place in case of targeted

sanctions. Fourth, IOs as bureaucracies during their operations may take decisions that undermine the 'principled approach' (supported by states in the General Assembly and UNSC) and adopt a 'pragmatic approach' that may undermine human rights norms. For instance, the UN humanitarian operations during its humanitarian assistance programme in Afghanistan undermined the principle of 'non-discrimination' by allowing the argument of culture to be used as a shield in justifying implementation of programme premised on discrimination against women. Such instances are examples of IOs reflecting what Barnett and Finnemore call 'dysfunctional behavior or pathology' (Barnett and Finnemore 1999).

Finally, the UN has expanded its horizon on the issue of managing the world by engaging in international administrative missions that are different from peacekeeping operations. In such missions, UN functions almost like a state and acts as a legislature, executive as well as administrator of justice. Normally, the Special Representative of the Secretary General or the UN Administrator acts a chief of the mission and enjoys broad powers. Such broad powers are entrusted under the flawed assumption that the UN power is a 'good power' as opposed to power exercised by state authorities (Verdirame 2002: 284).

Given the increasing power exercised by IOs in world affairs, it should not come as a surprise that the cases of abuse of power by IOs also accompany such developments. This development stipulates an update of the international legal framework with a focus on incorporating possibilities of human rights violations by IOs. The liberal democratic principle concerning the sacrosanct nature of individual freedom has been a catalyst in constraining state power since the French and American Revolutions. It will appear contradictory if another set of entities (here IOs) which is equally capable of harming human rights is allowed to escape from the framework protecting human rights (Verdirame 2002: 267). Thus, the second major argument in favour of accomplishing IO accountability is that 'power entails accountability' especially when this power no longer remains benign as in the case of UNSC approved peacekeeping operations.

2.3 IOs and the Ideal of Justice

Justice at any level– whether local or international– stipulates prevalence of an objective rule of law that must take its course while addressing claims between two parties. However, the practice of justice depends upon a codified body of law that is interpreted to avoid human subjective bias. The massive expansion of IO activities has not been accompanied by the progressive codification of their responsibility in situations of breach of international obligations causing injury. Only recently in 2011, ILC complete its project on bringing the functioning of IOs within the purview of an international legal framework. The widening scope of the functioning of IOs has resulted in a world wherein different categories of natural and legal persons exist as potential and actual claimant against IOs.

As early as 1981, Arsanjani (1981) identified the following such claimants. The first category includes those that are directly administered by the UN like the UN Temporary Executive Authority (UNTAE) over West New Guinea during August 1962 to May 1963. Similarly, after the termination of South African mandate over Namibia, the UN in 1967 created Council for Namibia that represented Namibia in international forums, concluded bilateral agreements on her behalf etc. This set of people can be referred to as 'dependent people' and a body like the Council for Namibia becomes accountable if it causes injury to the future state of Namibia, other states or non-state actors.

The second set of entities that may bring a claim against an IO are the governments. IOs do not have their own territory as states have. However, they create their jurisdiction within the territory of nation states by establishing headquarters, buildings, conducting conferences etc. Apart from establishing themselves in a territory, an IO engages in divergent tasks like lending loans, monitoring refugee camps, peacekeeping etc. These IO activities may cause injury to a government for the alleged wrong acts attributable to IOs. The third category of claimants is private parties – not those that are IO employees but rather individuals or private corporations. In the context of IO-private party dynamics, it has been observed that:

> IOs buy, sell, and lease movable and immovable property; acquire copyrights and patents; grant and obtain loans; engage firms and individual contractors to

> perform services; conclude contracts for insurance and public utility services; receive donations, and the like" (Arsanjani 1981: 136).

Finally, the fourth category of claimants can be the IO employees. The claims that they are likely to bring are related to administrative matters like contractual obligations, promotion, pension etc.

The linkage between IO accountability and the ideal of justice at the international level also has a typological dimension. An inquiry into the potential claimants against IOs would be incomplete without considering the types of claims that may be brought forth. The first set of claim that may arise during IO operations is in the form of 'contractual claims'. The contractual claims arise because the IOs engage into activities like construction, lease and purchase of movable and immovable property etc. The contracts signed by IOs with any other entity are unique in a sense that they specify the immunity for the IOs and its officials, something of this sort is not present in the other contracts signed between the entities other than IOs. The contracts involving UN have two common features– UN immunity and the non-liability of its members.It provides for the immunity of the UN from local prosecution and also highlights that its officials are protected from liability arising out of the contract. Moreover, the immunity is extended to those private contractors who undertake technical tasks on behalf of IOs like WHO. Disputes, if they arise, are to be settled by IOs or by means agreed by both parties (Arsanjani 1981: 136- 138).

The second category of claims is in the form of 'torts'. Tort claims generally are unpredictable in nature but certain kinds of IO operations are likely to generate more tort claims that others. The notion of tort claims is noticeable in court rulings as well as in the practices of IOs. Some IOs like the European Economic Community (EEC) provide settlement of tort in their constituent instruments. The liabilities that arise during IO operations in the territory of host states are governed by special agreements. Tort claims are highly likely during the peace operations conducted by UN. Though UN and its staff is immune from prosecution, the UN provides arrangements for the settlement of disputes e.g. in the Congo operation. Similarly, in the Cyprus operation, it was provided that any disputes brought by Cypriot citizens would be settled through claim commission (UN 1964). Later, in the case of Lebanon, the mode of settlement was provided in reference to Article VIII of the *Convention on the Privileges and*

Immunities of the UN, 1946. As a result, UN seems to have admitted that in case of damages caused by the UN during its operations, the responsibility to address the liability falls on the UN and not the host state (Arsanjani 1981: 138-147).

Third, claims may have borne out of the failure of the UN to protect the interest of its agents when the latter face issues like arrest, imprisonment etc. by the host state. As per the UNGA Resolution 365, the Secretary General has the authority to take up a case on behalf of its staff and negotiate with the host government (UN 1949). If the negotiations between the UN and the host state fail, the matter may be referred for arbitration. However, what is important from the viewpoint of accountability is whether UN is under an 'obligation' to pursue the case or not. In case it has the obligation, then it may be held liable for its failure to ignore the claims of its staff. Neither the ICJ ruling in the Reparations Case 1949 nor the UNGA Resolution 365 clarifiedwhether the matter for the UN was obligatory or discretionary. On the other hand, the UN staff rules and regulations do not impose any obligation on the Secretary General as the Chief Administrator to pursue their claims internationally. Nonetheless, UN has tried to pursue such cases for its employees but in majority of these cases claims remain unsettled and neither do states agree to arbitrate (Arsanjani 1981: 147-148).

In the context of the UN, the diplomatic protection of its staff is significant to maintain the independence of the organization. In the absence of such guarantees from the Secretary General, the staff is likely to look for alternative means of protection and in the process shall end up compromising the autonomy or independence of the organization. Moreover, the stand taken by the Secretary General in good faith in extending protection shall also boost morale of the staff across the globe working for the organization (Arsanjani 1981: 152).

Fourth, possibility of claims against an IO may also emerge from the acts that are *ultra vires* in character. The League of Nations in the past had a mandate system and one of its features was that the dependent territory could bring a claim against the mandated power. The same provision was made a part of UN in the form of the Trusteeship Council, a principal organ of the UN. The possibility of *ultra vires* acts

has increased dramatically owing to the state like administrative missions that UN has undertaken in recent time (Arsanjani 1981: 153).

Finally, claims against IOs may arise in the context of violation of international agreement. The ambiguity regarding the capacity of IOs as subjects capable of concluding international treaties between IOs or between IO and state(s) was clarified by ICJ in the *Reparations Case* (1949) by declaring that UN becomes a party to the international agreements concluded under the trusteeship provisions of the Charter (ICJ 1949). In addition, the ILC while dealing with the *Vienna Convention on the Law of Treaties* (1969) which concerns only states accepted that IOs can fully possess treaty making capability and those agreements shall be governed by this Convention itself (Arsanjani 1981: 157-158). So, there is no doubt that IOs are not just capable of violating rights of different entities but can also violate them in different forms. To reconcile this gap, 'right to remedy' is the most appropriate instrument that claimants must have while seeking justice involving IOs.

The right to remedy to the victims in case of human rights violation by IOs is a general principle of law and a norm under customary international law (Dominic 2001). The desirability of this right should always prevail over the functional needs of IOs (Muller 1995). In terms of its scope, it includes both the procedural right of effective fair hearing along with the substantive right to remedy (Nehl 1999). The non-availability of accountability mechanisms to third parties would constitute a gap in the accountability regime which would amount to a denial of justice if combined with the practice of IO and its staff immunity (Seyersted 1964). The non judicial accountability mechanisms like Ombudsperson and Inspection Panel are key developments since they remove the precondition of state led mediation at the international level, thereby bringing individuals in contact with the IOs through the mechanisms established for this specific purpose (Wellens 2004: 1162). Nonetheless, these mechanisms are not enough to prevent the human rights violations witnessed in various IO activities especially the UNSC authorized peacekeeping missions and sanctions.

2.4 UN as a Standard Setting Body

IO accountability is also desirable in order to maintain the status of IOs as facilitators in global problem solving. The recent faults found in the UN operations in the context of human rights violations are damaging UN credibility beyond repair (Hoffman and Megret 2005: 44). The legitimacy of IOs like UN, WTO, IMF, World Bank etc. has already been eroded due to practices like Structural Adjustment Programmes or the green room meetings prevalent in WTO decision making etc. Hoffman and Megret (2005) argue that accountability of the UN is essential for the following reasons – it is a logical corollary of authority and good governance i.e. maintenance of human rights standards; it is both a moral and operational imperative to maintain credibility of the UN; it is crucial in meeting the expectations of the local populace and bringing UN closer to the people; and lastly, to act as a standards setting body for the rest of the IOs.

The status of UN as a superior legal and moral entity goes absolutely contrary to the recent incidents where the peacekeepers who are expected to be the saviours were accused of the worst human rights crimes ever reported. The UN is expected to maintain highest standard than any other entity while operating in international sphere. Therefore, accountability of UN is not just an issue of legality but also morality (Maogoto 2000). On similar lines, International Law Association (ILA) opines that the 'principle of power entails accountability' is an emerging normative force of global normative law that binds the functioning of UNSC (ILA 2004).

Although the desirability of IO accountability is well established, yet making IOs accountable is far from being a simple task. The task of making IOs accountable faces not merely weak political will but also gaps in the international legal framework (though it can be said that the former feeds the latter). The following section will discuss the hurdles faced in filling the IO accountability gap and hence explains the factors that make this task a complicated matter.

3. Problems of IO Accountability

3.1 Issue of Separate Legal Personality of IOs and the Secondary Responsibility of Member States

The problem of IO accountability brings forth the puzzling issue of how to make a collectivity accountable? Peter French distinguishes between two types of collectives – aggregate and conglomerate. The former is a mere collection of people that mirrors a fluid identity that changes with the change in the members. It is nothing more than the sum of its parts. On the other hand, the latter is more than the identity of its members e.g. Red Cross (French 1984: 5, 10). The *Reparations Case (1949)* recognized the separate legal personality of the UN and its status as a subject of international law. This signified that IOs can be held responsible for their acts since they bear rights and duties in the international realm (ICJ 1949, Schermers and Blokker 1995: 1007, Stumer 2007, Council of Europe 2013). Considering IOs as bodies possessing distinct legal personality implies that neither the member states nor IO officials are deemed responsible for the acts committed in the name of IOs (Wilde 2006: 402).

Within the discussion on international legal personality of non-states entities including IOs, one of the basic inquiries relates to the sources of this status. The question on source is linked to the matters of international governance in two senses — first,it affects the ways in which people across the globe will be governed and second, it shapes the way in which accountability would be maintained in such setting of international governance. If the non-state actors succeeds in asserting their international personality then the existing state oriented system would shift in favour of other actors. New approaches to the sources of international legal personality are a result of several developments- collapse of USSR, rapid global economic integration, spread of democracy as well as free market model, information technology revolution, rise of global problems stipulating coordinated response i.e. climate change, human rights, energy etc., increase in international actors (both creation of new states and arrival of non-state entities) etc. All these changes have a bearing on the sources of international legal personality. The evolution of the international legal personality has accommodated wide variety of entities- global IOs like UN, ILO etc.; specialized organisations like ECOSOC; regional organisations like EU, ASEAN etc.; human beings. The source of international legal personality in the 21st still emanates from

states (largely through treaties) provided that states continue to respect the calls of popular sovereignty and adjust to the changing realities of global integration (Hickey Jr. 1997).

The accountability gap emerges in the functioning of the IOs due to the generally accepted principle that IOs have a separate legal personality and the member states cannot be held accountable simply on the basis of their membership (Wilde 2006). This view is supported by *Institut de Droit International* as well as the*International Law Commission (ILC)* in its Article 62 of the *Draft Articles on the Responsibilities of International Organizations* (DARIO) – "it is clear that the membership does not as such entail for member states international responsibility when the organization commits an internationally wrongful act".The gap emerges since on the one hand, member states and officials go scot free while on the other hand IOs despite their separate legal accountability cannot be prosecuted in national or international courts. Thus, the doctrine of separate legal personality opens up a space for abuse.The traditional approach of international law absolves member states and officials working in IOs from the responsibility of the acts committed in the name of the organization. Therefore, if a member state in UNSC exercises veto, it remains a process of the organization and not a state act for legal matters. Similarly, if states act through the organization, it remains the act of the organization not the state, again regardless of the consequences (Wilde 2006: 401-403). However, ILC maintains that a member state can be held accountable if the intervening act by a member influences the commission of the act. This intervention may take several forms – aid and assistance, direction and control, coercion and avoidance of compliance and acceptance (ILC 2009).

Although a majority of experts adhere to the view concerning the separate legal status of IOs, some scholars such as Henry Schermers contest it on the basis of two major arguments. First, international law lacks any specific norm providing for limited liability of IOs and this absence calls for the secondary responsibility of member states (Schermers 1980). Second, the presence of limited liability clauses in some IOs imply that in IOs like the UN where such clauses do not exist, member states could be held liable for the acts of the IOs. However, this viewis at odds with the majority view (which is also held by "Institut de droit international"based on the report of then

member Professor Rosalyn Higgins in 1995) that there is an absence of any general principle whereby member states could be held accountable for legal liability for the acts committed by the organization (Wilde 2006: 402-403).

The decision of the above mentioned institute also took into consideration the following dilemma – 'the tensions existing between the significance of maintaining the independent responsibility of IOs on the one hand, and the pressing need to protect third parties dealing with such international organizations on the other hand' (Institut de droit international 1995: 273-274). The majority view suggests that the independent functioning of IOs can only be maintained if its members are not held accountable for its acts (Wilde 2006: 404). As Professor Higgins remarked:

> If members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership (Higgins 1995: 288).

The supporters of the majority view argue that the principle of justice is not compromised but modified in a way that justice shall yet be delivered via alternative route. This route entails a variety of protective measures in favour of third parties. These are– insurance; adhoc guarantees from member states etc. This safeguarding approach must include the clarification by concerned IO regarding liability in its rules and contracts, in communications made to the third party prior to the event or transaction leading to liability; in response to any specific request by any third party for information on the matter (Wilde 2006: 407).

Other observers like Ryngaert believe that the accountability gap can be filled by holding member states responsible for wrongful IO action. The European Court of Human Rights (ECtHR) has adopted a stand that acts as a mechanism of accountability for states who are contracting parties to the European Convention on Human Rights (ECHR). The contracting parties are not absolved from HR obligations just because they have created an IO and delegated the performance of an issue area to that IO (Ryngaert 2011: 997-998). Despite the fact that both ILC and ECtHR does

not represent the generally applicable international law, they still maintain a status of enough authority to act as a framework that can assist in identifying the circumstances under which states are to be held accountable for acts conducted through IOs.

The International Tin Council (ITC) Case discussed few complicated issues concerning the field of IO accountability, one of which is whether member states of an IO are responsible for the liabilities incurred by the IO in question? The liabilities of the IOs may be against a variety of third parties– states, individuals, other organizations or legal persons. States as third parties may either be member states or non-members; individuals or legal persons may be either from the state who is either a member or non-member. The source of liability may be international when emanating from an agreement between the state and IO and thus fall under the rubric of international law. Liability may also emanate from municipal law involving transaction between the IO and the state, individual or legal person (Amerasinghe 1991).

The scope of transactions falling under the jurisdiction of municipallaw constitute the following:

> loansmadetotheorganizationbystatesorstate agencies wheretheintentionisclearthatthetransactionisat the municipal level; loans made to the organizationby individuals or legal persons; contracts,such as procurement or constructioncontractsenteredintobetweentheorganizationand individuals or legal persons; and [delicts]committedin the territoryof a state againstindividualsor legal personsby the organizationor by the organization's staffin the course of theirduties" (Amerasinghe 1999: 259).

The Court in Maclaine Watson Case(1989)recognized the instances of 'gross mismanagement' like unauthorized purchases of buffer stock shown by the ITC in implementing its mandate. Yet, the creditors failed to prosecute ITC member states on charges of negligent misrepresentation; and fraudulent misrepresentation. The Court dismissed the former charge as the commercial relations between the parties do not contain an element of care towards each other. In the latter case, the allegation was that the member states of ITC misrepresented their 'means or intentions to repay the debt'. The member states invoked 1828 Statue of Frauds that absolved them from liability because the misrepresentation was not written and signed (Maclaine Watson

and Co. Ltd v International Tin Council1989, Chandrasekhar 1989: 316).]

It is worth investigating whether in such cases secondary or concurrent responsibility of the member states arises because if it does, it would give direct recourse to third parties against states for the liabilities. The ITC was founded in 1982 by 20 states including EEC as an IO responsible for maintaining equilibrium in international tin production and consumption. In accordance with its status as an international legal body, it enjoyed immunity from suit. One of the tools of the ITC to pursue its mandate of maintaining appropriate price level was to borrow and maintain buffer stock. In 1985, the organization defaultedleaving creditors puzzled on how to make recover their investment (Amerasinghe 1999).

The ambiguity regarding choice of law in carrying out proceedings against ITC became apparent as no coherent body law existedthat convincingly covered IOs.The ITC was constituted through an international agreement among states and was not incorporated in the English law. It had a status of a legal person in the UK and thus entered into various contracts in that capacity. Although the English Parliament granted it the legal capacity of a body corporate yet it was not a corporation. The member states wanted it to be considered as a corporation so that they may hide behind the protection of being shareholders and thus escape claims (Chandrasekhar 1989: 327).

Nevertheless, the English law appeared to be an unappealing framework for resolving ITC cases because even if any aspect of international law provided for the secondary responsibility of member states, it would be beyond the scope of UK courts to enforce it. This is because the international treaty that founded the ITC was not incorporated in UK through proper legislation. Similarly, if under international law, ITC is to be treated as an agent of the contracting parties with the implication that the responsibility should be bestowed on the principals (in this case the member states) this again could not be enforced under the UK legal framework. The claim for the appointment of a receiver of the ITC's assets was rejected on the grounds of lack of jurisdiction of UK courts. In this context, it was observed that an unincorporated body cannot produce rights and obligations under domestic law. Lord Templeman unequivocally argued that English Courts cannot enforce rights or obligations

emanating from an unincorporated international treaty. The intentional grant of immunities to ITC from legal suit also confirmed that it was immunized from the English legal architecture (Chandrasekhar 1989: 327-328).

The ITC was created as a supranational organization and in recognition with this status; it could not be subjected to the domestic law of any state. It is therefore governed by international law. However, the international law on limited liability is at best ambiguous. Given such gaps, justices found it difficult to forge consensus. Addressing the issue of secondary liability of member states, two judges argued that international law does not stipulate that members of an IO have to explicitly limit their liability. Absence of such expression does not tantamount to the admissibility of liability (Chandrasekhar 1989: 328-329).

In contrast to this, the dissenting judge opined that in the absence of any clear law on limited liability, the sitting bench has the authority to examine and clarify the issue by referring to different sources of international law like scholarly writing, domestic laws, domestic judgments, international treaties etc. After his analysis, he found that member states are liable for the debt if they do not explicitly express limitation on their liability. Thus, according to him, member states of ITC should be held liable for the claims. However, the majority sought no liability but the case exposed the repercussions of engaging with IOs whose relatively ambiguous legal status and underdeveloped regulating law could have unpredictable outcomes for the private parties (Chandrasekhar 1989: 329).

Different criteria like effective control, dual control, joint and several liability etc. have been mooted as a solution to the question of attribution of responsibility and fixing accountability. On the question of remedy, the ILC has suggested both states and IOs bear that responsibility as and when they are legally liable (Dannenbaum 2010). The condition for attributing liability on either states or IOs constitutes two criteria. First, the act or omission in question can be attributed to the state or the IO and second, international obligations must violate because of that action or omission (ILC 2001, Dannenbaum 2010).

In the context of peace operations, the first criteria imply examining that the wrongful acts are committed by the peace keepers (who are regarded as organs of their states)belonging to the states. In theory, the command structure aims to clearly establish the authority of the TCC and the UN while on field, it becomes cumbersome task to identify the source of a conduct and thus makes it nearly infeasible to determine which authority —TCC or UN — responsible for the wrongful act in question (Mileva 2016: 124, Dannenbaum 2010). At this moment, the ILC's DARIO extends some help. Article 7 of the DARIO provides that —

> the conduct of an organ of a state (...) placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct (ILC 2011).

Nonetheless, given the appeal of the principle of effective control, the attribution of conduct in UN peace operations has remained a complex aspect. The variable that adds to the complexity of attribution of responsibility in case of peace operations is the command structure of the UN. The troops that work as UN peace keepers retain dual allegiance. They represent their states as national contingents but also wear the blue helmet, a symbol of UN. Each UN peace mission is authorized by UNSC and the department of peace keeping is the authority responsible for their overall administration. UN Secretary General as a chief of the Secretariat plays a key role in referring the cases (that require UN support) to the UNSCand laying down the foundation for missions. Throughout the mission, the Secretary General through its reports recommends the UNSC about the requirements of the mission — renewal, troop increase or decrease, use of air power etc. (Mileva 2016)

The Secretary General appoints its representative for each mission who is regarded as the Head of the Mission, normally a civilian, and known by the designation — Special Representative of Secretary General (SRSG).Alongside, a head of the military component of the mission is also appointed by Secretary General who is known by the designation — Force Commander or Chief Military Observer. In situations where the mandate of the mission is heavily militarized, the head of the military component is also the overall head of the mission. Each contingent representing its nation-state is headed by National Contingent Commander (NCC) and the NCC commands its

contingents after receivingorders from the Force Commander. Thus, as national commander, the NCC serves as a key link between UN and the national forces. Consequently, it is believed that these troops are under 'operational' command and control of UN (DPKO 2008, Murphy 2000: Mileva 2016: 125). In terms of their service, the Force Commander and the Head of the Mission are appointed by UN individually but the national contingents are employed as indivisible and discrete units implying that their internal command structures are inviolable (Dannenbaum 2010: 145).

The critical aspect of the command structure of the UN forces is that national contingents are deployed as per the prior agreement on rules of engagement (including the services required for the mandate) between UN and TCCs. This sets the limit on the scope of instructions that the Force Commander can issue to the NCCs. The NCCs represents the interests of the states they belong and thus may act contrary to the Force Commander's orders if they feel it undermines their country's interest or goes against the rules of engagement decided before troop deployment (DPKO 2003: 67-68). It is this point of occasional incongruity of interest between Force Commander and the NCC that the issue of attribution of conduct becomes complicated. At this critical juncture, the seamless looking chain of command goes astray. Precisely because of its appeal to resolve this complication, the test of 'effective control'has gained prominence in the academic circles (Leck 2009, Dannenbaum 2010, Buchan et al. 2011, Burke 2012).

The criterion of 'effective control' has been vehemently supported by scholars like Tom Dannenbaum as a solution to the question of attribution of responsibility. He elaborates this criterion as "control most likely to be effective in preventing the wrong in question". According to this criterion, the addressee of the human rights standards must be the authority exercising command and control over the forces operating on the ground. The decisive factor shall be the extent to which an IO (UN) acts autonomously from member states on exercising ultimate direction to military operations. Dannenbaum argues that both UN and troop contributing state can be held responsible (depending upon who exercises effective control at a particular time) for the acts of human rights violations under the 'effective control' doctrine. An unlawful order by the UN commander violates human rights and humanitarian law and thus, the

orders that violate laws of war must not be obeyed. However, peacekeepers may not be possessing the legitimate authority to doso especially in the light of the likelihood of criminal proceedings in case of human rights violations (as a result of obedience to the orders) is almost absent (Dannenbaum 2010: 114).

The Human Rights Committee(2004) in its general comment on the "Nature of the General Legal Obligation on States Parties to the Covenant"elaborated the principle of 'effective control' as follows:

> [A] State [P]arty must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party .... [T]he enjoyment of Covenant rights ... must...be available to all individuals, regardless of nationality . . . who may find themselves . . . subject to the jurisdiction of the State Party. [This includes] those [persons] within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation" (UNHRC 2004, para 10).

It is significant to note that peacekeeping missions exercise effective control over the population they administer. According to Hoffman and Megret (327-328), such control is clearly visible in missions like East Timor where UN performed quasi-sovereign functions. This control is regarded as effective territorial control. The idea of effective control is also practiced over individual detainees. For instance, the*Saramati Case* mirrors the exercise of effective control over individuals by peacekeeping forces (Dannenbaum 2010: 134).

The practice of attribution of liability in peacekeeping missions is not grounded on the effective control over the territory or individuals but rather on the basis of effective control over the peacekeepers that are found guilty of misconduct in reference to human rights standards. Dannenbaum also notes that in practice very few countries would give up full operational control to the UN and hence advocates abandonment of 'overall operational control' principle. The notion of shared liability between UN and the troop contributing states bears the potential to better serve the system of liability attribution especially since UN retains immunity (Dannenbaum 2010).

In contrast to the principle of effective control, the 'principle of dual control' proposes a different logic of apportioning responsibility and fixing accountability. According to this criterion, the addressee of the human rights standards must be the authority exercising command and control over the forces operating on the ground. The decisive factor shall be the extent to which an IO (UN) acts autonomously from member states on exercising ultimate direction to military operations. The strict separation between the UN and its members is not always clear and practice reflects tendencies of dual control since the operations are conducted under complex command structure. The UN assumes operational and strategic command while the member states are responsible for the execution of orders and administration of their national contingents and disciplinary action. Thus, the UN control is not exclusive but shared (Porretto and Vite 2006: 27-29).

The case of the UN authorized NATO military campaign in Kosovo in 1999 illustrates the above theory in practice. The bombing campaign was carried out under the operational command of the North Atlantic Council (NAC); the NAC is a supreme political body of NATO composed of permanent representatives of member states. The decision making of day to day operations was delegated to the NATO's military committee which is composed of Armed Forces Chief of Staff of all states. Decisions in NAC as well as in the military committee were taken by consensus which implies that each participant had a right not to participate in any action if they found it to be illegitimate. Under this structure, the member states maintained operational command over 'Operation Allied Force'. Even the NATO handbook noted that each nation retains complete sovereignty and responsibility for its own decisions. Therefore, the attribution of responsibility in such case can be resolved by considering the member states as the primary addressee of the human rights obligations while the NATO assumes the secondary responsibility (Porretto and Vite 2006: 29-31)

Similarly, the principle of 'Joint and Several Liabilities' proposes its own reasoning to address the accountability gap. Paust finds fault in the simple test put forward by Dannenbaum which allocates responsibility either to UN or member states based on the logic of 'effective control'. Instead, he offers a principle of 'joint and several liability wherever feasible'. In critique of Dannebaum's effective control principle, Paust argues that any doctrine that attributes liability only to one entity contradicts

general international law. The concept of effective control or ultimate control is a matter of irrelevance. Liability exists in variety including responsibility of leaders for the dereliction of duty. Each responsibility has its relevance. Irrespective of effective control, military commander or any other leader having authority over troops cannot escape responsibility on the grounds of dereliction of duty. Similarly, whenever a state or any IO is expected to uphold human rights, the actors' own dereliction is not an excuse to avoid responsibility (Paust 2010: 7-8).

In his reply to Paust's review (which also contains the proposition of joint and several liability), Dannenbaum in his new work, entitled *"Finding Balance in the Attribution of Liability for the Human Rights Violations of UN Peacekeepers: A Response to the Responses of Paust and Rowe"* critiques the concept of joint and several liability. First, applying joint and several liability in all cases would create an incentive for troop contributing states to withhold troop contribution. Second, this principle would not serve as an effective deterrent against human rights abuse by peacekeepers. Third, joint and several liability would impel the troop contributing states to retain ultimate control over their troops undermining the efficacy (including ability to prevent human rights violation) of peacekeeping missions (Dannenbaum 2010: 108-111).

The judicial pronouncements on the test of 'effective control' as a criterion of determining responsibility lacks coherency. The ICJ in 1986 in the *Nicaragua Case* and later in 2007 *Bosnian Genocide Case* have clarified the usageof the term — 'effective control'. The bottom line of these judgments is that for the principle of effective control to be established on states, the occurrence of the wrongful acts must have been 'directed or enforced' by the concerned state. In other words, the state in question can be held responsible if it exercised effective control over perpetrators when the violations took place (ICJ 1986, ICJ 2007). However, the ICTY in the *Tadic Case*(1999) introduced the test of 'overallcontrol' to apportion responsibility. In a similar vein, ECtHR while adjudicating the *Saramati and Behrami Case*(2007) preferred overall control by using the phrase'ultimate authority and control'.Scholars like Buchan et al. (2011: 300) have found the judgments prioritizing overall control over effective control as flawed or erroneous. They have also noted that the application of effective control test would in most cases result in attribution of responsibility on TCCs while overall control is likely to place responsibility on UN.

To summarize, one can say that initially the question of secondary responsibility of member states was largely sidelined due to the presumption that itis likely to jeopardize the autonomy of IOsas well as undermine the confidence of TCCs for future troop commitments. Nonetheless, with the advent of robust or multi-dimensional peace operations, the matter became a priority as a clarity on it is a precondition to attribute responsibility in joint ventures like peace operations. In most cases relating to peace operations, the Courts find it difficult to solve this complication mainly due to the complex command structure that these missions constitute. However, the 2017 judgment of The Hague Court of Appeal in the *Mothers of Srebrenica Case v. Dutch state Case*found Dutch state partially (30 percent) responsible for themassacre. Some like Amnesty International perceive it as a significant verdict that bear the capability to set the precedent in holding states secondarily responsible for the crisis. However, others like Van Genugten does not consider it as a precedent setting judgment as Dutch state has already shown signs of apprehensions and is likely to join in combat operations when NATO takes the lead (Reuters2017).

3.2 Absence of International Institution having Jurisdiction over IOs

International organizations operate without accountability since they cannot be prosecuted under municipal law of any other country nor are they subject to any international body that may initiate proceedings against them. No international tribunal or court enjoys jurisdiction to hear complaints against an IO and the IO's privileges and immunities immunizes them from local legal jurisdiction. Despite the fact that IOs operate at multiple levels and impact a large number of individuals, this gap persists. The Ombudsman can hear such complaints in case of the UN but its decisions are purely recommendatory (Wilde 2006: 409-410, Singer 1995: 53, 64). Other IOs like IMF have justified lack of transparency on the grounds of the nature of their work. They have justified their opaque way of functioning on account of the sensitive nature of member states key financial and macroeconomic variables (Suzuki and Nanwani 2006: 183). Hence, it is reasonable to conclude that the provisions on the responsibility of IOs still remain in a state of flux (Ginther 1988: 1336, 1339).

Non legal mechanisms to ensure internal accountability in the UN include the Office of Internal Oversight Services (OIOS), Board of Auditors and Joint Inspection Unit. In 2002, the Office of Ombudsperson was created to manage the conflicts relating to employment. As a participant in the process of administering justice within UN, the Inspectors of the Joint Inspection Unit (in their report entitled*Reform of the Administration of Justice in the UN System: Options for Higher Recourse Instance*(2002) have found a huge substantive and procedural gap in law that may allow the UN to escape punitive measures even when the conduct of its staff may result in detrimental impact on third parties (UN 2002: 5)

The clash between the traditional provisions of international law that grant immunity to IOs and the need for IO accountability surfaced in the *Manderlier*case (1962). Mr. Manderlier, a Belgian national owned property in Katanga, Congo; his property was ransacked and burned by Ethiopian troops operating under the banner of UN peacekeepers. Mr. Manderlier demanded compensation for the loss from the UN in which he was supported by the Belgian government. In response, UN paid a lump sum to be distributed by government of Belgium; however, he was not satisfied with the compensation and went to Courtof First Instance of Brussels against the UN and Belgium. His claims were rejected by the Court on the ground that IOs are immune from its jurisdiction. However, while giving this judgment, the Court of Appeals deplored the existing state of affairs since in the Court's view it was against the Universal Declaration of Human Rights (Zwanenburg 2008: 23-24).

In recent times, this tension between IO immunities and the demand for justice came to surface in the *Mothers of Srebrenica et al v. State of the Netherlands and the United Nations* case in 2012. The case was filed by 'Mothers of Srebrenica' (a Dutch association representing 6000 survivors) and ten women (whose family members died in the genocide) against the state of Netherlands and the United Nations for their failure to prevent the mass killing of Bosnian Muslims by the Serbs despite their assurance of creating a "safe haven". The Supreme Court of Netherlands (in 2012) upheld the decision of the District Court of The Hague (2008) and the Court of Appeal of The Hague (2010) that UN enjoys immunity from prosecution even in cases involving grave violations of human rights. While giving the verdict, the Court also addressed the issue of the right of access to the Court guaranteed by Article 6 of

the *European Convention on Human Rights (1950)* and the *International Covenant on Civil and Political Rights (1966)*. By invoking the judgment of the International Court of Justice (ICJ) in the *Nicaragua Case* in which ICJ interpreted Article 103 of UN Charter to mean that the Charter obligations of UN member states prevails over conflicting obligations from another international treaty, the Supreme Court of Netherlands concluded that UN enjoys absolute immunity (International Crimes Database website 2015).

Following this, the matter (*Stitching Mothers of Srebrenica and Others v The Netherlands, application no. 65542/12)* was taken to European Court of Human Rights (ECtHR). The applicants' main argument at this avenue was that decision of the Netherlands Courts of upholding UN immunity violate guarantees accorded to them under Article 6 (right to access to Court) of the European Convention on Human Rights (ECHR). In its judgment in June 2013, the ECtHR argued that the foundation itself is not a victim to the massacre so it cannot claim violation of Article 6 guarantees provided in ECHR. As a result, the ECtHR found the application inadmissible. The ECtHR also noted that the matter before it pertains only to the question of denial of Article 6 guarantees. The question concerning attribution of responsibility and its consequences is beyond the scope of the application. Concerning the UN immunity, the ECtHR held that it is not its duty to interpret the provisions of UN Charter or similar legal premises. The international law does not support the claim that in view of civil proceedings, the immunity could be lifted. The ECtHR made this argument in reference to the 3rd February 2012, Germany V. Italy: Greece intervening judgment of ICJ which sovereign immunity. By extension, it is applicable in cases involving UN (ECtHR 2013, Murati 2013, Papa 2016).

The ECtHR noted that the UN mission in Bosnia was carried out under Chapter VII provisions of the UN Charter and this provision is a core aspect of UNSC's functioning. It would be unreasonable to presume that the contents of ECHR could subject the acts or omissions of UNSC to domestic Courts without prior approval from the UN. Bringing this issue under local jurisdiction would tantamount to interference with the UNSC's mandate of maintaining international peace and security. Another argument that applicants made was the absence of alternative forum to bring claims against UN, the ECtHR agreed that even though such avenues are

missing both in Netherlands and in UN yet exercise of UN immunity does not contravene right of access to Courts. The ECtHR found merit in the applicant's contention that Netherlands is attempting to shift complete responsibility on UN for the massacre and in this sense evading its responsibility. Finally, the application was found inadmissible and the decision of Dutch Court that grant of immunity to UN does not breach right of access to Court was upheldby ECtHR (ECtHR 2013). Commenting on the flaw in this judgment, Papa (2016) argues that a better approach would have been if the ECtHR have applied presumption of consistency concerning obligations relating to HR while interpreting provisions relating to UN immunity. One major implication of this approach would have been on the practice of immunity, that is, subjecting it to availability of alternative forums of dispute settlement.

In 2017, after 22 years of the massacre in Srebrenica, a partial victory was achieved by the victims when the Appeals Court of Hague held Dutch state partially responsible for the massacre. The families of those killed have long argued that Dutch forces known as 'Dutchbats' should have gauged the threat posed by Bosnian Serbs. These families filed a civil suit against Dutch state for their failure to protect Bosnian Men and asked for appropriate compensation. In the opinion of Genugten, the verdict is both a victory and loss as the Dutch state was not found fully liable for the killings. Interestingly, it is estimated that Dutch state is responsible for 30 percent of the damages. This is based on the calculation that if the Dutch forces stayed to safeguard those killed, there were 30 percent chances that they would have survived the Serb onslaught (BBC 2017).

Nonetheless, two famous judgments–*Behrami vs. France* and *Saramati vs. France (2007)* – are crucial in understanding the accountability gap that results from the current international legal system. In these joined cases, the European Court of Human Rights (ECtHR) addressed the claims made against the states who participated in the UN authorized NATO Kosovo Force (KFOR). The *Behrami* case was acase against France on the grounds that its forces did not clear a number of unexploded bombs that killed one child and injured another. The *Saramati* Case involved a claim against France and Norway for the pre-trial detention of a civilian in Kosovo for half a year under the authority of KFOR (first approved by Norwegian Commander and later his successor from France. The Court in the *Behrami* Case held UNMIK (United

Nations Administration Mission in Kosovo) and not KFOR responsible for the loss of life and injury. In the *Saramati* Case, the Court held KFOR responsible for the illegal detention. Clarifying further, the Court opined that UN is responsible for KFOR since the former may have delegated the operational control to KFOR but it still retained the ultimate authority and control (ECtHR 2007).

After establishing the responsibility of UN, the Court opined that the UN is not a party to the *European Convention of Human Rights* (ECHR), hence rendering the Court incompetent to hear the case. Moreover, the Court added that troop contributing states can transfer the responsibility to the UN, relieving themselves from the ECHR obligations. Thus, the misconduct by the troops is attributed to the UN and the UN is immune from prosecution in any national or international court (Dannenbaum 2010: 124).

In the *Cumaraswamy* case (1999), the ICJ opined that UN can be held accountable for the damages it has caused while discharging its mandate. However, the claims for such damages cannot be brought forth in the domestic judicial bodies; rather they should be settled in accordance with the appropriate modes of settlement that UN makes provisions for under Article VIII, Section 29 of the General Convention (1946). The Convention states that the UN should provide for the appropriate modes of settlement in case of disputes arising out of contracts or any other dispute of private law character. The Convention also obligates the UN to provide for the appropriate modes of settlement in case of a dispute involving its officials who enjoy immunity but his immunity is not waived by the Secretary General (ICJ 1999, Wouters and Schmitt 2010: 3). The ICJ also opined that the provisions of the *Convention on the Privileges and Immunities of the United Nations* extend full immunity to the UN from the local systems of courts. Taking cognizance of such facts, the Venice Commission concluded in the Opinion of Human Rights in Kosovo that,"there is no international mechanism of review with respect to acts of UNMIK and KFOR". The absence of an international judicial body for addressing claims against IOs mirrors the state-centric character of the existing international dispute resolution system (Council of Europe 2004).

The absence of an institution to hold IOs accountable has resulted in forum shopping by victims in the hope of getting justice. Although the victims have raised their cases in domestic courts , regional courts (like ECJ, ECtHR) and ICJ etc. yet with exceptions like 2017 Dutch Court of Appeals judgment (that held Dutch state partially responsible for the Srebrenica massacre), their appeals have been dismissed. One of the most dominant factors that pushed courts towards this conclusion is the provisions of IO immunity and thus leading to gap showcasing absence of institutions or courts to sue IOs successfully. In cognizance of this, the ILA (2004: 26) noted that the case law formulation concerning IO liability/responsibility is made impossible because in most legal systems, judicial review of IO decisions and acts is missing. Even in Mothers of Srebrenica Case, the partial victory (if one can say so) for the victims came after decades long process of litigation in multiple judicial systems. Unfortunately, the possibility of International Criminal Court (ICC) filling this has also been nipped in the bud by the states[33].

3.3 Privileges and Immunities extended to IO staff

One of the major factors that complicates the issue of IO accountability is the immunity granted to IO staff which more often than not encourages the culture of impunity. The immunities and privileges granted to IO officials were originally adopted from the practice of diplomatic safeguards accorded to diplomats. However, soon it was realised that application of immunities to IO officials is not as simple as it seemed initially. In 1925, the American Journal of International Law published an article by Professor Van Vollenhoven titled,*Diplomatic Prerogatives of Non-diplomats* that inquired into the possibility of applying diplomatic immunities to IO officials. Another inquiry on this subject was led by the members (Adatci and De Visscher) of Institut de Droit International who concluded that the basis of immunities in case of both diplomats and IO officials is functional yet there exists a fundamental difference. The diplomats perform a national function while the duty of an IO official is international in character. Moreover, IO officials also need diplomatic protection against their own state which, however, many states are not comfortable in granting (Blokker 2014: 4-5, 264-266).

[33] A detailed study on ICC in the context of IO accountability is available in Chapter 5.

It should be understood that reasons for granting immunities to IOs and states vary. Although both states and IOs are subjects of international law and possess legal personality yet their existence, status and role vary significantly. Diplomatic immunity or immunity of states is derived from the sacred principle of sovereign equality of states. Such equality has also been the bedrock of the celebrated notion of non-interference in the internal matters of sovereign nation-states. Other elements of this practice include the inability of domestic courts to enforce decisions against a foreign state. Similarly, ambassadors enjoy diplomatic immunity as they represent their country in international affairs. However, such a narrative hides one reality that the practice of immunity predates the notion of sovereign equality of states. Instead, a deeper understanding reveals that immunity is grounded on the functional (as a precondition for autonomous functioning) premise rather than on the sovereign equality principle (Brownlie 2003: 322).

One of the major differences between IOs and states is that the former lacks territory as well as its own population. This implies that IO operations can only be conducted in some states' territory and would be carried out by the nationals of some states. The representatives of IOs are therefore viewed as vulnerable to state intervention especially interference by the state under whose territory they are located or operate. Realizing this, the League provided immunity to its personnel by claiming the following:

> Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities (Article 7: League Covenant).

Similarly, the ICJ in the Reparations for Injury Case, Advisory Opinion (1949) opined that:

> in order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him bythe Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (ICJ 1949: 183).

Thus, the theoretical base for IO immunities has always explicitly been functionalism. Another point concerningthe difference between IO and stateimmunity is that both have evolved independent of one another. The overall relationship between state and IO immunities is that they are related but not same.

Although the reasons for granting immunities to states and IOs differ, yet the scope accorded to IOs is largely drawn from the practice of state immunity. One such instance was the agreement between the League and Switzerland, providing that the former possessed legal personality and its legal status was analogous to that of a state. As a consequence, the League could claim the same independence from the Swiss judicial and administrative framework as any other member of the international community. In another case, IO officials enjoyed immunity as wide as the ones granted to diplomats. The Netherlands has done so vis-à-vis the staff of former International Criminal Tribunal for Yugoslavia (ICTY) and ICC. This similarity of the scope of immunity between IOs and states has remained despite the fact that the staff of IOs is also functionally different from diplomats because the IO staff maintains a complicated relationship with her/his home country. It may be a possibility that an IO staff may require protection against the home country instead of protection from it (Blokker 2014: 5, Brabandere 2010).

Overtime, state immunity has been truncated with the introduction of a restrictive theory of immunity which categorizes the acts of states as official and private. This categorization has also been reaffirmed in the 2004 *UN Convention on the Privileges and Immunities of States and their Properties*. Nonetheless, this development has not influenced the absolutist nature of IO immunities. It is worth investigating the reasons that justify such absoluteness of the IO immunities. First, absolute immunity is granted on functional grounds – so that these bodies can act autonomously. Article 105 of the UN Charter asserts functional immunity of the IO and the UNGA has adopted the Convention on Privileges and Immunities 1946, according absolute immunity to the UN. States have accepted this as a necessary condition for the effective functioning of UN. Second, the absolute cover of UN immunity is accorded to all official acts. One implication is that UN acts fall in two categories – official or ultra vires. All acts of IOs are official acts and they enjoy immunity. IO immunity appears to be restricted by its functional personality (Fox 2008: 727, Brabandere

2010: 87-88). Though the distinction between official and non-official acts is a key factor in determining the delivery of justice but in practice this distinction has not been clearly addressed.

The immunity cover germinates the culture of impunity as the sanctions or punitive measures that are otherwise associated with illegal activities acts vanish under immunity provisions. The immunities have a disastrous effect on the crime prevention measures as the root cause of the effectiveness of these measures, that is, fear of punishment is blocked legally.The functional immunity enjoyed by peace personnel imply that these would be relevant only for the official acts for instance if a peace keeper kills a pedestrian while patrolling a region or driving to attend a meeting, this immunity would prevail. However, suppose if the same peace keeper is coming from a party and kills a pedestrian, immunity cover does not prevail as by no standards can it be interpreted as an official act. The UN Secretary General has a power to lift immunity if it impedes the process of justice, however, without prejudicing the interests of UN. In practice, the difference between functional and absolute immunity is largely over stated owing to profoundly generous interpretation of what counts as official acts (Jennings 2017)

Moreover, domestic legal arrangements also play a critical role in providing privileges and immunities to IOs. For instance, the *International Organizations Immunities Act* (IOIA) of 1945 in US grants to IOs the "same immunity from suit and every form of judicial process as is enjoyed by foreign governments" (Young 2012: 311). Later in the year 1976, the restrictive theory of state immunity was applied through the enactment of Foreign Sovereign Immunities Act (FSIA) by the US Congress. Although analogy has always been drawn between the immunity of states and IOs, it is worth considering that both (states and IOs) have a different basis for securing immunity. The reference to state immunity is made to clarify the content of the immunity but never to suggest that both the systems are the same (Brabandere 2010: 89-90).

The international legal framework offers protective cover, both to the IO as an entity and to its employees (officials and troops). The UN Charter along with the *Convention on the Privileges and Immunities of the UN* adopted by UN General

Assembly in 1946 is the most significant legal documents in this context (UN 1946). Specifically, Article 105 of the UN Charter states:

> The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 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. 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 (UN Charter Art. 105).

Here, an important point of contention is – whether the absolute character of IO immunity is conditioned by the provision of alternative methods of dispute settlement?This can betrue especially in case when the aggrieved party is the employee of the organization yet it would be an exaggeration to assume that customary international law limits IO immunity in the absence of alternative dispute settlement mechanisms. The multilateral or bilateral treaties stipulate an obligation to provide for alternative dispute settlement systems, for instance Section 29 of the *Convention on the Privileges and Immunities of the UN* (1946)states:

> 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 byreason of his official position enjoys immunity, if immunity has not been waived bythe Secretary-General.

Although it is true that the adoption of the 1946 Convention witnessed only states as signatories and UN was not a party to it, it would be erroneous to presume that UN can neglect the provision on the desirability of a dispute settlement system. Legally, UN is not bound by the obligation contained in Section 29; yet it is highly relevant because it comes along with the provisions on immunity. Nonetheless, the grant of immunity is not conditional upon the availability of a dispute settlement system. Thus, there is an absence of any conditional relationship between grant of immunity and provision of alternative modes of dispute settlement (Brabandere 2010). However, others like Reinisch (2000: 143) believe that the UN is bound by the provisions of Section 29 of the UN Convention on Privileges and Immunities.

The legal framework onimmunities clarifies that national legislation does not apply to the IOs located within the domestic territory of a country. Such non-application facilitates the autonomy of the IOs. In a similar vein, jurisdiction of the national courts does not cover the areas run by IOs. Given this backdrop, it appears that the only possible way of somehow constraining the absolute character of IO immunity is the availability of alternative means of dispute settlement, either by the IO itself or some other international body. Claims against the UN may largely fall under two categories – first, claims of private law character emerging out of contracts of which UN is a party and second, disputes emanating because of claims against a UN official whose immunity has [not been waived] by the Secretary General. Cases such as those arising during peacekeeping do not constitute an institutionalized response towards resolving and settling disputes. However, in case of disputes arising from commercial contracts, the UN has provided for conciliation or arbitration, thus elements of institutionalized means are available here (Brabandere 2010: 92).

The issue of rights of the claimants against the UN was eloquently clarified by the Legal Counsel during the oral proceedings of the *Cumaraswamy Case*. First, he pointed out that Section 29 in the Convention is meant to offer an effective remedy system to settle claims against the UN. Second, this remedy system is needed to be provided not just in case of the involvement of UN official but its agent like experts. Third, normally such disputes are to be resolved via negotiation, conciliation and arbitration. Fourth, he spoke against the suggestion of a standing body by claiming that it is 'neither feasible, practical nor economical'. Inspite of this, the matter of conditionality between immunity and dispute settlement means was not clarified (Corell, Legal Counsel of the UN 1999).

The ICJ in the *Cumaraswamy Case* reaffirmed the conventional perspective on IO immunity by arguing that national courts lack jurisdiction to put these bodies on trial and therefore disputes involving IOs as party need to settle through the means provided by them. Importantly, ICJ did not condition enjoyment of immunity with the availability of dispute settlement mechanisms implying that one cannot argue that in the absence of such mechanisms, immunity might be diluted (ICJ 1999).

Such a state of affairs inevitably brings in the issue of right to a fair trial which is enshrined in various international conventions like the European Convention on Human Rights. In *Waite and Kennedy v. Germany Case (1999),* the European Court of Human Rights (ECtHR) observed that the availability of alternative remedial means is "a material factor in determining whether granting immunity is permissible under the Convention" (ECtHR 1999). Nonetheless, it still did not hold that grant of immunity is conditional upon the availability of alternative dispute settlement systems.

In *StanislavGalic v. Netherlands Case*, the ECHR addressed a situation where Galic (who was put under life imprisonment adjudicated by ICTY) brought a claim against the Netherlands for the violation of his right to access court. The Court considered the case from the perspective of attributing responsibility – between ICTY and Netherlands. It was observed by the Court that it lacks jurisdiction over the ICTY owing to its status as a subsidiary organ of the UN and the latter enjoys immunity. The Court also found that the mere fact of ICTY having its seat in The Hague is not a sufficient ground for holding Netherlands responsible. Broadly, one can notice that the Court reaffirmed the view that sovereign and IO immunity constitute an exception to the right to access to court (ECHR 2009).

Taking a more aggressive stand in the context of protecting fair trial rights, the ECJ in *Kadi Case* (2008) appears to link the enjoyment of immunity with the availability of alternative settlement mechanisms. About the inadequate character of the review procedures established in the domain of sanctions regime, the Court held that:

> the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community. Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection (ECJ 2008).

Nonetheless, the notion of UN immunity being absolute in character is reaffirmed by the fact that no dimension of international law has restricted its scope even when rights bearing the status of *Jus Cogens*were found to be violated (as witnessed in the judgment given in the *Srebrenica*case by the District Court in Hague) (Brabandere 2010: 98).

Immunities are usually incorporated in the constitutional treaties forming the organization i.e. Article 105 of the Charter in case of the UN. Article 105 of the UN Charter authorizes the UNGA to carry out the process of applying immunities in practice. This was done throughthe 1946 Convention that outlined the nature and scope immunities granted to UN and its personnel. The ICJ perceived it as a system of immunities that creates rights and obligation for state parties towards each other and towards the UN (Brabandere 2010: 98)

UN civilian staff is accorded immunity under Section 18 of the 1946 Convention in the following words, "UN officials areimmune from legal process in respect of words spoken or written and all acts performed by them in their official capacity". The UN civilian staff in the PKOs falls in this category. Immunity is relevant for the official acts and is not meant for the situations involving cases belonging to the criminal justice system. UN has the competence to determine whether an act is official or unofficial. In this context, the Convention states that the- "[p]rivileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves".Furthermore, the Secretary-General has the "right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations" (UN 1946).

Section 22 of the Convention elaborates the immunities to another category of people associated with the UN, namely 'Experts on Mission'. It states that these set of individuals would enjoy immunity:

> as...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 **...** 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 (UN 1946).

As in the case of UN civilian personnel, the Secretary General has the competency to waive immunity of people falling under experts on mission category i.e. military observers and civilian police in PKOs. The national contingents of troop contributing states that constitute the UN force are granted immunity under Status of Forces Agreement (SOFA). The SOFA ensures that in case of a criminal offense committed by the peacekeeper, the host state cannot claim jurisdiction unless immunity is waived by the Secretary General. In practice, the troop contributing state retains the right to put the alleged peacekeeper on trial (UN 1990).

Ladley (2005: 83-84) explains the problem by examining the practice of immunities in IR. The logic behind the grant of immunities to the diplomats of foreign countries is to secure independent working of such officials. Later, this practice was applied to grant immunities to the military forces of the intervening state under the *Status of Forces Agreement* (SOFA) concluded between the foreign and the host state. The problem arose when this arrangement was adopted by the UN in its peacekeeping missions since the traditional immunities were never intended to cover tens of thousands of staff in single deployment. Thus, the increasing power and scope for impact of IOs along with the immunity they enjoy in international law created an accountability gap in the international system that needs to be addressed (Reinisch 2001).

The issue ofIO accountability is also complex owing to its dependence on agency other than the states. The peacekeepers do not act (at least in a legal sense) as nationals of their countries but as agents of IOs who are tens of thousands in number. The blanket immunity or absolute immunity sought by IOs spills into violations of human rights which is also true in case of diplomatic immunity for example firing by Libyan Embassy officials at demonstrations outside their mission in London killing a police officer]in 1984. The IOs are likely to showcase themselves as bodies who act with caution after extensive deliberation and in good faith. However, legal accountability should be strengthened for example by waiving immunities in several cases or by carrying legal review by national and international courts (Parish 2010).

Advocates of immunity claim that the immunities exercised by IOs are preconditions for their autonomy and impartial functioning. The larger role played by IOs in recent times has brought these legal privileges into question as some argue that they abet the feeling of impunity. The shift in the role of IOs has not been accompanied with the modification of the structure of the immunities. As a result, large numbers of disputes of private law character have remained unresolved especially in the context of UN peacekeeping missions(Brabandere 2010).

The conventional argument in favor of IO immunities is that it prevents unnecessary interference by the state in the functioning of an IO that is operating or has an office in that state's territorial jurisdiction. However, the question of immunity has become interesting in case of territorial administrative missions run by the UN. In such missions, the UN acts almost like a state in a region which has collapsed politically and therefore apart from traditional aims of PKOs like conflict resolution or monitoring ceasefire, it makes laws, maintains law and order, conducts elections, adjudicates legal disputes, undertakes development tasks etc. (Brabandere 2010).

The practice of immunity has become most controversial during the peace operations owing to the growing magnitude of crimes committed by UN forces. Though the peace keepers have been charged with allegations like torture, illegal detentions, killings etc., it is the widespread incidents of sexual abuse of the host population that has attracted maximum criticism for the notion of immunity. The presence of international peacekeeping forces has shown a positive correlation with the rise in the number of incidents of Sexual Exploitation and Abuse (SEAs). For e.g. in Cambodia, the cases of prostitution have risen from 6000 to 10000 during 1992-93 (Csaky 2008). The UNHCR and Save the Children reported in 2001 that children are sexually exploited by the peacekeepers for as little as a biscuit in states like Guinea, Sierra Leone and Liberia (UNHCR/Save the Children 2002 in Burke 4). In Bosnia, human trafficking and sustenance of brothels have been widespread (Mendelson 2005).

Another shocking incident that came to the surface was the repatriation of 114 Sri Lankan peace keepers because they were accused of engaging in SEAs with minors in Haiti (DPKO 2004). In 2007, Moroccan force under the UN came under allegation of similar assaults in Ivory Coast. The [list is huge] and the UN has found itself

powerless in the face of its inability to push the trial of the accused peacekeepers. Despite the intent of the states that such incidents not occur, their failure to revert from the practice of immunity continues to rupture the legitimacy of peacekeeping. The application of immunities is so fundamental to peace operations that any step toward reforming the latter should be realistic enough not to assume that states would allow much deviation from the former. In other words, states are not likely to give up the privilege of immunities of their nationals while serving under any international organization (Senior Official of IOIS 2017).

It is quite clear that the accountability problem emerges not just because member states cannot be held accountable but also due to the gap that IOs cannot be prosecuted in domestic or international court. The aggrieved party i.e. an individual in a host country where an IO is operating has to rely upon the mechanisms provided by the IOs. Moreover, if it is clear that an IO official (both civilian and military) is involved in an illegal act, the IO does not enjoy much leverage in prosecuting the staff. At most, an IO can either impose some punitive measures on the concerned staff with regard to employment or send back home the accused staff and rely upon the fairness of the domestic legal arrangement of the staff's home country. In most cases, the home country lacks the political will to prosecute its own citizen for the crime committed against the citizen of some other country while performing "his duty". On the other hand, IOs like UN, in cases of peacekeeping missions, are quite reluctant to acceptthe intended role of the staff in the wrongful act since they fear curtailment in the supply of peace operators in the future operations (Murphy 2006).

3.4 Diversity of IOs

One of the major hurdles that has prevented the formulation of a clear legal framework for IO accountability is the immense diversity that IOs showcase,as also reflected in handbooks on the laws of IOs titled "Unity in diversity" (Schermers and Blokker 2003). Scholars like El Erian suggest that different classifications of IOs (e.g. universal-regional) may stipulate different legal consequences (Klabbers 2013: 12-13). However, recent attempts signal a tendency towards crafting general legal principles of IOs to simplify the issue of accountability. The Final Report of the *International Committee on the Accountability of International Organizations* adopted by the ILA in 2004 is one the most significant legal document on this matter (ILA

2004)[34]. ILA identifies accountability of IOs as a multifaceted phenomenon having four different forms – legal, political, administrative and financial (Dekker 2005: 97-99).

To sum up, the issue of IO accountability needs to be understood by conceptualising particular problems of IO accountability in relation to each other which spills into a broader structural problem. The issue of accountability is complicated because the established principles and practices are at odds with the emerging demands due to changed circumstances. The problematic principles and demands are as follows. The separate personality of IOs is essential to maintain its autonomy and effective functioning. Member states allegedly make use of the separate legal identity of IOs and strategically pursue their national interest. IOs cannot be prosecuted in any international or national tribunal or court. The states are not held accountable for the acts of IOs because if that happens, states will have greater incentive to intervene in the affairs of the IOs,jeopardizing the latter's autonomy. Another aspect that adds up the complexity is the immunities granted to IO staff from prosecution that builds a culture of impunity. The call for accountability arises when instances of human right violations occur and the established principles as well as practices defend both states and IOs leaving victims helpless (Stumer 2007, Council of Europe 2013, Schermers and Blokker 1995: 1007).

4. Accountability Gap of International Organizations and the International Legal Response: Attempts to Bridge the Gap

The issue of IO accountability has been addressed by both IR and International Legal scholarship. The former has attempted to highlight the unique features of the domestic accountability practices and its inability to address the accountability gap internationally. The key argument they have propose is that due to the different nature of the two realms – domestic and global – the accountability models should be conceptualized differently in the latter case. Accordingly, the mechanisms to ensure accountability in the global sphere should be different from those that are practiced domestically. Thus, the arguments from IR scholarship pertaining to the concept of

[34] For detailed discussion on ILA's account on accountability, See pg. 112.

accountability are largely grounded on the insights drawn from the field of political theory and international relations. On the other hand, [the international legal scholarship has addressed this question in a sequential manner after addressing the question of the responsibility of states]. However, the driving force for both the fields is the enhanced political role that IOs are playing in the present era. The legal scholarship has sought to create a regulatory cover over the functioning of IOs so that the legal gaps that have been a point of controversy in a large number of cases could be adequately filled.

The International Law Commission (ILC) took note of the seriousness of the issue of IO responsibility in 2002 and concluded its work in 2011. The UNGA in its resolution 56/82 on 12 Dec 2001 recommended the ILC to initiate work on the responsibility of the IOs (UN 2001). Consequently, the ILC took up the work on responsibility of IOs in its 54th session in 2002. The product of the efforts made by the ILC culminated in the adoption of the '*Draft Articles on Responsibility of International Organizations'* (DARIO). The DARIO was modeled on the lines of the previous work done by the ILC on the *Articles on State Responsibility (*ASR). The Special Rapporteur, Giorgio Gaja and the working group drew up eight reports during 2002 and 2011 to finish the task of formulating draft articles. The work on the DARIO was finished relatively quickly if seen in the light of the time duration (45 years, from 1956-2001) taken to complete the similar work on responsibility of states (ILC 2011).

There are two main reasons for the incorporation of the idea of accountability of IOs in the working agenda of the ILC. First, the drafts concerning the accountability of states were prepared by the ILC and thus the body thought of extending the agenda to bring in the related topic of accountability of IOs. Second, the ILC had earlier successfully dealt with legal questions relating to IOs which had resulted in two separate conventions – the*Vienna Convention on the Representation of the States in their Relations with the IOs of a Universal Character* (1975) and the *Vienna Convention on the Law of the Treaties between States and IOs or between IOs* (1986). These two factors along with the rising significance of IOs as entities influencing international outcomes triggered a move towards putting the issue of accountability of IOs on the agenda of ILC.

The DARIO takes a broad view of the term 'international organization' by stating that it is —

> an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities (Moldner 2012: 289-290).

According to this view, an organization can be established not just through a treaty but by means of resolutions of another IO or by the conference of states. Also, it covers IOs beyond the traditional IGOs. IOs having members other than states are included. However, it leaves out organizations established through municipal law. It also does not cover breach of obligation arising out of municipal law as the DARIO are solely concerned with obligations emerging out of international law (Moldner 2012: 289-290).

To justify the efforts towards holding IOs accountable, Article 3 of the DARIO states that "Every internationally wrongful act of an international organization entails the international responsibility of that organization" (ILC 2011). Hirsh (1995) argue that it mirrors the rule of international law because it reflects a 'general principle of law'. Others like Arsanjani (1981) contend that the responsibility of an IO is based on the rule of 'customary international law'. Ginther (1995: 1336) suggest that attribution of the responsibility of an IO is grounded in its 'international legal personality'.

The Commission perceives the accountability of IOs within the framework of customary international law in the light of two facts. First, the Commission argues that the issue of IO accountability is a matter of customary international law because the UN Secretary General in a report has explicitly admitted that the practice of state responsibility in case of breach of an international obligation is also applicable on the UN while performing its peacekeeping operations. Therefore, it seems to have relied on the IO 'practice' to bolster its assertion. Second, the Commission invokes the *Opinio Juris* by referring to the ICJ's Advisory Opinion in*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case(1999), in which the ICJ opined that the issue of immunity is different

from the issue of damages arising from the acts of UN agents acting in official capacity (ICJ 1999).

The ILC also relates the accountability of IOs with the idea of international legal personality of these bodies. The implication henceforth is that the wrongful act of an IO causing an injury would be attributable on the concerned IO without requiring that the injured state first recognize the personality of the concerned IO. Thus, the commission conceptualizes the legal personality of an IO being objective in character. However, this would also imply that the concurrent or subsidiary responsibility of member states no longer remains a possibility. Moreover, in the commentary to Article 3 of the DARIO, the ILC seems to place the issue of IO accountability within the purview of 'general principle of law' by stating that the principle of accountability applies to 'whichever entity' that commits the 'internationally wrongful act' (ILC 2011).

According to Article 1, the DARIO apply:

> 1. to the international responsibility of an international organization for an internationally wrongful act.
> 2. to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization (ILC 2011).

This provision poses the question – what constitutes an internationally wrongful act? In accordance with the formulation created in ASR,Article 4 of the DARIO states that:

> there is an internationally wrongful act of an international organization when conduct consisting of an action or omission – (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization (ILC 2011).

Articles 6 to 9 refer to the conditions under which the conduct is attributable to IOs. Attribution of conduct is linked to situations either of omission or commission. The former is feasible only when there is an obligation to act. The conduct is attributable either to the organ or to the agent of the organization. Article 2 lit. (c)provides that an organ of an international organization means "any person or entity which has that

status in accordance with the rules of the organization, no matter if it is explicitly called organ or if it gains that status from its functions (ILC 2011)."

The term 'agent' is defined under Article 2 lit. (d):

> agent of an international organization' means 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.

This definition of agent of an IO is incorporated in accordance with the ICJ's judgment in the *Reparation for Injuries Suffered in the Service of the United Nations (1949)*in which the court conceived the term 'agent' in the broadest form possible. In this context, the Court held:

> The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts (ICJ 1949).

The relationship between an IO and its agent is based on certain instruction, guidance or direction received by the latter while acting or not acting on behalf of the organization. The DARIO deals with this matter in reference to the provisions available in ASR. Aclear connection is visible between Article 8 of the ASR and Article 6 of the DARIO. Article 8 of the ASR talks about the attribution of conduct to a person or group of persons of a state when they are acting under the direction, instructions or control of that state. Similarly, Article 6 of the DARIO specifies that "[s]hould persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in sub-paragraph (d) of article 2 (ILC 2011: 19)."

On the question of attribution of conduct when an organ of a state or an organ as well as an agent of an IO is placed at the disposal of another IO, the articles clarify that attribution is feasible only when the latter exercises 'effective control' over that conduct. The ILC emphasizes the role of effective control [over] ultimate control and to establish the prevalence or absence of effective control, emphasis is laid upon the

factual circumstances and specific context. It is simple to infer that the ILC is considering the situations of peacekeeping operations wherein the states place their military and civilian staff at the disposal of an IO. The effectiveness of the DARIO is already visible in the references that different courts have made to the work of the commission while addressing cases involving IOs e.g. in *Behrami* and *Saramati* cases, the European Court of Human Rights made a reference to the 'ultimate authority and control' principle enunciated by the ILC. Similarly, in *Al-Jedda vs. United Kingdom* Case, the Court opined that the UNSC had neither ultimate control nor effective control and thus the detention of the victim was not attributable to the UN (Moldner 2012: 293-295).

The question – what constitutes breach of an international obligation? – is central in determining the nature and scope of accountability of IOs. Article 10(1) of the DARIO states that,"[t]here is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned." The international obligation of the IOs is relevant for different actors in the international plane. Such obligation is owed to all subjects of international law – international community as a whole, member-states, non-member states, other IOs and individuals. In case of individuals, reference is made to the status of individuals as employees or the citizens of the host state where UN peacekeepers operate (Moldner 2012: 295-296).

While determining the responsibility of the IOs, the Commission took note of the circumstances precluding the wrongfulness of the conduct. These circumstances are dealt with between Articles 20 and 27. The first circumstance involves the issue of consent. Article 20 of the DARIO read as follows, "Valid consent by a State or an IO to the commission of a given act by another IO precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent (ILC 2011)." The consent can be obtained in advance or at the time of the occurrence of the act. It may be explicitly given or implicit in expression.

Second, according to Article 21 of the DARIO, "the wrongfulness of an act of an IO is precluded if and to the extent that the act constitutes a lawful measure of self-

defense under international law." From the perspective of UN peace operations, the idea of self defense has been fundamentally important as the peacekeepers are traditionally allowed to use force in situations of self defense. In the light of the peace enforcement measures, the Commission notes that the force can be legitimately used or wrongfulness can be precluded if force is used to protect the mission. Third, Article 22 of DARIO says that an act of an IO can preclude wrongfulness if it is carried out in a form of lawful countermeasure. The countermeasure by an IO against a state or another IO is a reaction to the wrongful conduct carried by the latter and thus serves as a remedy.

Fourth, Article 23 of the DARIO provides that wrongfulness of an act of IO can be precluded when an act is conducted due to *force majeure*. The concept implies that wrongfulness is precluded if the act is carried out due to irresistible force, unforeseen event, something beyond the control of an IO. Hence, these exemptions are those that make it impossible for an IO to perform its obligations. It is worth noting that the Commission very carefully addressed the matter of financial distress of an IO as a part of *force majeure* as the former could be a result of poor management, non-payment of dues by states etc. Thus, financial distress qualifies as *force majeure* only under exceptional conditions (Moldner 2012: 303).

Fifth, Article 24 suggests that wrongfulness of an act is precluded when the author of an act has no means to save the lives of those entrusted on the author. This exemption is termed as 'distress'. In this context, even though the Commission touched upon the practices of R2P or humanitarian intervention, in the end,it decided to maintain a very limited scope. The sixth and the last element that may preclude wrongfulness of an act is the idea of 'necessity'. The idea of necessity has been controversial in the context of states and yet despite concerns it was decided that IOs would be allowed to invoke necessity, though it is to be monitored carefully. An IO may invoke argument of necessity only to protect essential interest of its member states as well as of the international community. Moreover, the necessity clause is applicable only when the concerned IO has an obligation under international law to safeguard such interest. Hence, Article 25 of DARIO specifies that the necessity argument cannot be pulled by an IO to advance its own interests (ILC 2011, Ahlborn 2011).

The DARIO elaborates quite significantly on the consequences of internationally wrongful acts invoking responsibility. Under Article 31 of the DARIO, an IO has a duty to make reparation for an internationally wrongful act. Article 34 specifies that the reparation can be made in the form of restitution, compensation and satisfaction. An important question arose during the drafting of the articles– Do member states have subsidiary responsibility to pay dues or damages to an injured party if IOs are not capable of meeting its obligations due to financial constraints. Although the Commission rejected such secondary or subsidiary responsibility of member states, yet to ensure that the injured party does not face injustice, the Commission included Article 40(1). This article states that the concerned IO must take all measures to urge member states to provide it with the necessary resources so that it may meet its obligations. Also, article 40(2) provides that memberstates must provide all means to the responsible IO in order to allow it to meet its obligations in the context of internationally wrongful act (ILC 2011).

The responsibility of an IO also arises in situations of a connection with the act of state or another IO. In these situations, the responsibility of an IO is incurred if it *aids or assists* a state or another IO in the commission of an internationally wrongful act. The IO needs to "intend" for the occurrence of that unlawful act and also that assistance must play a role in the occurrence of the act. Hence, mere knowledge is not a sufficient ground to hold an IO accountable. Second, an IO may be held responsible if it *directs or controls* a state or another IO in the commission of an internationally wrongful act. In this context, the term control implies dominationand the term direct must imply direction at an operational level and not mere suggestion. The third situation of a collaborative action is when an IO *coerces* a state or another IO in committing an internationally wrongful act. Finally, the Commission identifies atleast two situations where an IO seeks to *circumvent* its responsibility related to internationally wrongful act. First, when an IO authorizes a binding decision on state(s) or IO(s) to commit an act which if committed by the former would be internationally wrongful.Second, when an IO authorizes state(s) or IO(s) to commit an act that would be internationally wrongful if committed by itself. The difference between the two is that in the latter case, the act must actually be committed. By circumvention, it is implied that the IO seeks to misuse the separate legal personality of its members (Moldner 2012: 311-315).

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Equally significant are the situations of the accountability of states in connection with the conduct of the IOs. Article 58 of the DARIO unambiguously asserts that mere membership of a state in an IO does not amount to the responsibility of those member states if the IO commits an internationally wrongful act. This issue of responsibility of members because of mere membership has been a matter of significant controversy especially since the collapse of the International Tin Council in 1985. Nonetheless, the ILC adopted the position taken by Institute of International Law that there is an absence of any general rule in international law that provides for subsidiary or concurrent liability of member states (Moldner 2012).

Article 58 of the DARIO (which however is a reverse situation of Article 14) states that a state can be held responsible if it *aids or assists* another state or an IO in committing an internationally wrongful act. Article 58(2) says that an act conducted by a state in conformity with the rules of an IO does not invoke the responsibility of that member state(s). On the issue of *direction and control*, the Commission under Article 59 proposes that a state may be held responsible if it directs and controls another state or IO for the commission of an internationally wrongful act. Similarly, on matters of *coercion and circumvention,* the Commission creates parallel provisions in reference to Article 16 and 17. Another case where the responsibility can be attributed on the states is when they *accept* it towards third party or they have caused the third party to rely upon its responsibilities (ILC 2011).

One major point of criticism of the DARIO is that it continues to take a traditional approach (state centric) in a world that has already attained a significant level of complexity. It is not that the Commission is unaware of the narrow approach that it adopts because it conceives that obligations of IOs may arise towards individuals and other entities too. Nevertheless, consequences of such breach are not covered in DARIO. In the absence of international protection to an injured party (other than state or an IO), the concerned party has to rely upon diplomatic protection (Moldner 2012: 327).

Another criticism is that the DARIO fails to acknowledge the differences between states and IOs (Wouters and Odermatt 2012).There is no pretense that the DARIO is a

seminal contribution as they are firmly grounded in the [pillar] offered by the ASR. However, some experts like Alvarez (2006) have opined that DARIO is nothing more than the replacement of the term 'state' with 'IO'. Others like Blokker (2010: 36) argue that given the influence they have in modern IR, it is crucial to hold IOs accountable but creating a separate legal regime would be going too far. This may also result in fragmentation of international law and would create incentives for states to circumvent their responsibility by exploiting international legal personality of IOs (Moldner 2012: 322-323).

The DARIO conceives all IOs as similar. There are multiple grounds on which multiple typologies of IOs can be conceived. Among others, EU poses itself as an importantly unique body. The issue of attribution of responsibility becomes highly complex in case of EU when acts of EU are executed by member states and especially when the execution by the latter spills into breach of obligations. To deal with this critique, the Commission has incorporated Article 64 which says that the DARIO does not apply in situations where the conditions of an internationally wrongful act are governed by the 'special rules of international law.'

Another point of criticism of the DARIO is that they are created when even the primary rules (those that create obligations) related to IOs are at infancy,for instance, the contested notion of HR obligations on IOs (Alvarez 2006). Lastly, unlike ASR that drew a whole bunch of state practice, the DARIO is crafted out of very limited availability of IO practice. The ILC itself admits that lack of such practice turns the character of DARIO in favor of 'progressive development instead of codification'.Nonetheless, it should be viewed as a positive step towards strengthening the accountability of IOs. The DARIO persistently structures itself within the general principles of international law which means that it has implications for other subjects of international law as well and may pave way for other international legal regimes (Moldner 2012: 326-327).

The ILC has mandate to effectuate the progressive development of international law as well as facilitate its codification. Given the lack of practice substantiating IO responsibility, the ILC promulgated DARIO as a step towards progressive realisation. The DARIO showcase general character implying that they can be applied on all IOs

irrespective of variety of differences among them. It may be a different matter that some provisions are more relevant for a particular set of IOs than others i.e. provision of operational necessity and self-defence would naturally appear more familiar to peace operations (Gaja 2014: 4). Thus, the Special Rapporteur for DARIO, Giorgio Gaja, believes that there exists sufficient common ground in these articles for their application on diversity of IOs.

The parallelism between DARIO and ASR is not surprising given that the rules that are applicable on states can also be transposed to entities (IOs) having collection of states bearing separate legal personality. However, they aren't same and rightly display differences at different points. Some of the places where DARIO could have been improved are the following. Under Article 2 (a), explanation is missing on the conferment of international personality on IOs. In Article 8 of DARIO, it needs to be clearly specified that an IO cannot escape responsibility by arguing that its agent has acted ultra-vires. Similarly, Article 62 needs to be reframed. It must be acknowledged that generally the states responsibility for the IO acts (whose having legal personality) does not arise. If it does, it remains a matter of exception (Amerasinghe 2012: 29-31).

The stature of DARIO in the existing legal framework on IO accountability is supreme. It enjoys this rankingbecause of the unprecedented position of ILC in the domain of progressive development and codification of international law. As a subsidiary organ of UNGA (one of the most representative and the equal body in the world), the ILC enjoys wide legitimacy. Although the DARIO stands at the apex of the IO legal frameworkpertaining to questions of IO responsibility and accountability yet there are other organizations that have produced equally important work on this subject.

The International Law Association's (ILA) views on the responsibility of IOs are different in scope than the one adopted by ILC. The latter has largely focused on the responsibility of IOs in relation to states or other IOs while the ILA has conceptualized the responsibility in a broader sense by accommodating responsibility towards staff, individual persons as well. The broader perspective adopted by ILA has political theory based underpinnings which is mirrored in its proposition that "Power

entails accountability" (ILA 2002). Furthermore, this view suggests that accountability of IOs also covers primary norms (besides secondary norms) relating to the rules or policies of the IOs.

The ILA addressed the problem of IO accountability when the 'Committee on Accountability of IOs' was formed by ILA in 1996. Its first report was presented in 1998 at Taipie outlining general themes for consideration. Following this, general principles relevant for the issue of IO accountability were promulgated in the London meeting in 2000. A key feature of the London report was the annexure comprising Recommended Rules and Procedures (RRP-s). The RRP-s constitute relevant principles, guidelines and rules that are meant to be pragmatic and useful in the field of IO accountability. The committee believes that RRP-s need to strike a balance between the IO accountability for its acts and omissions and its autonomy. In 2001 meeting at Hague, a drafting committee was created to review the London draft RRP-s and other drafts framed by co rapporteurs (ILA 2002: 1).

The committee emphasizes the significance of co-existence of both primary and secondary rules as discussions on accountability in the absence of appropriate modes of dispute settlement would sound hollow. The RRP-s at the first level of accountability should reflectfollowing principles. The first principleis*good governance* which itself constitute following six components. The first key aspect of good governance is transparency in decision making process as well as during execution operational decisions i.e. normative decisions must be held through public vote. The second component of good governance is the participatory decision making process. The third component is the access to information for e.g. all IO documents should be made available to member states. Fourth, well-functioning international civil service. Fifth, effective financial management. Sixth, system of effective reporting and evaluation (ILA 2002: 2-5, ILA 2004: 8-11).

The second principle of RRP-s is the *principle of good faith*which can be demonstrated through display of values like honesty, reasonableness and fairness in the working modalities of IOs. The third principle is the*principle of constitutionality and institutional balance*. It implies that all organs of an IO are obligated to act in accordance with the rules of the organisation. Moreover, the organs as well as agents

of IOs must function in a manner that they do not exceed the scope of their official capacity. The fourth principle is one of sup*ervision and control* i.e. the IOs have an obligation to supervise and control their subsidiary organs. The parent IO should nullify those decisions of its organs that are found to be against general legal rules (ILA 2002: 5-6, ILA 2004: 12- 13).

The fifth principle at first level of accountability pertains to the *necessity of reasoning for decisions or actions made by IOs*. The sixth principle speaks about *procedural regularity* i.e. IOs should function in a manner to prevent abuse of discretionary power. The seventh principle emphasises *objectivity and impartiality*. The values of objectivity and objectivity is also significant as they reflect spirit of constitutive instruments of IOs an also find resonance in IOs internal rules of procedure. The eight principle is one of *due diligence* i.e. all organs and agents of IOs must act in a manner to avoid all claims against IOs. The functioning of peace keepers seems relevant here as the UN is overwhelmed by allegations of sexual abuse due to the criminal misconduct shown by them. The ninth principle is the *promotion of justice*. The paramount feature of this principle is the availability of remedies to the claimants (ILA 2002: 6-7, ILA 2004: 13-15).

The RRP-s on responsibility or liability of IOs are to be governed by constituent instruments, customary law, treaties and general principles of international law. The relationship between IOs and its member states would be governed by all these types of laws. The relationship between IOs and its staff members are covered by constituent instruments, staff regulations, other rules of IOs, any specific agreement(s) binding on IOs, employment contracts and general international law. Similarly, the relations between IOs and their staff are governed by employment contracts, rues of general international law, relevant rules of IO and any other agreement binding on them (ILA 2004: 19-20).

Lately, the relationship between IOs and third parties is becoming an important aspect of IO functioning. The relations between IOs and non-membersas well as between IOs and other IOs are governed by the tenets of general international law and agreements binding on them. The contractual relationshipbetween IOs and third parties are covered by contracts and the relevant principles of private international

law. The IOs must construct a uniform contractual regime as it serves the cause of accountability.The dispute between IOs and third parties can also arise in the absence of a contract giving rise to non-contractual liability. In case, IO acts damage state property or cause injury to state official, the international law shall govern the tort liability. In case, an act of IO causes injury (both personal and damage to property) to non-stateparty, the tort liability will be regulated by local law unless the breach in question relates to international law rules.(ILA 2004: 20-21).

In the circumstances where third parties have not consented to the relationship with IO, the applicability of local or international law would be conditioned by the status of the claimant. This situation is compounded because of the absence of presumption in international law that UN is primarily or exclusively responsible for the tort claims emanating due to operations of peacekeeping forces and the law in this regard has not fully developed (Brownlie 1998: 686). However, the UN has taken upon itself the responsibility of such damages but subject to the test of effective control (UN 1996).

Another dimension of the IO accountability pertains to the issue of prevention of damage caused by lawful operational activities. The IOs need to take necessary precautionary measures to minimize the risk of damages occurring of its operational acts.Before undertaking a task, an IO is expected to conduct impact assessment or potential damage its operations may cause. It must timely notify the possible affected parties. If an IO is offering a technical service or conducting conference, a harmless clause is signed in which the liability of injury falls upon host state excluding situations where injury occurs because of gross negligence by IO or agents. However, during UN peace operations, a reverse harmless clause favouring TCCs is included in MOU (singed between UN and TCCs) stating that any claims arising out of such operations would be directed at UN. However, in case of wilful misconduct or gross negligence creating individual criminal responsibility, the UN would pursue justice vis-à-vis state (ILA 2004: 21-22).

It is important that IOs must adhere to HR and IHL laws during decision making process and actions. The non-military measures should be undertaken after assessing its HR implications especially right to life, medical aid, living standards etc. All sanction measures must be targeted in character and offer mechanisms of redressal for

the listed individuals and entities. All TCCs have a responsibility to ensure that its troops adhere to IHL while UN bear coordinate responsibility for the operations under its command. The IOs must include IHL in the regulations governing its operations. The TCC is responsible for conducting trial of those accused of violations of IHL and the IOs need to follow up to ensure that free and fair trial happens (ILA 2004: 22-25).

The third level of accountability relates to the secondary rules. Every internationally wrongful act constitutes responsibility of IOs. attributed to IOs if that wrong occurs either through action or omission (ILA 2004: 26). The ILA vividly pronounces the RRP-s relating to international legal responsibility of IOs.

> First, every internationally wrongful act of an IO entails the international responsibility of that IO. Second there is an internationally wrongful act of an IO when conduct consisting of an action or omission is attributable to the IO under international law and constitutes a breach of an applicable international obligation. Third, the characterisation of an act of an IO as internationally wrongful is governed by international law. Such characterisation is not affected by the characterization of the same act as lawful by the IOs internal legal order. Fourth, an act of an IO does not constitute a breach of an international legal rule unless the Organisation is bound by the rule in question at the time the act occurs (ILA 2004: 27).

The right to remedy is a part of general international law, specifically international HR law and thus this right withstands in case of disputes with IOs. For remedies to make sense, they must be effective, adequate and in case of legal claims must be enforceable. Any denial to right to remedy constitute a denial of justice and thus all IOs should create institutional framework to pursue it. The remedial mechanisms should be made public as well as the information on the outcome of the remedial action should be open for public (ILA 2004: 32-34).

Different kind of claims would require different remedial regimes for e.g. if a claim is legal in nature, remedy must be enforceable, if a claim is of formal character then the remedial mechanism must be separate or independent from respondent authority (Harris et al. 1995). The accountability systems need not always meant to protect legal interests but also political, financial and administrative interests and these are

not presented in the form of legal claims (ILA 1998: 603). The non-legal mechanisms include Ombudsperson office, commission of inquiry, Inspection panel etc. To ensure fairness and effectiveness of remedial mechanisms, IO must adhere to the principle of good governance i.e. timely and reasoned reply (ILA 2004: 34).

There can be situations where states may want to exercise its diplomatic protection to help their national get justice. To pursue that, states need to first address the issue with the concerned organ with whom the matter is associated. States can extend diplomatic support only when all internal mechanisms of accountability established by IOs have been exhausted (ILA 2004: 37).

The liabilities arising out of contracts need to be settled by independent bodies like tribunals established by IOs or states. To address the tort claims of private law character, IOs should incur thirty party insurance. If the claims arise due to operational activities under the command and control of IOs, then IOs must offer solutions like standing claims commission, refer the issue to the tribunal etc. To handle cases against its staff and experts, IOs need to establish channels if communication to hear complaints (ILA 2004: 39).

While undertaking operational activities like peace operations, IOs must create channels of communication to the host state, non-state actors, groups and individuals whose interests are influenced by their operations. The Courts must allow NGOs accredited to IOs (against whom a case brought forth) to submit their observation on the case. This is important as states may omit few aspects of the case even if they are of public interest (Shelton 1994). However, one of the major procedural obstacle is the jurisdictional immunity of IOs before national courts (Gaillard and Pingel-Lenzza 2002: 2).

The IOs are under an obligation to cushion proper administration of justice in the judicial proceedings by revealing information or documents. It's denial of information disclosure must accompany strong reasons that may prejudice its independence. Wherever necessary, immunity of the IO personnel must be waived off to promote the cause of justice. The rules on international responsibility (except when differencesin the power and functions of IOs and states do not warrant) that apply to states should

also apply to IOs. Suitable modes of satisfaction need to be devised including apology of the IOs head and the punishment to the deviant staff. IOs must undertake non-repetition in the operational guidelines (ILA 2004: 41-43).

To render justice, the international tribunals should not adopt a narrow approach in admitting the case and IOs are under an obligation to abide by the decisions of the tribunal. On the question of potential role of ICJ on securing IO accountability, the Committee had divergent views. The boneof the contention was that for ICJ to exercise its jurisdiction over IOs, few fundamental steps are required — IOs need to alter their constituent instrument; and Statute of ICJ need to be amended (which indeed would imply amending the UN Charter). Thus, the Committee refrained from presenting the issue in the main text and unanimously decided to put it in the appendix of the report.Nonetheless, the IOs must be allowed to approachthe ICJ and seek its Advisory Opinion on disputes concerning its non-contractual and legal responsibilities. This opinion can be used to secure remedy like declaratory judgment (ILA 2004: 47- 49).

There may be IOs whose constituent instrument provides for the referral of disputes to the ICJ. To facilitate that, Article 34 of the Statue of the ICJ should be duly amended to allow access to IOs. As a procedural measure, the concerned IO after attaining the status of a party must submit their willingness to abide by the decision of the Court to the UN Secretary General (ILA 2004: 52).

To sum up, the ILA identifies accountability of IOs as a multifaceted phenomenon having four different forms – legal, political, administrative and financial – operating at three levels. The first level relates to the internal and external scrutiny or monitoring by member states or third parties and takes the form of instruments like reports. The second level relates to the tortuous liability for injuries committed and the redressal could be either through some preexisting arrangement or ad hoc legal political financial settlement. The third level pertains to the breach of international institutional law i.e. international human rights law that involves acts of human rights violations like killing, rape, torture. The association also recommended certain rules and practices at every level; for instance, principle of good governance, principle of

procedural regularity at first level; precautionary principle at second and third level (Dekker 2005: 97-99).

Another recent development in the context of international organizational accountability is the emergence of principles of Global Administrative Law (GAL). The relative absence of the modes of accountability in the global realm is reflected in the emerging trend wherein actors like IOs, expert committees, interest driven networks etc. make decisions having global implications. As a result, demands have been made to open the system of international decision-making and therefore a new legal framework is emerging since the beginning of 21st century (though its rootsare centuries old)in the form of 'global administrative law'. Global administrative law (GAL) pertains to a framework that falls outside the conventional domestic legal structure while at the same time maintains its difference from traditional state oriented international law. The traditional public international law regulates the affairs between states but the GAL creates positive norms for actions of universal scope (Reinsch 1909). GAL is more 'individual centric' and emerges as a regulatory authority concerning the impact of global decision making on individuals. The content of GAL includes accountability principles like transparency, participation, review etc. The aim of this law is to improve the quality of decision making and bolster the ability of accountability seekers in attaining justice (Kingsbury et al. 2005, Chesterman 2008: 39-40, Kingsbury and Donaldson 2011, Cassese 2015).

The conceptual roots of GAL lie in 19th and 20th century engagement of jurists with the idea of administration beyond domestic jurisdiction represented by actors like IOs. Some of the earliest writingsinclude Reinsch's account of the administrativeunions that according to Klabbers laid down the foundations for the theory of functionalism (Klabbers 2014). Reinsch (1907) characterized such unions as instruments of states constructed for specific purposes. The range of international activities by differ actors is blurring the national and international divide and thus opening the global administrative space for administration (Cassese 2005). The phenomenon of global administration has immense bearing on global order as it has noticeable implications on individual rights, practice of democracy, local autonomy etc. The patterns of authority and power in global administrative realm are loosely structured in

comparison to administrative set up in domestic settings. The role of law or law like structures in global administrative sphere is two-fold—on one hand, it strengthens administrative capacity while on the other it constraints it. The adherence to law legitimizes power while its existence also offers a framework of critique as well as change in power (Kingsbury and Donaldson 2011).

The sources of GAL may comprise the following. Some part of GAL may be derived from treaty law. However, most of it is rooted in practice of IOs and other bodies or networks that operate transnationally. Elements of participation, transparency etc. mirror normative dimension and many IOs adopt them as they are perceived as a standard setting bodies. The customary law is still viewed as a product of state practice and do not accommodate the practices of non-state actors. Similarly, the general principles of international law constitute elements that showcase great level of convergence and by this standard, the fragmented and highly diverse character of globaladministration is not likely to be eligible as general principles. The GAL may as well be assumed to reflect tenets of ius Gentium[35] though that linkage is at best uncertain. The international public law is another source that appears relevant in the context of GAL. When the public authority is exercised in a way that it as bearing on individuals, the principles of public law becomes applicable. When public authority is exercised by IOs, the principles flows with the power. One can also conceive that domestic administrative or public law may feed the realm of global exercise of authority. There are situations where domestic authorities affect global administration while the latter impact the rights of the individuals i.e. targeted sanctions. Because of criticism that emanated due the breach of due process or fair trial rights (e.g. Kadi Case), the UNSC modified its practice by adopting measures like creation of office of Ombudsperson for 1267 Committee(Kingsbury and Donaldson 2011).

The phenomenon of global governance can be understood as regulation and administration under the rubric of global administrative space. The notion of global administrative space features the following– blurring of the dichotomy between the domestic and international level; administrative functions are taken as a result of

[35] The concept of Ius gentium or jus gentium is derived from the ancient Roman law which distinguishes between the specific law made by a community for itself and the common will that remains same for all the people of the world. The latter, common law or the law of the world, is known by the term- ius gentium or jus gentium.

interactions between officials and institutions across levels; and the space in which regulation is effective despite its non-binding character. The exercise of power in this space has triggered questions of accountability by various stakeholders. To tackle the concerns of accountability, different mechanisms have been created in different issue areas. Mechanisms like transparency, notice and comment procedure in rule making, avenues of judicial as well as administrative review etc. are visible in areas like global banking regulation, UNSC sanctions regime, international administration of refugees etc. The project of global governance aims at comprehending these different but related strands of global regulation as members of umbrella term – global administrative law (Krisch and Kingsbury 2006: 1-2).

Although regulatory and administrative functions are increasingly performed beyond nation-state in a variety of forms ranging from binding decisions of IOs to non-binding agreements in IGO networks, the drivers of this process are neither legislators nor judicial bodies. The nature of decision-making in the global administrative process has rendered the conventional democratic accountability mechanisms ineffective. This is because the participation of national officials at international fora for creating global regulations locks them in the structure of commitment for national level implementation, eg. Basel Committee for Banking Supervision creates such commitment structure. In response to the accusation of accountability lag, the global administrative regime seems to be responding by formulating different accountability mechanisms premised on the principles of transparency, participation and review i.e. World Bank Inspection Panel, notice and comment procedure adopted by Organization for Economic Cooperation and Development (OECD) etc. (Krisch and Kingsbury 2006: 3-4).

Academics like Barr and Miller (2006) regard the adoption of global administrative mechanisms in the process of global governance in a normative light as they advance broader common goals like global financial crisis prevention. Elaborating with the example of the Basel Committee on Banking Supervision (BCBS), they contend that negotiations among the bank regulators and the adoption of notice-comment process have resulted in modification of key decisions like capital adequacy which may have detrimentally affected the small businesses. Moreover, strengthening participation and information flows has improved the degree of accountability and legitimacy of these

arrangements. Similarly, Meidinger (2006) concludes that application of global administrative law in the domain of forestry standard setting and certification has spilled into a decentralized regulatory regime comprising NGO campaigns, consumer boycotts and private standard setting initiatives (ranging from business to environment). Furthermore, adoption of notice and comment procedures in rule making has bolstered inclusiveness of this regime.

Despite the academic excitement with the idea of GAL shown by a number of scholars, the concept has not escaped criticism. Within the Marxist framework, Chimni (2005) regards GAL as an integral part of the imperial international law. GAL cannot act as a real catalyst of change securing global justice through neutral application of the principles of good governance. He criticizes the uncritical interpretation of GAL offered by scholars like Kingsbury which is grounded on the dualistic understanding of international law. This dualistic understanding creates a divide between the substantive and administrative law. A genuine change cannot occur since the international institutions that adopt GAL has not brought substantive changes.

The conventional definition of GAL excludes content of substantive rules from its scope, thereby preventing any critical assessment. The evaluation of GAL limited only to its principles, procedures and mechanisms of accountability and participation is therefore non-progressive. The contemporary international law and international institutions have an imperial character and it would be utopian to assume that GAL can bring about change in their character. This argument rests on the insight that administrative law in a domestic setting varies depending upon the nature of the regime. The content of this law is different in a democracy and a non-democracy, in a sense that in the latter case, it does not challenge the nature of the regime per se. Therefore, administrative law does not bear the capability to challenge the status quo, worse it may end up promoting the existing system. On such grounds, it is reasonable to assume that administrative law in the current international realm (comprising imperial nature of international law and institutions) may push the imperial agenda (Chimni 2005).

To conclude, the issue of IO accountability has attracted significant attention from different stakeholders- states, IOs, judicial systems, academics, NGOs etc- since the end of Cold War. The most dominant factor for this prominence is the enhanced capacity of the IOs in influencing the extent of enjoyment HR by people in different parts of the world. This is not to naively suggest that in pre-Cold War, HR were guaranteed globally. However, violating authority during that phase happens to be states. The IO activism has added another entity that can acutely impact the living conditions of people. Such ability of IO has forced reconceptualisation of the term accountability so that it may fit in the context of IOs. Although the practice of accountability in the context of IOs is not new as the influence of powerful member states have also conditioned IO functioning yet the focus of accountability under changed circumstances has shifted. The new discourse on IO accountability is geared towards those affected by IOs decisions and actions and as a result a form in the name of external accountability is mooted. Nonetheless, the Issue of IO's external accountability turned out be full of complications particularly due to the absence of adequate mechanisms of redressal that may be exercised by the victims. The international legal framework extended blanket cover in the form of IO immunities which diluted the prospects of fruitful engagement in domestic, regional and global Courts. By and large, courts have shown reluctance to give precedence to the rights of the victims over the provision of IO immunities. The international realm also lacks an institution where IOs can be sued. Traditionally, the secondary responsible of states has been suppressed owing the concerns that it is likely to prejudice or threaten the IO autonomy. Moreover, it would also dilute the willingness of states to engage with IOs in activities like peace keeping. Given such state of affairs, various attempts by bodies like ILC, ILA, One World Trust et. have been made to address the gap of IO accountability. However, the real practical effects of these efforts are yet to be seen.

CHAPTER 3

United Nations Security Council and Human Rights Law

INTRODUCTION

This chapter (and the subsequent chapters) deepens the discussion from the general to the specific by putting the United Nations Security Council (UNSC) and human rights at the centre of the study. It offers an account of the multidimensional relationship between the UNSC and human rights standards by analyzing various dimensions. The first dimension investigates the factors that have brought Security Council in close connection with concepts related to human rights, that is, 'Human Security', 'Responsibility to Protect' (R2P) and more recently, 'Responsibility while Protecting' (RwP). The second dimension covers the [functional dynamics[36]] between the traditional role of UNSC in maintaining international peace and security with the emerging norms of human security, R2P and RwP. This dimension also covers the implications of such dynamics on the development of law regulating relationship between UNSC and human rights standards. The third dimension covers the relationship between the UNSC and human rights when the UNSC is found guilty of breaching human rights through its actions. This aspect of the study covers the debate concerning applicability of human rights law and humanitarian law to UNSC. Lastly, this study explores the legal and practical challenges that make it difficult for human rights law and humanitarian law to be applied to the UNSC.

1. Conceptual Factors Entangling UNSC with Human Rights

The end of the Cold War did not end global problems; rather it substituted one set of problems with another – from proxy wars and the fear of nuclear catastrophe to intrastate conflicts and state collapse in areas like Somalia (1992), Yugoslavia (1992), Haiti (2003) etc. This change also entailed violations of human rights on an immense scale, although not resulting from conventional interstate wars. At least two factors can be identified that instigated such problems – first, differences along racial or religious lines among communities and second, ambitious local leaders or warlords wanting to rule in the absence of their [powerful masters, that is, no longer they

[36] It covers the phenomenon in which the UNSC has acted to safeguard the HR of the civilians.

micromanaged by the leader (US or USSR) of their chosen camp]. The implications of this change were felt in the academic as well as the policy making world and eventually influenced the UNSC's practice. Conceptual innovations challenged the previous meanings of the terms – 'security' and 'humanitarian intervention'.

The broadening of the concept of security by bringing the individual at the centre transformed its basis from its traditional connotation of military security into 'human security'. Alongside, efforts have been made to generate consensus on the issue of universal protection of human rights that transformed the contested notion of humanitarian intervention into 'Responsibility to Protect' (though it still remains contested). Both these conceptual innovations have inevitable consequences on the UNSC that brings the issue of human rights in close connect with the Council. Thus, the UNSC is faced with mammoth task of maintaining international peace and security without compromising the objective of protecting and promoting the ideal of human rights (Lillich 1994: 2-3). The UNSC has found it exceedingly difficult to strike this balance as its actions like targeted sanctions or peace operations that were meant to protect HR have indeed violated them (Fassbender 2011)

1.1 Concept of Human Security

The discourse on security in IR has traditionally been written from the perspective of the relationship between state and the citizens in which the former pledges to protect the latter from internal and external threat. This understanding has come under critical scrutiny as a result of the growing instances wherein states have not just failed in protecting its citizens but committed atrocities themselves. Instead of protecting the sovereignty principle, the present discourse is geared towards protecting individuals by placing the idea of 'human security' as the centre of discussion. This new avatar of the discourse on security assumes that violations of human rights constitute threat to international peace and security (Axworthy 2001: 19). Thus, it is obvious that given the fundamental duty of the UNSC to maintain international peace and security under UN Charter, any modification (limitation or expansion) in the meaning of the term 'security' is bound to have implications on Council practice.

The notion of a broader concept of security has its genesis in the post World War II period, where the international community pledged to protect and promote human

rights even when this meant creating friction with the principle of 'sovereignty' – another strongly guarded principle in the UN Charter. The Nuremberg trials that were aimed at punishing powerful individuals responsible for international crimes explicitly proclaimed the sacrosanct nature of human rights. The formation of International Criminal Court (ICC) in 1998 also represented a move towards institutionalizing the practice of holding individuals responsible for committing international crimes like genocide, war crimes, crimes against humanity, ethnic cleansing etc. which contribute towards bolstering international accountability[37]. Simultaneously, it must be noted that international legal instruments like the UN Charter, the Universal Declaration of Human Rights, and the Geneva Conventions etc. not just emphasize the significance of personal security but also challenge conventional ideas of sovereignty (Axworthy 2001: 19-20).

The effect of the concept of human security on international actors like IOs, informal groups (i.e. G7/8[38] is visible in the context of agenda and operations. For instance, the then G8's agenda for discussion evolved from being disproportionately focused on trade liberalization in 1995 to issues like conflict prevention, terrorism, arms control, environment etc. within the overall ambit of creating 'culture of prevention' during its 2000 Summit in Miyazaki and Okinawa. Other sets of nations have kickstarted new diplomacy initiatives like the 'Human Security Network' that supports UN efforts in diverse realms including HR. However, these efforts do not always come to fruition and critical situations demand direct UN involvement, both non-coercive and coercive (Axworthy 2001: 19-20).

[37] The ICC was established in 1998 following several attempts to implicate individual criminal accountability for the international crimes. The idea was to punish those who commit horrendous acts and hide behind the corporate veil of states by portrayingit as an act of state (an abstract entity). Earlier, ad hoc attemptsinclude Nuremberg trials (located in Germany) in which Nazi war criminals were tried during 1945-49. These were military tribunals of the Allied powers. Later, International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 to conduct trials of crimes committed during Yugoslav conflict. Following the genocide in Rwanda in 1994, the same year International Criminal Tribunal for Rwanda (ICTR) was created to prosecute those accused of genocide.

[38] The G7/8 is an informal group which has its roots in the library group formed in 1973. The G7 is composed of US, UK, Japan, Germany, France, Canada and Italy, known by the term 'like-minded liberal democracies'. Russia was included after the end of Cold War thus making it G8. Though Russia was suspended from the group after its annexation of Crimea, thus once again making it G7.

If the bearers of the responsibility or duty to protect are the UN and the third states then the beneficiaries of the R2P are the individuals if visualized from the prism of the notion of human security. A logical corollary of this argument is that if the bearers of responsibility fail to perform their duty, the creditors should have a reasonable claim for the damages they have suffered (Peters 2011: 12). The ICJ in the Wall Opinion Case in 2004 opined that reparations for the violation of international law may have to be made to all natural and legal persons concerned[39] (ICJ 2004).

The implications of the human security discourse are also visible on the behavior of TNCs in the form of the 'corporate social responsibility' (CSR) paradigm. Since TNCs can be exploitative if they are left without proper guidelines and obligations, it is desirable that their operations come under the legal framework enunciating human security content. IOs like the UN, Organization for Security and Cooperation of Europe (OSCE), Organization for Economic Cooperation and Development (OECD) are taking the lead in executing the thought of expanding the scope of human security beyond the public sector (Axworthy 2001).

Overall, it is not difficult to notice the effect of ideas of human security and R2P on the structure of global norms. Both human security and R2P have contested the sovereignty or state centric traditional norms in International Relations (IR). The invention of human security meant globalization of responsibility because prevention of humanitarian catastrophe has been projected as a universal good. The growing popularity of human security and R2P reached the UNSC in 2003 during the discussion on the peacekeeping operation in Burundi. Later, the High Level Panel Report on Threats, Challenges and Change (2004) too endorsed the concept of R2P. Furthermore, the World Summit Outcome Document[40] (2005) also emphasized R2P,

[39]On 9th July 2004, The ICJ in its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Case* expressed that first of all it has the authority to render decision as requested by UNGA. The ICJ found that the wall build by Israel, as occupying power, in and around East Jerusalem stands contrary to international law. As a result, Israel has an obligation to cease such work and dismantle existing illegal structres. Israel must pay reparation for the damages caused due to such illegal construction. The Court urges states not to recognize such illegal constructions. Moreover, the UNGA and UNSC must find ways to bring an end to such illegal developments.

[40]The World Summit took place September 2005 in which all UN member states (then 191) addressed the gathering. One of the major highlights of the event was the widespread support that R2P garnered

however, not unconditional and as a result observers like Edward Luck referred to it as "R2P-lite" (Luck 2008: 3). In terms of its universal status, it can be said that the UNGA supported the R2P—A/RES/63/308 (2009), A/RES/67/262 (2013), A/RES/69/188 (2014), A/RES/69/189 (2014), A/RES/70/172 (2015), A/RES/70/234 (2015), A/RES/71/130 (2016), A/RES/71/202 (2016), A/RES/71/203 (2016), S/RES/72/188 (2017) and S/RES/72/191 (2017) — and also approved the use of force as a last resort if the host country fails to protect its population (UNGA 2005, 2009, 2013, 2014, 2015, 2016, 2017).

1.2 Responsibility to Protect (R2P)

The conventional paradigm of international law regarded only states as subjects while other entities like IOs, individuals, groups etc. were conceived as mere objects (Oppenheim 1912). The monopoly of nation-states in the international legal framework on the status of subject has serious implications for the people across the globe. This doctrine basically implied that states have exclusive jurisdiction over the people they govern and the way states treat their citizens should be inconsequential for international law and practice (Buergenthal 2009: 2-3). In contradiction to this belief, the concept of R2P makes a promise to the citizens of weak or unstable countries that they are entitled to enjoy the same security as the citizens of stable or powerful states.

The idea of intervention with an aim to prevent states targeting their own citizens can be found in the writings of seventeenth century thinkers like Hugo Grotius. On the one hand, this doctrine propagated the idea that states are constrained by some limits in their exercise of power over the governed while on the other hand it opened a space wherein big power politics may find its presence. This doctrine has been misused by powerful states in order to conquer weaker states (Teson 1996, Fletcher and Ohlin 2008). In the more contemporary era, the conclusion of the Cold War has shown a parallel development wherein a number of controversial (both multilateral i.e. Afghanistan in 2001, NATO in Kosovo in 1999, Libya in 2011 and unilateral i.e. US led forces in Iraq in 2003) interventions have occurred (Roberts 1999, Joyner 2002, Smith and Thorp 2010, Puri 2016, Katzman 2017, Teimouri and Subedi 2018).

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cutting across North-South divide. The event ended with the conclusion of the World Summit Outcome Document representing collective will of all those who participated.

The need for such engagement by the UN in the territories where HR are violated has generated controversy between the sovereignty principle and the norms of HR. In order to preserve the legitimacy of the intervention, the language of humanitarian intervention has been reconceptualized as 'Responsibility to Protect' or 'R2P'. This rephrasing of the concept is not inconsequential in terms of its implications on the existing institutional practices. During crises, the R2P privileges human security over sovereignty and presents sovereignty as not merely equivalent to authority but more importantly as responsibility. The norm of R2P expects UNSC to be efficient in responding towards issue of human rights through peacekeeping measures. Beyond broadening the concept of security, the norm of R2P facilitates new methods of operation and transparency (Axworthy 2001: 21-22).

The innovative term – R2P came to surface in the report entitled 'International Commission on Intervention and State Sovereignty' (2001). The report was the result of the work undertaken by Gareth Evans (a well-known Australian statesman and academic) and Mohamed Sahnoun (Algerian diplomat), both of whom have been associated with UN in various international projects. The Commission sat down with a fundamental dilemma facing the international community- If humanitarian intervention is illegitimate or illegal, then how should one respond to crisis like Srebrenica or Rwanda? Most prominently, the R2P project was supported by Canadian government. The Commission attempted to answer the following question posed by Kofi Annan – When should the international community intervene to address a humanitarian crisis? The Commission invested in Francis Deng's idea of 'Sovereignty as Responsibility' (Deng 2010). However, the progression received a setback in the wake of the US led intervention in Afghanistan (2001) and Iraq (2003). Nevertheless, the (crisis in Darfur[41]) led to the UN Secretary General's attempt to address the vacuum by forming a 'High Level Panel on Threats, Challenges and Change' in 2003. The Panel issued a report entitled 'A More Secure World: Our Shared Responsibility' in 2004 which made 101 recommendations concerning the overhaul of the international security framework. Strengthening the ongoing spirit, the

[41]Darfur region in Sudan is subject to civil war since 2003. The major cause is the perception among rebel groups—Sudan Liberation Movement (SLM) and Justice and Equality Movement (JEM)— that the government is against non-Arabs. The crisis exacerbated due to the systemic killing in the form of ethnic cleansing unleashed by Sudan's government led by Omar Bashir. Due to his role in the conflict, Bashir has been put on trial in international crimes in ICC.

UN Secretary General published his own report entitled 'In Larger Freedom: Towards Development, Security and Human Rights for All' in which he urged governments to embrace the idea of R2P and recognized the duty of states and international community to protect civilians from mass atrocities (UN 2005, ICRtoP 2014).

The idea of R2P also received support from the African Union (AU), a regional organization, in 2000 when the member states started working on concretizing the ideal of R2P. In 2005, the African Union issued a report titled 'Ezulwini Consensus' which recognized both R2P as well as the authority of the UNSC in taking military action to protect civilians (AU 2005). A path breaking development occurred during the World Summit (2005) in which world leaders made a commitment on the idea of R2P. The document established the primary responsibility of states in preventing violation of HR in its territory. The document asserts—

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability (UN 2005: 30).

The doctrine of R2P establishes the primary responsibility of states and only if they fail to protect their people from HR abuses, the international community should take charge. In this context, the document asserts that the-

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war

> crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide (UN 2005: 30).

One of the significant features of the Summit was the support that the 'Global South' accorded to the contested idea of R2P. This support by the developing world challenged the critics of R2P who claim that R2P as a norm is biased against developing states. Menon (Personal Interview 2017) addresses this issue by claiming that the UN Summit Outcome Document is a very ambivalent document. Very odd coalitions came to support it but consensus is achieved by compensating precision and that dilutes the effectiveness of this document. There are others like famous international lawyer, Geoffrey Robertson, who also claim that R2P is diluted.

The World Summit Declaration recognized the primary responsibility of states in preventing human rights related crimes; followed by the role of the international community in discharging this responsibility; and use of peaceful means to protect civilians but authorizing collective use of force through UN as a last resort (UN 2005). Former Secretary General, Kofi Annan in one of his reports entitled – *In larger freedom: towards development security and human rights for all* (2005) explicitly emphasized the paramount role of R2P in 21st century. In his words—

> we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State whose primary raison d' etre and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations When such methods appear insufficient, the Security Council may out of necessity decides to take action under the Charter of the United Nations, including enforcement action, if so required (UN 2005).

The trend about UN Secretary General' support to the concept of R2P continues to grow when Ban Ki Moon (another former UN Secretary General) stressed its indispensability at various points and in various forums. He issued a report in 2009

entitled— *Implementing the Responsibility to Protec*t in which he emphasized the significance of three-pillar approach to address the complications rooted in implementing the doctrine of R2P. The first pillar concerns with the responsibility of states towards their population. The second pillar professes capacity building and institutional assistance. The third pillar is comprised of 'timely and decisive response' (UN 2009: 2). Reaffirming his stand on R2P, he quoted, while addressing the Conference on R2P at Stanley Foundation in New York, that —

> In 2011, history took a turn for the better. The responsibility to protect came of age; the principle was tested as never before. The results were uneven, but at the end of the day, tens of thousands of lives were saved. We gave hope to people long oppressed. In Libya, Côte d'Ivoire, South Sudan, Yemen and Syria, by our words and actions, we demonstrated that human protection is a defining purpose of the United Nations in the twenty-first century (UNSG 2011).

Similarly, in September 2011, Ban Ki Moon articulated that R2P should not remain just in theory but become a reality for all suffering from threats like genocide, war crimes etc. While attending ministerial level round table gathering at General Assembly, he remarked — "Our job is to keep it moving and on track as we move from words to deeds" (UNSG 2011). Reaffirming his resolve to take all necessary steps to protect humanity, he said that— "Our challenge now is to keep all [UN] Charter-based options open, and all of our collective tools sharp" (UNSG 2011). Highlighting the prominence of preventive measures, he told participants that— "We need to share information and assessments about States under stress. Effective prevention requires early, active and sustained engagement" (UNSG 2011). Realising the legitimate apprehensions of critics, he said that— "No government questions the principle. Tactics, however, will – and should – be the subject of continuing scrutiny (UNSG 2011)."

Similarly, the General Assembly passed a resolution (A/RES/63/308) on 14 September 2009 stressing the [need to discuss] the norm of R2P (UN 2009). The ICRtoP (2014) considered this as a crucial development as the member states of UN not just discussed the issue in principle bur also came out with concrete proposals— establishing criteria to prevent misuse of force, bolstering UNs early warning capacity, strengthening Peacebuilding Commission etc.—to promote the norm.

It appears that over the years, the UNGA's resolve toward R2P has magnified as it has not shied away from explicitly using the term in the context of some politically sensitive conflicts— R2P based resolutions on Syria include A/RES/67/262 (UN 2013), A/RES/69/189 (UN 2014), A/RES/70/234 (2015), A/RES/71/130 (2016), A/RES/71/203 (2016), S/RES/72/191 (2017). As a bottom line, all resolutions these have shown extreme concern at the HR and IHL violations in Syria. The states have underscored the primary responsibility of Syrian authorities in protecting the Syrians and urged all conflicting parties to respect IHL and HR law. Similar UNGA resolutions on North Korea constitute— A/RES/69/188 (2014), A/RES/70/172 (2015), A/RES/71/202 (2016), S/RES/72/188 (2017).These resolutions see HR violations including crimes against humanity in North Korea with grave concern. These documents have urged UNSC to refer the issue to ICC. These resolutions have reaffirmed faith in the first pillar of R2P strategy regarding primary responsibility of state towards its population.

The Brazil, Russia, India, China and South Africa (BRICS) group is cautious while approving the application of R2P. These states principally support pillar 1 (primary responsibility of the states in protecting HR of their citizens) and pillar 2 (international assistance in the form of capacity building) of the R2P modality but diverge on pillar 3 (foreign intervention including use of force) (Thakur 2016: 430). India has taken a cautious stand during Arab Spring (2011) and attempts to balance between its conventional support for non- interference in internal matters and its aspirations to play a leadership role in global affairs. Commenting on the Egypt uprising, the then India's external affairs minister, S.M. Krishna, gave a statement from New York in 2011— "We are proud of our traditionally close relations with the people of Egypt and wish them peace, stability and prosperity" (Dixit 2011). India then backed the mass protests as aspirations of Egyptians. While extending its support to the Arab nations in facilitating the building of democratic institutions, Krishna made a cautionary remark —

> India does not believe in interfering in the affairs of another country. We will take the cue at an appropriate time depending on how they want India to help.

> India will be willing to be of some assistance to them. But let the situation arise (Puri 2016: 50).

Later, addressing the UNGA on 24 September 2011, former Indian P.M. Dr Manmohan Singh said —

> We will succeed only if we adopt cooperative rather than a confrontational approach. We will succeed if we embrace again the principles on which the UN was founded — internationalism and multilateralism. More importantly, we will succeed if our efforts have legitimacy and are pursued not just within the framework of law but also the spirit of the law. The observance of the rule of law is as important in international affairs as it is within countries. Societies cannot be reordered from outside using military force. People in all countries have the right to choose their own destiny and decide their future (Puri 2016: 50).

To assuage the fears of those who suspected misuse of R2P for political or strategic benefits, the ICISS laid down two "just cause thresholds" that need to be met before active involvement can be initiated by international community. These two thresholds are intentional state violence against citizens or rupture of state structures resulting in failure of security apparatus. Moreover, certain precautionary and operational principles are identified to monitor the overall application of R2P – "right authority, right intention, just cause, last resort, proportional means and reasonable prospects" etc. (ICISS 2001: 12-13).

The just cause principle conditions military intervention only when irreparable human suffering is either occurring or likely to occur. It is a considered as an extraordinary and exceptional step warranted only to prevent or arrest the colossal loss of life in the form of genocide, ethnic cleansing etc. Apart from just cause, four precautionary principles govern the use of force under the banner of R2P. First, right intention—it can be assured if force is applied in a multilateral setting and by giving due regard to regional and victim opinion. Second, force must be considered as a last resort, that is, when all peaceful and less coercive means are exhausted. Third, use of force is conditioned by proportionality principle which prohibits disproportionate intensity of military engagement. Fourth, principle of reasonable prospects which implies that use of force should be mooted when there is a possibility of success.

The UN General Assembly's World Summit Outcome Document 2005 clearly spells out that the individual states have the responsibility to protect its population from genocide, crimes against humanity, ethnic cleansing and war crimes. If any state fails to discharge its duty, the international community through the UN has the responsibility to take peaceful and coercive measures to maintain international peace and security (UN 2005). Since the promulgation of the term R2P in 2001 in the Report on the International Commission on Intervention and State Sovereignty (ICISS), its application has been sharpened. Its application is called for only when core crimes as defined by ICC (genocide, crimes against humanity, ethnic cleansing and war crimes) are committed. Moreover, the international community observes only secondary responsibility and the primary responsibility remains with the concerned state.

The World Summit Outcome Document (2005) is also significant in terms of the broader three pillar strategy it laid out in dealing with the situations of human rights crises. Pillar one pertains to the responsibilities of the concerned state and if it fails, calls for pillar two response, namely 'international assistance and capacity building'. If both pillars remain ineffective, pillar three shall be exercised which includes 'timely and decisive response'. This three pillar strategy was also confirmed in the Secretary General's Report in January 2009 entitled "Implementing the Responsibility to Protect" and later endorsed by General Assembly in its Resolution No. 63/208 on 3rd February 2009 (UN 2009, UNGA 2009).

To make R2P an effective force, the ICISS has sought to tie the norm of R2P to Article 24 of the UN Charter that enshrines the primary responsibility of UNSC in maintaining international peace and security. The 2009 Secretary General report clearly suggested that coercive intervention by the UNSC should come only as a last resort when the following two conditions are met – failure of national authority in protecting its population from international crimes like genocide, crimes against humanity etc. and exhaustion of peaceful measures (required under the principle of proportionality) (UN 2009). The idea of UNSC led military intervention has also been [reiterated] by the High Level Panel Report by the Secretary General in 2005 titled *"In Larger Freedom: Towards Development, Security and Human Rights for All"* (UN 2005).

Sabine Hassler gives an account of the factors that pushed the realization of R2P. Post-Cold War crises necessitated a reconfiguration of the collective security system enshrined in the UN Charter as situations like Somalia, Kosovo, Rwanda etc. required different responses. The search for a new response gave birth to the idea of R2P. In the words of Day and Freeman (2005: 139), R2P mirrors "most sophisticated attempt at establishing a moral guideline for international action in the face of humanitarian emergency". [To uplift the status of R2P to attain universal protection of human rights, certain conventionally agreed norms of IR need to be modified in reference to those that bear moral or ethical connotation. These moral or ethical pronouncements are available in various international treaties and covenants (Hassler 2010: 137)].

The unwillingness to take decisive and appropriate action to implement R2P on the part of the North (partly due to the American policy of non-intervention in Africa after 1993 incident in Somalia) culminated in a political stalemate and the world remained a mute spectator during the Rwanda genocide in 1994. Another prolonged war zone that triggered immense humanitarian crisis was Kosovo. It is under such conditions, ICISS proposed the R2P, entailing a conceptual shift from intervention to responsibility and a shift in the perception from sovereignty being a privilege to a duty (Hassler 2010).

The UNSC enjoys monopoly as the authority that can legitimately authorize the use of force to protect human rights. This monopoly also acts as a mechanism against unilateral intervention that is susceptible to misuse. However, the issue of intervention in the absence of authorization by UNSC is not yet settled. The 2007 report of the *Institut de Droit International* prepared by M.W. Reisman on the issue of intervention concluded that although international law still does not permit unilateral humanitarian intervention, recent practice provides evidence that it may be in the process of adjustment. It seems that under critical conditions, unilateral humanitarian intervention may be deemed lawful. Also, given the political reality of veto, the General Assembly may chip in to exercise its secondary responsibility and authorize intervention (Institut de Droit International 2007: 201).

Nonetheless, the notion of R2P (or humanitarian intervention) has always been a subject of disagreement and contestation among states. The status of R2P is unclear in international legal and normative framework because states differ on its exact interpretation. The differences in the interpretation were noticed during the General Assembly debates in 2009 in which states like Brazil, Guatemala, Morocco, China, Venezuela and Monaco refused to consider R2P as a legal principle. Liechtenstein proclaimed R2P as a "political commitment of the highest order" (Peters 2011: 7). On the one hand, Canada conceives R2P as a legal principle while on the other hand, Bangladesh referred it as the "emerging normative framework" (Peters 2011: 7). However, in recent years, Bangladesh has started to high due regard to the norm of R2P. In one of the statement made by Bangladesh on 6th September 2017 during the informal interactive dialogue session, Bangladesh claimed that it supports the clear-sighted approach of UN Secretary General on R2P. It prioritized atrocity prevention and in the capacity of a major TCC recommends clear and achievable mandates for peace operations (ICRtoP 2017).

The concern over the possible misuse of R2P for political reasons was put forward by the Foreign Minister of Zimbabwe in the Security Council Summit in 1992 when he stated that as the Council was entering into a phase of activism on matters of human rights, great care should be taken to ensure that such situations should not be used as a pretext to carry out regime change activities by big powers to serve their political interests. Therefore, this scope for misuse calls for a careful drafting of guiding principles governing the Security Council practice pertaining to questions of humanitarian intervention (UNSC 1992). Nonetheless, it should be remembered that R2P can be misused even by leaders of weaker states like Robert Mugabe of Zimbabwe or Omar Bashir of Sudan by [connecting R2P with imperialism] and justifying some of their wrong acts (Menon Personal Interview 2017).

The concern about the selective application of R2P is one of the major reasons academicians like Rajan Menon take an anti-interventionist stance. R2P qualifies sovereignty but it has serious implications for only a selected number of states. R2P per se is not an issue but its selective application certainly is; it is conveniently ignored when we are dealing with powerful states or their allies. Given the atrocities that certain powerful countries and their allies have committed in the past, R2P cannot

be selectively applied as a norm. Iraq is a clear example where R2P was invoked to prevent a dictator from having Weapons of Mass Destruction (WMDs).When no such weapons were found, a discourse was constructed to declare Saddam Hussein as a danger to the Iraqi population, who needed to be liberated through intervention. However, it should be noted that all members of P5 indulge in the politics of selective application (Personal Interview Menon 2017). There are valid reasons to be skeptical about the intentions behind intervention in the name of human cause; so the place for R2P in the scheme of international norms needs to be carefully identified.

Menon (Personal Interview 2016) explored this debate between the advocates and critics of intervention in his book *Conceit of Humanitarian Intervention*. The advocates of intervention believe that critics of R2P fall in either of two categories – either those who lack moral and ethical commitment or those who are apologists of the human right abusers or totalitarian regimes. To this, Menon, a critic of R2P (2016) argues that opposition to intervention does not mean lack of ethical commitment or support to brutal regimes. Instead, the opposition is grounded in the belief that there is an absence of a principled approach towards human rights and the realization that most interventions are in pursuit of vested interest. In most cases, intervention is not pursued –when either the brutal repressor is an ally or the conflict zone is strategically unimportant. Although liberal democracies may not fight against each other but their complicity in the violence committed by their allies (no matter how brutal they are) is not hidden (Menon 2016). The debate between the advocates and critics of intervention begs a question on how to carry out a legitimate intervention?

It has been argued that R2P is problematic because states are "genetically meant to modify norms" (Personal Interview Menon 2017). Any intervention must follow a well-established protocol. It should neither be random nor selective in nature. It must go through stages – e.g. Early Warning Signs, Third Party Mediation, Name and Shame, Targeted Sanctions and, finally, Intervention. In other words, intervention should be the last resort (Personal Interview Menon 2017).

Nevertheless, the proponents of R2P offer different justifications for R2P. The shift of secondary responsibility (since primary responsibility stays with the states) to the international community for the protection of human rights can be explained with

reference to the concept and reality of multilevel governance in the present era. The reality of such governance demands that the obligations should be allocated to that level where the governance tasks are effectively performed. Thus, responsibility can be attributed to actors that operate at the international level. Further, the principle of 'solidarity' can be invoked to justify sharing of responsibility to protect human rights between states and the international community. In this context, Chazournes (2010: 103,109) states that "R2P is one of the forms that international solidarity can take….the responsibility to protect gives legal expression to the notion of solidarity in the sense that it specifies the conditions of action for protecting shared values which are of a human rights nature".

UNSC Resolution No. 1970, 1973 and 1975 were passed in 2011 to address the Libyan and Cote d' Ivoire crisis with an aim to the execute the contested norm of R2P. The first two Resolutions urged the Libyan authorities under Gaddafi to protect its population while Resolution No. 1975 was passed in the context of the post electoral crisis in Cote d' Ivoire and urged defeated President Gbagbo to step down immediately. In the press statement on Resolution No. 1970, the French permanent representative to the UN stated, "If a government is not able to protect its own population, it means that the international community has the right and the duty to step in" (UNSC 2011: 7). Scholars like Alain Pellet regard these resolutions as a step towards making the R2P obligation real (Peters 2011: 3).

As a policy option to address matters of international security, Weiss (1999) prefers armed intervention over sanctions. In his article *"Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses",* he argues that given the uncertainty over the possible benefits of the sanctions policy coupled with almost certain humanitarian implications, armed intervention may serve the cause of international peace and security better than sanctions. He maintains the same position even after the passage of approximately two decades. In an interview conducted by this researcher in April 2017, he opined that sanctions are only marginally helpful and are at times counter-productive. For e.g. in a poor country like Haiti,impact of sanctions was excessive deforestation. Consequently, the export industry shifted its focus. The sole reliance on sanctions would not have led to the removal of Colonel Gaddafi from Libya or Saddam Hussein from Iraq (Personal Interview Weiss 2017).

Thomas Weiss strongly supports the doctrine of humanitarian intervention. As a close observer of R2P related actions, he argues that the real threat to human security does not lie in excessive use of force for insufficient humanitarian reasons but rather in situations where the international community stands like a mute spectator and witnesses mass killings of Africans in Sudan, DRC and Rwanda (Weiss 2012). In the present times, Syria has been an example of a lack of willingness to intervene. The exercise of veto by Russia and China was an excuse for inaction. There were also previous instances of absence of willingness in Rwanda (Personal Interview Weiss 2017).

Anne Peters states that "R2P pulls pre-existing norms together and puts them in a novel framework". It is a novel construct because it reorients pre-existing legal principles as building blocks for a new framework. It illuminates the normative force behind those principles. Therefore, "the whole is more than the sum of its parts" (Peters 2011: 9-10). Evans and Sahnoun (2002: 102) suggest that the use of the term R2P has implications for the principle of sovereignty which now showcases not control but responsibility. This reflects a shift of culture from 'national impunity to one of national and international accountability'. One of the root causes of such a shift is the celebration of the idea of human security challenging the traditional mainstream focus on national security.

Others like Mohamed opine that as far as the legal status of the R2P is concerned, it is not a component of international law because it is not constituted in the form of an international treaty nor is it regarded as an element of customary international law nor is it recognized as the general principle of law. The emergence of R2P has not altered the permissible scope for the use of force (as Article 51 and Chapter VII remains the only valid grounds) in international affairs. Moreover, R2P does not create an additional legal obligation on states. At best, emerging consensus on the desirability of R2P mirrors political and moral commitment by states as they prefer a case by case approach. Thus, there exists no general duty on the international community to address humanitarian crises (Mohamed 2012: 319, 330).

While assessing the current stature of R2P, Thakur (2016) argues that the two critical cases in pre-R2P era that questioned the premise of international normative framework pertaining to interventions for humanitarian reasons are Rwanda (1994) and Kosovo (1999). The former because of the international community's inaction and latter because of NATO intervention without UNSC's approval. In the post R2P era, two paradigmatic cases that mirror UNSC's massive mobilising power but at the same also illuminate its weaknesses are UNSC authorised NATO led R2P oriented intervention in Libya (2011); and the case of Syria (2011). Despite mass HR violations in these cases including use of chemical weapons, UN largely proved ineffective in taking action in Syria. More recently, South Sudan and Central African Republic have been bearing the chaos of civil war but UN response remains lukewarm.

To sum up the discussion on R2P, it can be safely argued that it is the most contentious and sensitive issue of IR today. It is because it challenges the very heart of the post-World War II sovereignty centric framework of international system. Although R2P is a refined version of the principle of humanitarian intervention yet it does not completely take away the fact that interventions have colonial history. Unsurprisingly, the states belonging to developing-emerging world remain suspicious on each case of intervention. Moreover, events like regime change in Libya under the garb of R2P adds to the suspicion.

1.3 Responsibility while Protecting

It has been alleged that the Libyan intervention (2011) was mooted as a purest form of R2P's execution but the politics during the implementation stage discredited it as an example of regime change. One of the outcomes of the Libyan intervention was the conceptualization of the innovative term 'Responsibility while Protecting' (RWP). Although RWP was a reaction to the Libyan intervention, at a general level, it raises key questions relating to collective security and R2P. As an addition to the normative architecture of R2P, RWP refines the dilemma of using force for humanitarian reasons by raising the issue of accountability. In this sense, RWP completes the norm of R2P because the latter emphasizes effectiveness of protection while the former introduces the necessity of scrutinizing the methods of protection or course of protection (Tourinho et al. 2016: 134-135, Serbin and Pont 2015).

It is important to note the events that took place in Libya that impelled the Brazilian conceptual response of RWP. Post-intervention, civil war broke out between the forces loyal to Gaddafi and those opposing his rule. Factors like Gaddafi's decision to hire foreign fighters, free flow of arms, freezing of assets by Libyan authorities etc. caused immense humanitarian turmoil. The involvement of NATO led by US, UK and France deeply polarized the ground conditions. Critics say that NATO went out of its way to support rebels with an intention to carry out regime change (Tourinho et al. 2016: 136).

It is probable that in reaction to such western led initiatives, states like China, Russia, India, Brazil etc. may intensify their resistance towards R2P. The deadlock in Syria is a clear witness to that. Consequently, the feeling of euphoria realized in the domain of R2P could dwindle leading to either inaction or action outside the legal framework. However, it must be clearly understood that the opposition of the emerging and developing world in not towards R2P per se but instead towards the manner of its applicability (Ignatieff 2012, Ignatieff 2014).

Taking the lead, Brazil proposed (on 9th November 2011) a reform in the form of a document titled *"Responsibility while Protecting: Elements for the Development and Promotion of a Concept"*. The proposal was based on three principles or insights. First, the application of non-coercive and preventive measures needs upgrading. Second, the criterion for invoking R2P needs to be more rigidly defined. Third, the document pointed at the problematic gap of authority that arises on the ground once the operation is approved by the UNSC. To fill this gap, the document suggests institutional accountability of the intervening parties (UN 2011).

It has been found that consensus on prevention is easy to come by at a diplomatic level but difficult to implement at the local level. In the context of prevention, states are very sensitive about sovereignty as they loathe oversight by foreign [intelligence bodies]. The states fear reputational loss that may occur if they are being singled out on charges of committing grave violation of HR. Alongside prevention, the first aspect of the RWP strategy emphasizes supremacy of political and diplomatic solution over coercion. The second component of RWP strategy lays emphasis upon

the necessity of clear criterion for intervention. Enunciation of clear criteria will increase the political cost of neglect and thus it would also please the supporters of effective protection. The concept of RwP also envisages UNSC established proper compliance and monitoring mechanisms concerning the interpretation and execution of the resolutions. This aspect lucidly reflected the unease on the manner of Libyan intervention (Garwood-Gowers 2013, Rodrigues 2012: 171-173, Tourinho et al. 2016: 144).

Some commentators like Thomas Weiss have argued that the threat to R2P is not the excessive use of force but inactivity. Empirically too, it has been found that cases where consent of the host was not an issue like Mali, Central African Republic etc., the international community struggled because of lack of resources. In a similar vein, specification of unambiguous criteria would prevent abuse of power or authority which was a matter of concern for those seeking accountability or responsibility. Observers like Pape (2012: 43) have attempted to fill the content of the criteria (which he calls as pragmatic standard) as:

> "(1) an ongoing campaign of mass homicide sponsored by the local government in which thousands have died and thousands more are likely to die; (2) a viable plan for intervention with reasonable estimates of casualties not significantly higher than in peacetime operations and near zero for the intervening forces during the main phase of the operation; and (3) a workable strategy for creating lasting local security, so that saving lives in the short term does not lead to open-ended chaos in which many more are killed in the long term".

Finally, the third component of RwP advocates enhanced monitoring of the execution process of R2P with an aim of boosting transparency. Another tool of the UNSC – targeted sanctions – already created institutions and bodies to enhance accountability of the sanctions process such as the Office of Ombudsperson, Monitoring team, Panel of experts etc. This system ensures a steady supply of reliable information which allows the UNSC to take better decisions. This component of RwP is also significant as till now the process of execution of R2P mirrors a scenario wherein the P5 seek to avoid regulation while most of the rest of the world care about regulations as well as information (Tourinho et al. 2016: 147-148).

The RwP norm also seeks to regulate various principles and norms of IR – just war theory, international humanitarian law, use of force as a last resort etc. RwP addresses certain long standing issues of the collective security system like indecisiveness on criterion of intervention, inconsistency of authorization, issue of delegation of authority concerning legitimate use of force etc. (Tourinho et al. 2016: 138).

Like most norms, RwP received support as well as criticism from different actors. States like US, UK and France perceived it as an assault on their freedom to take steps for maintaining international peace and security. One major point of criticism of RwP was the suggestion to convert the principle of last resort [into a purely chronological order] (Stuenkel 2013, Prawde 2014: 2005, Tourinho et al. 2016: 140, Serbin and Pont 2015). The element of use of force as a last resort has been staunchly emphasized in RwP. Antonio Patriota, the then former Minister of Foreign Affairs of Brazil remarked—

> for Brazil, it is fundamental that when exerting the Responsibility to Protect through the use of the military, the international community must not only hold the corresponding multilateral mandate, but also observe another precept: The Responsibility while Protecting. The use of force must only be contemplated as a last resort. (...) Burning phases and precipitating the recourse of coercion is an attempt against the "rationale" of international law and the UN Charter. If our greater objectives included the decisive defense of human rights in their universality and indivisibility, as consecrated in the 1993 Vienna Conference, Brazilian actions must be defined case by case, under rigorous analysis of the circumstances and the means that are most effective to deal with each specific situation (Patriota, 2011).

The emphasis on the cautious use of force and only as a last resort in the concept of RwP has its roots in the Libyan intervention where it was observed that the NATO overstepped its mandate of civilian protection and stopped only after annihilating the Gaddafi regime (Evans 2004: 19-20). In the context of chronological use of force, the original document says that- pillars of RtoP "must follow a strict line of political subordination and chronological sequencing" (UN 2011). Responding to the proposal of RwP, German Ambassador, Peter Wittig, remarked that RwP lacks "a precisely defined concept of its own". In the context of the emphasis made by RwP on use of force as a last resort, he noted that —

> the prescription of a strict chronological sequencing, the mandatory exhaustion of all peaceful means, and the introduction of 'exceptional circumstances' as an additional qualifying trigger. limits the scope for timely, decisive and tailor-made solutions to situations of extreme gravity (2012).

Given the lack of support of sequencing approach towards the use of force, Brazil started to distance itself from this obstinate interpretation (Stuenkel and Tourinho 2014: 19). Nonetheless, the support RwP received from civil society actors made states realize that it is a step forward in the normative development and practical applicability of R2P (Tourinho et al. 2016: 140,

The nature of the Libyan intervention and the deadlock in Syria point at the dangerous precedent that may set in under conditions of lack of mutual trust. Gareth Evans (2012) opines that RWP aimed at preaching a code of conduct for the proper operationalization of R2P. While it does not fundamentally challenge the R2P, it certainly questions the working methods of UNSC authorized interventions. Due to RWP, the proponents of the use of force to resolve humanitarian crises must present their case with greater precision and details. In this context, a European diplomat, Steffan Barriga, Deputy Permanent Representative at the Mission of Liechtenstein to the UN, stated that "the IBSA countries [India, Brazil, South Africa] will most likely request many more caveats before agreeing to support such a resolution" (Tourinho et al. 2016: 141). Similarly, Murthy opines that RWP shifts the burden of proof about the desirability of use of force to the supporters of coercive intervention (Tourinho et al. 2016: 141).

Another implication of RWP is that it kick-started a wide debate on R2P among states, civil society, informal groups like G20 etc. The RWP attained significant support at Lima Declaration, III Summit of the Arab and South American States in 2012. The participants also argued that RWP deserves to be discussed in the UN and other forums like Union of South American Nations (UNASUR) and the Arab League. Even traditionally staunch opponents of R2P like Venezuela also welcomed the RWP. By deepening discussion on the question of legitimate use of force, RWP rescued the R2P debate from the binary construct of for and against. It allowed states to offer constructive criticism without necessarily being labeled as anti-R2P (Lima Declaration 2012, Tourinho et al. 2016: 142).

Such conceptual, political and legal developments bind the UNSC with the norms of human rights in a closely knit yet complex relationship. The next section looks at the dynamics between the UNSC and human rights standards [at the 'pre-action stage' as during the 'action stage']. The former stage of UNSC functioning relates to the process of drafting of a Resolution. This sub section makes an analysis of the language used in the formulation of a UNSC Resolutions for protecting human rights (implementing the concept of R2P).

2. Functional Dynamics between UNSC and Human Rights

Under Article 24(1) of the Charter, member states confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. To support this, member states also undertake to provide assistance of all kinds like troop contribution, financial support, rights of passage etc. to the UN under Article 43 of the UN Charter. Article 24(2) stipulates that to pursue this objective, the UNSC shall act in accordance with the purposes and principles of the UN Charter. Since effective implementation of the decisions of the UNSC requires support of the members of the UN, under Article 25, member states undertake to carry out the decisions made by the Council (UN 1945).

Chapter VII of the Charter grants special powers to the UNSC as Article 39 states that the "Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". Article 41 bestows the power to impose economic sanctions on states held responsible for violating Article 39 while Article 42 permits military action including demonstrations, blockade and other operations by air, sea or land forces of members of UN. The Security Council under Article 48(1) of Chapter VII can identify the members who are required to take action in order to concretize the decisions taken by the Council (UN 1945). The above provisions seem to offer a comprehensive legal framework granting extensive powers to the UNSC (UN 1945).

The UNSC's involvement in the efforts to maintain international peace and security has attained broader relevance in the light of the growing consensus in the international community on conceiving human rights violations as a threat to international peace and security. According to scholars like Tom Farer, this expansion of the scope of threat to peace wherein the treatment of its own citizens by a state may invoke measures under Chapter VII was not envisaged in 1945 (Farer 1991: 185,190). However, the record of the Security Council in its efforts to prevent human rights violations is far from being consistent owing to a variety of reasons. The inconsistency of the UNSC on matters of human rights can be seen not just at the level of operations but also during the consensus forging or resolution drafting stage, i.e. both during the pre-action (draft resolution formation) stage and the action (operations) stage. The pattern of inconsistency or selective intervention of the UNSC in choosing to protect human rights has implications on the development of the law regulating the relationship between the UNSC and human rights norms.

During the Cold War, the Council was subjected to the ideological battle between the capitalist and communist world. As a result, the Council lacked big power political consensus which is a precondition for any Council activity. Nevertheless, at least two cases can be identified during this phase wherein the Council acted (though not military intervention) in response to human rights violations. The UNSC's action in Southern Rhodesia in 1966 and in South Africa in 1977 can be cited as instances where the Council conceived human rights violations as possible threats to international peace and security, thereby deserving immediate response. Economic sanctions were found appropriate to deal with the former case while South Africa faced an arms embargo (Lillich 1994: 5). The phase of Council inactivity during the Cold War finally ended with the collapse of bipolarity which allowed the body to intervene in Iraq when it invaded Kuwait in 1990. UNSC Resolution 678 was passed in which Iraq was found guilty of breaching international peace and security and the Resolution urged member states to undertake steps to undo the invasion (UNSC 1990).

For the R2P enthusiasts, R2P is a norm that strengthens the work of international organizations. It expands the scope of Article 39 of the UN Charter and gives

additional reasons to the Council to invoke the provision relating to 'threat to peace'. In the words of Orford (2011: 403-420) the significance of R2P lies in the fact that it:

> transform deeds into words ... [and] consolidate established practices of international executive rule, such as surveillance, fact-finding, security sector reform, peacekeeping, and civilian administration, and to provide a coherent normative framework for those practices.

R2P has openly recognized the legitimate role of the UNSC on matters of intra state disputes having international implications. In this sense, Orford asserts that R2P has offered "a coherent theoretical account of the form of international authority" (Orford 2011: 424).

The relationship between the UNSC and human rights standards is visible at various stages of UNSC's functioning. The first stage lies at the time of the drafting of UNSC resolutions and the text used in defining or authorizing particular actions i.e. economic sanctions, military intervention, unique character of a situation etc. The following sub section captures the politics inherent at this stage of the Council's functioning which can be understood by analyzing the language used in drafting Resolutions.

2.1 Politics of Language in UNSC Resolutions on Matters of Human Rights

UNSC Resolution No. 794 adopted in 1992 in the context of the Somalian crisis allowed the Council to take economic or military steps in order to avert threat to and protect violations of human rights. The Council's action in Somalia in 1992 explicitly stated the 'unique character of the present situation in Somalia' that requires an 'exceptional' response (UNSC 1992). The intention behind the use of this language seems to be that the Council wanted to indicate that authorization of force by UNSC would come only under exceptional circumstances. Another important feature of the Resolution was the explicit linkage of human rights violations with international peace and security. In this context, the Resolution states that "the magnitude of the human rights tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitute[d] a threat to international peace and security" (UNSC 1992). Also, the Resolution does not warrant an action due to the fear of spillover effect on neighboring states in

various forms like refugee flow; rather the human rights crisis within the state of Somalia was deemed as condition enough to invoke measures under Chapter VII (Lillich 1995: 7).

Similarly, Resolution No. 929 (1994) on Rwanda also depicted the circumstances as "exceptional" and hence, deserves military intervention to protect displaced persons, refugees and civilians. In case of Haiti (1994), UNSC Resolution No. 940 declared the military regime as illegal and cited the systematic violations of civil liberties as a threat to peace and security. The resolution recognized the situation as 'unique and exceptional' and thus deserving military response under Chapter VII (UNSC 1994). Observers like Richard B. Lillich regard this move as the most comprehensive and purest form of humanitarian intervention. Moreover, this author also views Resolution No. 940 as a general precedent setting Resolution in the field of UNSC sanctioned humanitarian intervention (Lillich 1994: 9-10). The intervention in Albania in 1997 was authorized without recalling the phrase "unique and exceptional", probably due to its close association with Yugoslavia (UNSC 1997). The resolutions in the context of Congo (1999) which authorized UN Organization Mission in the Democratic Republic of Congo (MONUC) were passed without mentioning them as "exceptional".

The lack of consistent commitment shown by the Council on issue of execution of R2P can also be gauged from the careful drafting of UNSC Resolutions. In certain cases, the UNSC has deliberately used the term "exceptional" to denote the seriousness of the crisis to justify actions. In other cases, the Council has acted without using such language in the resolutions. For instance, the UNSC authorized the use of force in Bosnia and Herzegovina in 1992 for humanitarian purposes without recognizing the situation as exceptional (Osterdahl 2005: 3).

The initial post-Cold War years mirror a tendency of the UNSC in declaring a situation exceptional before authorizing military intervention under R2P. In justifying highly controversial interventions, the states are convinced about the necessity of such interventions by terming them as "exceptional". The Security Council did not want to establish a precedent of intervention in every case of human rights crisis and hence the condition of exceptionality was incorporated. This conditionality is not completely

unreasonable given the resources required to carry out such activities. The issue of R2P is still controversial even among the western countries that are vocal champions of its prevalence. The application of exceptionality allows the Council to maintain its political freedom in 'selecting' the situation for action (Osterdahl 2005: 9-10). From the legal perspective, it must be noted that through the application of the exceptionality clause, the Council wanted to prevent the legalization of humanitarian intervention in general international law (Chesterman 2001:162).

The supporters of a legalistic view of R2P like Arbour (2008) argue that it is derived from pre-existing treaty obligations. Notable legal instruments like the Genocide Convention (1948), Geneva Conventions (1949) and Human Rights Covenants (1948, 1966) etc. oblige states to prevent the occurrence of of such crimes within their territories. It is worth noting that the World Summit Outcome Document 2005 emphasizes the relevance of Chapter VI and VIII of the UN Charter (these chapters relate to diplomatic, humanitarian and other peaceful means) in resolving the concerns of human rights while Chapter VII (relaying to coercive measures) is spelt out in relatively weak language. The inclusion of weak language was a deliberate move by the US in order to avoid any sort of legal obligation. Reinforcing the American stand, the then Permanent Representative of US to UN, John Bolton clarified that the nature of responsibility for the host state and the international community (both UN and rest of the member states) are not of same character. The UN and the other states do not have the obligation to intervene under international law (Peters 2011: 8- 11).

Rejecting the possibility or desirability of setting precedent on Security Council action on matters of R2P, Oscar Schachter is critical of:

> a tendency on the part of those seeking to improve the United Nations to prescribe sets of rules for future cases, usually over-generalizing from past cases. Each crisis has its own configuration. Governments will always take account of their particular interests and the unique features of the case. While they can learn from the past, it is idle and often counterproductive to expect them to follow 'codified' rules for new cases (Schachter (1992: 320).

To conclude, the record of the UNSC with regard to controversial situations, which on one hand demand intervention to protect civilians but also breach the sovereignty

principle, lacks a pattern. This absence of pattern in UNSC's engagement is described by Luck, "The Security Council has displayed little consistency in applying humanitarian standards to its decisions and actions. But, presumably, inconsistency is to be preferred to disinterest" (Luck 2006: 83). Apart from showing inconsistency in the language of the resolutions, the Council has also shown inconsistency in its actions. The factors causing inconsistency of actions are explained in the next sub section.

2.2 R2P and Inconsistency of Action

The doubts surrounding the genuine application of R2P were heightened in the aftermath of the US led invasion of Afghanistan (2001) and Iraq (2003) and critics pointed at the neo-imperial imprints on such actions. As a result, the international community has not arrived at a consensus on the content and the execution methodology of R2P. While the developed world views it as a positive change in the normative architecture of global affairs, the developing countries do not rule out the agenda of cultural imperialism embedded in the rhetoric of R2P (Williams and Bellamy 2005: 36). Pointing at the hidden contradiction in the assumption (that R2P seeks to intervene in the most objective manner possible) of R2P, Thakur (2006: 348) observes:

> How can one 'intervene' in Kosovo, East Timor, Iraq or Darfur and pretend to be detached from and not responsible for the distributional consequences with respect to wealth, resources, power, status and authority.

The difference between what is legally acceptable and what is desirable came to surface during the 1999 crisis in Kosovo when NATO intervened without authorization from the UNSC. Its supporters justified it on the ground that crimes committed by the Serbs were so horrendous that no excuse was good enough for non-intervention. However, critics point out that undertaking such unilateral military actions may set up a dangerous precedent for the future. Thakur (2002: 250) questions the methodology adopted to restore normalcy in Kosovo as the NATO air strikes continuously bombarded the region, with a huge cost to civilian lives. Although the use of indiscriminate bombing as a humanitarian tactic raised several eyebrows, the

illegality of the NATO intervention was weighed against the moral compulsion of saving Kosovars and neither the UNSC nor states collectively condemned the move.

The Libyan intervention by UNSC in 2011 was widely celebrated as the moment of victory by the proponents of timely application of R2P (Evans 2011, Axworthy 2011, UN 2011). But the euphoria soon dissolved into disagreement among the P5 on the scope of the use of force. The conventional unease among the developing world concerning the pursuit of strategic objectives under the garb of R2P also resurfaced when the nature of NATO intervention was closely observed. The direct impact of the Libyan incident fell on the Syrian crisis wherein the UNSC remained deadlocked while the widespread loss of civilian life went on unabated. The intervention in Libya was a result of the specific political and factual conditions that worked in favour of the timely application of R2P. However, post Libya this consensus disappeared as disagreements arose. This is particularly because Russia and China got extremely suspicious about the hidden reasons behind Libyan intervention which was justified on humanitarian grounds but eventually end up dislodging Gaddafi regime.

The accountability of the UNSC is to be seen both from its acts of commission and those of omission. The most significant factor that prevents it from acting is the lack of political will or consensus, which was clearly visible during the Cold War. However, there are exceptions – for eg. the Council acted through a trade embargo in case of Rhodesia in 1966 and an arms embargo in case of South Africa in 1977. While acting under Chapter VII, the Council held the view that violations of human rights constitute a threat to international peace and security. Nevertheless, the Council never clarified the exact reason for its action – concern for human rights and violence or a call for independence in case of Rhodesia (Forsythe 2012: 2-3).

Recent examples suggest that R2P is likely to face political obstacles, especially when big powers or their allies are involved. The Myanmar military rulers failed to act swiftly to rescue its population during cyclone 'Nargis' in which more than 80 thousands died and millions turned homeless. Seen from the prism of R2P, the domestic authorities failed to meet their responsibilities and the international community had a legitimate claim to intervene to restore normalcy. However, that did not happen. Supporters of R2P like Abramovitz and Pickering (2008: 100) saw this

as, "once again starkly exposed the international community's inability to face down governments that massively mistreat their people". On the other hand, the Russian government in 2008 carried out strikes in Georgia on the ground that its military action constituted an implementation of R2P to protect its nationals on foreign soil. Such unilateral use of force based on the argument of extra territorial protection of nationals may not find an easy place within the R2P framework (Hassler 2010).

Much of the UNSC inactivity during the Cold War can be attributed to the exercise of veto by P5 members (Lillich 1994: 5). The exercise of veto or the willingness to 'solve' the international crisis depends to a great extent on the national interest. It would be naive to assume that the members of the UNSC act in the interest of the international community when their national interest is at stake (Stoessinger 1977).

It would be reasonable to assume that despite concerns over human rights issues in Syria, the realpolitik of balance of power has been prevalent in the Libyan crisis (2011) and the current Syrian crisis (since 2011). In Libya, the democratic upsurge against Gaddafi's authoritarian rule allowed UNSC authorized NATO led intervention supported by Arab allies. Though Russia and China approved the Council Resolution to protect civilians, they did not anticipate regime change while they also abstained on the on-fly zone resolution (Forsythe 2012).

States like Russia and China suspect the R2P interventions to be a camouflage for the US led attempts to carry out regime change and political adventurism for political gains. The deadlock and prolongation of the Syrian Crisis bears a witness to this mistrust between the big powers when Russia along with China exercised double veto on the anti-Assad resolution drafted under theUS leadership supported by the Arab league. The mistrust could not be overcome even when the UN High Commissioner for Human Rights, Navi Pillay, declared in the General Assembly in 2012 that crimes against humanity probably had been committed in Syria and the call by Ban Ki Moon for international action to end the crisis (Forsythe 2012: 6). The deadlock in Syria is a reflection of the prediction made by Richard Lillich in 1995 that "as long as US, France and Britain have the political will and Russia and China do not object, the Council now has the ability to intervene in crisis situations in order to make peace and save lives" (Lillich 1995: 14).

States like Costa Rica, Switzerland, Norway, Rwanda, New Zealand etc. have objected to the practice of veto in the context of R2P during General Assembly debates. Venezuela and Bolivia have gone to the extent of proposing elimination of veto power. Expressing discontent on the matter of the exercise of veto, the President of the General Assembly mentions in the concept note on R2P that "It is the veto and the lack of UNSC reform rather than the absence of a responsibility to protect legal norm that are the real obstacles to effective action" (Peters 2011: 14).

Against the backdrop of persistenceexercise of veto by Russia (12 times since the Syrian crisis began in 2011)and China. In response to the UNSC's paralysis to address the mass killing in Syria, France has introduced a proposal named — Responsibility to Not Veto (R2NV) —mentioning that when human rights of large number of people are at stake, the P-5 have the responsibility not to exercise veto and stall action. As French Minister for Foreign Affairs and International Development, Laurent Fabius, quoted at the 70th UNGA gathering, 2015 —

> Quite simply because we cannot resign ourselves to the Security Council's paralysis when mass atrocities are committed, and we see this in numerous situations, including in Syria. The main idea is that the veto isn't a privilege, it's a responsibility (UNGA 2015).

Reflecting on the emergency of UNSC reforms, the Deputy Permanent Representative of France to the UNSC,Mrs.Anne Gueguen, said —

> Because it is focused on the crises that are currently disturbing the international order, more than any other institution the Security Council must be able to adapt its methods and functioning to changes in its environment (UNGA 2018).

Clarifying the nature of R2NV, she opined that the nature of the obligations that emanate from the said proposal are voluntary and therefore would not require amendment or revision to the UN Charter. It is the political commitment that this proposal expects from all veto exercising member states. The objective of the initiative is to ensure that UNSC continues to perform its primary duty of maintaining

international peace and security but also retain legitimacy in its functioning (UNGA 2018).

Among the scholarly community, Blatter and Williams (2011) argued for the adoption of an informal agreement among P5 member on not to use veto when majority supports intervention, vital interests are not at stake, and when HR violations at mass level are occurring. The genesis of R2NV go back to 2001when Foreign Minister of France, Hubert Vedrine, called for a 'code of conduct' to regulate the use of veto. The Minister was conscious of the complexities involved in formally amending the Charter and thus suggested the reform in the form of code of conduct. The idea was supported by ICISS who recommended that P5 members must undertake this obligation. However, others like Levine (2011: 324)suspect the vitality of this proposition. According to Levine, R2NV is likely to be counterproductive because of two main factors — first, it prioritizes military action over non-military ones; and second, it may end up authorizing inappropriate interventions too often.

Apart from the political dynamics of veto, the UNSC at times also faces problems due to the shortage of human resource (troops) and finance. The ability of the UNSC to respond to a crisis is greatly hampered by the fact that it does not have its standing army and the troop contributing states have to accommodate the domestic pressure. Without its standing army, UNSC remains dependent upon states or regional alliances for the execution of its military operations (Axworthy 2001: 22). In 1995, the Dutch withdrew their troops from Srebrenica after one casualty. Belgium sought to do the same when around a dozen of its nationals serving under the UN were killed in Rwanda in 1994 (Forsythe 2012: 4-5).Similarly, American commitment was also diluted in the wake of 18 fatalities suffered in Somalia ('Black Hawk Down' incident) in 1992 which also became a reason for its reluctance to intervene in Rwanda in 1994 (Forsythe 2012: 4-5). In these cases, the exigencies of the application of the norm of R2P were overwhelmed by the domestic pressure of the participating states. Hence, the problem of R2P is not just one of the UNSC intervening too often in countries but also of failing to intervene in critical cases such as Rwanda (1994) and Srebrenica[42] (1995) (Winfield 1999, Peters 2011: 3, Grunfeld and Vermeulen 2009)

[42] For detailed analysis on Srebrenica, [See] Chapter 2.

The scholarly community is divided on the issues of desirability or undesirability of the inconsistency of UNSC's response. Some like (Chomsky 1999, Archibugi 2004) contend that the selective application of R2P can be attributed to the military as well as economic interests of powerful states. Hence, It undermines the prevalence of rule of law in IR. Others like (Roberts and Zaum 2008) finds the selective intervention desirable as it helps in avoiding the dangers of over commitment. It also prevents UN from putting precious resources in ill-conceived missions. Therefore, it facilitates cooperation among states.

Binder (2017) assesses the factors due to which the UNSC's response to the humanitarian crisis display inconsistency and selectiveness. This analysis is based on the observation that the UNSC has taken action in areas like Somalia, Bosnia, Libya etc. while other regions like Myanmar, Syria, Sudan etc. have either been ignored or met deadlock. The apparent inconsistency in the intervention is not random but shows a pattern. The intervention occurs when the following four variables exist vis-à-vis particular situation. These variables are immense human suffering; extent of conflict spill-over to neighbouring regions; extent to which the target country (with the support of its powerful allies) has the potential to avoid intervention by raising the cost for the sponsors of intervention; and the magnitude of sunk cost, that is, the amount of resources (diplomatic prestige, money etc.) already invested in the mission. Thus, the intervention occurs only when the combination of these factors prevails. Mere presence of one or two factors does not warrant decisive UN response.

Offering a solution to this problem, observers like Vesel (2003: 15) argue that just because the Council fails to reach a consensus, it should not be interpreted as the end of the story as regional organizations or coalitions of the willing may well act swiftly to address the crisis. Although UNSC based interventions are the best option, unilateral interventions under some situations may not just be tolerated but welcomed (William and Bellamy 2005: 41).

Among all the questions related to intervention, one of the most fundamental is: Is there a legal obligation to intervene to deter a human catastrophe? It is of course true that not all crises require military intervention. A threshold level is required beyond

which the violence should not be tolerated by the international community. Also, it is equally important to recognize that intervention without the possibility of success is counter-productive. Not only should the cause or intention behind the intervention be just but the decision-making procedure or process must also maintain a significant level of transparency, accountability and legitimacy (Camilleri 2008: 47). As a criteria of intervention, the following six elements are proposed by the ICISS – right authority, right intention, just cause, last resort, proportional means and reasonable prospects (ICISS 2001: 12). Absence of a coherent doctrine to manage missions that straddle between traditional peace efforts and peace enforcement is a serious challenge for the applicability of R2P (Luck 2008: 8).

As a result of the increased demand for peacekeeping and peacebuilding, interventions have assumed a three pronged approach – prevent, react and rebuild. Prevention is often the neglected dimension of the peace keeping approach and much peacekeeping is reactionary in character. Consequently, the root causes of conflicts often get ignored (Sommaruga 2004: 359). Incidents like Rwanda prove that international efforts should be highly driven towards attaining diplomatic solution as early stage political settlement is the optimal outcome (Abramovitz and Pickering 2008: 106). Highlighting the significance of early warning systems, Kuperman (1996: 116) suggests that the Rwandan disaster could have been avoided if the United Nations Assistive Mission for Rwanda (UNAMIR) would have been deployed few months earlier as proposed by Belgium.

The relationship between the UNSC and human rights does not cease after the passage of the Resolution but continues thereafter. This (although not an absolutely new dimension) has become a focus of analysis since the end of bipolarity. The factor that has triggered this dimension to become a centre of analysis in the post-Cold War time is the widespread reporting of human rights violations as a result of the actions taken to execute Resolutions. The actions that have sparked controversy about the legality of the UNSC functioning include both sanctions and peacekeeping missions. As a result, questions have been raised about the desirability of applying human rights standards on the functioning of the UNSC. This call to apply human rights norms to regulate the functioning of the UNSC is different from the phenomenon in which UNSC passes Resolutions to uphold human rights principles like R2P. Hence, the

demand to make UNSC accountable if its actions violate human rights is a relatively new dimension witnessed in the relationship between the Council and the human rights standards.

3. Applicability of International Humanitarian Law and Human Rights Law on UNSC

Human rights law and international humanitarian law (IHL) have different origins. The former is related to an intra-state setting governing the dynamics between the State and the individual while the latter was crafted to regulate the relationship between states at the time of armed conflict between them. Human rights law is assumed to be applicable before and after the conflict while IHL or 'law of armed conflict' is not applicable during peace time. Both of these do not apply at the same time. Which regime is applicable at a particular moment depends upon the nature of the armed conflict (Meron 1983: 602). At the same time, it is to be noted that a gap may arise if in a particular situation the relevance of both the regimes is denied.

In the 20th century, IHL became most prominent after the end of WW II and the Geneva Conventions were signed to bring IHL into the mainstream international legal framework. Before the Geneva Conventions, the Hague conventions were concluded to regulate situations of inter-state conflict. The word 'armed conflict' is deliberately used instead of war because the intention is that the law becomes operative at the time of aggression whether conflicting states have formally declared war or not. However, these conventions do not cover armed conflict between the states and the UN or between organized groups within a state (Murphy 2007: 221-222).

The relationship between these two set of laws and the UN peacekeepers is a result of strengthened military might displayed by the peacekeepers since the end of bipolarity. The post Cold War UN operations like Somalia (1993) is similar to earlier UN engagement in war like situations e.g. in Korea in the 1950s, Congo in the 1960s, the first Gulf War in 1991 etc. Such situations have brought the UN peacekeeping forces at loggerheads with those responsible for derailing the process towards peace and stability. Particularly, measures taken by United Nations Operation in Somalia (UNOSOM) in Somalia kick-started the debate on the application of international

humanitarian law (IHL) on UN forces. However, the path of binding UN peacekeeping forces to IHL is legally and practically troublesome (Murphy 2007: 214).

The tricky situation before the UN is how to strike a balance between the necessity of maintaining international peace and security on the one hand and preventing collateral damage on the other. One of the most contentious questions that have emerged in this context is, "Are IOs in general and particularly UN bound by the human rights law?" (Jacoiste 2010: 277). This question can be addressed by analyzing two set of arguments, one supporting the thesis that the UN is bound by HR law as well as IHL and the other relieving it from such restrictions.

3.1 Arguments in Favor of Binding UNSC to Human Rights Standards

International human rights law can be defined as the law concerned with the protection of individuals and groups against violations of their internationally guaranteed rights and with the promotion of these rights (Buergenthal 2009: 1). International humanitarian law as well as human rights law was developed primarily to regulate the affairs of the nation-state. The erosion of the monopoly of states over the exercise of authority on their territory has been paralleled by the rising powers of IOs. This increase in power of IOs has grown to the extent of performance of literally all state functions in the post-cold war projects of international civil administrations i.e. United Nations Interim Administration Mission in Kosovo (UNMIK), United Nations Transitional Administration in East Timor (UNTAET) etc. The office of Special Representative of the Secretary General (SRSG) in particular exercises enormous clout over the territory and population under control (Poretto and Vite 2006). Exercise of such influential authority must not escape the legal controls of international humanitarian and human rights law.

In terms of scope, IHL has a broader jurisdiction as it regulates activities beyond state activity while human rights law puts reasonable restrictions on the government to protect individuals within a country. IHL is recognized by International Committee of Red Cross (ICRC) as a part of customary international law and thus applicable to all states as well as all sorts of armed groups engaged in an armed conflict (ICRC 1965). Similarly, the UNSC has called on all parties to a conflict to respect the principles of IHL (UNSC Res 814 1993, UNSC Res 788 1992). Following the trend, the UN

Secretary General issued a Bulletin in 1999 that talks about the application of IHL on UN forces during situations where they are engaged as combatants (UN 1999). The ICJ opined in its Advisory Opinion in *The Legality on the Threat or Use ofNuclear Weapons Case*(1996) held that the IHL is applicable during the armed conflict unless it is lawfully derogated from. In reply to those who suspect that the ICCPR does not mention war or weapons, and it was never meant to regulate the legality of nuclear weapons, the Court suggested —

> that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict (ICJ 1996: 17, 239).

Furthermore, referring to nuclear powers, the ICJ opined —

> The Court notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law (ICJ 1996: 17, 239).

Hence, there is a significant overlap in both IHL and human rights law regimes. While assessing the linkages between HR and IHL, academicians like Orakhelashvili (2008) have found that the previous inquires on this subject are surrounded with the questions like — whether these two develop by fragmenting the international legal framework; whether their requirements complementary or in conflict with each other; whether the safeguards offered under the IHL lower in standard than the HR law etc.

The most basic criteria to establish IO accountability is to first settle the question of its international legal personality. The legal personality of IOs established through the advisory opinion of ICJ in the Reparations Case (1949) clears the status of IOs in the international system. The verdict notes that —

> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.

> (…) It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged (ICJ 1949).

Its capacity to operate with rights and obligations projects it as a subject that can be bound by human rights law. If denied the necessary legal standing, the UN may not be able to fulfill the functions desired by its founders. The founders of the UN envisaged huge powers for the UN including the establishment of a UN armed force under Article 43. However, this should not be interpreted to mean an extension of partial sovereignty to the UN. The legal personality of UN is functional in nature and does not cover the whole gamut of rights and duties established under international law. Indeed, the scope of international rights and duties applicable to the UN correspond to or are limited by the purposes and principles for which it is established (ICJ 1949, UN 1945).

Anothervital legal pronouncement regarding the issue of IO obligations is in the form of an advisory opinion in WHO-Egypt Case (1980). The ICJ (1980: 37) held that-

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.

Many scholars perceive it as an authoritative text that settle the question of obligations of IOs in international law in favor of their binding nature (Schutter 2010, Benvenisti 2014, Reinisch 2001). Pointing at the significance of incorporation of HR norms in the functioning of IOs, Schutter remarked-

> We may conclude that international organizations, as subjects of international law, must comply with general public international law in the exercise of their activities, and that this includes a requirement to comply with the Universal Declaration on Human Rights as general principles of law (Schutter 2010: 72-73).

Similarly, Benvenisti (2014: 99) explicitly and unambiguously recognized the IOs obligation by commenting that - "[A]s an international person, an [IO] is subject to

general international law. Therefore [IOs] are subject to customary international law and general principles of law." Applying the logic of IO obligations on UNSC, Reinisch (2001: 136) remarked-

> [S]trong arguments in favor of an obligation to observe customary law may be derived from more general reflections concerning the status of the UN as an organization enjoying legal personality. It has been forcefully stressed that the Security Council is 'subject to' international law because the UN itself is a 'subject of' international law, and this reasoning may be applied more generally to other international organizations.

Thus, a lot of emphasis is made on the point about the legal personality of IOs. This is because the logically construction of bringing IOs under international legal obligations passes through this test. To claim for IOs obligations without first establishing its legal personality in international law would not be convincing. However, in the case of UNSC, the process of establishing HR obligations is far more complicated due to the enormous powers it draws from UN Charter.

Those seeking to bind UNSC to HR law contend that although UNSC's decisions prevail over any treaty obligation of member states (as per Article 103 of UN Charter), it cannot take precedence over general international law (Alvarez 2003: 119, Orakhelashvili 2007). Irrespective of the Charter provisions, Article 103 cannot overpower the tenets of peremptory norms. In this context, Lauterpacht comments that "relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decision and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council Resolution and Jus Cogens" (Lauterpacht 1993: 407). Similarly, it has been argued that since human rights have achieved the status of *jus cogens*, Article 103 remains ineffective when it comes to matters related to human rights like prohibition of genocide, torture etc. (Olivier 2004: 399).

Vradenburgh (1991: 185) identifies three possible limitations on the powers of UNSC –I statutory rules of construction, subsequent actions of the UN and prevailing international law. The first limitation is based on the logic that a document must be

internally consistent in a sense that its provisions do not contradict each other. Therefore, the provisions of the Charter should be interpreted in a manner that it preserves the Charter as a whole without challenging the relevance of some of its provisions. The interpretation that ensures greatest harmony and minimum inconsistency is bound to prevail. Thus, the provisions on human rights under Articles 1 and 55 must constrain the wide enforcement powers granted to the UNSC under Chapter VII. In this context, it should be noted that the former UN Secretary General, Trygve Lie urged member states to include preservation of human rights as one of its primary concerns.

The second factor limiting the unbridled power of UNSC are the actions of the UN after the formation of the Charter. The efforts of the UN in giving specific shape to the general human rights provisions in the Charter gave substantial substance to human rights norms. These specific efforts include the *Universal Declaration of Human Rights (UDHR)*, the *International Covenant on Civil and Political Rights (ICCPR)*, and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, Resolutions against torture and genocide, recognition of the Nuremberg Principles etc. Such developments condition the functioning of the UNSC in a sense that the goal of attainment of peace and security should not be influenced by political, racial or religious reasons (Vradenburgh 1991: 187-188).

The third source of potential limitation on the UNSC emerges from the current international law on human rights. The framers of the Charter acknowledged the significance of economic and social conditions for the preservation of world peace. The social conditions include realization of human rights (Goodrich 1969: 244). Infact, the drafters wanted to incorporate a human rights document known as the Bill of Rights, which was dropped due to problems like difficulty of enforceability. However, the Council's power can be limited by customary law. In addition to this, the Council's power can be limited by a principle of treaty law which suggests that the international agreements like UN Charter must be interpreted within the shadow of customary international law (Janis 1988, Brownlie 1990).

The UN has always perceived itself as a benevolent promoter of human rights while considering states as the principal actors engaged in the task of the effective

protection of human rights. The UN has never seen itself as a body capable of violating human rights (Reinisch 2001: 131). However, this assumption or self-belief of the UN seems at odds with the present reality wherein UN has been accused of violating human rights on several occasions. The new UN has undergone a transformation – from being a traditional intergovernmental organization to a body at the global level engaged in governance tasks in a way that is reshapes its human rights missions (Megret and Hoffman 2003: 315).

Megret and Hoffman (2003) identify three possible routes to bind UN to international human rights standards – 'external conception', 'internal conception' and 'hybrid conception'. The external conception is based on the premise that the UN is a subject of international law and therefore, it is bound by customary international law as well as human rights law so far as the latter has achieved the customary law status (Schermers 1995: 824, 986). The internal conception emphasizes the internal juridical order and propounds that the UN is bound by human rights standards because its own constitutional or internal legal order mandates it to promote human rights. In this context, Ray Murphy states that "nothing can be more contradictory than a United Nations force transgressing humanitarian law standards" (Murphy 2000: 953, 964). Finally, the hybrid conception suggests that the "UN is bound transitively by international human rights standards as a result and the extent to which its member states are bound". Therefore, UN is bound by the logic of functional treaty succession by IOs to the position of their members "since states should not be allowed to escape from human rights obligations by forming IOs to do the dirty work" (Reinisch 2001: 137, 138, 143). The hybrid conception combines the aspects of both internal and external conception.

The UN mandate – including peacekeeping missions – is not created in a situation of legal void. The Chapter VII provisions, no matter how influential they are, cannot be seen in the absence of purposes and principles of the UN, especially promotion of respect for human rights and fundamental freedoms. The equilibrium intended by the Charter between the Chapter VII and the human rights provisions stands disturbed if humanitarian and human rights law are not upheld during UN operations (Poretto and Vite 2006: 20).

Norms like human rights as well as humanitarian law are regarded as *jus cogens* and therefore as a matter of practice cannot be breached by the UNSC when acting under Chapter VII. Judge Weeramantry of ICJ upheld this view in the *Lockerbie*case (ICJ 1992: 694-696). The Security Council's jurisdiction on matters of peace and security cannot be studied in isolation from the principles and purposes of the UN. The promotion of human rights is one of the inalienable purposes of the UN and thus UNSC cannot ignore it when acting under Chapter VII. Humanitarian law can be viewed as 'human rights law in armed conflicts' and the Council is bound by humanitarian law (Beck and Vite 1993: 94, Jacoiste 2010: 291). Rule of law is another crucial test that UNSC decisions must pass and if they contradict principles of rule of law, a peaceful world order is inconceivable (Gasser 1996: 880).

The role of judicial bodies operating at the international level has been instrumental in resolving the debate on the application of human rights law on IOs. An important judgment has been delivered by the European Court of First Instance (ECI) in *Yassin Abdullah Kadi v. Council and Commission* Case (2005) in which the ECI asked the European Community (EC) to annul restrictive practices undertaken to execute a UNSC sanction against Mr. Kadi on the grounds that these sanctions breach the human rights guaranteed to individuals under EC law (CFI 2005). This judgment is critical from the viewpoint of the contemporary question dealing with the problem of managing Security Council within the international legal framework. It builds on the issue of defining the relationship between the Council and the domestic legal arrangements featuring rule of law (Cannizzaro 2006: 190).

The political character of the UNSC is often projected as an excuse to relieve it from the tenets of rule of law. The ICJ clarified this matter in the *Lockerbie* case, where Judge Jennings opined that:

> The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law and, at the same time, claim to be above law (ICJ 1998: 99).

Ndulo (2009: 137) rejects the traditional position of the UN (relieving UN from the obligations of the Geneva Conventions) and argues that such obligations never impede the functioning of the UN. Indeed, their observance accords greater legitimacy by enhancing a positive image of UN forces in conflict areas. However, it should be noted that the UN has modified its conventional stance since signing the 1993 *Agreement on the Status of the UN Assistance Mission in Rwanda* that explicitly binds UN forces to the Geneva Conventions and the two additional protocols (UN 1993).

UN commitment to international humanitarian law has evolved over time. Initially, the UN agreed to abide by the ambiguous term – 'principal and spirit' of general international conventions. This commitment has been shown in legal instruments like the UN military rules of engagement; agreement between UN and troop contributing states; and the Model UN SOFA. The ambiguity of the phrase – principle and spirit – is explained by Benvenuti as:

> The aim of this general formula was to respond to the specific, practical problems arising within the framework of each operation. However the formula needs to be completed through the concretization process in order to achieve a sufficiently detailed normative ensemble capable of satisfying practical requirements (Benvenuti 1995: 116).

Authors like Seyersted, Schindler etc. believe that this process of concretization should be grounded in customary rules. However, customary law is not the only relevant source of law in this context and one may refer to treaty law. In fact, the UN has shown its commitment with reference to the 1949 Geneva Conventions, the 1977 Additional Protocols, UNESCO Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

Recent UN practice — UNSC's April 2017 general discussion on HR under the rotating presidency of US — affirms the thought of applying human rights standards to UNSC functioning (Ramcharan 2017). The 1994*Convention on the Safety of UN and Associated Personnel* indicates that all relevant rules of IHL apply to UN commanded or authorized operations. Under Article 20, the Convention notes that "nothing in the Convention shall affect"—

> The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standard (UN 1994)

Moreover, the UNSC Resolution No. 1327 passed in 2000 urges parties to peace missions to comply with rules and principles of international law especially international humanitarian, human rights and refugee law (UNSC 2000).

The concept of 'delegated powers' is an important framework within which to understanding UNSC's obligations. The UN Charter constitutes the common will of the member countries and the powers transferred to the UN cannot be higher than those possessed by its creators (Bedjaoui 1994: 46). Furthermore, De Wet (2004: 189) suggests that delegation of powers to the UN should be perceived as an ongoing interaction so that the delegated power is constantly checked by the developments in *jus cogens*. Similarly, Brownlie (1995: 217) states that the UNSC acts an agent of all member states and not independent of their wishes; hence it is bound by the principles and purposes of the UN Charter. IOs like UN are projected as moral agents and hence it is bound by HR since the latter exist as a cluster of moral or ethical values (Erskine 2003).

The notion of delegated authority is also used in another context. The UN is said to represent the authority delegated by its constituent members. However, the member states could delegate the authority that they themselves lack i.e. authority to violate customary human rights law. The entities charged with violating laws of war cannot seek immunity if the delegating agencies (states) have themselves acted outside their competence in international legal framework (Paust 2010: 4). Dannenbaum (2010: 322,327) argue that the transfer of responsibility by the voluntary troop contributing state does not result in relieving the concerned member states from the human rights obligations. Since states lack authority to violate human rights law and thus the same cannot be delegated to UN or any other IO (Paust 2010: 4).

It is not that IOs are unaware of the HR obligations that emanate because of their operations especially those that have been accused of making mockery of HR of nationals of the states which IO deals. The uncountable cases of SEAs during peace operations, IMF's conditionality effects transposed on people (of the states that have availed loans) through austerity measures etc. are few notorious reflections of IO functioning. Such outcomes spoils legitimacy of IOs and the latter then respond with measures to regain it. These measures can be termed as 'authority-legitimation' mechanisms. There is no specific pathway for these mechanisms to prop up, instead it depends on the kind of actor(s) involved. One of the pathway could arise if the Parliament of a member state advocates and influences the government to push IOs for HR protection. This pathway can be called as 'legislative institution building'. If HR safeguards result because of judicial activism, then the pathway in operation is 'judicial institution building'. Another source could be in the form of 'Anticipatory institution building' if IOs adopt the HR safeguards through peer learning and not by violating hem in first place. Lastly, HR safeguards may take shape through 'like-minded institution building' if middle powers, civil society organizations etc. advocate change (Heupal et al. 2018)

The accountability of the UNSC for human rights abuse poses an interesting case study since this body was deliberately created with immense political weight and the question of its accountability never arose. However, the functioning of the UNSC has undergone massive changes reflecting a trend in which it delegates substantial administrative powers on a frequent basis. The demands for opening up the [UNSC's unaccountable way of functioning are emerging from at least two fronts. First, the national courts especially in Canada (*Abdelrazik v. Minister of Foreign Affairs Case, 2009*) and EU (for example *Kadi and Al Barakaat International Foundation v Council and Commission Case, 2008*) have asserted their right to review controversial decisions taken by the UNSC in the context of listing individuals in the sanctions committee.

Abdelrazik, a Sudan born Canadian citizen was added in the 1267 Committee Consolidated List in 2006. Consequently, his assets were confiscated and travel ban was imposed. He was detained by Sudanese authorities while travelling and his attempts to return to Canada failed. The Canadian was unsupportive of his return. He

brought the Case in front of the Canadian Federal Court arguing that the restrictions put on him are in breach of guarantees conferred under Canadian Charter of Rights and Freedoms. The Canadian government argued that restrictions on Abdelrazik are a result of the mandatory execution of UNSC resolutions — 1267 and 1822. According to government, it impossible to repatriate Abdelrazik without violating UNSC resolutions. However, the Court found the assertion unpersuasive. Justice Russel Zinn opined that in the light of the availability of exemptions clause (that travel restrictions may be lifted for certain purposes like medical grounds, fulfilment of judicial process etc.), one can allow Abdelrazik to return without breaching UNSC resolutions (Canada Federal Court 2009). In Kadi Case (2008), the ECJ admitted that it does not have the jurisdiction to review the UNSC resolution but it can review EC regulations. However, EC regulation to impose targeted measures was a result of UNSC resolution implying that incidentally, ECJ reviewed the legality of UNSC resolution.

Secondly, the UNSC approved peace keeping missions (involving functions of territorial administration) in which the mission operators replace the state and exercise enormous powers over the individuals of the host state have made the demand for effective legal accountability all the more important. This legal accountability of the UNSC at the minimum includes an expectation from the Council to provide reasons for its decisions (Kingsbury 2005).

The UN enjoys international legal personality and therefore it is bound by general customary international law. Expressing unambiguous approval on the matter of the applicability of international human rights law on the UN, Schindler (1984: 526) states, "it is uncontested that the United Nations is bound by the customary rules of IHL when engaged in hostilities". The UNSC, an organ of the UN should not be less subject to legal obligations than the organization itself. The UNSC is bound by the Purposes and Principles of UN Charter that includes customary human rights law and the right to self-determination (Lamb 1999: 361-388, Wood 2006, Manusama 2006).

Article 55(c) of the Charter requires member states to promote universal respect for and observance of human rights and fundamental freedom for all (UN 1945). Such an express obligation of the UN must also condition the functioning of its other entities including the UNSC, General Assembly, Secretariat and even UN personnel

(McDougal et al. 1980: 332-334). Furthermore, Article 56 places member states under an obligation to take joint and separate action in order to achieve the objectives set forth in Article 55. Even ICJ has opined that any action that violates human rights also violates the purposes and principles of the Charter (Paust 2010: 3). In cognizance of these provisions, Paust (2010: 3) concludes that there must be "a strong presumption that any vaguely phrased authorization from the UN can reasonably be interpreted to stretch only as far as it is consistent with human rights law". In the context of peacekeeping missions, Article 56 conditions the member states as well as their nationals who are serving under UN operations towards human rights obligations.

Nonetheless, the argument of HR protection during peace operations has hardly moved beyond theory. The UN Stabilization Mission in Haiti (MINUSTAH) stands witness to the shortcomings in integrating the peace operations with HR obligations. This is despite that UN has principally accepted that root cause of crisis lie in violations pertaining to social, economic and cultural rights. It is also well established that HR protection leads to poverty reduction, good governance and facilitates peace in a long run (Howland 2006). Thus, the tasks of maintaining international peace and security and HR protection are complementary in character.

Some academicians like Reisman (1987), Halberstam and Stein (2009) etc. have argued that IOs can be relieved from obligations of international law if member-states contract around them. In response certain other like Scholars like Simma and Alston (1989)s, Tomuscat (1999), Reinisch (2001) etc. consider the possibility of relieving IOs from their obligation (through the state practice of contracting out these norms) a problematic trend. Illustrating the significance of obligations of non-use of force in UN Charter, Tomuschat (1999: 135) remarked- "If states could evade this central rule of today's legal order by founding an international organization, it would soon totally lose its practical impact". The obligations on IOs fall in two categories- jus cogens norms and ordinary norms. The states can contract around the latter but the former category is immune from such legal manipulations (Tomuschat 1999: 136). In a similar vein, Lankford (2013) regard the privilege of IOs to ignore international obligations as a possibility that may end up undermining norms relating to HR. Simma and Alston (1989: 82-83) assert that HR obligations are binding in nature as

they constitute part of general principles of law. Quite vividly expressing his stand on this issue, Reinisch (2001: 851, 858) pronounced that-

> [T]he assumption that the UN member states could have succeeded in collectively 'opting out' of customary international law and general principles of law by creating an international organization that would cease to be bound by those very obligations appears rather unconvincing.

The traditional opinion that UNSC is an intentionally created political body that operates beyond the legal framework is subject to modification in an era reflecting constitutionalization of the international system. UNSC operations are governed by the rule of law (Peters 2011: 16). In support of this argument, it can be recalled that as early as 1948 the ICJ opined (in its advisory opinion on the issue of admission of new members to the UN) that "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limits on its powers or criteria for its judgment" (ICJ 1948: 57, 64).

Hurd (2014) argues that the UN Charter constitute provisions that bestows UNSC with extraordinary powers ever accorded to any organ in the history of collective efforts. Never in the past any collective enterprise has brought together the military capability of great powers under a single central authoritative system. However, the formal powers conferred on UNSC by the Charter is subject to several constraints like influence of powerful states, legal restraints in the form of prior UNSC practice. The difference in the actual and formal power of UNSC is due to the politics of powerful members and the legal framework, both of which, conditions its functioning. This interface between law and politics results in two situations- first, when UNSC acts according to UN Charter leaving influential powers unsatisfied and second, when it acts in contradiction of Charter provisions. Overall, the practices of UNSC signifies the operationalisation of rule of law in global affairs.

The UN has been the forefront organization in matters of promoting human rights treaties. It would be illogical and illegitimate if the resultant treaties bind other bodies while the promoter (here UN) escapes obligations (Fuller 1969: 215). Another theory propounded to tie the UN to human rights law is based on conceiving the UN Charter

as a constitution. The founding documents of UN i.e. Charter is portrayed as a Constitution that contains a belief system binding upon its institutions. The question that emerges is that if UN Charter possesses the status of a Constitution then, "Does human rights law exist as an element of UN constitution?" (Fassbender 1998: 531-532). Scholars like Sohn (1982: 16-17) and Brownlie (1998) answer the above question in the affirmative.

Although, under Article 25 of the Charter, member states have an obligation to execute the decisions taken by the Security Council, this obligation is subject to the following condition. Either the members should implement only those decisions that are taken in consonance with the Charter provisions relating to human rights; or that members should carry out decisions in such a way that the Charter obligations are not violated. In sum, it must be noted that Articles 1(3), 24(2), 55(c) and 56 create a structure of human rights obligations for both UN (including its organs) and member states (Paust 2010: 4-5).

From the perspective of efficiency, it can be argued that the observance of HR law ensures effective peacekeeping. Any deviation from these rules results in severe loss of UN legitimacy as well as discredits the role of troop contributing countries e.g. the Canadian troops were held in high esteem until the Somalian incident came to surface that caused national shame for Canada[43] (Minister of Public Works and Government Services, Report of Commission of Inquiry 1997). The incident had an irreversible impact on the highly-acclaimed reputation of Canadian peace keepers. It came a s shocking news for the Canadians and it became a matter of controversy and intense debate in Canada for next four years. Sherene (2004: 23, 30, 116) asks whether it is one of its kind affairs or represents the broader problem embedded in complex peace operations. She suggests that the complex peace operations represent a mismatch, if not a contradiction, in a sense that the peace keepers are trained to be violent and treat

[43]The incident involves the death of a Somalian teenager, Shidane Arone, at the hands of Cpl. Clayton Matchee and other soldiers of Canada's Airborne Regiment in 1993. The manner of Arone killing became a serious matter of controversy— he was kicked, punched burned with cigarettes on private parts before being beaten to death. Another name came forward as accused was of Kyle Brown. After two days of his arrest, Matchee attempted suicide in the army hospital. Though he survived but declared brain dead and thus unfit for trial. The other accused soldier, Kyle Brown, was convicted of manslaughter and torture and served sentence of 40 months in jail. Meanwhile the Airborne regiment was disbanded.

the conflict zone as warlike situation. But at the same time, these hyper active, frustrated soldiers are expected to play humanitarian role as well.

Ramcharan (2017) rebuffs the claims that HR issues are beyond the scope of UNSC and other bodies like UNHRC are better equipped for that purpose. Instead, he asserts that the notion of peace and security is broader and the UNSC enjoys wide discretion in determining its content. The April 2017 deliberation of UNSC under the American Presidency on the issue of HR is a welcome step. Some of the key outcomes of the discussions were- UNSC holds thematic discussions on issues like women and armed conflict; role of Secretary General is significant in the process of laying down proper foundation (in the form of his reports) for deliberations; UNSC has created HR based components in various peace operations; attention has been directed at rule of law and international justice etc.

To modernise UNSC's nature of engagement on HR issues, Ramcharan (2017) proposes theme based incremental approach. This approach is not a novel idea as UNSC in the past has thematically engaged on subjects like environmental protection, women and armed conflict, children and armed conflict, HIV Aids, role of HR in conflict prevention etc. The UN faces consequences in terms of reputational loss when it fails to prevent HR violations. The past of UN is full of inconsistencies i.e. during Yugoslav conflict, UN safe areas created to stem the ride of HR violations while it chose to ignore action in regions like Sri Lanka, Myanmar, North Korea etc.

The thematic approach carries the potential to help UNSC in reflecting on how HR issues are handled during peace operations. The Secretary General along with USG for political, peace keeping and peace building can offer necessary foundation for deliberations. They may also be joined by UN High Commissioner for HR and UNSC President. The advantages of such initiatives are many. It would give a strong message to the world that UNSC views peace, HR and development as a package. The occasion may also play vital for UNSC to identify gaps in its strategies. The UNSC is likely to attain crucial insights on the HR issues during peace operations as well as on the issues of law and justice. It would also facilitate a better understanding between UNSC and UNHRC on the common goal of universally protecting HR (Ramcharan 2017).

3.2 Arguments against binding UNSC to HR norms

The UN Charter was written after the horrors of the Second World War and despite the fact that the Charter enshrines multiple purposes, it provides means of achieving these purposes only in the context of maintaining international peace security. The emphasis on this purpose can be explained by the historical circumstances that, unlike the League, drove the framers of the Charter to create UNSC as a central decision making body (Goodrich 1972: 18). The Charter's plain language under the following Articles – 24, 25 39, 41 and 42 – not just grants enormous powers to the Council but also stipulates Council authorized action (Vradenburgh 1991: 180). The UNSC's task of achieving international peace and security may conflict with another purpose of UN Charter – promoting and encouraging respect for HR and fundamental freedoms (Vradenburgh 1991: 175).

The question about the supremacy between the goal of security and goal of promotion of HR was answered by the Chairman of the Coordination Committee in the Committee's twenty first meeting in 1954:

> The sole purpose of the Organization is the maintenance of peace and security, which is not to be confused with the objectives or principles covered by other articles. Article 1 is governed by the words – to maintain peace and security – and envisages a breach of the peace as the final point of danger (Pasvolsky 1954: 139-140).

Article 1 of the UN Charter states four purposes of the organization to which all members agreed to abide by. The ordering of these purposes is crucial to understand the intent of the drafters in terms of the priority accorded to different purposes. The first purpose talks about the necessity of maintaining international peace and security while the concern for HR as a purpose follows . Moreover, the Charter does not extend governmental powers to the UN to secure social and economic rights and hence the intent of the drafters was not to guarantee HR via the UN. Instead, Article 55 of the Charter requires member states to 'encourage and promote' respect for HR. Also, Article 2 prohibits the UN from intervening in matters within the domestic jurisdiction of the nation-state unless it becomes an international issue (Goodrich 1969: 25-27, 35).

In acknowledgement of Articles 25 and 103 of the UN Charter, it is argued that UNSC has limitless powers. Article 25 of the UN Charter obligates members to carry out decisions of the Security Council while Article 103 provides that obligation of the members towards UN Charter prevails over any other international treaty obligation on member states including a HR treaty. Therefore, it has been concluded that UNSC can act above international law since Chapter VII imposes no substantial limits on its power in matters of international peace and security (Oosthuizen 1999: 549). The status of the UN as an IO and not a state has been cited as a reason to relieve it from the obligations under the Geneva Conventions (1949). Traditionally, the UN Office of Legal Affairs held the view that UN forces are bound just by UNSC Resolutions and not Geneva Conventions. Furthermore, it has been argued that the UN is not in a position to become a party to the Geneva Conventions, which entail obligations made only for states (Amerasinghe 1996: 102-103).

Kelsen opines that UNSC is primarily a political organ that enjoys wide discretion concerning the maintenance of peace and security which however is different from law enforcement. Article 39 authorizes UNSC to maintain peace and ensure security which is not necessarily identical to restoration of law (Kelsen 1951: 294). International humanitarian law and HR norms do not provide specific limits to the powers of the UNSC but lay down broad guidelines in the exercise of its powers. It is upto the UNSC to strike a balance between humanitarian law and HR norms on one hand and the goal of maintaining peace and security on the other. (Frowein and Krisch 2010: 711 in Jacoiste 2010: 316-317). According to Megret and Hoffman (2003: 314-316), IOs and UN particularly cannot prima facie be bound by human right treaties.

Although UN has shown commitment towards international legal instruments like 1949 Geneva Conventions, 1977 Additional Protocols but one should not be over ambitious in believing that all human rights obligations that can be applied on state can actually be applied to UN. The UN does not resemble a state and hence, it should not be forced to comply with obligations that it cannot deliver (Porretto and Vite 2006: 21-22).

Refuting the argument of moral agency and the implicit HR obligations, scholars like Hart (1961: 181-182) contend that such expectations are based on a flawed logic of muddling law with morality. Hence, the moral considerations of the UN should not be regarded as mandatory legal duties. Kondoch (2005: 36) rejects the proposition that regards the UN Charter as a Constitution on the grounds that irrespective of special status of UN in the light of its superior powers in certain aspects; it was never conceived as a supranational organization. Moreover, a World Constitution stipulates legal expression of common values shared by all countries. This is a problematic claim for the UN Charter in the light of challenges faced by HR discourse grounded in cultural relativism (Quenivet 2010: 601).

It is worth recalling that the UNSC was never expected to be an open institution, which is why the General Assembly was created. The demand for UNSC's accountability also brings the issue of the necessity to respond quickly to international crises pertaining to the field of security. The demand for greater accountability of the Council may come at the cost of diluting its ability to effectively respond to the crisis conditions. This dilemma can be sorted out by differentiating between the political and administrative functions of UNSC. It is possible to bring in elements of accountability like obligation to provide reasons for decisions; input from states as well as non state actors etc. in the latter case (Kingsbury 2005).

The founders of the UN found that one of the fundamental reasons for the failure of the League was that it privileged the idea of democracy beyond necessity. It comes as no surprise that the UN contains UNSC as a political body with wide powers charged with the responsibility for maintaining international peace and security. Although the Charter protects the provision of non intervention in the domestic affairs of member states, Council actions prevail over this provision. Moreover, there is an absence of any provision of the judicial review of the UNSC actions, thereby making the body a final legal arbiter of its actions (Forsythe 2012: 2, Matheson 2004: 615).

International organizations are not contracting parties to the treaties relating to HR and humanitarian law. UN is not a party to any HR instrument including the *Universal Declaration of Human Rights*. Although the UN can enter into HR agreements, it cannot be a party to HR documents since the latter are open only to the

states. (Megret and Hoffman 2003: 316, Peters 2011: 11). Moreover, the limits of extra territorial jurisdiction to prevent international crimes are not clearly defined. Though, the question as to whether the treaties relating to protection of HR possess extra territorial jurisdiction at all is settled in the affirmative, the question of what the limit of this extra territorial jurisdiction is remains blurred (Peters 2011: 11).

One of the crucial factors preventing the applicability of IHL to the UN is that the humanitarian principles are designed for combatants involved in armed conflict of national and international character. Peacekeepers are neither considered as combatants nor participants in the conflict in which they are involved. Although the UN has declared its commitment towards humanitarian law, it has been insistent that its forces should neither be considered as a 'party' to a conflict nor as a 'power' in the sense used in the Geneva Conventions. This resistance should be understood from the perspective that the UN does not possess the institutional framework to deal with the violations of such law. Moreover, accepting the status of a 'party' will constitute a loss of impartiality (Turley 1994). Another practical problem that complicates the application of IHL on UN forces is the difficulty in making these rules understood by the soldiers on the ground as the language in which these rules are framed is not easily understood (Best 1994: 10).

To lift the status of R2P to the level of international customary law, especially by making the international community responsible for HR everywhere will require further legal intervention. The World Summit Outcome Document despite being a Resolution of the General Assembly does not have binding force. UNSC Resolution no. 1973 and 1975 passed in 2011 give substantial weight to the norm of R2P. Furthermore, the practice of attaining legal accountability through the formation of tribunals for people responsible for committing core crimes also builds on the issue of lifting R2P to the level of customary international law. While R2P is an established 'hard law' in relation to the host state, it remains an 'emerging legal norm' vis-à-vis UN and other states (Peters 2011: 11-12).

The argument about *lex specialis* has also been proposed to argue that IOs can be relieved from the obligations emanating from international law if its members contract around it. An implication of this argument is that IOs will remain obligated

towards international law as a default matter. The states enjoy substantial discretion in forming IOs that are not bound by certain international legal obligations if it is believed that it would contribute towards functional efficacy. Therefore, the IOs remain bound by general rules of international law unless its Charter state otherwise (Reisman 1987: 391-395, Halberstam and Stein 2009). Explicitly in the context of UNSC, Akande (1997: 309, 320) argues that derogation from international law is allowed if UN Charter permits so.

Balancing the status of jus cogens and the capacity of states to contract around international law, Daugirdas (2016: 329) argue that capacity of states to contract around international obligation is not unlimited but governed by the content of jus cogens. Thus, even though IOs are creatures produced by international law yet it does not imply that all sorts of international legal obligations are applicable on them.

The end of the Cold War opened up the scope for greater action by the UNSC. The Council's presidential statement in 1992 declared that the meaning of threat to international peace and security has changed wherein threat emanates from diverse sources like economic, social, ecological instabilities etc. The Council took notice of the situation of mass starvation in Somalia in 1992 and regarded it as threat to international peace and security under Chapter VII. Another complicated situation that arose during the late 1980s and early 1990s was the internal armed conflict in El Salvador that spread to Nicaragua. The UNSC response was based on the notion that human rights and security issues cannot be compartmentalized (Forsythe 2012: 3).The correlation established between peace and protection of HR continue to be a matter of supreme relevance as noted in Secretary General's report in 2018. The report entitled ―*Responsibility to protect: from early warning to early action*‖ was adopted by both UNGA and UNSC. The report showed commitment towards the principle of R2P but at the same time showed concerns over lack of UN's inability in making using of early warning mechanism to prevent HR violations from occurring in the first place (UNGA/UNSC 2018).

The issue of Council's action to address the concerns of human rights is a politically sensitive matter. Two permanent members – Russia and China – are not enthusiasts of

human rights causes and often exercise their veto power to prevent action. In 2007, a draft UNSC resolution on pressurizing Myanmar to rectify its human rights record was vetoed by both countries on the ground that the issue pertains to the internal jurisdiction of the state. Again, in 2008, Russia and China exercised double veto to block sanctions targeted at Robert Mugabe regime for bad human rights record. Moreover, the developing world (recalling their colonial experience) loathes Council attempts at representing the moral crusade of the developed world. For instance, South Africa voted in opposition in case of Zimbabwe (2008) as well as Myanmar (2007) while India and Brazil abstained from voting on Libyan crisis in 2011 (Forsythe 2012: 3-4). The Syrian crisis is another instance which shows that the big power politics may end up making HR related issues hostage. It is in this context, France has proposed the R2NV initiative.

The *High level Panel on Threats, Challenge and Change* (2004) had suggested that the UNSC should adopt necessary guidelines to regulate the matter of use of force in terms of not just whether it can be used but also when it can be used as a "matter of good conscience and good sense" (UN 2005: 204-209). Though, the UNSC enjoys enough discretion in its functioning but this "discretion is not unfettered" (Cahin 2003). The accountability of the UNSC is a matter of concern in case of both its action and inaction. The latter aspect which relates to the acts of omission or passivity is well established in the domestic legal system where government could be held accountable for non-performance. At international level, like most other issues, questions of prevention or protection also gets complicated.

To conclude, the mix of HR centric conceptual evolution and the changed international structure since the end of Cold War have had a dramatic impact on the relationship between UNSC and HR. Though, UNSC has shown greater willingness to respond to intrastate crisis, hallmark of post-cold war era, the discourse and action on intervention has been a matter of debate. The scholarly community and the policymaking world remains divided on reasons behind UNSC's selective implementation of HR orientedR2P obligations. Despite the wide support that 2005 World Summit Outcome Document gathered from all kinds of states, it does not take way the fact that apprehensions among the states especially of Global South persist. In current scenario, the nature of the conclusion of Libyan intervention (in the name of

R2P) with Gaddafi's removal has proved critics right that R2P may be used for purposes other than purely humanitarian.

Another important point of profound debate has been whether and to what extent an all-powerful political organ like UNSC be bound by IHL and HR law? This debate too is far away from being settled. Scholars from both schools of thought (those who argue for binding UNSC with HR obligations and those who argue against it) have proposed different reasons to support their arguments. As far as UN is concerned, it has included HR as well as IHL obligations in its staff regulations and policies yet it has been cautious in not over committing itself. This can be substantiated by the observation that whenever UN has been sued by victims, its legal department invoke immunity and reiterate UN's non-justiciable moral obligation. This is not to suggest that UN is indifferent towards HR repercussions of its activities but certainly failing to do something effective about it especially in the context of SEA's in peace operations.

CHAPTER 4

The Issue of Accountability and UN Targeted Sanctions Since 1999

Introduction

The broader theoretical and policy structure within which international disputes are resolved include diplomacy, sanctions and military action. In terms of sequence, sanctions follow after the unsuccessful deployment of diplomacy. The assumption that sanctions is a "collateral damage free policy" witnessed a major setback most profoundly during the Gulf War in Iraq in 1991. Instead of losing their relevance altogether, comprehensive sanctions were replaced by targeted sanctions as an innovative response to punish the real offenders (political elites) and protect the dignity and rights of the civilians. Even though targeted sanctions sought to identify individuals and institutions responsible for threatening international peace and security, they still generated controversy due to lack of transparency, review mechanisms and denial of due process of law. The issue of mass violations of human rights, which was the hallmark of comprehensive or traditional sanctions, has been replaced with the issue of human rights violations of a different type – namely the 'Fair Trial Rights'. Faced with intense criticism, the UN responded by creating accountability mechanisms such as the 'Office of the Ombudsperson of the UNSC's 1267 Committee' in 2010. Apart from such UN led initiatives, judicial bodies across different states as well as EU Courts took note of the legal vacuum and passed certain judgments favoring, at least partially, those who are listed on the sanctions list, thereby [generating a sense of optimism about the newly found mechanism of 'legal accountability' on the otherwise unbridled powers of the UNSC. Taking lessons from the previous experience, a few states have also undertaken initiatives at the political level to reform the practice of targeted sanctions. The effectiveness of these accountability mechanisms shall determine the future trajectory of sanctions as a policy.

1. Theory and Ideas on Sanctions

The modern economic statecraft of sanctions has been derived from the ancient warfare technique of the siege. During [ancient days], the assaulters would close off the walled city in the anticipation that the locked citizens would submit under the

pressure of hunger (Simmons 1999). Thus, for sanctions to be effective, the target has to be vulnerable to economic coercion. Taking account of this insight, Hirschman (1945) argues that powerful states will attempt to minimize such vulnerability and make other states dependent upon themselves.

The practice of sanctions has travelled a long distance. During ancient Greece, Megara was punished with trade embargo by the Athens in 432 B.C. In modern era, the European pacifists like Belgian Professor of International Law, Henry La Fontaine discussed the vitality of 'peaceful' sanctions during 1892-1894. The end of World War I ignited interest on sanctions when French statesman like Leon Bourgeois envisaged a society of nations that may apply measures to boycott of recalcitrant nation-state. One of the most vocal supporter was President Woodrow Wilson of US who proposed that the citizens of the aggressor state need to face disruption of trade and communication relations with rest of the League members. The sanctions policy failed in 1935-36 when it could serve as a deterrent against Italian annexation of Ethiopia. One of the major that drove Japan into World War II were the US trade sanctions (Friedman 2012).

During the Cold War, sanctions were used in just two occasions- Rhodesia and South Africa. The effectiveness and the legitimacy of sanctions policy was staunchly criticized by Galtung, a Norwegian sociologist. In the 1980s, the South African apartheid regime faced a loss of around $20 billion due to the activities of the grassroots divestment campaign. Alarmed by the Iraq's occupation of Kuwait I 1990, powerful sanctions measures were imposed on Iraq, though it became notoriously known for mass civilian suffering. During 1993-1994, UNSC imposed targeted sanctions on Haiti's military junta. A set of targeted measures comprising- travel bans, blood diamond embargoes and asset freeze- were aimed at rebel group in Angola, UNITA. In the light of the politically most influential event of 2st century till date, the 9/11 attacks in 2001, triggered unparalleled targeted sanctions against terrorists and their apologists. During 2003-2004, UN and US removed their sanctions in the light of Gaddafi's renunciation of nuclear programme and support to terrorism. The North Korean nuclear test in 2006 ignited a personal targeted sanction on Kim Jong II's favorite luxury articles like Rolex watches. During 2006-2009 US officials met dozens of foreign banks urging them to restrict engagements with Iran. During

the Arab Spring in 2011, it became clearer that seamless implementation of targeted sanctions is utopia as even the modern software could not detect differences in similar names. Some of the current measures include sanctions against Iran and Syria. Though the continuation of bloodshed in Syria points at the inherent limitations of sanctions (Friedman 2012).

The International Law Commission has defined sanctions as:

> reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular certain measures which the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of peace and security (ILC 1979: 121).

According to Biersteker and Eckert (2009: 2), sanctions constitute "coercive pressure on transgressing parties, leaders and the network of elites and entities that support them, in order to change behavior or prevent actions contrary to international peace and security".Scholars like Hufbauer, Jeffrey Schott, Kimberley Elliott and Barbara Oegg regard economic sanctions "as the deliberate, government inspired withdrawal or threat of withdrawal of customary trade or financial relations" (Hufbauer et al. 2007: 3). However, the scope of sanctions is much broader than just disrupting economic relations with the target state. Another important aspect is diplomatic sanctions which constitute measures like recall of ambassadors[44]; suspension of membership in an IO[45] etc. Combacau (1992: 313) defines "sanctions as measures taken by state acting alone or jointly with others in reply to the behavior of another state which it maintains contrary to the international law". In view of this definition, it is clear that sanctions are a response by state(s) to the perceived violation of international norms by the target.

[44] 14 countries including US recalled their ambassadors from Venezuela after President Maduro's re-election in 2018 which opposition claimed to be rigged.

[45] Syria was suspended from Arab League in 2011 because its failure to end its crackdown on protests.

Conventionally, the resort to economic sanctions has been considered as a humane way of handling the crisis without the need of blatant force and was supported by idealists like Woodrow Wilson. As he famously remarked —

> A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but brings a pressure upon the nation which, in my judgment, no modern nation could resist (Padover 1942: 108).

Sanctions include the interruption of economic relations and communications as well as the severance of diplomatic relations (Wallensteen and Grusell 2012: 207, Kondoch 2001). The justification of sanctions lies in the character of international politics that features absence of a centralized global authority. The task of maintaining the status quo lies with the states that, therefore, have created bodies like the UN to achieve the goal of system stability. In accordance with its mandate, the UN acts through mechanisms like economic sanctions, targeted sanctions and military interventions depending upon the situation. The problem arises when the goals of systemic stability contradict other principles and purposes of the UN, particularly protection and promotion of fundamental rights (Shagabutdinova and Berejikian 2007: 59).

The prescriptive nature of the international legal order creates a problem of compliance. The international society has traditionally functioned on the decentralized system of responses (namely through states unilaterally) to violations of international law. The gradual institutionalization of the international society had an impact on the structure, normative content and enforcement of the international law. This process of institutionalization now witnesses collective responses to instances of violations of international law. This collectivization of efforts can be noticed in the trend towards reduction in the unilateral measures as well as in the formation of international economic institutions like the WTO, Charter law and law on state responsibility. The post-Cold War UN activism has also strengthened this phenomenon significantly. The use of sanctions is conceived as a centralized mechanism that has replaced relatively ineffective measures like suspension or expulsion from membership. Sanctions are

justified with the objective of upholding community values or interests (Debbas 2010: 119-120).

Sanctions include measures that are otherwise regarded as illegal in international law, though the unlawfulness of such measures is neutralized by the involvement of international organizations like the UN. Although the term sanctions is not mentioned in the Charter, Article 41 provides a wide scope to the Security Council in determining the measures to be taken to resolve a crisis. Unlike similar provisions in the League of Nations, the open ended-ness of Article 41 of the UN Charter was a deliberate move by the US and UK. Also, the League provisions were clear enough to suggest that sanctions cannot be imposed against non-state actors. The UN Charter on the other hand does not limit the scope of sanctions by such specifications (Wessel 2004: 637-638). Because of this leverage exercised by UN Charter in the context of non-state actors, rebel groups like UNITA in Angola, individuals or entities associated with terrorism etc. have been targeted through sanctions with an aim to prevent collateral damage.

In terms of the seriousness of the measure, sanctions are considered as a midway between the diplomacy and military measures. The relevance of sanctions as a foreign policy instrument becomes eminent when diplomacy fails to attain the desired results and military measures are considered as too costly an option (Chantaal de 2007). However, given the human rights violations that the policy of sanctions (both comprehensive and targeted) have generated, it may become difficult for the supporters of sanctions policy to argue that it is a relatively less coercive mechanism available with the sponsoring states.

Information asymmetry is a key variable on which the logic of sanctions rests. If both sides have complete information coupled with the absence of doubts, sanctions would become meaningless.Sanctions are different from wars as they stop when either the sender or the target submits while the war ends when both sides decide to cease hostilities (Kecskemeti 1958). Sanctions succeed when the target backs down under the pressure of economic coercion while the sanctions fail if the sender abandons the policy in view of the larger cost involved with its continuation (Allen 2005: 122-123).

Therefore, it becomes important for the sender to identify whom to target so that the desired outcome is achieved.

The limits of targeted sanctions, no matter how precise they are, can be understood by looking at the outcomes of these measures on Russian leaders and their cronies after the annexation of Crimea. Russia was denied access to western financial market. The West wanted to showcase their collective resolve in not allowing Russia got scot free after breaching the international law by annexing another territory. Initially, the US and EU sanctions had a substantial impact on Russian economy as they coincided with the fall in international prices of oil. In response, the Russian Central Bank exceedingly printed money to cushion companies owned by Putin's cronies. The hope was that these measures would put pressure on Putin as inner circle is targeted. Infuriated by these measures, Putin seized and nationalized oil company, Bashneft, of a liberal oligarch, Vladimir Yevtushenkov to restore loss afflicted by sanctions (Lorber and Feaver 2015, Middendorf II and Negrea 2017). Thus, the intended targets manage to shift the cost of sanctions on a third party.

The central government and the domestic groups who support the government are vital elements to be targeted through a sanctions policy. Troubling central government members is a direct measure while troubling support groups indirectly serves the goal of sanctions imposition. Within this framework, the goal of changing state behavior can take place through three mechanisms. First, the cost benefit analysis may compel the government and the support groups to bow in front of the sender state. Second, such pressure may spill into a regime change as a result of the wedge between government and support groups and the latter withdrawing their support. In this interplay, sanctions may have also weakened central government making it difficult to sustain in the face of lack of cushioning from support groups. Third, "sanctions can have differential effects *within* the central government and *across* core groups themselves, shifting the balance of political power within the government and altering its preferences" (Kirshner 1997: 42).

The motivations behind the use of sanctions are multifold. Sanctions may be imposed to dilute the military and economic power of the targeted state. Sanctions also showcase themselves as strong statements of disapproval against the behavior of the

targeted state on behalf of the international community (Elliot 2010). For instance, while announcing fresh sanctions against Iran in 2010 for its controversial nuclear weapons programme, US President Barack Obama claimed that the "new package would indicate to Iran how isolated they are from the international community as a whole" (CBS News 2010). Similarly, while announcing sanctions against North Korea, Susan Rice (UN Ambassador of US) stated, "the entire world stands united in our commitment to the denuclearization of the Korean Peninsula and in our demand that North Korea must comply with its international obligations" (Rice 2013).

Another reason behind applying sanctions is to demonstrate the capability and the willingness of the sender countries against the target or to anticipate or deflect criticism. It may also be intended to change the behavior of the target in accordance with the international norms or to maintain a "certain pattern of behavior in international affairs" (Barber 1979: 380-382). Most of the times, the real aim of the sanctions is not always made explicit and may be hidden in the public rhetoric of the policymakers (Elliot 2010: 86). The objectives of the sanctions are also prone to change overtime (Barber 1979).

Some argue that sanctions do not necessarily serve the political objective of creating a change in the behavior of the targeted state. However, these sanctions are instrumental in accomplishing other goals like serving the interests of domestic political constituents or at times the major role played by the sanctions is merely symbolic in nature (Gordan 1983, Paarlberg 1983, Daoudi and Dajani 1983, Baldwin 1985, Lindsay 1986, Nossal 1989, Baldwin and Pape 1998). Scholars like Brown-John and Lloyd (1975), Strack (1978) etc. argue that sanctions alone are ineffective but they may serve important goals if mixed with other policy devices. Others like Knorr (1975) examined the effectiveness of sanctions with a sample of twenty-two cases and found them effective in only four instances. The following reasons were identified for the failure- ability of target state in finding alternative trading partners; unintended effect of sanctions in bringing domestic integration than political destabilization.

Wagner (1988) draws on the bargaining theory to explain the likelihood of effectiveness of sanctions. The central argument put forth is that sanctions may not work if the sanctions impose cost on both sender as well the target. Such a state of affairs will incentivize resorting to the negotiating table by both parties. It is only

when the sender country had entered into an economic relationship that disproportionally favored the target; the benefit of the relationship can be used as leverage for the realignment of other policies of the target state. The act of sanctions is a part of the process of international bargaining (Smith 1996, Morgan and Miers 1999, Marinov 2002, Lacy and Niou 2004). Sanctions involve an element of uncertainty as both the sender as well as the target state faces substantial political costs. The domestic response is one vital factor that both sender and target state is concerned about. Losing domestic support or more precisely political power over sanctions is the worst outcome for both sender and target state (Miller 1995).

The success and failure of economic sanctions is influenced by the absence or presence of certain causal mechanisms. One of such important variable is the anti-government activity. The sanctions are likely to propel such activities but are conditioned by the nature of the domestic political system of a state. The possibility of political violence (due to the imposition of sanctions) in case of autocratic targets is less likely to occur. Thus, to alter the behavior of autocratic regime, the pressures must emanate from systemic level as domestic factors may fall of short of creating desired change (Allen 2008). Farmer (2002) argues that sanctions are conventionally studied from the perspective of the benefits it may accrue to the sender and the loss to the target. However, deeper understanding reveals that the cost of sanctions is borne both by the sender as well as the target. Thus, the sender needs to assess the decision on sanctions through cost-benefit analysis or parameters.

Examining sanctions from the perspective of domestic political realities, Allen (2005) contends that given the pressure of electorates, democracies are more likely to succumb to the pressure of sanctions. The nature of the domestic political system has an impact on the strength of the political costs of the unpopular sanctions policies. In a democratic system, the leaders, both in sender and the target state, are accountable for the ill effects of their policies. They face immense competitive pressure while autocratic states have fewer constraints while maintaining an unpopular policy stance due to lack of accountability structures. Autocracies depend upon the loyalty of a small segment of the population and may not feel the degree of pressure felt by democracies. Thus, the domestic political structure plays a key role in conditioning

the outcome of sanctions (Bueno de Mesquita and Siverson 1995, Cortright and Lopez 2000).

The process of the execution of sanctions has been theorized by John Galtung in his seminal academic contribution in the context of Southern Rhodesia. Galtung (1967) made an argument that the economic loss created by sanctions will generate popular discontent and this discontent will put pressure on the ruling elite to conform to the demands of the sender(s) states, thereby taking the country back to the pre-sanction level prosperity. According to this proposition, the ruling elite have two options – either to cooperate with the sender countries or face domestic wrath and ultimate removal. The key factor is the strength of the domestic value system and the extent to which this system permits its deprivation. Once this limit is crossed, a schism will occur within the domestic setting of the target state. These schisms may be visible in various forms like a disconnect between the rulers and the population or a split within the leadership etc. Finally, these developments will result in political disintegration and will force the leadership to negotiate (Galtung 1967: 388).

The theory propounded by Galtung was eventually discredited owing to its failure to create change in the behavior of the target. The arrival of smart sanctions may have altered the concept of sanctions in terms of scope of the target and the intention of preventing collateral damage [but the reliance on the path towards effectiveness] (as identified by Galtung) remains similar (Brzoska 2003). However, Baldwin (Baldwin and Pape 1998: 193) argues that "there are many causal logics that could be used to construct variety of theories" of sanctions.

Proponents of sanctions like Hufbauer et al. (1990) have collected data of those [116 cases] on which sanctions have been imposed since 1914. They concluded that sanctions have been effective in 40 cases. However, it must be noted that this study regards British use of sanctions against Germany during 1914-1918 as a success. The interpretation is that sanctions policy followed by Britain was intended to assist the war efforts. It is clear that sanctions serve multiple purposes like change in the behavior of the target state, assisting the war efforts, punishing the target state, making a symbolic statement etc. On a highly optimistic side, sanctions are also

expected as alternatives to war to attain a policy objective (Morgan and Schwebach 1997: 29).

However, the assumption that greater the cost to the target country, the higher the probability of the success of sanctions has been strongly challenged in academic circles. Indeed, it has been observed by many scholars that the pain involved in the sanctions to the target state does not necessarily spill over into political gain for the sender(s) because if the regime enjoys some level of domestic support, it may result in a "rally around the flag effect" (Hoffman 1967, Doxey 1971). Observing the ineffectiveness of sanctions in a number of cases, critics now argue that "at the end of the day, there is little empirical evidence that sanctions can achieve ambitious foreign policy goals" (Pape 1997: 76).

The underlying logic of sanctions that economic pain will result in political gain is found flawed by a number of studies as it fails to take into account the scope of adaptability by the target (Galtung 1967, Renwick 1981). An essential aspect of the successful sanction policy is the combination of economic and political costs inflicted on the target. The ineffective sanctions cases are not those where there is no impact on the target but those where only economic cost is involved and the political cost has not resulted. In order to be a success, sanctions must also be politically costly relative to the issue at stake (Morgan and Schwebach 1996, Kirshner 1999). Furthermore, the target must also see a clear benefit out of the compliance. Hence, the sanctioning measure should be viewed as a bargaining tool and not a punitive exercise with an objective of encouraging dialogue (Allen 2005: 121).

The UN is not just a near universal diplomatic forum but also a judicial body that monitors the legitimacy of the actions of member countries and imposes punitive measures if any wrong is committed. One of the most prominent tools at the disposal of the UN to enforce its law is sanctions. The status of UNSC as a powerful UN organ that acts on behalf of the international community brings with itself a set of responsibilities. The policy of sanctions has been accorded great significance so much so that the UNSC "lives and breathes" through ratification of sanctions (Friedrichs 2014: 6). The success and failures of sanctions has a strong impact on the legitimacy and performance of the organization that applies them.

The biggest problem with sanctions is when they miss their target and unintentionally hurt innocent civilians. This critique became a central point during the Iraqi sanctions and one observer suggest that the sanctions in Iraq became a direct cause of the suffering inflicted upon the hundreds of thousands of children under five years of age (Normand 1996: 40 in Shagabutdinova and Berejikian 2007: 60). Such consequences brought forth the necessity of looking at the sanctions from the perspective of human rights.

The euphoria of the 1990s which Cortright and Lopez (2000) dubbed as the 'sanctions decade' started to dissipate in view of the legitimacy and efficiency challenges overriding the positive outcomes of a sanctions policy. In view of the negative implications of comprehensive sanctions witnessed in states like Iraq, Haiti etc., the UN, EU and UK have abandoned the policy of comprehensive sanctions altogether. Specifically, the criticism that the Iraqi case attracted played a critical role in pushing the UN to conceptualize sanctions differently in the form of "smart or targeted sanctions". Conventionally, sanctions were applied on entire countries while the new approach sought to target the individuals responsible for "deviant" policies of a country. The most important elements of targeted sanctions include assets freeze and travel ban (Cortright and Lopez 2002, Wallensteen and Grusell 2012: 207-208).

Although the theory and practices on sanctions are disproportionately skewed in favour of negative measures like ban on trade, diplomatic cut off, travel ban etc. yet the IR is not alien to the concept of positive sanctions. The positive sanctions can be defined as "measures which something (a resource, membership, status etc.) to a targeted actor beyond what exists at point zero" (Wallensteen 2005: 232). Therefore, these set of measures aim to later behaviour of the targets through inducements.

Baldwin (1985) conceived largely economic measures that may add up to the content of positive sanctions. Later, (Cortright 2000) has offered has a large set of positive measures that may play effective role in facilitating change in the target's behaviour. In the domain of economics, these measures may take forms like extending MFN status, debt relief, access to technology, guaranteeing investment, export or import licences etc. In the field of narrowly defined international security, measures like i.e.

security assurances, military cooperation, membership in military alliances, diplomatic support etc. may prove decisive. In the broadly defined sphere of international security, positive sanctions include measures like extending citizen diplomacy, environmental and social cooperation, strengthening cultural exchanges etc.

These measures are largely meant to address situations of inter-state conflict and may not so easily be applied in the context of intrastate conflicts. Extending security assurance or initiating military cooperation in intrastate conflicts would mean taking sides. The practicality of positive sanctions also suffers from moral considerations or denial of justice i.e. UNITA rebel leader, Savimbi, was enticed with attractive arrangements to persuade him to leave Angola that would have spared the country from horrendous conflict. However, on the flip side, it would have taken Savimbi out of the reach of domestic law (Wallensteen 2005: 234). Thus, the concept of positive sanctions entail moral dilemmas.

Crumm (1995) examined 40 instances in which USSR attempted to modify India's behaviour through incentives. The study found that the measures work well when the relationship between the sender and the target are cemented on shared norms. The USSR's incentives did not meet much success when they attempted to alter India's position on key issues of IR like non-interference. The positive sanction measures are effective if used sporadically. From Indian perspective, they helped India to gain access to oil deliveries, provided India with spare parts for military deliveries etc. In this sense, they helped India break western monopoly over certain goods and technologies.

One of the major reasons for the failure of sanctions is the lack of clear policy goals and the inability of states to ensure that applied sanctions work, which makes their usage as a foreign policy tool costly and, at times, counterproductive. The effectiveness of the implementation of sanctions is greatly compromised due to the lack of an adequate monitoring and verification system. Moreover, the use of sanctions reveals that they are hegemonic in nature as it is a policy tool for the powerful states to penalize the weaker ones while the reverse situation is not feasible. The political orientation of sanctions severely dilutes the legitimacy of the UNSC

(Chesterman and Pouligny 2003, Haas 1997). With policy failure of such magnitude, it comes as no surprise that better methods of attaining collective security – such as targeted sanctions – needed to be designed.

2. Targeted Sanctions – A Conceptual Framework

Targeted sanctions are regarded as 'precision guided munitions' of economic statecraft that hurt elites while at the same time minimize collateral damage. These sanctions alter the material incentives associated with 'deviant' behavior and force elites to pressurize their government for concessions (Drezner 2011: 96). Targeted sanctions contain three purposes that may not be mutually exclusive while in operation – initiate bargaining for compliance by making individuals have a personal stake in making their country comply; deprive resources to the target that may shift a balance of power, creating difficulties for the concerned entity; threaten potential target by applying sanctions on some individuals and thus signaling to others who are not yet listed to modify their behavior (Wallensteen and Grusell 2012).

The opposite of smart sanctions is the comprehensive economic sanctions that can be pronounced as 'dumb' since they are driven by the flawed logic that the pain suffered by the general population will force rulers to concede to the demands of the international community that has imposed the sanctions. Targeted sanctions are aimed at hurting the political elite who are responsible for the deviant behavior of the state. Such sanctions cause discomfort to these elites, their associates and business organizations. The smartness of the targeted sanctions also flows from their ability to evolve as per the changed conditions. It is also worth noting that targeted sanctions weigh the costs and benefits of their various components and alter them according to the need. For instance, there can be a country in which an aviation ban may prove counterproductive if travel via air is a common feature for the general population while there can be a situation where aviation travel is a privilege of the elite and does not hurt everyone. Thus, various components of targeted sanctions operate in a flexible way, moreover they are time bound policy initiatives that prefers constant review and can be put off if found ineffective (Brzoska 2003: 522).

Under the UN legal framework of Chapter VII, targeted sanctions as a policy choice can be invoked only when the concerned individuals or entities are accused of

threatening or violating international peace and security (Brzoska 2003: 522). Contrary to the conventional practice, the concept of targeted sanctions establishes a connection between the individuals or entities (other than the states) and the Security Council. Resolution 1390 is a seminal development that leaves out states as an intermediary between UNSC and the citizens. Given this development, the mechanisms available to provide legal remedy to victims may be inadequate (Wessel 2004: 635). The means through which the targets arepunished includes – travel ban, asset freeze, arms embargo, visa ban, personal financial sanction and sanctioning specific commodities like diamonds, oil etc. In principle, targeted sanctions aim to exempt civilians from the wrath of sanctions (Tostensen and Bull 2002: 373).

The adoption of smart sanctions as a foreign policy tool has to be embedded within the broader shift in the security paradigm from being predominantly state centric to human centric. This combination can serve as a compromise formula between the proponents of sheer hard power on one hand and pure soft power on the other (Werthes and Bosold 2005). The aspect of human security is a preventive measure while the policy of smart sanctions represent a reactionary dimension of the 'human security-smart sanctions' approach. Targeted sanctions are principally conceived as a political and preventive move than a punitive measure. Also, they are time bound and expected to be temporary in nature (Biersteker et al. 2001: 7). The advocates of targeted sanctions argue that these sanctions are the solutions to the problem of conventional sanctions. Moreover, these sanctions act as a base for policy coordination among great powers, medium powers and global civil society (Garrett and Weingast 1993).

The micro-foundational approach towards sanctions has added a further nuance in the understanding of the operationalization of sanctions. Instead of looking at the impact of sanctions on the target state, it examines the effect on different constituents within the state. Economic sanctions are of many types – trade, aid, finance, currency and assets of the target state. Trade sanctions constitute the major element of the economic sanctions and can be further divided into two parts – import sanctions and export sanctions. The overall aim of both is to deprive the target state of the benefits of integrated trade relations. The relative effectiveness of the different types of sanctions depends upon the conditions in each case. For instance, freezing assets or cutting

loans may serve as a strong deterrent against a target state with an aim to stop that state from financing military operations. In such cases, trade sanctions may take time before becoming effective. Nonetheless, under some other conditions and different aim, trade sanctions may be more desirable policy tool for e.g. forcing a state to give up its control over an occupied territory can be achieved more effectively through trade sanctions (Kirshner 1997: 36-38).

To increase the probability of the success rate of targeted sanctions, several factors should be kept in mind. First, sanctions that are comprised of commodity embargoes and financial sanctions must also be combined with more specific targeted sanctions like visa ban and arms embargo. They not only bolster the overall sanctions package but also prevent likelihood of 'sanctions fatigue'. Second, sanctions must be crafted considering the vulnerabilities of the targets. Every effort should be taken to minimize humanitarian impact through regular monitoring and refinement. Third, practices like 'panel of experts' should be institutionalized to carry out timely evaluation. Finally, an effective public outreach programme should be put in place to sensitize stakeholders like developing states, media, public etc. about the desirability of the sanctions (Portela 2014).

3. Evolution of Sanctions Policy: Empirical Account

The term 'sanctions' does not exist in the UN Charter but it has become a part of the vocabulary used by the UNSC in its Resolutions. By their nature, binding decisions of the UNSC are political in nature and do not fall in the category of legal [interpretations]. During the first 45 years of its formation, sanctions were invoked in just two cases – Rhodesia (1966) and South Africa (1977) by the UNSC (Weiss 1999: 499). The use of sanctions has gradually mushroomed under the overriding assumption that sanctions constitute a "liberal alternative to war" (Pape 1997: 90). As a result, the balance sheet shows that for the first 56 years of its existence, the UNSC imposed sanctions on 14 occasions (relatively small number). The assumption that sanctions work without causing a humanitarian crisis (which is inevitable during inter-state warfare) has become an element of foreign policy (Haas 1997: 1).

The first major challenge that the UNSC encountered in the context of its sanctions policy was in Iraq. The use of economic sanctions by the UNSC led to a hue and cry

owing to their unintended consequences in the form human rights violations forcing former UN Secretary-General Boutros Boutros-Ghali to term sanctions as a "blunt instrument" (UN 1998: 62, 25). According to UNICEF and Save the Children, the Iraq sanctions regime "destroyed society in Iraq and caused the death of thousands, young and old." The UN Secretary-General showed his reservations for the policy of sanctions in a statement made in the UNSC: "the humanitarian situation in Iraq poses a serious moral dilemma, we are in danger of losing the argument about who is responsible for this situation in Iraq – President Saddam Hussein or the United Nations" (Willis 2011: 678).

The Iraq debacle created a divide among the P-5 members of the Security Council in which France and Russia undertook not to be in such a situation again. The UN was forced to brainstorm on reforms in the light of the consequences like huge collateral damage, the elite remaining unhurt, proliferation of black and gray weapons markets with storage in states like Ukraine and Bulgaria etc. (Brzoska 2003: 520). The humanitarian implications arising out of the Iraq debacle forced a re-conceptualization of sanctions with a focus on individuals (UNSC 1992).

Powers to sanction non-state actors were not envisaged during the years of the Charter formation, however the Security Council imposed sanctions against the White minority government in Rhodesia in 1966 (UNSC 1966). The UNSC first imposed economic sanctions targeting individuals involved in the acts of terrorism in 1997 when it applied travel and financial restrictions against the members of UNITA, the National Union for the Total Independence of Angola (UNSC 1997). Predominantly, the practice of targeted sanctions is a post-cold war phenomenon, used most frequently in the 1990s. While the UNSC used sanctions during the Cold War only twice, it was invoked twelve times in the 1990s. As a result, the attribution of responsibility for wrongful international conduct has gone beyond states to include non-state actors such as the UNITA in Angola, Bosnian Serbs in former Yugoslavia, armed militias in the DRC, Janjaweed in Darfur etc. (Debbas 2010: 123).

The measures taken by the UNSC against individuals and entities (to maintain international peace and security) fall under the category of 'sanctions regime.' The creation of a counter terrorism regime represents a significant departure from the conventional UNSC measures in the sense that it reflects an overarching move

towards bringing non-state actors within the fold of international law. The broadening of the scope of the phrase "threat to international peace and security" depicts a change in the nature of the UNSC from a body enforcing collective security to a global law maker (Szasz 2002: 901).

Not just the 'targets' but also the 'grounds' for invoking sanctions have undergone change. The notion of international peace and security has witnessed the expansion of its scope from original collective security to factors like preventing ethnic cleansing, genocide, human rights violations, and breach of international humanitarian law, punishing international war criminals, restoring democracy etc. (Stremlau 1996). Thus, the reasons for the imposition of sanctions are as diverse as the actors against whom they are directed. The case of Sierra Leone is pertinent in showcasing the changing context and conditions of use of sanctions.

Following a military coup in Sierra Leone in 1997, sanctions were imposed by ECOWAS that included measures like a ban on the supply of petroleum and related products to Sierra Leone, and a travel ban on members of the military. On the insistence of ECOWAS, UNSC also adopted a Resolution declaring that conditions in Sierra Leone pose a threat to international peace and thus steps under Chapter VII were called for. Sanctions already in place were strengthened and new sanctions like arms embargo were also introduced. Also, a monitoring group, Economic Community of West African States Monitoring Group (ECOMOG), was formed to monitor and report to the sanctions committee on the implementation scenario in Sierra Leone (Vines and Cargill 2010).

In accordance with its efforts to balance security and humanitarian needs, paragraph 14 of UNSC Resolution 1132 stated that its important to "…establish appropriate arrangements for the provision of humanitarian assistance and to endeavor to ensure that such assistance responds to local needs and is safely delivered to, and used by, its intended recipients". 15 days after the UNSC sanctions were imposed, the Armed Forces Revolutionary Council (AFRC) andRevolutionary United Front (RUF) junta conceded and power was transferred to Kabbah. After the reinstatement of the Kabbah government, sanctions were lifted by the UN (Vines and Cargill 2010).

Nonetheless, tensions between RUF and the Kabbah government did not dissipate as the former continued to extend its grip after the sanctions were lifted. The RUF had external support from Charles Taylor, the President of Liberia. Taylor was a beneficiary of the illegal diamond trade and supplier of arms to Sierra Leone in return for diamonds. By 1999, the RUF appeared extremely potent which led to an agreement between RUF and the Sierra Leone government at Lome in which the former could obtain significant concessions from the latter such as sharing of cabinet posts, control over diamonds as a strategic resource etc.(Vines and Cargill 2010).

Following an agreement between RUF and Kabbah government, Nigerian forces, which led the ECOWAS presence in Sierra Leone, also decided to withdraw. Consequently, a power vacuum started to build especially when the RUF continued its attack on the UN. Observing this, the UN responded by instituting United Nations Mission in Sierra Leone (UNAMSIL). Alongside, a coalition of NGOs was actively campaigning for banning the trade in 'blood diamonds', something which it was able to do in Angola (Vines and Cargill 2010).

Although UN sanctions in Sierra Leone disrupted the socio-economic and political situation, they did not nudge it in the direction of conflict resolution. The arms embargo had a relative success as the warring parties could not acquire more sophisticated weaponry yet the violence was not eliminated. Trade regulation on the diamond industry came quite late and the travel ban often involved complications based on identity. International pressure led to the creation of a panel of experts to offer clarity to UNSC. Sierra Leone was also a case in which multiple bodies got involved like UN, ECOWAS, NGOs etc. which of course complicates the issue of judging the effectiveness of any specific actor. Another issue that emanates from the multi-body operation is the division of accountability and fixing of responsibility for the highs and lows of the mission (Vines and Cargill 2010).

Similarly, sanctions against Myanmar (in 1993 by US and in 1996 by EU) were a response to the denial of democracy by the military dictator. Sanctions were mooted as a mechanism to force reform in the authoritarian system and create political space for the National League for Democracy (NLD). The sanctions against Zimbabwe (2001) were motivated by the desire to end the growing authoritarianism and create an

environment where the opposition groups can manifest themselves properly. The case of Iran (2006) and North Korea (2006) showcase an attempt of the UNSC to prevent these states from acquiring nuclear weapons (Portela 2014).

The success and failures of sanctions depends upon a large number of factors though the role of other states plays a key role in diluting or strengthening the impact of sanctions (Portela 2014). Together, such factors have shown the effect of increased instances of UNSC's involvement at the individual level, permeating the national sphere (Kanetake 2008: 114, Kulessa and Starck 1998: 144, Reinisch 2001: 851). Such a transformation of the role of the UNSC in the present era has instigated the academic community to declare the UNSC as a "World Legislator" or "Global Law Maker" (Hudson 2007: 203, Finlay 2010: 489-490).

The sanctions regime is made up of a number of different UNSC authorized sanctions adopted under Chapter VII of the UN Charter. Each targeted sanction is administered by a corresponding committee which acts as a subsidiary organ of the UNSC. Among all the sanctions committees, the 1267 Committee on the Taliban and Al Qaeda Sanctions Committee gained significant prominence due to the large number of individuals or entities being targeted under this committee. The reason for such prominence is the controversies it created in the light of the denial of procedural fair trial rights to the listed individual or entity.

The traditional function of the UNSC to maintain international peace and security must be read in the light of emerging norms like human security. Contrary to the conventional focus on states, these emerging norms are individualist in substance. The emerging linkage between the original mandate of the UNSC (preserving international peace and security) and the precepts of justice is redefining the nature of the current order (Debbas 2010: 121). Thus, the current collective security mechanisms (i.e. targeted sanctions and peacekeeping missions) connect individuals directly with the UN. One pressing problem that has pushed such changes is the threat of terrorism and the UNSC's recognition of it as a factor constituting a threat to international peace and security.

4. Targeted Sanctions to Counter Terrorism: 1267 Committee

In the wake of the bombing of the Pan Am Flight 103 in 1988, the UNSC through its Resolution 731 for the first time characterized international terrorism as a threat to international peace and security. Later, in 1996, the Council reiterated this characterization in its Resolution 1054 after the attempt on the life of the Egyptian President. UNSC Resolution No. 1189 passed in 1998, condemned the attacks against the US embassies in Kenya and Tanzania and Resolution No. 1267 of 1999 adopted sanctions against the Taliban regime (UNSC 1988, 1996, 1998, 1999).

The 1267 sanctions regime was crafted within the Chapter VII provisions of the UN Charter. The states can creatively avoid obligations arising out of international treaty law (by not ratifying it) or customary international law (by being a persistent objector) but the resolutions passed by UNSC are mandatory for all states. Any failure to execute the decisions taken by the UNSC may be interpreted as a breach of Charter obligations. Moreover, such failure can also be viewed as a threat to international peace and security, thereby opening space for enforcement action under Article 40 or 41. The unprecedented powers exercised by the 1267 sanctions regime are premised on the delegation of such powers by the UNSC. The principal mandate of the 1267 Committee is to maintain "an updated list based on information provided by states of the individuals and entities designated as being associated with Osama bin Laden" (Hudson 2007: 206, 210).

The aforesaid sanctions committee acts as a subsidiary body that has the power to impose sanctions on individuals. The 1267 Committee also impinges on the domestic jurisdiction of the states by putting them under the burden of compulsory duties, including expecting states to criminalize acts which otherwise may not be liable for punishment. States are instructed to modify domestic law, punish non state actors, ratify treaties and be accountable to the sanctions regime (Hudson 2007: 210). Although the sanctions regime was established with a one year review period yet it has been strengthened each time and hence does not appear temporary. This constitutes the legal framework of the 1267 Committee.

The counter terrorism regime consists of four elements – "condemnation of terrorist acts; imposition of obligations on all states; capacity building; and imposition of sanctions on individuals" (Rosand 2004: 745). The decision of the UNSC to target the

Taliban in Afghanistan was based on the premise that the inability of the Afghan government in stopping the Taliban (a non-state actor) from unleashing terror constituted a threat to international peace and security. Resolution No.1267 set up a committee to monitor state compliance with the obligation of freezing financial resources meant for the Taliban (UNSC 1999). The Resolutions passed by the UNSC as a part of the counter-terrorism sanctions regime requires all states to impose a travel ban and arms embargo on, and freeze the assets of, individuals and entities listed as being "associated with" the Taliban, Osama bin Laden, AI-Qaeda or their affiliates (UNSC 1999, 2000, 2002, 2003, 2004, 2005).

Section Six of the Committee's working guidelines specifies the procedure for the submission of names for listing the individuals or entities to the sanctions list. Each state bears the capacity to propose a name for listing though it is the Committee which takes the final call for inclusion. The scope for including a name on the list was quite wide since the initial UNSC Resolutions did not specify a clear criterion and provided states with discretion. For instance, Resolution No. 1390 passed in 2002 stated that any individual, group, undertaking or entity associated with the Al-Qaida, the Taliban or Osama bin Laden could be added in the list (UNSC 2002).

The majority of the names on the sanctions list were put up at the behest of the US after the September 2001 attacks. Until 2002, no proper mechanism existed to ensure transparency for the listed individuals and entities. Since November 2002, initiatives are taken to at least provide the personal information of the listed individual and the reasons for inclusion. Resolution No. 1526 passed in 2004 obligated states to divulge information establishing the link between the proposed name and the banned elements – Al Qaeda, Taliban and Osama Bin Laden. Further, Resolution No. 1617 passed in 2005 provides a broad definition of the term "associated with Al Qaeda, Taliban or Osama Bin Laden". The method of decision making of the Committee is based on the principle of 'no objection' wherein the committee members are expected to respond within forty eight hours of the proposal. The proposal is added if no country objects (Hudson 2007: 207).

Table 4.1: Evolution of the 1267 Sanctions Regime: Important Resolutions

RESOLUTION NUMBER	YEAR OF PASSAGE	CONTENT OF THE RESOLUTION
1267	1999	- Taliban must cease its sanctuary and training of terrorists - Taliban must hand over Osama Bin Laden without further delay - Taliban sanctioned with air embargo and freezing of financial resources - Sanctions committee set up to monitor implementation
1333	2002	- financial embargo extended to Osama Bin Laden - financial embargo also extended to individuals and entities associated with Osama and Al-Qaeda Movement - sanctions committee mandated to establish an updated list based on information provided by states and regional organizations of individuals and entities associated with Osama Bin Laden
1390 and 1452	2002	-Granted humanitarian exemptions to travel ban and asset freeze. -Standardized payment for basic living expenses e.g. payment for food stuff, rent or mortgage, taxes, medicine and medical treatment other extraordinary expenses were to be considered on the merit of the case e.g. exemption on travel ban may be granted to meet religious obligation or attend judicial hearing
1526	2004	- In response to calls for transparency, demanded that states, while submitting names for inclusion, provide background information explaining the link between individual, entities and the Taliban, Al Qaeda and Osama Bin Laden -Encouraged states to inform the designated individual or entity about the measures imposed against them.

RESOLUTION NUMBER	YEAR OF PASSAGE	CONTENT OF THE RESOLUTION
1617	2005	Security Council gave clearer criteria as to what the term 'associated with' meant. It included such acts or activities as: – "participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; – supplying, selling or transferring arms and related materiel to; – recruiting for; or – otherwise supporting acts or activities of Al-Qaeda, Osama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof"
1735	2006	- designating states asked to provide an extensive statement of case with specific information supporting a determination that the individual or entity is linked with Al-Qaeda, Taliban or Osama bin Laden - states to indicate the nature of the information (e.g. from intelligence source or other) and identify which parts of the statement of case can be made public for the purposes of notifying the listed individual or entity formal delisting criterion made public; committee to consider the following while reviewing request for delisting – mistaken identity, whether an individual or entity no longer meets the listing criteria and if the individual is deceased or has severed all association with Al-Qaeda, the Taliban or Osama bin Laden

RESOLUTION NUMBER	YEAR OF PASSAGE	CONTENT OF THE RESOLUTION
1822	2008	- obligated committee to produce narrative summaries of the new listings and required it to upload it on the committee's website along with the reason for listing. directed the Committee to undertake a comprehensive review of all listed names and to review each entry again after three years.
1904	2009	- established an independent and impartial Ombudsperson to assist the Committee in processing the delisting requests The Ombudsperson's task is to mediate between individuals, entities and the Committee - The Office of Ombudsperson replaced the Focal Point vis-a-vis 1267 sanctions regime. However, the focal point shall continue to receive requests from individuals and entities seeking to be removed from other sanctions lists.
2083	2012	- allows listed individuals and entities to apply through the Focal Point for exemptions to the assets freeze and travel ban - reverses the assumption that a state proposing an individual or entity for listing wishes to have their identity as a designating state kept confidential.
2161	2014	requested the Secretary General to publish the Al-Qaida Sanctions List in all official languages of the United Nations - allowed de-listed individuals, and individuals claiming to have been subject to the measures as a result of mistaken identity, to communicate with the Focal Point

RESOLUTION NUMBER	YEAR OF PASSAGE	CONTENT OF THE RESOLUTION
2170	2014	takes note of the growing threat posed by Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF) - imposedassets freeze, travel ban and arms embargo on six individuals associated with Al-Qaida, ISIL and ANF - directed the Monitoring Team to report to the Committee on the threat posed by ISIL and ANF
2178	2014	- taking note of the migration of youth to participate in the campaign launched by ISIL, the Council directed member states to prevent and suppress recruiting, organizing, transporting or equipping of foreign terrorist fighters; prevent and suppress financing; and prevent travel - requested the Monitoring Team to report to the Committee on the threat posed by foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida
2199	2015	- emphasized that states are required to ensure that their nationals and persons in their territory do not make economic resources available to ISIL and ANF, including oil and related material and other natural resources - encouraged the submission of listing requests by member States of individuals and entities engaged in oil trade-related activities with ISIL, ANF and other related groups - requested the Monitoring Team to report on the impact of the new measures within 150 days and the Chair to report on the implementation of the resolution in his regular oral reports to the Security Council

Source: Adapted from UNSC Website. URL: https://www.un.org/sc/suborg/en/sanctions/1267/resolutions#

5. Criticism of Targeted Sanctions

The UNSC decisions imposing sanctions on individuals have met with multiple complications in the sphere of international law and IR. These decisions have led to questions such as: what, if any, are the sources of constraints on UNSC decisions?; do targeted individuals have a right to judicial remedy?; do domestic courts have jurisdiction over UNSC decisions?; what is the role of UNSC vis-à-vis domestic orders that are based on constitutionalism and rule of law? An important judgment was delivered by the European Court of First Instance (ECI) in *Yassin Abdullah Kadi v. Council and Commission* case 2005 in which the ECI asked the European Community (EC) to annul restrictive practices undertaken to execute UNSC sanctions against Mr. Kadi on the grounds that these sanctions breach the human rights guaranteed to individuals under EC law (CFI 2005, Cannizzaro 2006: 189-190).

The advent of targeted sanctions brought its own kind of problems and the calls for accountability resurfaced in other forms such as the shift from humanitarian issues to human rights. First, lack of clarity on the reasons for listing and delisting have prevented reform since the listed individual fails to understand what is to be reformed? Moreover, lack of clarity also fails to make it clear, what is to be monitored? Second, the targeted individual may portray sanctions as an anti-nation move domestically generating patriotism among citizens and hence fundamentally altering the effect of sanctions. Third, the capacity of the targeted individual in influencing a nation's policy is dependent upon his/her place in the hierarchy of administration and hence targeting individuals without proper calculation about its impact on the probability of change in state behavior may turn out to be a fruitless exercise (Reinisch 2001: 851, Wallensteen and Grusell 2012).

The practice of sanctions assumed critical shape in 1999 when a Resolution was passed by the UNSC (No.1267) putting pressure on the Taliban regime to handover Osama Bin Laden in connection with the 1998 attacks on US embassies in East Africa (UNSC 1999). The naming of the individual (Osama Bin Laden) in the above-mentioned resolution was not a matter of controversy but the extension of travel ban

and asset freeze on individuals accused of financially supporting Al Qaeda after 9/11 attacks instigated critical responses. The relative lack of scrutiny during 2001-2002 in the phenomenon of listing individuals provided sufficient ground for the legal challenges (Biersteker and Eckert 2009: 6-8, Wessel 2004: 634-635).

The practice of targeted sanctions also brings in the issue of legitimacy of these measures in the light of universally recognized legal rights of individuals. The designated individual faces serious consequences as a result of the process of inclusion of his or her name. Apart from being labeled as a terrorist, the designated individual is deprived of the resources needed for survival by impacting the employment and income status (Hudson 2007: 206). The individual mentioned on the list prepared by the committee faces serious consequences on matters ranging from character portrayal as a terrorist to financial insecurity (Drezner 2007: 4). Taking note of the method adopted by the UNSC in listing and the consequences of being listed on the sanctions list, the Eminent Jurists Panel of the International Commission of Jurists found 1267 sanctions regime procedures to be arbitrary and discriminatory in character. It declared that this system is unworthy of being associated with institutions like the UN (International Commission of Jurists 2009).

The concern over not providing fair procedure rights to the individuals and entities listed on the sanctions list instigated critical voices from the UN member states, individuals and entities, human rights watchdogs, other bodies associated with UN, domestic and international courts and tribunals etc. (Willis 2011: 689). The 2005 World Summit Outcome document raised this issue which resulted in a commissioning of a study, known as the 'Fassbender Study', aimed at finding an answer to the following question: Is UNSC obliged to provide fair procedure rights to the listed individuals and entities in the sanctions list when acting under Chapter VII?. In 2006, the UN Secretary General called on the UNSC to create 'fair and clear procedures' to enlist and delist entities associated with the 1267 sanctions regime (UNSC 2006). On a similar note, the 'Watson Report' suggested that a number of member states have found themselves in a dilemma when faced on the one hand with the contradictory rulings of their domestic courts as well as legislative decisions and on the other hand with the binding obligations of the UNSC Resolutions (Biersteker and Eckert 2009: 4).

Critics argue that the most significant missing link of targeted sanctions is the absence of due process rights or fair trial rights. Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR) states: "in the determination of any criminal charge against [a person], or of [his or her] rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (ICCPR 1966). The ICCPR does not recognize the due process rights as non-derogable in nature. Nonetheless, the Human Rights Committee regards them as non-derogable (UNHRC 2001). The international legal framework that seeks to bind sanctions includes legal instruments like the UN Charter, UDHR (1948), ICCPR (1966) and ICESCR (1966). Collectively, they are regarded as the Universal Bill of Human Rights.

The idea of due process rights has its origin in the context of the relationship between individuals and the state. IOs were not put under explicit obligation to respect the due process rights as the likelihood of IOs directly impacting individuals was never envisaged. Due to this, customary international law has not expanded its scope in accommodating obligations of IOs vis-à-vis individuals (Fassbender 1998: 19-20). However, there is a growing trend that attempts to bring any governmental action either by states or IOs within the purview of customary international law if it relates to individuals. Scholars like Dan Sarooshi (2005) argue that due process rights are a part of the general principles of international law and thus are binding on the Security Council.

The policy of sanctions has come under attack not just from the legitimacy or normative vantage point but also from the prism of efficiency. Fitzgerald (2008: 37-38) regards smart sanctions as one policy mechanism that continue to be dumb due to the unrealistic expectations and lack of practical considerations while framing their scope. The reason for dumbness is rooted in the non-realization that actual success of the sanctions – whether against a state like North Korea or against an individual or entity – depends upon the voluntary compliance of the economic community than on government enforcement.

As a policy option to address matters of international security, Weiss (1999) supports armed intervention over sanctions. In his article *"Sanctions as a Foreign Policy Tool:*

Weighing Humanitarian Impulses", he argues that given the uncertainty over the possible benefits of the sanctions policy coupled with almost certain humanitarian implications, armed intervention may serve the cause of international peace and security better than sanctions.

Faced with the under-performance of sanctions, some stakeholder countries have taken steps to identify the problems associated with sanctions as a policy. For instance, the British House of Lords Economic Affairs Committee study entitled *Inquiry into the Impact of Targeted Sanctions* (2007); US Congress's instituted Judicial Review Commission on Foreign Assets Control's *Final Report to Congress* (2001); Swedish Institute of International Law's *Report to the Swedish Foreign Office on Legal Safeguards and Targeted Sanctions* (2002) etc. Broadly, the uncertainty over the deeper details of the sanctions, the kind of obligations they create and the method of compliance constitute the key reasons for failed compliance. More specifically, few principal factors can be identified that force the underperformance of sanctions policy Fitzgerald (2008: 37-38).

First, the ambiguity about the regulated community who is expected to comply with sanctions results in sub optimal results. For practical considerations, smart sanctions are directed at financial bodies but their broad terms expect compliance even by those that are outside the scope of the regulated community. This is often referred to as the 'McDonald's problem' wherein it is unclear whether the obligation of sanctions boils down to the level of the retail owner and if it does, is it wise to expect these businesses to install an expensive internal compliance process. Thus, the effect of broadly written sanctions is not effective compliance as those outside the financial community are aware of the limited resources of the government and therefore the compliance rate remains low. Clearly, the system has flaws but the way out for government is to move beyond mere listing of names on the sanctions committee list and engage at the ground level where the success and failure of a step is decided (Fitzgerald 2008).

Second, the implementation of smart sanctions is hindered by the inability to clearly identify the target and as a result the listed individual or entity may escape sanctions even due to minor variations. The screening system has usually found itself

overwhelmed with multiple names causing chaos for all those involved. Several cases substantiate this claim for e.g. Senator Ted Kennedy, President of Bolivia, in some cases children etc. have been mistakenly stopped at the airport. Third, availability of clear cut standards of compliance is necessary because it would be highly unwise as well as unrealistic to punish private actors for every incident of non-compliance. This is so because entities like banks may have full details of its clients but other non-bank financial actors like Fund transmitters i.e. American Express, Western Union etc. do not maintain extensively verified database of its customers. Also, companies nowadays rely upon interdiction software to comply with the requirements of the sanctions and it may not necessarily be completely accurate given the scale of transactions occurring every day (Fitzgerald 2008: 44-45). In this context, Bank of America conveyed the following to the US Treasury Department's Office of Foreign Assets Control:

> [1]arge banking institutions handle millions of transactions each day and, despite state of the art interdiction systems, frequent staff training and the institution's best efforts, it is statistically inevitable that a large bank will have inadvertent violations of [the] sanctions. Inadvertent violations that do not evidence a systemic weakness in an institution's... compliance program should not result in penalty proceedings, nor should inadvertent violations in the past be used to classify a large banking institution as a repeat offender (Bank of America 2006)."

If government fails to enunciate desired as well as realistic level of compliance standards, then private industry itself can produce best practices for the relevant players.

The criticism concerning the nature of UNSC functioning has also come from states as important as India. In February 2018, India has complained against the lack of transparency in UNSC's decision making in the context of veto exercising power of the P-5. Without pointing a country but apparently annoyed by the China's repeated blockage of India's request for listing Masood Azhar on 1267 list, Syed Akbarduddin, India's Permanent Representative to UN, called for UNSC reform. He showed serious reservations on UNSC's working methodsandlack of accountability as well as transparency in the overall UNSC functioning. Pointing at the 14 sanctions committees that are operational today and the larger number of targets listed by them,

678 individuals and 385 entities, he argued that these decisions are taken beyond the public scrutiny which is problematic. Bolivia came in full support of India's concern as it was also noted that such opaqueness stifles cooperation from member states whose support is vital for executing UNSC decisions (PTI 2018).

With numerous criticisms at hand, the targeted sanctions regime started to see some measure of reform towards accountability, sometimes internally while at other times resulting from the activism shown by other stakeholders.

6. Targeted Sanctions and Mechanisms of Accountability

6.1 UNSC's Response

6.1.1 Transparency

The first step towards accountability begins with the initiatives that support the cause of information availability. The availability of necessary information is a hallmark of the modern democratic systems that places civil society in a unique position to arrest the authoritarian tendencies posed by the government. In democracies like South Africa, right to information has a status of a fundamental right while in India it is a legal right that is used widely to hold public officials accountable. Therefore, it would look contrary if UNSC overlooks this well-established practice of democratic governance especially when the sanctions regime is created at the behest of the leaders of liberal democracies.

The Security Council made attempts to bolster *transparency* (as a mechanism of accountability) in the decision making procedures of the sanctions committee. Accordingly, the UNSC passed Resolution No. 1822that permitted humanitarian exceptions to sanctions and established a procedural focal point where delisting and derogation requests could be submitted. The UNSC sought to ensure that the listed individuals' nationality and host country were notified. The resolution also urged countries to provide a list of reasons for which the concerned individual or group is listed, the summaries of which were to be uploaded on the Sanctions Committee's website (UNSC 2008). Nonetheless, the uploaded summaries have been described by

the General Court in the *Kadi II* case as "general, unsubstantiated, vague and unparticularised" which lack evidentiary standards (ECR 2010: 157).

6.1.2 Focal Point

As far as the delisting process is concerned, the 1267 Committee adopted the following guidelines in 2002. First, the individual must petition his or her government of residence or citizenship to request a review of the case. Second, the government of residence or citizenship, if it wants to support the petition, should approach the government that originally proposed the individual's listing. Third, the government which designated the individual can seek information from any other government. Fourth, if the government of residence or citizenship wishes to pursue a de-listing request, it should seek to persuade the designating government. Fifth, the government of the individual's residence or citizenship may then submit a request to the Committee. However, since the Committee operates on the principle of consensus, every member effectively retains the capability to veto a request for de-listing. It is also worth noting that the meetings are also held in private and members of the committee are not required to provide reasons for their objections (Hudson 2007: 208).

Clearly, the process of delisting relied too much on states for the successful removal of the name from the list. The concerned designated individual or entity lacked *locus standi* before the sanctions committee which suppressed their due process rights. Faced with this criticism, Resolution No. 1730 of the Security Council established a 'Focal Point' (initiative of France and supported by US) within the Secretariat to receive delisting requests directly from the listed individuals (UNSC 2006). The focal point allowed individuals access to delisting procedures without relying on the states and therefore moved beyond the practice of diplomatic protection. The designated individual or entity now had a choice of approaching the process of delisting either through the state of residence/citizenship or directly by requesting the focal point (UNSC 2006, Kirschner 2010: 591-592).

The mandate of the focal point includes the following: receive delisting requests from petitioners; acknowledge receipt of the request, inform the petitioner of the general procedure for processing that request; forward the request to the designating

government(s) and to the government(s) of residence and citizenship; and inform the petitioner of the Committee's decision to grant the delisting petition or to dismiss it. Notably, the Focal Point does not have the authority to forward the delisting request to the Committee. The choice of whether or not to recommend delisting is solely made by the designating government(s) and the government(s) of residence and citizenship. A successful delisting request stipulates no objection from the Committee members. In case of absence of unanimity, the Chairman may submit the matter to the Security Council for decision (UNSC 2009). Most notably, the focal point lacked authority to conduct independent review of listings; offer remedies; and provide information and notification to listed persons (Willis 2011: 686).

6.1.3 Office of 1267 Committee: UN Ombudsperson to the ISIL (Da'esh) and Al Qaida

In 2009, UNSC Resolution No. 1904 created the office of Ombudsperson charged with the responsibility of facilitating the 1267 Committee on matter of delisting requests. The Resolution states that Ombudsperson's office shall be established for an initial period of 18 months and he/she is to be appointed by the UN Secretary General in close consultation with the Committee. In the context of the qualifications, it states that Ombudsperson shall be an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions (UNSC 2009).

The office of Ombudsperson is an outcome of the institutionalization of the idea of good governance. At national level, the Ombudsperson was first set up in Sweden in 1809 with a mandate over the public officials (Bonnor 2003). The desirability of the Ombudsperson's office can also be gauged from the fact that a number of important international organizations also established the same within their institutional paraphernalia. For instance, the Maastricht Treaty created an office of European Ombudsperson who acts as an intermediary between European citizens and European institutions alongside the courts. The European Ombudsperson investigates cases of maladministration in various organs of the EU. Other IOs like IMF, World Bank etc. have also created the offices of Ombudsperson with a mandate over settling disputes between the concerned organization and its employees (Kirschner 2010: 596-597).

At the international level, Denmark proposed the creation of Ombudsperson in 2005 as a mechanism to review UNSC decisions. Later, the famous Watson Report (sponsored by Germany, Sweden and Switzerland) supported this proposition and argued that among other options like advisory panel, judicial review body etc., the office of Ombudsperson is best suited to meet the purpose of reviewing UNSC decisions. The Report states that "the appointment of an Ombudsperson would probably be the simplest and easiest review mechanism to implement since it would meet minimum independence with the smallest institutional infrastructure (Watson White Paper 2006: 4, 32, 45)." The advisory nature of Ombudsperson's office is also less likely to be seen as an encroachment on the powers of Security Council (Kirschner 2010: 597).

The mandate of this office is to process the delisting requests relating exclusively to the 1267 consolidated list. However, the focal point continues to function in relation to the delisting requests emanating from other sanctions list. In accordance with Resolution No. 1904 (2009), Judge Kimberly Prost of Canada was appointed by the Secretary General (in consultation with the Sanctions Committee) to serve as Ombudsperson in 2010 (UNSC 2009). To petition the Ombudsperson, the petitioners seeking delisting can:

> present their case to an independent and impartial Ombudsperson, who, after a period of information gathering and dialogue with the petitioner and relevant states, and with help of the Monitoring Team, will present a comprehensive report to the Sanctions Committee laying out the principal arguments concerning the delisting request based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's observations (UN Ombudsperson Website 2017).

However, the General Court (EGC)[46]has opined that this office lacks final decision making capability and ultimately removal of names requires a political consensus in

[46]General Court is a constitutive institution of the Court of Justice of the EU(CJEU). The CJEU is composed of two courts — Court of Justice and the General Court. One can appeal against the decision of General Court in the Court of Justice. These judicial institutions are different from the ECtHR and the ECJ. Before the enforcement of Lisbon Treaty in 2009, the General Court was known by the name — Court of First Instance. One of the important functions they play in EU is to hear complaints against EU institutions on behalf of organizations and individuals.

the Sanctions Committee (ECR 2010: 128). Although, the formation of this office as a concrete institutionalized response towards the demands for delisting appears promising, it suffers from faults like the final decision concerning delisting requiring political consensus in the Committee.

The work of the UN Ombudsperson is divided into three stages. The first stage is known as the "Information Gathering Period".In this stage, the Ombudsperson needs to acknowledge the receipt of the delisting request to the petitioner and inform the petitioner of the general procedure as well as take on the queries put forth by the petitioner. In case the request is incomplete or repeated without additional information it shall be returned to the petitioner for his/her consideration. In cases where the request is found fit, the Ombudsperson shall forward it to the Committee, designated states of residence and citizenship or incorporation, relevant UN bodies as well as the Monitoring Team. The Ombudsperson shall then ask these entities to provide within two months any additional information relevant to the request (e.g. court decisions and proceedings, news reports, information that states or relevant international organizations have previously shared with the Committee). After the completion of two months, the Ombudsperson is obliged to put forth a written update to the Committee on the progress. This period may be extended once for two months if in the views of Ombudsperson more time is required to gather information (UNSC 2009, Personal Interview Marchi-Uhel 2017[47]).

Reflecting on the nature of information that is received by Ombudsperson, she makes a key distinction between the information used as an evidence in a "proper" judicial system and the one received by the office of Ombudsperson as a consultant. The Ombudsperson is dependent upon the information provided by states as "they decide which information they want to share with me". (Personal Interview Marchi-Uhel 2017). In most cases, the information lacks the coherency of an evidence. At times, some information as good as evidence may also be provided (Personal Interview Marchi-Uhel 2017).

[47] Ms. Catherine Marchi-Uhel was the Ombudsperson in 2017 when the interview was conducted in April 2017.

Once adequate information is gathered, the next step the Ombudsperson is expected to take is to enter into a period of dialogue. This stage is known as the "Dialogue Period or Period of Engagement" and stays for a period of two months though if needed it can be extended by two more months. During this period, the Ombudsperson enters into a mode of dialogue with the petitioner and acts as a facilitator of information between the Committee and the listed individual or entity. After this, the Ombudsperson drafts and circulates (along with the Monitoring Team) a report to the committee containing a summary of the information relevant for delisting coupled with the analysis of the principal arguments concerning the request for delisting (UNSC 2009).

The final stage comprising the process of delisting is called as the "Committee Discussion and Decision Period." The committee spends thirty days to review the comprehensive report submitted by the Ombudsperson. Once it is reviewed, the chair of the Committee places it on the agenda for consideration. At this juncture, the Ombudsperson presents the report to the Committee in person and answers questions that members raise concerning the request. Following this, the committee takes the final decision. If the Committee decides to grant the request, the Ombudsperson is informed about the same and then he/she informs the petitioner accordingly. In case the committee rejects the request, the Ombudsperson is informed and then he/she conveys the decision to the petitioner along with the explanatory comments, any other relevant information and an updated narrative summary of reasons for the listing within 15 days. In principle, the communication shall describe to the extent possible the processes and publicly releasable factual information gathered by the Ombudsperson (UNSC 2009).

The Watson White Paper (2009) claimed that the Ombudsperson possesses limited capability in offering effective remedy to the petitioners as its recommendations are non-binding in character.

However, although the office of Ombudsperson lacks power to issue binding verdict, it nonetheless offers several advantages over other dispute settlement mechanisms. It is quick, informal and more easily accessible than courts. Moreover, the Ombudsperson relies on the application of reason than coercion in making judgments.

Such reasoned and thoroughly investigated process of arriving at decisions is more persuasive in making all parties embrace the recommendations (Owen 1993: 51-52).

The real role of an Ombudsperson is that of an independent investigator since the final decision making authority rests with the committee, a political body. The committee by no means is regarded as an impartial review authority since the latter stipulates that the decisions are taken impartially, based on facts without undue influence of external factors. However, on the positive side, the Ombudsperson has opened a space by which the petitioner can dialogue with an established authority. The speed at which it functions is also commendable as the Ombudsperson is also expected to communicate the final decision of the committee to the petitioner within 15 days of the date of the decision (Kirschner 2010: 601.

Statistically, in 78 cases, the officeof Ombudsperson has finished the proceedings. In these cases, there are three outcomes — either the decision is taken; or the petition is withdrawn; or the issue is still pending with the committee. Till July 2018, 74 out of 78 cases (nearly 95%)have reached their conclusion. Out of these 74 cases, 57 petitions have been approved (77%) (meaning the petitioner is removed from the list and the sanctions are lifted) while 17 petitions (23 %) have been denied (meaning the petitioner remains listed and continues to face sanctions). The approved 57 petitions have resulted in delisting of 52 individuals and 28 entities while one more entity is also delisted as an alias of listed entity. (Office of Ombudsperson of the Security Council's 1267 Committee Website 2017). Thus, the office of Ombudsperson seems to be functioning efficiently both in terms of number of cases taken up and in terms of number of petitioners getting delisted (though this is not to suggest that Ombudsperson acts as an advocate of the petitioner as its task is to carry out independent investigation and evaluation).

The report of the Ombudsperson may be in the form of a recommendation but to reject such a recommendation, the sanctions committee need to show unanimity. In other words, to reject the Ombudsperson's recommendation, all 15 members (permanent and non-permanent) needs to vote aginst the decision. Even if one member of the committee agrees with the Ombudsperson's recommendation, the

recommendation will take effect (Personal Interview, Marchi-Uhel 2017). This shows that recommendation has a credible practical effect.

It should also be noted that no such time frame was set for the focal point. Moreover, the committee members are now expected to provide a reason if they decide not to delist a petitioner. Clearly, the introduction of the office of Ombudsperson has contributed substantially towards the notion of transparency and easy accessibility. To equate Ombudsperson with an independent and impartial judicial review mechanism would be a fallacy (UNSC 2009, Kirschner 2010: 601).

One of the major shortcomings of the accountability mechanism of Ombudsperson is that it does not allow the petitioner to present his/her case in front of the sanctions committee, the final decision making body. The Ombudsperson performs this task on the behalf of the petitioner. It can be contended that as a result of the intermediation by Ombudsperson between the petitioner and the committee, the petitioner is well informed about the reasons that drove the committee to take a particular stand. Information is also available with regard to the status of the petition during the process and this removes the uncertainty for the listed individual or entity. However, states are quite reluctant to share the information they have gathered through their intelligence sources. Despite the confidential clause that obligates Ombudsperson to keep certain information shared by states as confidential, states are not likely to share the information they find sensitive (Kirschner 2010: 601).

In the views of the Monitoring Team, "One reason to create a review mechanism is simply to get ahead of the law in this area, to establish it, rather than allow national and regional courts or Member States practice to do so. The Committee might be well advised to establish the desired standard of review, rather than effectively cede this role to others" (UN 2009).

6.2 Responses by Judiciary: Mechanism of Legal Accountability

The judicial machinery in different parts of the world (like Europe, US, Pakistan, Canada, Turkey etc.) and at various levels has been quite active in addressing legal concerns with regard to the lack of due process rights, hence creating a culture of

mechanisms of judicial review. Faced with a legal vacuum at the international level, the listed individuals increasingly resorted to domestic courts challenging the domestic acts passed in order to implement the decisions of the UNSC (Tzanakopoulos 2010: 249-250).

One of the path breaking judgments was made by European Court of Justice (ECJ) in the *Kadi II* case (2010). In 2001, the 1267 Committee added Saudi businessman Yassin Abdullah Kadi's name to the consolidated list of individuals and groups associated with Al Qaeda and Taliban implying asset freeze along with travel ban. The targeted sanctions measures, namely travel ban and asset freeze, were brought in by the EC regulation in its "duty" to comply with the UNSC resolution. The ECJ asserted its right to review in the light of the fundamental rights guaranteed by the EU on the grounds that the sanctions infringe fundamental rights, specifically the right to be heard and the right to avail judicial review. The significance of the verdict is to be gauged also from the viewpoint of the dualist approach adopted by the ECJ emphasizing the autonomy of EU's legal order from international law (Arslanian 2012: 1-6).

The European Court of First Instance (ECI) in *Yassin Abdullah Kadi v. Council and Commission* Case 2005 asked the European Community (EC) to annul restrictive practices undertaken to execute UNSC sanctions against Mr. Kadi on the grounds that these sanctions breach the human rights guaranteed to individuals under EC law (CFI 2005). This judgment is critical from the viewpoint of the contemporary question dealing with the problem of managing the Security Council within the international legal framework. It builds on the issue of defining the relationship between the Council and the domestic legal arrangements featuring rule of law (Cannizzaro 2006: 190). Such legal accountability also expects the Council to provide reasons for its decisions, which in itself is an accountability of a kind (Kingsbury 2005).

The verdict in the *Yusuf Case* is premised on the assumption that the right to a fair hearing has assumed the status of *jus cogens*. In one sense, one can say that recognition of any right as non-derogable in nature partially facilitates its *jus cogens* status. Nevertheless, not all non derogable norms are *jus cogens*. Others like Orakhelashvili (2005) argue that a norm is *jus cogens* if it is non-derogable in

character which means it aims to protect community interests beyond the interests of individual states. If this criterion is adopted, then right to fair trail falls in a category of *jus cogens* (Hudson 2007: 216). Under Article 3 of the Geneva Conventions, the right to a fair trial has been recognized as *jus cogens*. Ad-hoc criminal courts like the *International Criminal Tribunal for Yugoslavia* (ICTY) acknowledged the right to a fair trial as a norm that extends legitimacy to its existence. Even Security Council's move to incorporate this norm in the functioning of ICTY adds potency to the argument of the inviolability of fair trial. The elevation of the right to fair trial in the *jus cogens* category is a contested issue, however regarding it as a norm promoted in the principles and purposes of UN Charter is largely uncontested (Hudson 2007: 217).

The *Kadi* and *Yusuf* Cases not just brought the impact of UNSC resolutions to scrutiny but they also pointed to a vacuum in international law. The individuals or the entities after being listed do not have recourse to justice since they are not the subjects of international law who can bring a suit against the Council at the international level. The gap in the law arises because the Security Council has usurped the power of listing individuals or entities to the sanctions list as a mechanism of collective security. However, such extraordinary power exists in the absence of proper mechanisms to channelize the de-list appeal. Taking note of such a state of affairs, the European Court showed willingness to address this gap by invoking the supreme law of *jus cogens* (Herik 2007: 800-801).

The *Mujaheddeen* Case (CFI 2006) and the *Sison* Case (CFI 2007) also mirror the trend towards judicial activism dealing with a similar problem of denial of fair trial rights, however with a different legal framework. *Mujaheddeen* and *Sison* were listed on the sanctions list pursuant to the Council's Resolution No. 1373. Like the 1267 resolution, the 1373 Resolution of UNSC also obliges states to take measures against the listed individual or entity, however unlike 1267 Resolution, the power to identify the individuals or entities rest with the states. If the individual or entity resides in EU, the power of identification is exercised by the Council of the EU (UNSC 2001).

Since the identification part was done by the Council of the EU in *Mujaheddeen* and *Sison* , the thorny issue of judicial review of the decision taken by the UNSC does not picture in which facilitated the Court of First Instance to critically evaluate the merit

of the sanctions. In its judgment in the *Mujaheddeen* Case delivered on 12th December 2006, the Court annulled the decision to place *Mujaheddeen* on the sanctions list on the grounds that the listing has been done without providing due process guarantees coupled with the fact that no reasoning has been offered at the time of listing (CFI 2006). Similarly, in the *Sison* Case, the individual named Sison, a Philippine national living in Dutch, was listed by the Council of EU. The CFI in its judgment on 11th July 2007 annulled the listing on the grounds of procedural flaw. In both the cases, the Court signaled the necessity of providing reasons and evidence when someone is listed on the sanctions list (CFI 2007).

It is worth noting that the Court did not engage with the matter of judging whether it is correct or incorrect to place individuals or entities on the sanctions list. The Court avoided considering the substantive aspect of the case and relied on the less controversial procedural dimension while giving its verdict. Both Mujaheddeen and Sison were later added to the list after undergoing the necessary procedural requirements as suggested by the Court. Thus, it can be concluded that the judiciary has been quite careful in examining the pronouncements related to matters of international security by touching upon the procedural dimension and leaving out the substantive part of the decisions.

6.3 State led Initiatives: Measures of Political Accountability

Mechanisms of political accountability often surface themselves in various forms and do not reflect a strict institutional structure or paraphernalia. The imposition of sanctions is a highly political and divisive issue which has generated certain critical responses by some states. Most P-5 members are rivals amongst themselves in their endeavor towards creating more and more space for their ideologically defined world. The Cold War was the explicit manifestation of such rivalry. In the post-Cold War period, although the bipolar fundamental differences have reduced, disagreements have also been noticed within the so-called monolithic western bloc for e.g. on the issue of Iraq in 2003. In the contemporary era, the status of the U.S.–China rivalry and the U.S.-Russia rivalry define the prevalence of consensus in the UNSC.

An offshoot of such rivalry or disagreement is the check on the proposals pushed by one side on the other in the Security Council, for instance, the “sunset clause” in the

sanctions policy. This clause is a result of the insistence by France and Russia on putting time limits on the operationalization of sanctions despite stiff opposition by U.S. and U.K. Since the arms embargo against Ethiopia and Eritrea in 2000, all sanctions contain sunset clauses while US and UK continue to oppose them principally. Indeed, U.S. and U.K. have since faced a dilemma to have sanctions with a sunset clause or not to have them at all in view of the veto by the opposing members (Brzoska 2003: 523). From the perspective of the policy of targeted sanctions, such political disagreements within the Security Council have spilled into an accountability device known as the sunset clause that does not allow the continuation of sanctions without review or without any time limit.

Given the prevalence of political volatility associated with the issue of sanctions, the agenda for the reform of the sanctions regime has failed to achieve consensus on vital issues like role and politics of the UNSC, enforcement powers of UNSC etc. Neither has consensus been formed on technical issues like the monitoring capacity of the UN, clarity on rules concerning humanitarian exemptions, standardization of sanction procedures and uniform execution of sanctions nationally (Brzoska 2003: 520-521).

Nevertheless, the sanctions policy has witnessed change on three parameters. First, the re-conceptualization of sanctions has occurred in the name of smart or targeted sanctions. It is a result of evaluation of purpose, challenges and prospects of sanctions. Second, the debacle of comprehensive sanctions has triggered inquiry by the UNSC with the help of expert groups in order to address the fault lines inherent in the conventional approach towards sanctions. For instance, the 'Fowler Report', named after the Canadian Permanent Representative who acted as the chair of the investigation, was carried out to study the sanctions imposed on 'Unido Nacional para Independencia Total de Angola' (UNITA). Third, attempts have been made to understand the problem from the technical point of view. This process has surfaced itself in the form of 'Interlaken Process', 'Bonn-Berlin Process' and the 'Stockholm process' (Brzoska 2003: 520-521).

Accountability mechanisms have also taken birth as a result of more conscious and directed efforts in bringing the process of sanctions implementation under greater scrutiny. An essential hallmark of the initiatives undertaken under the category of

political accountability is the prevalence of strong political will. One major form of political accountability is the independent investigation with an aim to understand the root cause of the sanctions problems. The ineffectiveness of sanctions measures against the Hutu regime in Rwanda triggered investigation concerning the causes of the failure. A commission of government experts headed by Egyptian Ambassdor, Mahmoud Kasssem, was instituted. The investigation revealed significant details on illegal deals and pinpointed the uncooperative behavior of governments implicated in sanctions busting (Brzoska 2003: 523-524).

The next investigative attempt was made in the context of the sanctions imposed on UNITA which included arms, travel and financial measures. The Canadian government and particularly its permanent representative to UN, Robert Fowler, vigorously pursued this investigation. As the chair of the sanctions committee against UNITA, he was charged with the task of monitoring the process of implementation. In the same capacity, he encouraged the expert team led by Swedish ambassador, Anders Mollander, to be 'as frank as possible' in identifying the reasons of sanctions ineffectiveness (Brzoska 2003: 524).

Cortright and Lopez (2000: 66) described the report as a "bombshell" as it did not hesitate in identifying and naming the sanctions busters which included two sitting Presidents – G. Eyadema of Togo and B. Campaore of Burkina Faso. Moreover, Bulgaria was named as the primary supplier of arms to UNITA. In order to deal with the situation, the report recommended big steps like stationing of sanctions monitors in neighboring countries. It also advised to impose sanctions on sanction breakers. However, France claimed that the report is biased against francophone region. The legacy of 'naming and shaming' established by the Fowler Report was later adopted by other expert groups though all other groups were not as lucky to have a as good as Fowler. Neither did they have the same sort of mandate in terms of comprehensiveness. Furthermore, the UNSC also showed reluctance in implementing the recommendations of the expert groups for political reasons and because of resource scarcity (Brzoska 2003: 524).

An interesting political process that has unfolded is one in which the General Assembly has taken initiative through its Resolutions questioning unilateral economic

sanctions, such as the US arms embargo on Cuba, setting the culture of accountability. Other UN bodies like the *Sub-Commission on the Promotion and Protection of Human Rights* urged the Human Rights Commission to recommend to the Security Council that import of civilian goods especially food and pharmaceutical supplies should not be hindered (UN 2000). The task of securing the accountability of the UNSC has also been shared by a variety of non-state actors owing to their strengthened voice in the post-Cold War period. Scholars like Kanetake (2008: 112) point at mechanisms of community accountability where elements of civil society, like epistemic communities, seek to ensure accountability of decisions taken by the UNSC. One such method is the critical review of such decisions that may disturb the public reputation of the UNSC and may even make execution of decisions more difficult.

In cognizance of the fact that the implementation of sanctions rests upon states and not all states bear the same capacity to implement them, the Swiss government took an initiative in 1998 in the form of the 'Interlaken Process' that held rounds of expert seminars. The focus of the initiative was the challenges faced while executing financial sanctions. The first meeting focused on the technical requirements and the pre conditions for a successful execution of the sanctions like clear identification of the target, ability to control financial flows etc. Among other things, the participants argued that speed and discretion in identifying targets as well as the specific sanctions are important components of a successful sanctions implementation (Watson Institute 2001: 1).

In the second meeting, it was opined that many member states lack the legal authority to execute sanctions. Even among those who possess the capability, wide variations exist, which compromises the effectiveness of the implementation. In view of such a problem, the experts undertook to draft a model law that would facilitate quick, full and consistent implementation of sanctions measures. In order to ensure uniformity, other measures included the creation of standardized text or language which UNSC may adopt in its resolutions. The task of systematically compiling the contributions of the Interlaken was given to the Watson Institute who then prepared a manual titled *Targeted Financial Sanctions: A Manual for Design and Implementation.* The manual was presented to the Council in October 2001 so that it could serve as a guideline for

the UNSC members as well as national officials engaged in designing and implementing targeted financial sanctions (Watson Institute 2001).

Following the lead from Interlaken, Germany kick-started a series of meetings (known as the Bonn-Berlin process) on arms embargoes, travel and aviation sanctions. The initiative was undertaken in collaboration with the UN secretariat and Bonn International Center for Conversion. As a part of this process, the first expert seminar was held in Bonn in November 1999 which saw the participation of experts from governments, academia and NGOs. The initiative declared the following aims: the identification of deficiencies in the sanctions policy both at the UN level and at the implementation stage; discussion on measures to make the sanctions work better and enlisting of a broad list of proposals; and finally, selection of a number of proposals from the broader list (Watson Institute 2001).

The structure of [this] initiative contains 4 Expert Working Groups with specific mandate allocated to each group. The first group focused on developing model resolutions and proposals for the national implementation of travel and aviation sanctions. The second group focused on understanding the factors that can make arms embargoes more effective on the ground. The third group developed model text for Security Council resolutions on arms embargoes. The fourth group suggested ways to improve monitoring and enforcement of arms embargoes at the UN level. These groups carried out their task throughout 2000 and produced draft reports which were finally discussed at the Final Expert Seminar in Berlin on December 2000. The report was published entitled "Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process". This document was presented along with the Interlaken Manual to the UNSC on 22 October 2001 (Watson Institute 2001).

The process produced the following key findings concerning arms embargoes: use standard language in drafting resolutions imposing arms embargoes; develop consensually a list of goods and services falling under an arms embargo; and review the implementation of arms embargoes regularly. On the issue of travel bans, the document suggest the following: It is important to determine targets accurately and bring within the ambit of sanctions those whose who are likely to influence the

behavior of elites like family members; appropriate mechanisms are to be constructed that may allow targets to be delisted; establish procedures to determine when and how exemptions and exceptions to the prohibitions should be granted.; broader terminology of "travel ban" should be used instead of "visa ban"; and identifying time limits for travel bans may be less important than it is in the case of arms embargoes. In the category of aviation bans, it has been noted that there are:

> 'Several forms of aviation bans, ranging from a ban on specific aircraft to a total ban on international air travel; in addition, bans upon the provision of services to targeted airlines, and the closure of their offices, may be considered. Be precise in wording exceptions and exemptions to the prohibitions imposed. Consider allowing a delay before the imposition of aviation bans, to allow targeted aircraft to return to their home base (Watson Institute 2001: 2).

The report also looked at the issue of implementation of arms embargoes, and travel and aviation bans at the national level and suggested that:

> existing legislation should be adequate to implement the full range of measures (e.g. export, follow-up export, re-export, licensing and transit restrictions for arms embargoes; measures to deny permission for take-off from, landing in and flight over national territory, in the case of aviation bans) that may be imposed by a Security Council resolution(Watson Institute 2001: 2).

As far as the implementation part is concerned, the following measures were proposed – formation of administrative structures for the registration, licensing and monitoring of arms brokers like maintaining national lists of brokers convicted of offenses related to arms embargoes; a list of controlled goods prohibited by the embargo is to be created; the seizure of prohibited goods and the funds used or intended for use in illegal arms transactions; those found breaching the embargo must face criminal prosecution etc. The report provides for the provision of an official body or bodies to administer sanctions, such as import and export administration agencies or customs. The implementation should ensure effective communication at various levels – between the UN and Member States, between UN missions and capitals, and within the capitals (among those responsible for implementation) (Watson Institute 2001: 2-3).

Taking note of the vital role transparency plays, steps should be taken towards dissemination of information. Some of the specific recommendations include: spread of information to the public through notices in official journals and using media and information technology. Various key stakeholders like arms producers, distributors and brokers needs to be adequately informed. Continuous flow of information (including records of arms production and surpluses) and intelligence to be ensured among government departments and between governments to identify suspect shipments, destinations, transit routes and brokers (Watson Institute 2001: 3).

An indispensable component of the effective sanctions regime is adequate monitoring and compliance. Following measures are likely to ensure monitoring and compliance: Establishing procedures for licensing and certification of end-users of arms, including delivery verification; Promoting the adoption of codes of conduct for arms suppliers; Utilization of ports of entry (land, sea and air) as opportunities to monitor arms transfers etc. Finally, enforcement measures to be instituted which may include the following: legislation to be passed that specify that breach of an embargo or ban may invite criminal prosecution; To deter violations, penalties are to be imposed including criminal penalties etc. (Watson Institute 2001: 3-4).

The measures for improving the effectiveness of various kinds of targeted sanctions – namely Interlaken, Stockholm, and Bonn Berlin Process – showcase an attempt to reform practices of the UNSC as well as of the member states responsible for execution of the mandatory resolutions. Expert enquiries and reports, a hallmark of the above discussed processes, do not constitute measures of accountability in a strict sense. However, if seen in a broader perspective, the expert review of the UNSC practices tends to suggest that some element of accountability is surely involved in the processes discussed.

The sanctions practice has also been refined as a result of the political disagreements among the members of the UNSC. These disagreements have spilled into a consensus where sanctions are more carefully crafted so as to avoid the unnecessary negative effects on civilians. Following the failure of sanctions policy in Iraq, little noticed yet significant change is the inclusion of ‘time limits’ in the sanctions mandate. It was first incorporated in the UNSC Resolution 1298 in 2000 with the objective of limiting

the time period of the application of sanctions. The Resolution imposed arms embargo on Ethiopia and Eritrea for a period of 12 months, after which the Council would assess the degree of compliance (halt military action, withdraw forces and carry out peace settlement) shown by the parties (UNSC 2010). The UNSC practice followed afterwards in the domain of sanctions policy mirror a time frame of 12 months. After the completion of 12 months, it ceases automatically, though it can be renewed by the Council members in its original or altered form through a new decision (UN 2000, Oette 2002)

Theoretically, sanctions are to be lifted only when the aim is achieved. Practically, lifting of sanctions has been a matter of controversy as the members of the Council have had a hard time in agreeing as to what constitutes completion of the mandate. In other words, they find it difficult to reach consensus on the matter of appropriate level of compliance expected from the sanctioned party. If any of the permanent members of the UNSC feels that the compliance is not at a desirable level, it can block any move of other permanent members to lift or suspend sanctions. This power or phenomenon is known as 'reverse veto' (Caron 1993). Thus, any one permanent member can veto against the majority view in the Council and has the capability to prolong sanctions indefinitely.

The inherent conflict-ridden character of the reverse veto came to surface in case of Iraq during the final stages of the weapons inspection system in 1998. US and UK favored a modified weapons inspection scheme in reciprocity to the suspension and eventual removal of sanctions. Russia, France and China wanted easing of sanctions. The situation reflected an irony as any of the latter three powers could have prevented imposition of sanctions in first place but now even its easing appeared difficult given the exercise of reverse veto by US or UK. In the light of this lesson, Russia, France and China decided to modify their future policy on sanctions by calling for time limits on principle grounds. Without much option, US and UK grudgingly accepted because without this compromise (as other members can veto any sanctions move in the first place), sanctions as a tool of maintaining international peace and security runs the risk of extinction (Oette 2002).

As a policy option, inclusion of time limits has its cost and benefits. The inclusion of time limits is an attempt to secure rights of the civilians; something that critics say was missing in the case of the Iraq sanctions. It is alleged that despite the 'oil for food programme', the right to life was clearly violated by the UN sanctions. Time limits allow timely review of sanctions to gauge its proportionality with the benchmark of HR. It also enhances the legitimacy of the UN in a sense that sanctions embodied in a time frame encourage states to execute them without much concern over moral dilemma. Opposition to mandatory UNSC resolution on grounds of illegitimacy is not an alien aspect in international affairs i.e. Libya and Iraq case (Oette 2002).

To sum up the discussion on UNSC authorized targeted sanctions and accountability mechanisms, the year 1999 opened a new phase wherein the UNSC imposed heavy restrictions on large number of individuals and entities (accused of being terrorists or supportingterrorism) bypassing state authority. The tension between this practice and the shared norm of fair trial rights or right to remedy brought the judicial system at national as well as regional level into picture. Because the UNSC resolutions have violated right to fair trial of listed individuals or entities, the judicial bodies have shown utmost caution in interpreting the thorny question of national (states) and regional (EU) obligations emanating from UNSC resolutions. This judicial recourse may well be termed as mechanism of judicial accountability. Moreover, the move towards accountability is also noticeable in various institutional mechanisms especially Office of Ombudsperson for 1267 Committee. The functioning of this office is not merely symbolic given the number of delisting that have occurred due to its existence as an interlocutor between the targets and the UNSC. The urge towards minimizing the negative spillovers of targeted sanctions has also been shared by states. Initiatives like Interlaken Process, Bonn-Berlin Process and Stockholm Process reflect that commitment. Overall, one could concluded that the practice of targeted sanctions began without any accountability or transparency but the collective efforts have shown a noticeable reform.

Chapter 5

The Need for Accountability and UN Peacekeeping Operations since 1999

Introduction

The present era bears witness to a climate of foundational change in the domain of international protection of human rights. Contrary to the traditional understanding which is framed in the narrative of the individual vis-à-vis the state, recent years have brought a focus on actors such as International Organizations (IOs), that have become capable of posing a threat to human rights. Rising instances of either state collapse or state sponsored violence – especially since the end of bipolarity – impelled efforts towards reconceptualization of the priorities of the international system. This problem of prioritization is evident in the clash between the sovereignty principle and the consensus on the inviolability of human rights. The norm of Responsibility to Protect (R2P) suggests that the protection of human rights ceases to be a concept limited to the relationship between states and their citizens. The internationalization of the concern for human rights, although not uncontested, has facilitated the authorization of a greater number of UNSC sanctioned peacekeeping missions. A matter of controversy that has emerged, however, are the violations of the rights of the citizens of host states at the hands of peacekeepers, including crimes like torture, killing, damage to property and sexual violence reported widely since 1999. The argument of R2P falls flat in the light of abuse by the protectors themselves, that is, the peacekeepers. Moreover, the accused peacekeepers have escaped punitive measures owing to the following gaps in the legal framework covering such operations – lack of jurisdiction of both host state and the UN in conducting trial; the reluctance of the countries of origin in trying their citizens for crimes committed in other countries; immunity from prosecution granted to peacekeepers; separate legal personality of IOs etc. Having faced criticism, the UN has introduced certain preventive (e.g. UN Model Status of Forces Agreement, SOFA) and remedial measures (e.g. local claims review boards) to regulate the behavior of peacekeepers. Other attempts – such as the formation of the International Criminal Court (ICC) – have also been made by the international community to address questions of international accountability. This chapter is divided into five sections. The first section deals with the legal framework

within which the peacekeeping operations are mandated. The second section addresses the factors that have made accountability a serious matter in the post cold war era especially since 1999. The third section critically examines the accountability mechanisms that are created to both prevent abuse and render justice in cases of human rights violations committed during the course of a UN peacekeeping operation. The fourth section offers a critique of the practice of peacekeeping operations. In the final section, reforms measures are explored that may better serve the cause of the practice of peacekeeping.

1. International Legal Framework relating to UN Peacekeeping Operations

The formation of the UN reflected a trend of limiting the scope of unilateral measures available to states to settle international issues along with the expansion of options available under multilateralism. While the peaceful measures under Chapter VI have greater moral grounding, the Security Council can pass mandatory orders under Chapter VII. The idea of collective security[48] is applicable in situations where the big powers are either directly involved in a conflict or engaged through proxies because such situations constitute conditions threatening international peace and security. Nonetheless, it is also true that collective security measures cannot be invoked against such major powers as it will result in a world war like situation, something which the collective system intends to prevent in the first place. Therefore, the Security Council is created as a solution to this dilemma wherein any collective security measure requires consensus among the top five powerful countries of the world. On the flip side, lack of consensus among P5 members (even if a situation exist that constitutes a threat to international peace and security) arrests the capability of the most powerful organ of the UN (Thakur 1994: 389-390, Orakhelashvili 2011, Tsagourias and White 2013).

Although the end of the Cold War in 1991 tremendously diminished the likelihood of the situations that may cause a breakdown of international peace and security, intra state rivalries opened up as a problem requiring international attention. Soon it was felt that the collective security system was primarily designed to meet the problem of

[48]Collective Security refers to a security system in which all states of the system regard safety of one as the concern for all and therefore undertake to carry out a collective response to threats of peace.

inter-state conflicts and the civil war situations that appeared to be an endemic feature of the post-cold war order may require a different approach. Peacekeeping operations are significantly different from the collective security system. The latter stipulates determination of aggression, identification of the guilty and pooling of forces by the states. The collective security seeks military victory while peacekeepers are expected to create stability in the system by creating conditions that may facilitate negotiations. The peacekeeping attempts are *ad hoc* steps to address problems that necessitate deployment of third party (Thakur 1994: 393).

The idea of peacekeeping missions was not envisaged by the drafters of the UN Charter. They instead sought the creation of a standing UN army as a device of collective security. The provision closest to peacekeeping missions is Article 42 which opens the possibility of taking "action by air, sea or land forces as may be necessary to maintain or restore international peace and security" (UN Charter 1945). Peacekeeping operations were a brainchild of former UN Secretary General, Dag Hammarskjold, who conceived them as Chapter VI and a half (Bildt 2011). Lester Pearson, one of the creators of the idea of UN peacekeeping, defined it as "an intermediate technique between merely passing resolutions and actually fighting" (Pearson 1957: 401). On a similar note, former UN Secretary-General, Boutros Boutros-Ghali defined peacekeeping as "the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned" (UN 1992).

The legal basis for peacekeeping missions is found in Chapters VI, VII and VIII of the UN Charter[49] that provide for peaceful measures, military measures and measures by regional bodies to maintain international peace and security. By their nature, traditional PKOs fall in the category of Chapter VI while the complex operations are mandated by UNSC under Chapter VII. The readiness of the Security Council to invoke Chapter VII signifies political will and an obligation on the rest of the world to help execute the content of the resolutions. Critics point at the selectivity shown by the UNSC in displaying such political will.

[49]Chapter VI concerns with the pacific settlement of disputes; Chapter VII provides for the military measures to address threat to international peace and security; and Chapter VIII provides that measures to maintain international peace and security can be carried out through regional organisations.

There is an emerging consensus in the policy making as well as academic world that issues of international peace and security cannot be dealt in isolation from the norms of human rights. As a device for maintaining international peace and security, it was conceived that legal-normative frameworks within which PKOs operate were to be also underpinned by human rights law and international humanitarian law. The former expects peacekeepers to respect human rights of the vulnerable host population and if they are found violating or deviating from the established norms, they must be held accountable. International Humanitarian Law seeks to regulate the means and methods of conducting warfare. The peacekeepers must adhere to the provisions of the 1949 Geneva Conventions, 1977 Additional Protocol and conventions relating to protection of the environment, cultural property, prisoners of war and victims of conflict. The Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law (1999) is a basic document providing for the said obligations of the peacekeepers (UN 1999). Furthermore, the following UNSC Resolutions constitute an integral part of the normative framework for the PKOs – Resolution No.1325 (2000) on women, peace and security; Resolution No. 1612 (2005) on children and armed conflict; Res. No. 1674 (2006) on the protection of civilians in armed conflict (UN 2008); UNSC Res. No. 2242 (2015) to Improve Implementation of Landmark Text on Women, Peace, Security Agenda; UNSC Res. No. 2382 (2017) Security Council Supports Implementing Strategic Guidance Framework for Police Peacekeeping etc.

Given the increasingly reported instances of sexual offences by peacekeepers, the UNSC Resolution No. 1325 passed in 2000 is no less than a benchmark resolution signaling towards a formation of a new norm in the making. This resolution integrates different thematic concepts, namely security, peace and women rights and projects them as a component of the agenda on peace keeping missions. This was for the first time that the Security Council conceived women rights as an issue related to its overriding mandate of maintaining international peace and security. The resolution is undoubtedly a noticeable development representing efforts of UN especially Secretariat in pushing the agenda forward in collaboration with member states, NGOs, and individual experts. Justice is central to the issue of peacekeeping missions designed to secure international peace and security (UN 2000, Tryggestad 2009).

2. Evolution of UN Peacekeeping

The precedents of modern peacekeeping can be traced to 19th century England. The phenomenon managing the breakdown of the Ottoman Empire featured the role of multinational force. Similarly, stability mission in Albania in the early 20th century is a precursor of humanitarian operations quite prominent nowadays (Pugh 2004: 42). The UN faced the Cold War in its infancy. Instead of being reduced to a position where it was to be perceived as non-threatening body to both superpowers, the UN steered a space for itself largely outside the sphere of influence of great power politics and assumed the role of international peacekeeper (Berdal 1993: 3). UN peacekeeping during the initial days was strictly perceived within the norms of sovereignty and non-intervention to allay the concerns of nation states (Evans 1993: 17). The UN restricted itself to an aid agency that operated outside the areas of conflict with an aim to support displaced populations and any intervention would be considered just to police the ceasefire (Duffied 2001: 52). This careful assistance and intervention policy served the UN's cause which culminated in the United Nations Peacekeeping Forces (UNPKF) being awarded the Nobel Peace Prize in 1988.

The first ever UN PKO was launched in 1948 in Jerusalem as the United Nations Truce Supervision Organization (UNTSO). Except for Congo, all missions launched during the Cold War were restricted to maintaining stability and the peacekeepers were supposed to adhere to the principle of consent of the host state, use of force for self-defense and impartiality. The core elements of the mandate included separation of belligerents, monitoring of borders, withdrawal of foreign troops etc. Major troop contributors in this phase included Poland, Ghana, the Scandinavian countries, Canada, Nepal etc. The idea of impartiality was so sensitive that not using troops from certain countries was a matter of political expediency Statistically, between 1948 and 1987, the UNSC approved 13 PKOs and 7 out of these were deployed in West Asia. Such operations were regarded as classic or traditional missions (Malone and Wermester 2000: 38, Roberts 1994: 27, Koops et al. 2015).

The traditional peacekeeping missions – during the Cold War – were limited in scope and mandate. The mandate of such operations was limited to monitoring ceasefire, supervising buffer zones and pushing disarmament. The key principles on which they

were grounded were – limited use of force for the purposes of self-defense, neutrality of the peacekeepers, consent of the parties etc. Missions like Kashmir (1951), Golan Heights (1974), Cyprus (1964) etc. fall in this category. Nonetheless, in certain situations the limited traditional peacekeeping missions appeared to be not adequate to deal with the issues at hand. The second generation operations or peace-building missions undertook activities of administering the territories and implementing civilian functions. The 1989 operations in Namibia kick-started the move towards peace-building and were later echoed in Cambodia and East Slovenia (UN Peacekeeping Website 2016, Thakur and Schnabel 2001).

By and large, the role of peacekeepers during the Cold War (with exceptions like the mission in Congo during 1960-64) was limited to maintaining the stability by monitoring the ceasefire with a hope that the parallel political negotiations would carry out the process of national reconciliation. The mandate stipulated that the size of the peacekeeping mission remains small while the use of force was limited to self-defense. Under such conditions, the probability of human rights violations of the host population by the peacekeepers was very remote and unsurprisingly the issue did not arise during the Cold War.

The Cold War practice of fixing international political and security issues through the UN was primarily designed to counter the threat emanating from interstate conflicts. The experience of the two world wars convinced the leaders that the root cause of international security issues lie in interstate conflicts and hence the idea of intra-state conflict failed to find a place in the minds of the drafters of the UN Charter. The same period also witnessed decolonization of the erstwhile colonies which bloated the number of independent countries in existence. The UN acknowledged the idea of self-determination but mere achievement of independence proved fatal for number of states that failed to sustain themselves in long run. Helman and Ratner (1993: 3) call them "failed states".

Robert Jackson (2000: 295-296) defines failed states as those who "cannot or will not safeguard minimal civil conditions for their populations: domestic peace, law and order, and good governance". In the words of Mohamed (2005: 814) –

> State collapse is characterized by a wide range of circumstances – failure of the government to maintain a monopoly on the use of force and the presence of armed civilians and militias, violence targeted at civilians, massive refugee flows, and breakdown of essential public services.

There is a strong academic view that ties the phenomenon of failed states with the collapse of the Cold War. The constraints of the Cold War that demanded ideological conformity and strategic partnership negated the diversity within the states and more importantly the tensions within the diversity. The removal of Cold War constraints brought back those tensions to the surface in various forms such as religious tension, ethnic rivalry, sectarian violence etc. (Daniel and Hayes 1995: 25, Tharoor 2002). The conditions of failed states posed a serious challenge to the ability of the UN Charter to deal with a situation that was not initially envisaged. The Charter's emphasis on the principles of non-intervention, respect for sovereignty and equality of all states emerged as a hurdle in addressing another priority area od the UN –human rights. In the words of Tharoor (2003), "Treating states as equals prevents treating individuals as equals". In the light of the incidents of the failed state, the dual allegiance that UN cherishes (towards the sovereignty principle and towards the human rights) created ambiguity in the UN law (Lillich 1973). As a result, the following question became a matter of intense academic inquiry – Is status of sovereignty contingent upon state's ability to guarantee human rights to its population? (Gordan 1995: 330).

The occurrence of failed states took place most noticeably in the post-cold war period. The post-Cold War era is also significant as it has been anointed by liberals as a victory of liberal values, which would make this world a better place given the reenergized UN. Unlike during the Cold War where troop involvement of big powers was feared by many states, the end of the Cold War fundamentally changed the dynamics and the troops from P5 countries signified a determined resolve of the international community to maintain stability (Roberts 1994: 27).

The possibility of use of force by an IO had long remained an abstract thought; however, the post-cold war PKOs brought this idea to a consistent reality in troubled areas. The use of force is controversial as the dividing line between collective security measures and the invocation of force for self-defense is getting increasing thinner. One view suggests that the use of force by an IO is legitimate if any concerned IO

finds itself in a situation of armed attack and if under the same situation, states are permitted to apply force (Gaja 4th report of DARIO: 2006). The issue of self-defence by IOs involving the use of force found resonance in the ILC's DARIO (2009) stating that "the wrongfulness of an act of an international organization is precluded if and to the extent that that the act constitutes a lawful measure of self-defence under international law" (ILC 2009: 95).

Matters get further complicated because any armed attack on IO forces may invoke retaliation under the self-defense provision. However, the question remains as to whether the states whose contingents constitute an IO force also retain the right to intervene and protect their nationals. This situation arises as these troops remain part of the national armed forces of the sending state even though operational control is exercised by the IOs during the tenure of the service of an IO under whom they are deployed (Palchetti 2010: 244). Inspite of the lack of consensus on these matters, the scale and number of peace operations have continued to shoot up.

Since 1990, the UN has intervened in matters of human rights within the domestic jurisdiction of the states – Somalia (1992), DRC (1999), Liberia (2003), etc. This activism stemmed from a relaxed interpretation of the sovereignty principle where issues of human rights are involved (Mohamed 2005: 817). The resolve of the UN to intervene in states that are either incapable or unwilling to protect their population assumed the name of peacekeeping operations structured within the idea of R2P. Due to their uniqueness, these operations have been described by Boutros Boutros-Ghali as an "invention of the UN" (UN 1992: 46).

Clearly, peacekeeping missions since their invention have also undergone transformation. Based on the scope of their mandate, Doyle (1998: 529, 532-533) categorizes them into three categories – first-generation or traditional operations; second-generation or multidimensional operations; and third-generation or peace-enforcement operations. Others like Bellamy and Williams (2010) categorize them into seven types – ranging from preventive deployments to transitional administrations. They also identify two broader categories (Westphalian and Post-Westphalian) within which all sub categorizations fit in. The Westphalian oriented operations intend to peacefully resolve disputes between states while the latter are

ingrained with a belief that the key to international peace and security lie in the nature of domestic order. Such a belief justifies the reordering of the trouble society along liberal lines featuring the ideals of good governance, rule of law, democracy etc. (Kaldor 2007: 11). By and large, it can safely be concluded that the peacekeeping operations conducted post-cold war are those that relax the hitherto inviolable norm of sovereignty and non-intervention. Nonetheless, the important difference was that the methodology of traditional peacekeeping became obsolete in the violent conflict zones that failed states reflected.

Convinced about its strategies, powered by the euphoria of liberal values and driven by the altered norm of non-intervention, the UN intervened in several conflict zones. However,the UN soon appeared overwhelmed by the shortcomings of its vision and the challenging conditions on the ground. The failures of the PKOs in instances like Somalia (1992), Rwanda (1994), Bosnia and Herzegovina (1995) etc. generated the need for the reconfiguration of certain aspects of peacekeeping.

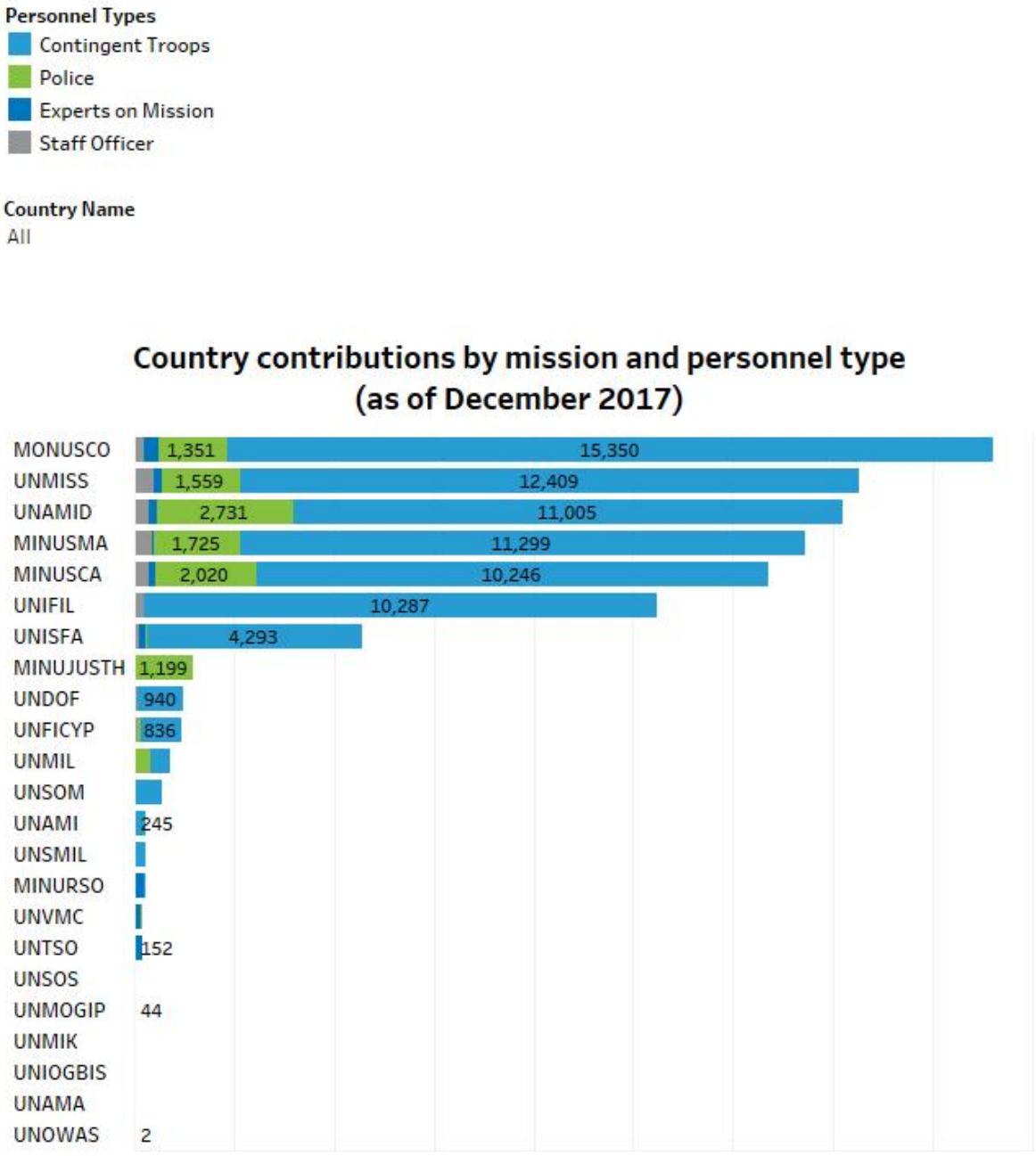
Such reconfiguration emerged as 'robust peacekeeping' that aimed to multiply the strength of the DPKO. The Brahimi Report of 2000 made note of the need for robustness in PKOs. In simple terms, robustness in peace operations means that the mandate must have necessary political and operational support for implementation. In the wake of the civilian deaths witnessed in the failed missions, the UNSC incorporated language in its Resolutions that strongly supported civilian protection. An important difference between traditional PKOs and the robust operations is that the force is used at the tactical level in the former while the robust operations are armed with the authority to use force at the strategic level (UN 2000, UN 2008: 19). At present (2018), the UN is engaged in 14 peace operations, most them are in West Asia and Africa.

Table 5.1Current UN Peacekeeping Operations

Mission Name	Region	Date of Commencement
Abyei, United Nations Interim Security Force for Abyei (UNISFA)	Africa	27 June 2017
Central Africa Republic, United Nations Multidimensional Integrated stabilization in Central African Republic (MINUSCA)	Africa	15 September 2014
Darfur, United Nations – African Union Hybrid Operation in Darfur(UNAMID)	Africa	31 July 2007
Democratic Republic of Congo, United Nations Organization Stabilization Mission in Democratic Republic of Congo (MONUSCO)	Africa	1 July 2010
Mali, United Nations Multidimensional Integrated Stabilization Mission in Mali(MINUSMA)	Africa	25 April 2013
Somalia, United Nations Support Office in Somalia(UNSOS)	Africa	9 November 2015
South Sudan, United Nation Mission in South Sudan, (UNMISS)	Africa	8 July 2011
Western Sahara, United Nations Mission for Referendum in Western Sahara(MINURSO)	Africa	24 April 1991
India And Pakistan, United Nations Mission Observer Group in India And Pakistan(UNMOGIP)	Asia	30 March 1951
Cyprus, United Nations Peacekeeping Force in Cyprus (UNFICYP)	Europe	4 March 1964
Kosovo, United Nations Mission in Kosovo (UNMIK)	Europe	10 June 1999
Golan, United Nations Disengagement Observer Force (UNDOF)	Middle East	31 May 1974
Lebanon, United Nations Interim Force in Lebanon, (UNIFIL)	Middle East	19 March 1978
Middle East, United Nations Truce Supervision Organization, (UNTSO)	Middle East	29 May 1948

Source: UN peacekeeping Website.

Fig. 5.1



Source:https://peacekeeping.un.org/en/troop-and-police-contributors

The table 5.1 and fig. 5.1 shows that not just most peace operations are in specific region especially Africa but also that the UN personnel requirement in these countries is highly dense. Thus, the intensity of conflict is on a higher side where operations

like UNMISS, CAR, MONUSCO etc. are operating. In addition, these areas are also the ones that have witnessed high level of SEAs. As a result, the society remains deeply fractured and depressed.

One of the unintended outcomes of the breach of the sovereignty principle and the robustness of peacekeeping operations is that it has brought the population of the host state and the peacekeepers face to face. The power asymmetry between the powerful peacekeepers and the vulnerable population has often spilled into a situation wherein the supposed protectors turn out be the worst offenders (Jain 2005). Such a state of affairs very strongly challenges the legitimacy of the ideas, norms, institutions, processes and authorities that are constructed by discounting the norms of sovereignty and non-intervention. Undoubtedly, accountability emerges as the most significant virtue that has the capacity to sustain the system by bringing back the lost legitimacy and ensuring justice to the victims.

'Robustness' is not entirely a new concept. Operations in DRC (1960-64), Lebanon (1978 - till date) etc. mirrored features of robustness. However, the term became prominent during 2008-2010 as a result of the brainstorming undertaken about its preciseness during this time period. Documents like *New Horizon non paper, Concept Note on Robust Peacekeeping* etc. prepared by various units of DPKO offered clarity on the term 'robustness'. Later, the Special Committee for Peacekeeping Operations (also known as C-34) also took up this issue, though a majority of members of the third world showed apprehensions about the growing potency of PKOs. There is an element of truth in the claim that robustness of the PKOs finds difficulty in sustaining with the principles of peacekeeping (Tardy 2011: 153). The robustness of peacekeeping operations seems to have had a strong implication for the structures of UN accountability. Unsurprisingly, the use of force not just as a measure of self-defense but as a part of strategy with an aim to defeat an identified enemy has generated civilian casualties.

The UN has not just moved away from the conventional operations to complex but in certain cases also assumed roles that are typical of a state. There has been not just a quantitative shift in the nature of peace operations but rather the international administrative missions undertaken by UN mirror a qualitative change in the realm of

peacekeeping. The multidimensional peace operations and the international administrative missions are placed under the Special Representative of the Secretary General (SRSG) who exercises overall authority over military and civilian agents involved in these operations. The office of SRSG acts as an important point of information who aims to reconcile the local needs with the resources available at the UN head office.

Nonetheless, the authority exercised by international administrative missions e.g. in Bosnia and Herzegovina over local population is devoid of any accountability mechanisms when compared to the ones that exist in the liberal democracies. They are instead accountable to the bodies that commission them to implement the task of administration e.g. the accountability of the Stabilization Force towards the North Atlantic Treaty Organization (NATO). Some may argue that such territorial administrative missions cannot be compared to the full-fledged liberal democracies with vibrant civil society and institutional checks on the powers of the rulers. Still, the relative absence of such mechanisms raises the broader question of the legitimacy of these operations given the fact that they aim to build a democratic order but do not themselves follow it during the process of establishment. Given the extraordinary powers exercised by the administrators in such missions, it is worth asking – Is the presence of NGOs, international media, international democratic norms etc. enough to maintain the level of accountability needed to safeguard local population in international administrative missions like 1999 United Nations Transitional Administration in East Timor (UNTAET) (Caplan 2005: 463-464).

In such missions, the UN functions almost like a state and acts as a legislature, executive as well as administrator of justice. Normally, the Special Representative of the Secretary General (SRSG) or the UN Administrator acts a chief of the mission and enjoys broad powers. Such broad powers are entrusted under the flawed assumption that the UN power is a 'good power' as opposed to power exercised by state authorities. This assumption translates into constituent instruments that govern the UN led international administrations for e.g. absence of provisions binding such administrations to human rights law. Moreover, the extension of immunities of staff involved in the process of administration from the domestic courts serves as a bottleneck to check the abuse of power. In case of the United Nations Interim

Administration Mission in Kosovo (UNMIK), immunities offered to UN staff including Kosovo Force (KFOR) contractors, employees and subcontractors were challenged by the constitutional Court of Bosnia and Herzegovina. In the words of David Chandler (1999: 3), the Dayton Peace Accord was grounded on the "assumption that democracy can be taught or imposed by international bodies on the basis that some cultures are not rational or civil enough to govern themselves". It has also been argued that the refugee camp management involves derogation from human rights like freedom of movement. For instance, in Kenya and Uganda, there are refugees who have spent almost a decade in refugee camps. Other incidents also bring forth cases of denial of freedom of expression, violation of equal pay for equal work etc. (Verdirame 2002: 284).

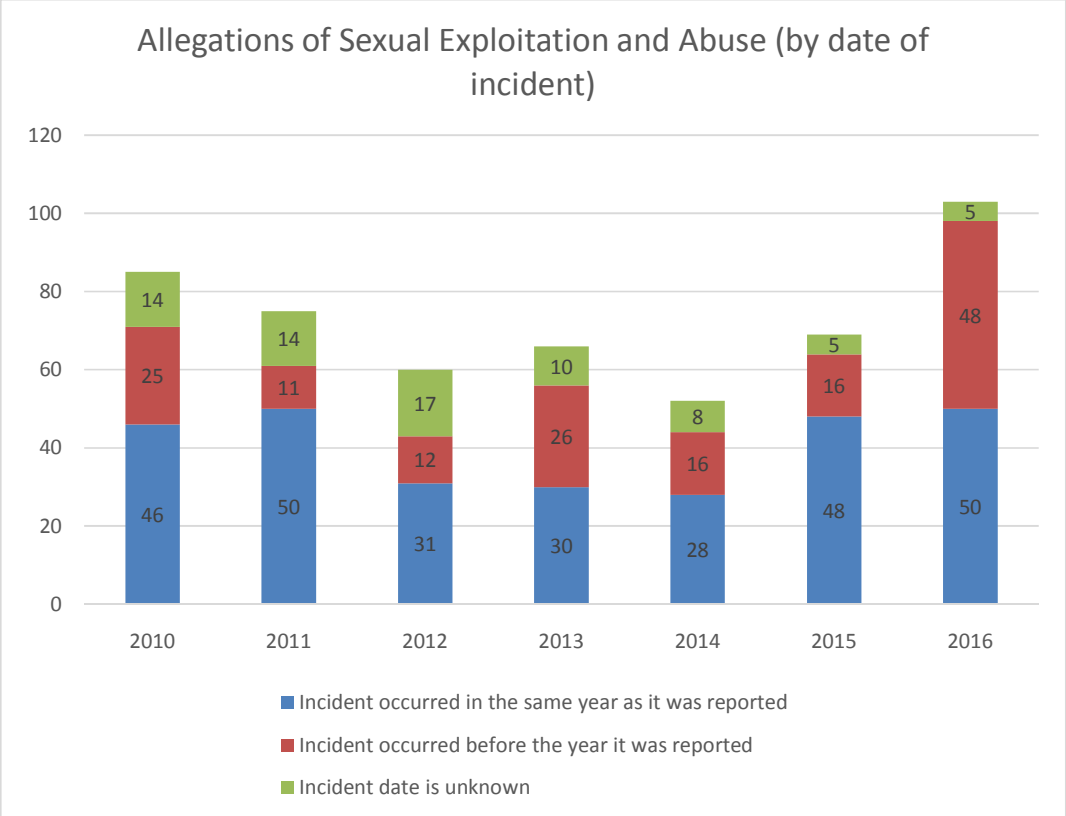
3. Peace Operations, Sexual Abuse and Exploitation (SEA)

Although the accountability of peace operations is called in all cases of human rights violations yet a special emphasis is laid upon the crimes related to SEAs due to the magnitude of these crimes committed by peace keepers. Despite best efforts, the UN has not been able to eliminate this scourge and provide SEA-free operations. Unfortunately, and quite contrary to the spirit of the UN, the presence of international peacekeeping forces has shown a positive correlation with the number of incidents related to SEAs. In Cambodia, the cases of prostitution rose from 6,000 to 10,000 during 1992-93 (Csaky 2008). The UNHCR and Save the Children reported in 2001 that children are sexually exploited by the peacekeepers for as little as a biscuit in states like Guinea, Sierra Leone and Liberia (UNHCR/Save the Children 2002**).** In Bosnia, human trafficking and sustenance of brothels have been widespread (Mendelson 2005 in Burke 5). Another shocking incident that came to the surface was the repatriation of 114 Sri Lankan peace keepers because they were accused of engaging in SEAs with minors in Haiti (DPKO 2004). In 2007, the Moroccan force under the UN came under allegations of similar assaults in the Ivory Coast.

Overall, the scope of human rights violations has undergone unprecedented growth and intensity since the Sierra Leone and Congo operations in 1999. Following calls by Save the Children and the UN High Commissioner for Refugees (UNHCR) in countries like Sierra Leone (1999), Congo (1999) and Liberia (2003) etc. coupled with investigations of Office of Internal Oversight Services (OIOS), the General

Assembly passed Resolution 57/306 (2003) requesting the Secretary-General to report on such crimes. The department of peacekeeping reported 24 cases in 2003 and disciplinary action was taken against the personnel. Even greater international outcry was witnessed in the *United Nations Organisation Mission in the Democratic Republic of Congo* (MONUC) when cases of large scale sexual violence were reported. 121 cases were reported by the Secretary-General in 2004 across missions which was more than double the 53 allegations reported in 2003. The Secretary-General reported a staggering 340 cases of sexual abuse in 2005. The number dropped in 2007 with a total of 59 cases reported across missions. The UN explained this drop as a result of progress made in creating a legal framework as well as the result of awareness campaigns (UN 2005, Ndulo 2009: 142). The drop reported should not hide the fact that huge number of cases goes unreported. Moreover, later in 2007, 800 peacekeepers were suspended in Cote d'Ivoire on grounds of engaging in sex related crimes with minors (Ndulo 2009: 143).

Fig. 5.2: Allegation of Sexual Exploitation and Abuse (by date of Incident



Source:https://conduct.unmissions.org/sites/default/files/factsheet_v._8_march_2017.pdf

The gravity of the problem is to be gauged not just from the perspective of the sexual or physical assault on the victim as the impact of such criminal activities by the peacekeepers adds to other related issues too. One such issue is that of abandoned babies. It was reported that UN peacekeepers have fathered about 6,000 babies in Liberia and 25,000 in Cambodia. The increase in UN peacekeeping has also contributed towards the spread of HIV and other related STDs. The problem is compounded as there is no mechanism established by the UN for conducting pre-medical examination of the contingents even when there is evidence that troops from some Troop Contributing Countries (TCCs) are infected with the virus (Feldbaum et al. 2006).

The incidents of the crimes related to SEAs have a severe psychological and social impact. The victim may be ostracized from the society and possibility of effective counseling and conductive living environment post crime is usually a far cry (Zeid Report 2005). In other cases, it has been found that reporting of SEAs may not occur due to lack of incentive when prostitution is a source of income and survival. Another reason for lack of reporting is the fear of reprisal from the authorities (Csaky 2008). The widespread reporting of abuse by peace keepers is a severe strain on the UN's image. This is unfortunate because the moral standards for the UN forces must be much higher than any other typical army (Personal Interview Doyle 2017).

There is absolutely no doubt about the desirability of UN peace operations in various conflict zones across the world. Both inter-state as well as intra state conflicts require a neutral body to segregate the belligerents and help initiate the peace process along with other steps as per the mandate. The problems of SEAs are found in situations of civil wars where law and order situation collapse and the vulnerabilities of the population are exposed to the outside UN forces. To remain the most legitimate body in the world in addressing the issues of security, the UN has adopted certain mechanisms to arrest the tendency among the peace keepers to commit SEA related crimes. This issue has been taken extremely seriously by the UN Secretariat because it hits hard at the normative structure on which the UN legitimacy rests.

4. Peace Operations and Mechanisms of Accountability

4.1 UN Soft Law

In response to the exacerbating situation on the ground, the UN has responded in various ways to address the gap of accountability. Its response has had both a preventive and corrective dimension. The UN has responded to the problems of abuse by peacekeepers by promulgating documents containing codes of conduct to be followed during operations. Such documents include UN *Model Code of Conduct*; 1999 *Bulletin on the Observance by UN Forces of International Humanitarian Law*; *Brahimi Report* (2000); Secretary General's 2003 *Bulletin* entitled *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*; *Reports of the Special Committee on Peacekeeping Operations*; Prince Zeid Al-Hussein's 2005 Report titled *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations;* 2015 UN Document –*"Accountability for Conduct and Discipline in Filed Missions";* 2017Report of the Secretary-General — "*Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach"*; 2018 UN Report — *"Preventing Sexual Exploitation and Abuse, Quarterly Updates"* etc. (Odello 2010: 351, UN 2003, UN 2005, UN 2015, UN 2017, UN 2018). The overarching aim of these documents, guidelines and reports is to tighten the screws of accountability while engaging into peace operations.

Recognizing the seriousness of the growing incidents of sexual violence, then UN Secretary General Ban Ki Moon had stated:

> The United Nations, and I personally, are profoundly committed to a *zero-tolerance policy* against sexual exploitation or abuse by our own personnel. This means zero complacency. When we receive credible allegations, we ensure that they are looked into fully. It means zero impunity (UN peacekeeping website 2015). The policy provides a three pronged strategy – prevention of misconduct; enforcement of UN standards; and remedial action.

4.1.1. Secretary General's 2003 Bulletin – Special Measures for Protection from Sexual Exploitation and Sexual Abuse

Taking into account the UNGA Resolution No. 57/306 passed on 15 April 2003 titled "Investigation into sexual exploitation of refugees by aid workers in West Africa", the then Secretary General, Kofi Annan issued a Bulletin – *Special Measures for*

Protection from Sexual Exploitation and Sexual Abuse – on 9th October 2003. The bulletin aimed at addressing the growing instances of SEA and in order to do so, it defined the sexual exploitation and abuse as follows:

> The term "sexual exploitation" means 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. Similarly, the term "sexual abuse" means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions (UN 2003: 1).

In terms of its scope, the provisions are applicable on all personnel under UN command and control. It explicitly asserts that all UN personnel are prohibited from committing SEA related crimes and they must realize their special duty towards women and children. Acts of SEA are antithetical to international legal norms or standards. They constitute unacceptable behavior and qualify as sufficient ground for dismissal. SEA with children below 18, irrespective of local law on age, is strictly prohibited. Entering into sexual relations in exchange for material benefit like money, employment is humiliating and degrading behavior which UN strictly restricts. Reporting of a suspected sexual abuse is encouraged among all staff members of UN. Managers at all levels must ensure that SEAs are prevented and whenever they do occur, must be reported. Similarly, the Heads of Missions must create an environment of zero tolerance towards SEAs. In case of allegations, proper investigation should be conducted and once evidence is established, the matter should be referred to member states requesting criminal prosecution (UN 2003)

4.1.2. Brahimi Report

The Brahimi Report (2000) is a result of the request made by the Secretary General to Mr. Lakhdar Brahimi of Algeria to head the Panel on United Nations Peace Operations. The task of the Panel was to recommend remedies to solve the problems of peacekeeping witnessed in areas of strategy forming, decision making, rapid deployment, operational planning and support, and the use of modern information technology (UN 2000).

The recommendations of the report are written in recognition of the structural boundaries and constraints of the existing order. One of the striking features of the existing order the report noted is the prevalence of a wide variety of multiple actors entangled in the crisis i.e. IOs (like UN, IMF) NGOs, regional organizations (like ECOWAS, EU), warlords and militias etc. The report problematizes the principle of impartiality by suggesting that the conventional reluctance to determine the problem creators needs to be reconsidered. Effective use of force may entail clear identification of the spoilers. Taking a realistic picture of the UN operations, the report recommends that the UN should not get involved in all troubled zones and whenever it does, the peacekeepers must possess adequate capacity. The report makes a strong case for robust peacekeeping in situations where the warring parties reflect the worst-case behavior. Elaborating this point, the report suggest that the Secretariat must provide the accurate picture to the Security Council instead of telling what the latter wants to hear (UN 2000).

The Report was accepted by the General Assembly and the Secretariat led by the Secretary General identified measures needed for its execution. First, the Secretary General stressed the need for better coordination between the UNSC and the troop contributors. Second, the Secretariat needs to reinvent its methodology of assessing the number of troops needed in a mission and the ideas for operations. Third, 'integrated mission task forces' shall perform the task of coordination among various agencies of UN. Fourth, Kofi Annan requested states to enter into stand-by agreements. Fifth, he pointed at the scarcity of funds that Secretariat usually faces (UN 2009: 9).

The implementation of the Brahimi recommendations reveals that acute political, decision making and operational aspects of the report have been sidelined. Of importance is the reluctance shown by several states about the vision of strengthening the muscle power of the peacekeepers. These states drawn from the Non-Aligned Movement (NAM) or G77 also emphasize the requirement of principles of consent, impartiality and non use of force. These states claim that PKOs suffer from the 'right political will'. Political will is a problem when states decide to remain mute spectators at the time of crisis, something witnessed during the Rwandan genocide (1994). The other related problem occurs when states show strong political will but for reasons

other than protection of civilians or redressal of crisis i.e. invasion of Iraq in 2003. Therefore, right political will would be something that may represent consensus to solve the crisis and the considerations of national interests do not affect the decision making. It comes as no surprise that given the sensitivity of the issue, the political dimension of the Brahimi report lost relevance during the implementation phase and the main area of reform has been centered on improving the performance of the international bureaucracy (Bellamy and Williams 2004).

Critics have also pointed out the following loopholes in the report. First, the Brahimi report has been criticized for not digging deep into the political problems faced during peacekeeping like financing. Second, the report fails to frame a proper relationship between the military and civilians. Moreover, it overlooks the necessity of bringing locals into the crisis resolution strategies. Third, despite the growing proliferation of peacekeeping missions led by regional organizations, the report sidelines the relationship between the UN and the regional actors (Bellamy and Williams 2004).

4.1.3. Prince Zeid Report

Alarmed by the massive reporting of sexual abuse in the UN Mission in Congo in 2004, the then UN Secretary General, Kofi Annan in his attempt to fix this problem appointed His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of Jordan, as an advisor on this matter. The Report was submitted in 2005 and has been regarded as the first attempt to comprehensively analyze the problem of sexual exploitation by UN personnel (UN 2005).

As a part of the Report preparation, Prince Zeid visited the Democratic Republic of Congo (DRC) during 24 October to 3 November 2004 and found rampant cases of sexual abuse by the peacekeepers. He pointed out that such incidents destroy the impartiality and goodwill of the UN in the eyes of the host population, which seriously undermines the possibility of fulfilling the tasks enshrined in the mandate. The act of sexual abuse presents a contradiction in which on the one hand, the mission preach the ideals of respecting human rights and on the other its own personnel blatantly violate them. An offshoot of sexual abuse is the medical emergency as incidents of diseases like HIV dramatically shoot up. The victims are further

traumatized as their families refuse to accept them and the abandoned babies. Moreover, it forces the victims to engage with the exploitative relationship with personnel to meet the needs of basic survival (UN 2005).

The Report acknowledged the pressing problem of making sure that different categories of UN personnel abide by the policies against sexual abuse. The UN peace operations constitute a variety of personnel like military contingents, civilian police, UN volunteers, experts on mission, contractors etc. All these kinds of personnel should be brought within the purview of UN documents that are meant to regulate the behavior of peace keepers. In order to facilitate the phenomenon of due process of justice, the report recommended the installation of a permanent professional investigative mechanism to handle the cases of sexual abuse. To ensure the accountability of troop contributing countries, the report suggested that they should hold on site court martial to prosecute the offenders of their nationality. In case, a country's national legal system does not allow on site court martial, it was advised to reconsider their domestic legislation (UN 2005).

Accountability is sought at various levels. The UN as an organization is accountable to ensure effective training of the personnel; take steps to outreach the locals; maintain a proper data collection system of investigation and resolve the accusations of sexual misconduct. UN must also make efforts to take mission specific measures in order to cushion the effective and legitimate functioning of its operations. In order to facilitate the process of these processes, a few permanent positions may also be considered at headquarters and at the missions for the purposes of coordination (UN 2005).

Accountability needs to trickle down at all levels for it to be effective. The accountability of managers and commanders could be attained by linking their performance with the rating of performance goals. Those who are effective in reducing instances of sexual exploitation must be rewarded and those who fail to do so must be asked to step down from their post. At an individual level, the peacekeepers are to be held accountable if they are reported to be involved in sexual misconduct. In order to secure this, the General Assembly must clearly define sexual misconduct. The General Assembly must also urge the Secretary General to establish

procedures to tackle such cases like suspension without pay. The troop or staff contributing country must refer the cases of their nationals to the domestic legal authorities in order to carry out prosecution of the accused personnel. In addition, financial accountability of the personnel must also be sought to cushion the paternity claims of the abandoned babies (UN 2005).

To ensure the criminal accountability of the military contingents, the practice of Secretary General taking assurances of domestic prosecution of troops from the troop contributing states in exchange for immunities from the prosecution in the host state must be reinstated. The General Assembly should make a point that acceptance of this condition should be a bedrock for any troop contribution by the troop contributing country. Similarly, in the context of civilian staff and experts on mission, the UN never intended to provide a protective shield in the form of immunities to the personnel if reportedly engaged in human rights violations (UN 2005).

Stern (2015) evaluates the events of ten years after the Zeid Report was promulgated and claims that significant actions are taken by UN in addressing the problem of SEAs in peace operations. Further, it advocates measures like better training, sophisticated awareness creating projects, deepening partnership with TCCs, improvement of victim's assistance mechanisms, more intense investigate modalities etc.

4.1.4 Capstone Doctrine

In the light of the unwritten principles or guidelines that continue to cushion the practice of PKOs, an attempt was made by the Department of Peacekeeping Operations (DPKO) and Department of Field Support (DFS) in 2008 to codify the lessons learnt during these missions by various participants. The result of this attempt is the document entitled *United Nations Peacekeeping Operations: Principles and Guidelines*. It draws from other significant works like the Brahimi Report (published in 2000) and presents itself as a living document that shall require timely updates. In terms of its scope, the document was declared to be one that is at the apex of the all doctrinal frameworks guiding PKOs and covers all personnel associated with UN at headquarters and on the field. The specific aim of this document is to articulate the doctrinal foundations of the PKOs in the wake of changing contours of peacekeeping

missions reflected in the disputes revolving within the state instead of being inter-state. However, the document does not aim to surpass the national military doctrines of member states and thus the military tactics, techniques and procedures (TTPs) remain under the jurisdiction of the individual member states. The member states may consider the document as a reference to their military doctrines and training programmes (UN 2008).

4.1.5 Accountability for Conduct and Discipline in Field Missions (2015 Report)

In 2015, the UN published a document entitled *"Accountability for Conduct and Discipline in Field Missions"* authorized by the Department of Political Affairs, Department of Peacekeeping Operations and Department of Field Support. The stated purpose of the document is as follows:

> This Policy sets out the framework in place to ensure accountability for the conduct and discipline of all personnel serving in peacekeeping and special political missions. In this regard, it sets forth the roles and responsibilities of, and interactions amongst, each component assigned with responsibilities regarding the conduct and discipline of all personnel in field missions, both in those field missions and at Headquarters" (UN 2015: 2).

The document is mandatory in nature and covers all individuals or entities associated with the UN in managing peacekeeping missions – UN officials, UN volunteers, individual contractors, experts and military contingents. The legal foundation of this document is rooted in Article 10 paragraph 3 of the UN Charter that suggests that the prime consideration in matters of UN employment would be "efficiency, competence and integrity". Integrity is identified as a key term supporting the rationale for this document (UN 2015: 3).

This policy paper seeks to identify where responsibility lies in observing the conduct and who shall ensure observance of proper conduct. It also tells how to seek accountability in case of deviant behavior. It is part of an effort to create an atmosphere where organizational, managerial and personal accountability becomes a part of work culture. Through this document, the zero tolerance policy enunciated by the Secretary General in instances of sexual exploitation is broadened to accommodate all kinds of misconduct. All UN related personnel have an obligation not just to refrain from all sorts of misconduct but also report such instances to the

authorities. The policy is composed of three pronged strategy – prevention, enforcement and remedial action. Prevention includes efforts like awareness campaign, training, outreach etc. Enforcement comes in when the preventive measures fail and the crime is already committed. Enforcement ensures accountability of those who abuse. The remedial action entails support and assistance to be offered to the victim of abuse (UN 2015: 4).

The said document is to apply to different partners in the following way. UN officials are to abide by the standards mentioned in the regulations, rules and other administrative orders pertaining to their employment letters. For UN Volunteers, such standards are applicable through the conditions of service. The experts on mission shall sign an undertaking with the UN declaring that they undertake to abide by the standards of conduct. The conduct of military components is to be regulated by the Memorandum of Understanding (MOU) signed between the troop contributing countries and the UN. For contractors and consultants, similar agreements would be concluded stating their commitment to abide by the proper standards of conduct (UN 2015: 5-6).

The document provides for the investigation by the UN and also by national authorities. The primary responsibility for conducting investigation lies with the member state if a military personnel is accused of misconduct, however the failure of a member state to do so will compel investigation by the UN administration. Administrative actions may include measures like repatriation on disciplinary grounds, contractors may be asked to replace individual staff etc. However, in matters of criminal offenses, apart from taking administrative measures as identified above, the UN relies on member states for the prosecution of the accused (UN 2015: 6-7).

The policy document places accountability at various levels. At a micro level, individual accountability is sought of those who commit misdeeds. The individual accountability pertains to each UN personnel and obliges them to take part in training sessions and be well versed with the appropriate standards of conduct. They must refrain from any deviant acts and must also bring to the notice of the higher authority's commencement of such acts by others. At a leadership level, it is the duty of the commanders and managers to ensure that their subordinates do not indulge in

any misdeeds. In case of misconduct, they are expected to report to their immediate superiors or directly to the Office of Internal Oversight Services (OIOS). At the organizational level, the UN is accountable for conducting trainings of its personnel and sensitizing them about the issues like sexual abuse. The body is also accountable for creating mechanisms to address the cases of misconduct and making sure that appropriate punitive action is taken against the culprit (UN 2015: 8-10).

At the level of member states, it is the duty of troop, police or any other staff contributing states to ensure that their nationals are aware of the standards of conduct. It is the duty of the state to inform the UN about instances of abuse in which their national is involved and in cases of sexual misconduct, the investigation should get over within six months. The states must also ensure speedy settlement of claims arising out of paternity or child support matters. Most importantly, states are expected to conduct trial of those accused of committing criminal offences under their national legal structures. The accountability is also sought at the level of head office wherein the Under-Secretary General, Department of Field Support (USG-DFS), Under-Secretary General, Department of Peacekeeping operations (USG-DPKO), Under-Secretary General, Department of Political Affairs (USG-DPA) along with Military and Police Advisor are all responsible for overall conduct and discipline. At a mission level, Head of Mission, Force Commander, Chief of Mission Support are also accountable for maintain discipline and conduct (UN 2015: 8-10).

4.1.6. UN Secretary General Report 2017

The new UN Secretary General, Antonio Guterres, issued a report on 28th Feb 2017 entitled *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach*. The report begins by acknowledging the contributions made by almost 95 thousand civilians and 1 lakh uniformed military and police officials towards the cause of world peace. States and governments worldwide have played a crucial role serving the cause of maintaining world peace and promoting human rights by making available human and financial resources. The report points that the global efforts towards a better world through the UN must not be allowed to be tarnished by crimes related to SEA (UN 2017: 4). The Secretary General acknowledges the efforts made by his predecessors in addressing the problem through multifold steps like better

reporting, rapid assistance etc. Countries have also engaged in mechanisms of best practices in preventing and responding to the offenses.

The report highlights that the problem of SEA is prevalent among different components of UN and not just restricted to military contingents. Statistics reveal that at a system wide level (which includes peace keeping as well as other UN activities), 145 instances of SEAs were reported in 2016. Out of these, 80 were made against uniformed personnel while 65 against civilians. At least 311 victims were identified and many more cases and victims remain unidentified. The number of cases reported is higher than 2015 and this trend mirrors better reporting methods and efforts of the UN in ensuring that victims do not hide in fear. Alongside, non-UN international forces have accounted for 20 allegations of SEA (UN 2017: 5).

If seen in the light of only peace keeping (9 peacekeeping and 4 special political missions), a total of 103 allegations were reported in 2016. Out of these, 73 were made against military contingents or observers; 23 against UN staff, volunteers, contractors; and 7 against police officers or units. Among the operations or missions, 50 percent (52 cases) of such incidents were found in just one mission – United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). 43 percent (44 allegations) were recorded for 8 other operations and 7 allegations in 4 other missions.

While addressing the fundamentally crucial question – why does SEA occur in peace operations, the report identified the following reasons. First, pointing at the systemic aspect of the problem, the report argues that discriminatory practices against women and unequal gender relations are a hallmark of all societies today (though they may vary in degree). This can also be understood from the fact that nearly all victims of sexual abuse by peace keepers happens to be women or young girls. Second, since the UN forces are deployed in troubled areas, the power asymmetry between the host population and the UN forces persist at a very high scale. The condition of the host population is characterizd by poverty, homelessness, lack of safety etc. Third, the frequency of the SEAs is multiplied by:

> weakly enforced standards with respect to civilian hiring; little to no 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 (UN 2017: 5-6).

The report presents to the world the strategies and commitment of the current Secretary General on matters of sexual abuse and exploitation (SEAs). The broader components of the strategy constitute four pillars – "victims first; ending impunity; engaging civil society and external partners; improving strategic communications for education and transparency" (UN 2017: 6-7). The Secretary General lays a strong emphasis on reconnecting or realigning the task of peacekeeping with UN values and principles. To achieve this end, he proposes that every effort will be taken in future to recruit only those who share UN values. The Under-Secretary General for Management has been informed about the necessity of strengthening the screening process of job seekers in UN. He further recommended inclusion of clauses like personal history profile to inquire about the pending allegations, disciplinary measures etc. of a candidate as a part of recruitment drive. The Ethics Office needs to monitor the sexual offenses at the workplace and ensure that the leaders or managers do not engage in sexual relations with their subordinates (UN 2017: 7).

Table 5.2: Components of the 4-point strategy

VICTIMS FIRST	ENDING IMPUNITY	ENGAGING EXTERNAL PARTNERS	IMPROVING STRATEGIC COMMUNICATION	Sustainment
1. Appoint a system wide victim's rights advocate.	1. Promote special protocol on SEAs in high risk areas.	1. Create a world-wide network of leadership including Heads of State to end impunity.	1. Instruct the Department of Public Information (DPI) to work with victim's rights advocate in devising effective strategies on SEAs.	1.Request Chef de Cabinet to carry out monthly meetings on SEAs
2. Meet and hear directly from victims.	2. Pooling in SEA investigative capability to optimally exploit resources and expertise.	2. Commission a standing Advisory Board comprising element of civil society that shall report to Secretary General.	2. Ask DPI to establish a standard practice on reporting facts concerning SEAs.	2. Regular public reporting on the action of states on cases of SEAs.
3. Develop a victim's assistance protocol.	3.Promote technology driven live streaming with an aim to facilitate court martial within national boundaries.	3. Work with the Chair of the Global Compact in identifying additional measures through business advisory group.	3. Ask DPI to suggest ways so that the social media and technology could be used to deepen transparency and reporting on SEAs.	3. Establish a system wide mechanism to publicize state's best practice and reports on lessons learned.

VICTIMS FIRST	**ENDING IMPUNITY**	**ENGAGING EXTERNAL PARTNERS**	**IMPROVING STRATEGIC COMMUNICATION**	**Sustainment**
4. Explore the possibility of using ex gratia payments to victims.	4. Establish policies and procedures for the collection of DNA to facilitate conviction.	4.Stronger outreach to local communities and bolstering community based complain mechanisms.	4. Request Chief IT Officer to work along with DPI in reducing the risk of online SEAs.	4. Promote capacity building and learning of states especially troop and police contributing countries.
5. Seek annual plan of action from the senior leadership on the field.	5. Notify the executive officer of the Secretary General if investigations are not pursued by states.	5.Engage with regional organizations to ensure that crimes related to SEAs are addressed in non UN operations as well.	5. Launch system wide internal communication campaign on SEAs.	
6. Ensuring the conduct of risk assessment from all entities on the field and usage of risk management tools.	6.Unannounced visits to field missions to be carried out by USG Peace Operations, field support and political affairs.			
7. Requesting Ethics Office to ensure prevention of SEA at workplace.	7. Suspension of staff accused of SEAs.			

VICTIMS FIRST	**ENDING IMPUNITY**	**ENGAGING EXTERNAL PARTNERS**	**IMPROVING STRATEGIC COMMUNICATION**	**Sustainment**
8. Coordinate with OHCHR to ensure that it works with UNSC while dealing with non-UN forces to prevent SEAs.	8. Request Chef de Cabinet to launch the pilot of the uniform incident reporting form.			
	9. Protect whistleblowers who report cases related to SEAs.			
	10. Inclusion of discussion on sexual abuse in the leadership dialogue.			
	11. Annual Reporting by Senior leadership on allegations as well as actions taken on matters related to SEAs.			

VICTIMS FIRST	ENDING IMPUNITY	ENGAGING EXTERNAL PARTNERS	IMPROVING STRATEGIC COMMUNICATION	Sustainment
	12. Careful hiring procedures.			
	13. Request Department of Management to ensure that every staff member gives in writing the appropriate understanding he/she has of UN standards on SEAs.			
	14. Make training mandatory for all UN personnel on issues related to SEAs.			

Source: Report of the Secretary General –Special measures for protection from sexual exploitation and abuse: a new approach, 28 Feb 2017

4.1.7. UN Model Status of Forces Agreement

Before operationalizing a peacekeeping operation, a Force Commander receives guidelines or directives from the Secretary General concerning the tasks assigned to him/her. The SOFA with the host government specifies a no-interference area or zone for the UN force so that the tasks of the mandate could be conducted smoothly. Ideally, both the documents – SOFA and the Secretary General issued directive – should be signed before the mission formally takes off. The importance of SOFA should be gauged from the fact that in its absence, the status of the peacekeepers is that of tourists (Fleck 2001: 47). The mandate designed by the UNSC resolution defines its broad purpose while it is the SOFA that details out the principles on which the force is grounded. It also specifies the relationship between the force with the host government as well as with other parties to the conflict. Most importantly, the SOFA talks about the rights, duties and privileges of the incoming UN force. For instance, it details out the rights like freedom of movement, right to bear arms, non-intervention during communications in the zone of operations, immunity from criminal prosecution etc. A fair arrangement is one in which the sovereign rights of the host state and the interests of the peacekeepers are adequately addressed (Murphy 2007: 108-110).

The UN Model SOFA was realized in conformity with Article 29 of the *Convention on the Privileges and Immunities of UN 1946*. The UN Model SOFA is concluded between the UN and the host country. It has two main features – privileges or immunities of UN and its staff; and claims settlement (UN 1990, Zwanenburg 2008: 27). The Agreement entails that the UN Secretary General would take formal assurances from the troop contributing countries that in case of human rights violations by their troop, they shall carry out criminal proceedings in domestic setting. This arrangement is sought to justify the immunities granted to the troops from the prosecution in the host state. Accordingly, the troop contributing state must inform the Secretary General about the actions taken by them in his context (UN 2005).

Article 51 of the Convention on Privileges and Immunities (1946) provides for the SOFA under which the disputes are to be resolved through claims commission. The composition of the commission includes a member which is to be appointed by the Secretary-General of the UN, one member to be appointed by the Government and a chairman to be appointed jointly by the Secretary-General and the Government. A

precondition for a decision is the approval of any two members. The awards of the commission shall be final and binding, unless the Secretary-General of the United Nations and the Government allow an appeal. In case of conflict between the UN and third party, the Convention under Article 8**,** Section 29 provides that the UN shall make provisions for appropriate modes of settlement of "Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; Disputes involving any official of the United Nations who because of his official position enjoys immunity, if immunity has not been waived by the Secretary-General" (UN 1946).

The UN signed a Status of Forces Agreement (SOFA) with the host state that apart from specifying immunities accorded to UN personnel also specifies the establishment of 'standing claims commission' that shall entertain claims of a private character. Though the SOFA was first crafted to settle claims in relation to the United Nations Emergency Force (UNEF) in West Asia, later it has been applied in a similar form in subsequent operations, hence the term 'UN Model SOFA' (Zwanenburg 2008: 28-29). The provision of SOFA basically pertains to the need for maintaining legal accountability of UN arising out of its operations.

However, the practice is at odds with the promise since the Standing Claims Commissions have not been formed; instead the UN has created "local claims review boards" which do not include representatives of the host state. Moreover, the UN has restricted the scope of entertaining private claims on the grounds of "operational necessity" and "limited liability". The former means the unavoidable damage caused during the course of carrying out the operations. It is worth noting that the notion of operational necessity has resulted from the practice of peace operations and has no specification in the International Law Commission's draft on the Responsibility of International Organization. The limited liability provision was triggered by the staggering claims made by certain states for the damages done by the UN troops as a part of the peace operations. This impelled a reaction in which UN proposed that such operations are conducted in the benefit of the host and moreover with their approval hence the state must be deemed to share burden of damages incurred as a result of it (Zwanenburg 2008).

Apart from the legal and administrative bottlenecks faced in maintaining the sanctity of UN SOFA, practical circumstances have also served more as a hurdle than facilitator. The key problem witnessed in situations like Lebanon or Somalia is the absence of a legitimate and effective voice that can be regarded as the government and with whom SOFA could be signed. In Lebanon, the UNIFIL operated for almost 20 years without SOFA though the emphasis was made on Article 104 and 105 of the UN Charter. It is not unique where the UN force operates in the absence of SOFA. There have been instances where SOFA took 18 months before it being signed. In other cases like Cyprus, the SOFA, though signed quickly, had serious imperfections. Although the United Nations Interim Force in Lebanon (UNIFIL) operated without a SOFA, it was governed by the trust known as 'gentleman's agreement'. However, there is no denying that in the absence of SOFA, troop contributing states are hesitant to participate in peace operations (Murphy 2007: 110-111).

In the absence of a formal agreement with the Lebanese government till December 1995, the status of UNIFIL was derived from the Secretary General's regulations. The regulations clarified that the force falls under the command of the UN with a power vested in the Secretary General under the authorization of UNSC. The Force Commander (who reports to the Secretary General) is the dominant authority on the field. In case of UNIFIL, the standing operating procedures (SOPs) served as the basis on which the force functioned. Though these SOPs were not signed by the Force Commander yet their presence was not challenged owing to the goodwill and cooperation displayed by the participating contingents (Murphy 2007: 110-112).

In case of the NATO led KFOR, SOFA was not concluded. Instead, the KFOR signed a Military Technical Agreement (MTA) with the FRY and the Republic of Serbia in 1999. This is because a restrictive SOFA would have reduced the scope of powers exercised by both KFOR and the UNMIK. The MTA on the other hand gave sweeping powers to the KFOR commander and relied on his judgment for appropriate measures including military steps to protect the KFOR. In reality, the KFOR and UNMIK have acted in a manner that shows that they are beyond the jurisdiction of Serbia (Murphy 2007: 112-113).

Given the extraordinary powers exercised by the UN in case of international administrative missions, it has been argued that the authority wielders must adhere to the practice of reporting to various stakeholders of the process. In case of Bosnia and Herzegovina, the Office of High representative (OHR) was supposed to report to the UN, US, EU, Russia and other interested parties regarding the implementation of the Dayton Peace Accord. Other international stakeholders like World Bank may also stipulate such reporting mechanisms and can also request the OHR to directly brief on the conditions. The officials of the stakeholder institutions can also visit the administered territory to draw a more unbiased understanding of the events. One shortcoming of such self-reporting is that it might not contain a strict critical assessment of the ground situation (Caplan 2005: 466).

4.2 Office of Internal Oversight Services

Apart from creating a normative structure through the aforementioned documents, reports, agreements, guidelines etc., UN has also created institutions to address the issue of its accountability. Among all forms of HR violations, the cases of large scale sexual violence have attracted the strongest criticism. On matters relating to sexual violence, the *Office of Internal Oversight Services* (OIOS) has emerged as a significant agency buttressing the accountability system. The OIOS is a central UN wide mechanism formed in 1994 to "enhance oversight functions, in particular with regard to evaluation, audit, investigation and compliance" (UN 1993).

One of the explicitly stated aims of the OIOS is to bring about 'a culture of accountability'. By its very nature, the OIOS is based on the conventional checks and balances principle that aims to ensure that every organ within an organization operates at an optimum level (Pallis 2006: 888-889). Nonetheless, the effectiveness of an accountability mechanism also depends upon the financial and operational autonomy it is bestowed with. This factor is especially relevant in the light of the letter sent by the former UN Ombudsperson for 1267 Committee, Ms. Kimberly Prost, to the Secretary General on the last day in office in which she pointed at the shortcomings of the contractual, administrative and organizational nature. She requested a fundamental restructuring so that the autonomy of the office of Ombudsperson enjoys institutional safeguards (Prost 2015). These observations are equally relevant for the OIOS as it is engaged in the task of carrying out evaluation which requires a significant amount of

financial and operational autonomy. According to a senior official of IOIS (2017), by and large the working arrangements and the autonomy are fine.

Broadly speaking, the OIOS is a body responsible for promoting good governance and accountability and acts on behalf of the UNGA and the Secretary General. More specifically, the OIOS is an internal oversight body that was created to assist the Secretary General in carrying out monitoring functions through means like Investigation, Evaluation, Inspection and Internal Audit. The structure of the OIOS is composed of the following divisions – Internal Audit Division; Inspection and Evaluation; Investigations Division; Leadership; and Coordination and Cooperation. The investigations division rests upon the mechanism of 'reporting wrongdoing'. It is a confidential mechanism to report any wrongdoing, though once reported, the discretion lies with the OIOS whether to pursue it or not and how to pursue it (OIOS Website 2017).

The Inspection and Evaluation (IED) was established on 1st January 2008 in reference to the 2005 World Summit mandate – *Comprehensive Review of Governance and Oversight within the UN System*. The mandate of the IED includes helping the UN to help programmes deliver better results; to enable the UN to learn from its experiences; and to provide public accountability. The IED's jurisdiction constitutes authority to conduct independent evaluations of all UN Secretariat activities. It covers all 38 UN Secretariat Departments and Programmes involving peace operations as well as Special Political Missions. The output produced by the office IED can be categorized as follows – Programme Evaluations, Thematic Evaluations, Inspections, Ad-hoc Inspections and Evaluations, Biennial Report on Evaluation, Evaluation Scorecards and Triennial Reviews (OIOS Website 2017). Among all such evaluations and reviews, the programme evaluations are most relevant from the vantage point of the PKOs. They are defined as follows:

> Full programme evaluations, also referred to as "in-depth" evaluations when mandated by the CPC, assess the overall relevance, effectiveness; impact and efficiency of a single Secretariat programme, sub-programme, or of a peacekeeping operation (PKO) or special political mission (SPM). Programme evaluations assess the work under the authority of one programme manager or department head. Programme evaluations assess the overall relevance,

> efficiency, effectiveness, and impact of that programme or sub-programme" (OIOS Website 2017).

In what ways has the OIOS made a difference to the reality of sexual exploitation and abuse (SEA) in the peace operations, given that the conventional immunities continue to protect the perpetrators? Addressing this question, a senior official of IOIS acknowledged the dilemma posed by the provision of immunities and affirmed that they continue to be a very serious hurdle in the possible development of the process of judicial system in PKOs. Within the allowed capacity, this office tries to investigate and make public the instances of such crimes. For instance, in Haiti where sexual exploitation has been rampant, investigation by the IED division resulted in disciplinary action against Sri Lankan troops in 2007. More than 100 peace keepers were sent back home (Senior Official 2017).

In its investigation in West Africa and Bunia, the Office of OIOS reported that victims of sexual abuse are usually uneducated, poor young girls and children. In most cases, these victims find it difficult to identify the foreign abuser. In other cases where the abuse exists in the form of prostitution, there is a financial disincentive to report cases. Hence, to bolster the practice of accountability, the report recommended that the UN should poise strongly towards 'preventive' measures (UN 2005).

The programme evaluation that IED undertakes, reflects a wide variety of issue areas. One such area is the chronic problem of sexual abuse and exploitation in peace operations. In its assessment of the PKOs, from the prism of SEA, the Inspection and Evaluation Division in its 2015 Evaluation report titled *Report of the Office of Internal Oversight Services on the evaluation of enforcement and remedial assistance efforts for sexual exploitation and abuse by the United Nations and related personnel in Peacekeeping Operations* notes:

> Despite continuing reductions in reported allegations that are partly explained by underreporting, effectiveness of enforcement against sexual exploitation and abuse is hindered by a complex architecture, prolonged delays, unknown and varying outcomes, and severely deficient victim assistance (OIOS 2015: 4).

The key notable points highlighted by the report are as follows. There has been a decline in the number of SEA allegations since 2010 though with a slight rise in 2013. Reports of abuse are highest in MONUSCO, United Nations Mission in Liberia (UNMIL), United Nations Stabilization Mission in Haiti (MINUSTAH) and United Nations Mission in Sudan (UNMIS). Although military contingents rank highest in terms of reported abuse yet the civilians outnumber them in terms of percentage i.e. civilians constitute 17 percent of all UN personnel but account for 33 percent of cases (OIOS 2015: 8-9). The report mentions that enforcement against the perpetrators is often featured with "multiple actors with distributed responsibilities, delays and confusion" (OIOS 2015: 10).

Given that immunities will stay, judicial conviction is not a possibility and peace keeping will continue, it is necessary to search for any other mechanism that is likely to act as a strong deterrent against SEA related crimes in PKOs. One of the senior officials of IOIS believes that the mechanism of 'naming and shaming' is one such factor that bears the potential to narrow – if not completely fill – the accountability gap. The office has started the practice of naming the countries whose troops or staff is found guilty of committing crimes against. Earlier, the UN was reluctant to name the countries owing to the fear that it may impact the supply of troops in the mission (Senior Official of OIOS 2017). At last, one can be hopeful and issue a different prognosis to rectify the ills of the peace operations in future. Nonetheless, expectation of a radical transformation and a miraculous change with zero deviant cases in the conduct of peace keepers would be unrealistic. The UN peacekeeping is a highly-bureaucratized practice and therefore any reform is going to be slow. It is a likely to be long struggle (Senior Official of OIOS 2017).

4.3 International Criminal Court and the Peacekeeping Missions

The evolution of international criminal responsibility started with ad-hoc mechanisms and culminated in the creation of the International Criminal Court (ICC). The traditional conception of international law allows individuals to hide behind the abstract entity or legal personality of the state, thus hindering the path to justice. Historical attempts made to establish institutions for international criminal prosecution show a constant tension between the causes of justice these attempts portray with the interests of political settlements. One of the earliest incidents of the

prosecution of an individual in connection with international crimes dates back to the year 1474 when Peter Von Hagenbach was tried before a court composed of 27 judges of the Holy Roman Empire of crimes his troops committed against civilians (Marquardt 1995: 76-77). In the present era, the idea of holding individuals accountable for international crimes is not just restricted to the leaders of states but has also found resonance in the practice of peacekeeping. In the light of the absence of an international court having authority to prosecute UN or its staff, calls have been made to bring the conduct of peacekeepers within the jurisdiction of ICC.

International law has shown greater sensitivity towards the cases of sexual abuse and exploitation. Increasingly, it has been noticed that crimes related to SEA are regarded as violation of customary international law (Meron 1983). Specifically, under Article 7 and 8, The Rome statue provides the most comprehensive list of offences relating to SEA like forced prostitution, rape, sexual slavery, forced pregnancy etc. In the context of the jurisdiction of the ICC, even a single act may constitute a war crime if sufficiently serious in character. The criteria of seriousness are mentioned as 'in particular when they are committed at a large scale and carried out as part of a policy'. The term 'in particular' seems to establish a threshold level but that does not necessarily mean all other cases can be outrightly rejected. Hence, theoretically, even a single serious sexual offence may constitute a war crime. The threshold requirement is a result of the compromise reached during the negotiations wherein some participants wanted ICC to be associated only with grave offences. The Appeals Chamber of ICC has attempted to clarify this by suggesting that requirement of large scale violation is an alternative to requirement of a part of a policy. Moreover, these requirements are not absolute in nature but qualified by the words 'in particular' (ICC 2008).

Article 8 of the Rome Statue states that for a crime to be regarded a war crime, it must be committed during the 'international armed conflict'. It is also not necessary that a crime should be committed by a 'combatant' for it to attain the status of a war crime; though not impossible but it would be relatively difficult to establish it in case of civilians. The ICTY in *Kunarac et al. Case (2001)* opined that a crime is a war crime if it is 'closely related' to the armed conflict. The term 'closely related' means that the crime is committed in the aftermath of conflict or committed because of the

vulnerable conditions created by the conflict. Hence, the court noted that the civilians were raped, abuse and killed due to the conditions arising out of armed conflict which created a culture of impunity among the perpetrators. Also, the Appeals Chamber affirmed the stance taken by the Trial Chamber that for a crime to be associated with armed conflict does not require that it should take place at the location of fighting. It can be temporally and geographically distant from the conflict zone. This is captured in the following paragraph of the verdict "the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting" (ICTY 2002).

The judgment in *Kunarac et al.* has important implications for the practice of peacekeeping. It implies that if peace keepers are involved in armed conflict in which IHL also apply, an act of sexual offense may amount to a war crime even if is geographically and temporally distant from the war zone. It should be noted that the armed conflict is not necessarily supposed to act like a causal factor but rather it must have played some role in pushing the accused to commence the crime (ICTY 2002). Moreover, it is not necessary that the crime must have served the military purpose of the combatant(s).

The *Kunarac Case* has important implications from the perspective of ICC and the SEA committed by the UN personnel. For instance, the vulnerability caused by the collapse of law and order in DRC was exploited by the peacekeepers when they decide to engage in sexual offences at such a large scale. The power asymmetry compounds this exploitation where the locals are found at the mercy of well armed uniformed powerful peacekeepers.These features render the conduct of peacekeepers associated with the conflict]. In this context, Cassese (2012) argues that any crime committed against a protected person is a breach of IHL and therefore constitutes a war crime. The ICTY Appeals Chamber in *Brdanin Case* (2007) opined that rapes committed by the troops during house searches constitute a war crime as they are committed during armed conflict and the troops also take advantage of their position (ICTY 2007).

Quite clearly, the idea of holding individuals accountable for international crimes is not just restricted to the leaders of states but can also be extended to cover personnel

involved in peacekeeping. In the light of the absence of any international court having authority to prosecute UN or its staff, calls have been made to bring the conduct of peacekeepers within the jurisdiction of ICC. Nonetheless, even if random or isolated instances of SEA are established as war crimes, the major problem arises because a number of troop contributing countries are not a party to the Rome Statue. For ICC to exercise jurisdiction over the UN forces, either the troop contributor country or the host country (where the crime) is committed must be a party to it or in case of non-state party, they must accept jurisdiction through declaration. However, any such attempt has raised issues of sovereignty and states like US have shown great unwillingness to subject their troops under a non-US judicial body.

As a result, the human rights violation by the peacekeepers has pitted the Security Council against the ICC. The latter was created in response to the gap in the international law wherein political leaders have shielded behind their states in carrying out politically motivated crimes. Backed by the precedents of ad-hoc arrangements like the Nuremburg Trial, International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Yugoslavia (ICTY), the ICC was established as a permanent institution having jurisdiction over individuals relating to grave crimes like genocide, crimes against humanity, war crimes etc. (Jain 2005).

The problem is compounded by the fact that peacekeepers are immune from prosecution which raises a serious question of denial of justice to the victims. The search for an authority that can fill this gap (at least for those who were highly optimistic about the ICC) ended after the formation of the ICC. The Security Council has passed several resolutions – Resolution No. 1422 (2002), 1487 (2003) and 1497 (2003) – that implicitly questioned the validity of the authority of ICC over the matters of peacekeepers abuse. Although the UN Charter grants wide discretion to the UNSC in deciding what constitutes threat to international peace and security, in case of the Resolutions No. 1422 and 1487, it appears the guiding motive was blatantly US driven and political in nature (Jain 2005).

Although UNSC Resolutions No. 1422 and 1487 were passed as a measure of great security importance, though its practice relevance is not clearly known. At most, it would have ended the UN Mission in Bosnia and Herzegovina. At American

insistence, these Resolutions curtailed the jurisdiction of the ICC and granted immunity to the UN troops that are non-parties to the conflict. Various scholars, legal experts and Coalition for the International Criminal Court (CICC) have doubted the legitimacy of these Resolutions purely because of the immense bearing they have on the functioning of the ICC (Stahn 2002: 86-88, CICC Website 2016).

A number of arguments have been put forth in support of the exclusive jurisdiction of the troop contributing states over the troops contributed by them for the purposes of peacekeeping. In most cases, peacekeepers are deployed to a situation where the institutions of justice are either paralyzed or do not exist at all. Troop contributors are reluctant to expose their troops to such a fragile system. Having exclusive jurisdiction, therefore, facilitates troop contribution to multilateral institutions like UN (Jain 2005: 245).

It is true that the Rome Statue contains a provision whereby the Security Council can request deferral of an investigation or prosecution for a renewable period of 12 months (ICC 1998). However, the purpose of such a provision is to serve the interest of the international community and thus it is to be invoked if investigation or prosecution constitutes threat to international peace and security. Moreover, the aforesaid provision which is made available under Article 16 of the Rome Statue is to be referred on case by case basis instead of seeking blanket concession as in the case of Resolution 1422 and 1487 (Stahn 2002: 91). The key problem area is that these Resolutions create a category – peacekeepers serving in UN missions – as an exempted entity from the overall jurisdiction of the ICC. It is also worth noting that these Resolutions constrain the ability of the ICC not after the crime is committed but even before the peacekeeper has engaged in an act of illegality. Such absoluteness ingrained in these Resolutions has been a matter of intense criticism. By this account, resolutions 1422 and 1487 do a great disservice by restricting the jurisdiction of an independent institution like the ICC that claims wide international respect (Jain 2005: 247).

4.4. Conduct and Discipline Unit

Broadly, the Department of Peacekeeping Operations (DPKO) and Department of Field Support (DFS) are responsible for enforcing the policies of the UN on matters of conduct and discipline in peace operations. More specifically, the USG-Field Support is responsible for the conduct and discipline of the peace keepers on the field. The Conduct and Discipline Unit (CDU) was established in 2007 replacing its predecessor, Conduct and Discipline Team, as a primary regulatory unit to manage conduct and discipline issues in peace operations. The Conduct and Discipline Team was formed as a part of reforms seeking to address the problem of SEA through steps like training, victim assistance etc. The Team was constituted within the DPKO in 2005 while its replacement – CDU – was installed under DFS in 2007 (CDU Website 2017).

To pursue the CDU mandate, the Conduct and Discipline Teams (CDT) exist in most peace operations or political missions. It is the duty of the CDU to ensure that the UN personnel uphold the principles and values of the UN. The UN personnel must respect local laws, customs or practices, treat local population with respect and courtesy and act impartially while recognizing the principle of diversity. The major task of the CDU is to issue guidelines concerning awareness programmes, pre-deployment training, preventive steps like curfews, compulsory uniforms outside barracks etc. It keeps a track of the SEA related allegations and liaises with the member states about the same. Another important task it undertakes is to advise the USG and Assistant Secretary General (ASG) for Field Support on the implementation of the three pronged strategy on SEA (enunciated by former Secretary General , Ban Ki Moon) – prevention, enforcement and remedial action(CDU Website 2017).

It is the duty of the Conduct and Discipline Teams to bridge the awareness gap of the local population concerning the procedures and different ways of reporting a compliant. The reporting of a misconduct can be done in various ways – email, locked complaint box, telephone hotline, in person to the CDT personnel on the mission. Reporting can also be done directly to CDU in New York or to the OIOS. It is important that before any matter related to misconduct in the context of peace keeping is considered, the term misconduct should be clearly defined. The UN rules define misconduct as:

> Failure to comply with obligations under the United Nations Charter, the Staff Regulations and Staff Rules, or other relevant administrative issuances or policy documents developed for specific categories of personnel. Misconduct can also result from failure to observe the standards of conduct expected of an international civil servant. All UN personnel have a duty to report any suspected misconduct they come across and in fact failure to report constitutes a misconduct in itself (CDU Website 2017).

To deal with the issues of conduct and discipline on the field, the CDU functions in collaboration with other offices of the UN. The CDU can forward the allegation related to SEA to OIOS so that the latter may initiate investigation on the matter. Similarly, the Office of Legal Affairs (OLA) pitches in when the reported misconduct brings in the issue of criminal accountability or privileges and immunities. The Office of Human Resources Management (OHRM) comes into the picture when the allegations have been proved and the disciplinary action has been recommended to the USG-DFS and this recommendation is forwarded by the USG-DFS to OHRM. The OHRM reviews the case and may carry out any disciplinary measures it finds appropriate (CDU Website 2017).

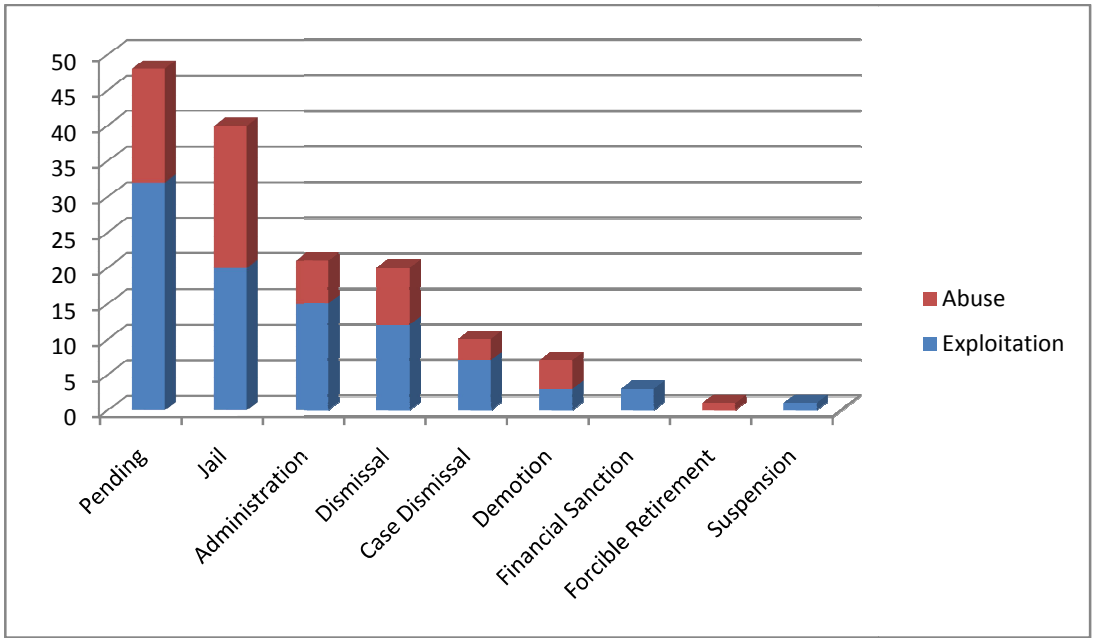
In its assessment of the effectiveness of the CDU in reducing the number of SEA related allegations, Neudorfer (2014) finds that the creation of CDU resulted in a sharp decline in SEA related cases during 2006 and 2007. With the case study of MONUSCO, the study suggests that CDU acted as a deterrence measure in MONUSCO and consequently a significant level of negative correlation between the presence of CDU and the number of SEA allegations was noticed. The study draws from the deterrence theory which bases the criminal behavior in the cost-benefit analysis he/she does before committing a crime. If the cost of committing a crime is substantially increased then it acts as deterrence towards the commission of the crime. In case of peace operations, the cost can be linked to the material advantage the peacekeepers attain after serving in the peace missions. In various studies, it has been found that one of the most important motives for the peace keepers is to bloat up the savings as the pay they receive as a peace keeper is substantially higher than what they receive nationally. In most states, a strong selection criterion is followed to choose soldiers who qualify for the international job of a peacekeeper. Thus, a lot is at

stake for a peacekeeper who is found guilty and not just sent back but barred from participation in future peace operations too.

Another way to increase the cost is to strengthen the probability of punishment. The peace keepers are aware that the UN cannot prosecute them for the crimes they commit during peace missions. The strongest punishment it could incur is repatriation or withholding of payment. In the calculation of a peacekeeper, the cost can be increased if member states cooperate in punishing the peace keeper if found guilty. However, in a large number of cases such political will is found missing and investigations have been seriously undermined due to problems in collecting evidence far away from the place of trial. A lot also depends upon the conditions of rule of law and the domestic laws of the country. For instance, in Pakistan, it has been found that about 70 percent of women in police custody face sexual or physical violence and the police officials have not faced any criminal prosecution. Soldiers here may find the cost of crime to be very low and are likely to act with impunity. Encouraging such states to create appropriate laws for such crimes and enforce them without fail would appear a right step towards creating credible deterrent (Neudorfer 2014).

For the CDU to act as a strong deterrent, it has to show to the peacekeepers its effectiveness. Beginning in late 2006, the CDU acted quickly and coordinated with the focal points or conduct and discipline team in various arenas like forming a common code of conduct, coordinating a referral system for victims, sharing training manuals etc. The results were noticeable. In comparison to 2006 where only 19 percent (13 out of 66) of the SEA allegations were substantiated, this percentage rose to 97 percent (115 out of 118) in 2017. The path-breaking rise in the substantiation of the allegations gave a very strong signal to the peace keepers about the possibility of punishment if found guilty. Thus, the study concludes that the creation of CDU increased the cost side of the analysis in the calculations of a potential criminal in the garb of a peace keeper and this acted as a deterrence which resulted in the fall in the SEA related crimes during that time (Neudorfer 2014).

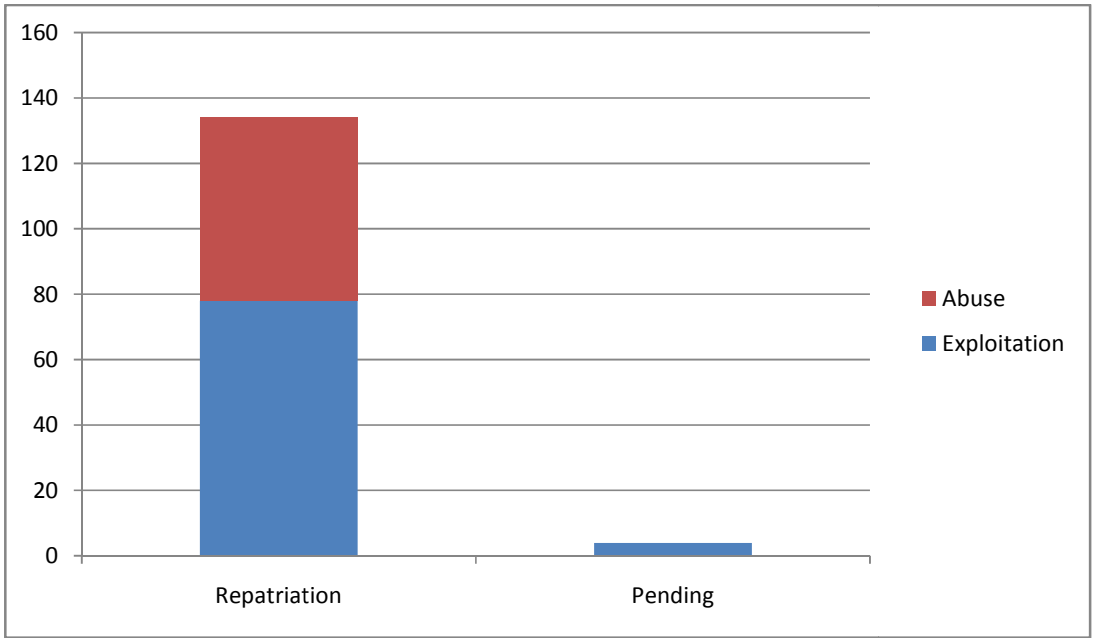
Fig. 5.3: Action taken by the national government (Uniformed Personnel)



Source: https://conduct.unmissions.org/sea-actions

In the above shown sub divided bar diagram, the X axis represents the kind of punitive measures taken by the member states and the Y axis denotes the number of cases (absolute numbers).

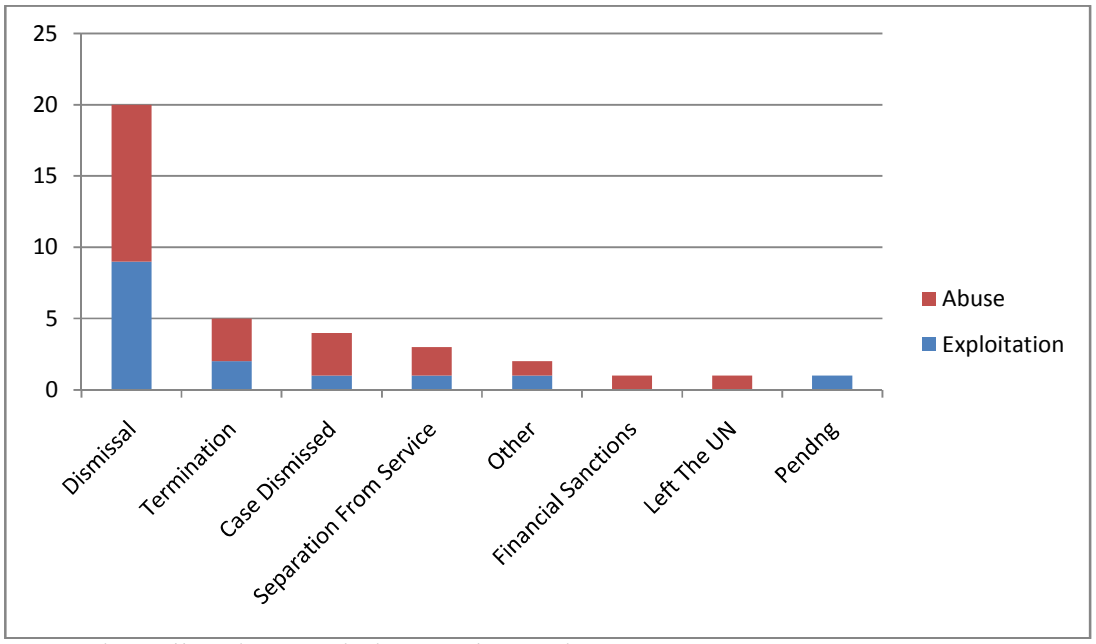
Fig. 5.4: Action taken by the United Nations (Uniformed Personnel)



Source: https://conduct.unmissions.org/sea-actions

In the above shown sub divided bar diagram, the X axis represents the kind of punitive measures taken by the UN and the Y axis denotes the number of cases (absolute numbers). Fig 5.2 and 5.3 reveals that the real problem lie at state level. As fig. 5.3 shows, UN action which however restricted to repatriation (as authority to prosecute lies with the troop contributing country) is taken in most of the cases (78 in case of exploitation and 56in case of abuse). Only 4 cases are pending with UN pertaining to the category of exploitation. On the other hand, large number of cases are pending with states (32 in cases of exploitation and 16 in case of abuse). Though this is followed by 40 cases of jail — 20 each in the category of exploitation and abuse.

Fig. 5.5: Action taken by the United Nations (Civilians)



Source: https://conduct.unmissions.org/sea-actions

In the above shown sub divided bar diagram, the X axis represents the kind of punitive measures taken by the UN and the Y axis denotes the number of cases (absolute numbers). In case of civilian, UN has acted with dismissals occupying the number one spot among the range of punitive measures. Overall, the real mismatch lie in the kind of crimes committed and the potency of punitive measures. This has germinated a culture of impunity among the peace keepers (both uniformed and civilians).

4.5Some Recent Initiatives by UN Secretary General

On 18 September 2017, the current Secretary General called together a meeting at the Chamber in Trusteeship Council to highlight the serious problem of SEAs in peace operations. The meeting was regarded asinternational commitment of highest political character to eliminate the problem of SEA's from the peace operations.The current UN Secretary general, Antonia Guterres, has vehemently argued that victim's assistance ought to be the bedrock of UN's response to the crimes related to SEAs. To execute the idea, *Trust Fund*was created in 2016 in DRC which is offering services like community oriented complaint mechanism. In Central African Republic, specialized services like medical, legal, psychosocial etc. will be instituted. In Liberia, the fund shall provide vocational training and education to the fearful and depressed victims. At present, the Fund has received voluntary financial support from 19 countries[50] and amounts to $2 million. Apart from this, funds, around $317000, are also available in the form of money withheld by the UN as a disciplinary action of those peace keepers against whom the complaints have been substantiated (UN Website 2018).

To assist the traumatized and stigmatized victims, a *Victims' Rights Advocate*, Ms. Jane Connors, is appointed by UN Secretary General on 23 August 2017. Her job is to carry out an integrated and strategic action to facilitate the delivery of justice to victims. The modus operandi is grounded on establishing partnerships with civil society actors, UN bodies etc. and seek execution of local laws to deliver remedy. A *Voluntary Compact* is pronounced by Secretary General to be agreed with those member states whose nationals are working in UN in different capacities. The compact is meant to showcase a joint commitment and mutual accountability towards cases of SEAs. 72-member state have already signed the compact while 19 others have shown commitment towards it. In a similar vein, a *Circle of Leadership* initiative is taken by current Secretary General in his personal capacity in which he invited head of government/state. These political leaders have agreed to get personally involved in

[50]Bhutan, Cyprus, India, Japan, Norway, Albania, Australia, Bangladesh, Canada, Finland, Italy, Luxembourg, Nigeria, Pakistan, Portugal, Slovakia, Sri Lanka, Switzerland and Uganda.

cases of SEAs and have shown solidarity with victims. As on 22 May 2018, total of 60 states have acceded to this commitment including India who is among the top 20 troop contributing/police contributing countries (UN Website 2018).

These are welcome steps, however due their relative newness, it is not possible to comment on their effectiveness. Only time shall suggest their role in curbing cases of SEAs and delivering justice to already affected victims. Undoubtedly, the SEAs continue to be the most profound negative impact of peace operations. However, peace operations are also criticized for factors other than these. The next section captures the broad critical interpretations of these missions.

5. Criticism of Peacekeeping Operations

The end of the Cold War reinvigorated enthusiasm about the idealistic form of the new world order wherein the respect for liberal ideals will be protected by a Cold War free UNSC. The confidence in the UN was also restored due to the nature of problems faced since 1991 like climate change, pandemics, terrorism, human rights violations (due to the increased number of failed states) etc. that stipulate coordinated global efforts and who else can serve this role better than the UN. In the changing context, a need was felt to explore new paradigms to conceptualize a world order that appeared substantially different from the previous era.

The theory of global governance is a response to the inability of the conventional IR theories to explain changes witnessed since the early 1990s. The theory accommodates the phenomenon concerning the spread of liberal norms of good governance, democratization, respects for human rights etc. Various schools of thought have emerged relating to the idea of global governance and each school offers a different interpretation of this process. The mainstream proponents of global governance emphasize the role of UN as a global coordinating agency wherein the work of managing the globe is divided among diverse institutions that operate in the global landscape (Weiss and Gordenker 1998, Thakur and Ruggie 2010). Other scholars take note of the transformation in the re-allocation of authority and power within the international system. This approach focuses on the phenomenon of

diffusion of power across actors like states, INGOs, TNCs, Civil Society etc. in the international realm (Rosenau 1995, Murphy 2000, Dingwerth and Pattberg 2006).

One of the mechanisms for spreading the western backed liberal norms of global governance is through the UN peacekeeping missions. These missions are based on the prevailing norms that prioritize certain policies over others. According to Bellamy (2004), the PKOs are a gateway to comprehend the nature of the current order and therefore unlike conventional studies that elaborate the functions or capabilities of such missions, deeper understanding will prevail by dipping deep into the normative and political context within which they function. Similarly, Cousens and Kumar (2001) emphasize the need to examine the politics that shape the motivation and implementation of these missions.

The concept of global governance is laced with the liberal precepts of good governance, democratization and respect for human rights. The mandates of PKOs are also derived from the same liberal norms which is visible in the aim of post conflict reconstruction efforts (Johnson 2005: 176). Critical theory challenges the liberal premise that peace follows the installation of liberal democratic capitalism. From this perspective, the entire paraphernalia of PKOs is vulnerable to being perceived as a tool of neo-imperialism. The fear is not completely misguided given the power asymmetries among states which would means that only the strong could intervene against the weak on moral grounds.

One of the strongest allegations against the practice of PKOs or the norm of R2P is that it is selectively adopted in situations where the strategic interests of the powerful states are at stake. For instance, the UN intervention in Yugoslavia (1992) was backed with a stronger political will and resource allocation than Somalia despite the fact that humanitarian crisis were reported in both cases. The legitimacy of PKOs is enhanced if such measures are undertaken without discrimination. For instance, the intervention to liberate Kuwait in 1991 failed to set a precedent wherein similar actions are taken against Israel to address human rights concerns in Palestine. Thus, the system of collective security is dependent upon the will or leadership of the hegemon (Thakur 1994: 392).

The post-Cold War peace operations cover the wider mandate of nation building and stipulate adequate resources, which in turn depends upon strong political will. One of the most critical aspects of peacekeeping is the 'need to follow up'. Intervention entails huge responsibility. Given that most peace operations are sanctioned under Chapter VII, these interventions relate to the notion of *'Jus Post Bellum'*, something which was once relevant only for states (Menon 2017). A successful peace building operation requires political will as strong as the one witnessed after the end of Second World War to reconstruct Germany and Japan. Also, an effective and legitimate process of attaining sustainable peace would entail involvement of locals (Personal Interview Doyle 2017).

The absence of political will was the most dominant factor that made United Nations Assistance Mission for Rwanda (UNAMIR) a complete failure. The Arusha deal between Hutus and Tutsis was fragile. The reluctance of participation was noticeable as UNAMIR had just 240 troops. Belgium withdrew after losing 10 soldiers. Clinton already faced a lot of wrath for the killings of US troops in Somalia. There was absolutely no plan for Rwanda (Menon 2017). A well planned, principled, adequately resourced and realistic intervention would serve the purpose of peace keeping much better than ad-hoc, half-hearted moves.

The political will of states is influenced by a number of variables. At various times, domestic politics has a noticeable influence on foreign policy of states. It has impacted the commitment of states towards peace keeping as well. Liberal democracies are more likely to face these domestic compulsions because they are democracies. For instance, during the Kosovo conflict where 90% of the Kosovo Force (KFOR) constituted US troops, Clinton was inclined towards having 'zero casualty operations' due to domestic public opinion (Menon 2017).

Some like Whalan find PKOs deeply problematic due to either absence or presence of a flawed accountability system. According to Whalan, peace operations showcase a dual dimension as they are sanctioned at the international level and operate at the local level. This feature justifies a case for local accountability as hitherto accountability of PKOs was visible only at the international level. Such a gap can be understood within the delegatory and participatory models of accountability. In case

of the former, an agent's conduct is held accountable by those who delegate powers to it while in the latter case; an agent's accountability is sought by those who are impacted by the action of the concerned agent (Whalan 2016).

The UN PKOs reflect a strong sense of delegatory accountability, which operates as follows. A UNSC Resolution establishes a peacekeeping mission that defines its overall mandate – goal, resources, means of conduct, time frame, composition etc. The Secretary General is in charge of its overall management who in turn delegates tasks to various authorities below him. The Secretary General is expected to report on the ground level conditions encompassing dimensions like security condition, political dynamics, state of finance, conduct of peace keepers etc. Based on this reporting, the mandate of the mission is modified (Whalan 2013: 205).

The PKOs traditionally rely on three principles – consent of the host state, non-use of force (except self-defense) and impartiality. The element of consent can be perceived as the bedrock of local accountability. It can operate as a means of power through which peacekeepers may be evaluated and in case they fail to meet the required standards, consent may be revoked. Conceptually it sounds effective but in practice, consent hardly represents the preferences of the host populations. In a number of cases, consent is coerced while in other cases state is weak, non-existent or itself a reason for insecurity. Given these conditions, consent appears to be a very weak mechanism of holding peacekeepers accountable. Possibly, one way of attaining local accountability is through instituting Ombudsperson with a design that incorporates local inputs in setting standards, conducting evaluation, determining sanctions (Whalan 2016).

In the absence of recognition to the idea of local accountability, injustices during peace operations are inevitable. In 2011, Haiti citizens and human rights organizations made a case against the UN and specifically the United Nations Stabilization Mission in Haiti (MINUSTAH) for gross negligence that caused an introduction of Cholera in Haiti through Nepalese personnel. However, the UN rejected the claims for reparations under Section 29 (Settlement of Disputes) of the 1946 Convention on Privileges and Immunities.

The mechanism of UN Ombudsperson was created in case of the United Nations Mission in Kosovo (UNMIK) and United Nations Transitional Administration in East Timor (UNTAET). These offices provided a platform of grievance redressal to the local populace in a variety of cases like property damage, physical abuse, unfair employment etc. The Ombudsperson in Kosovo also had the power to investigate. Nonetheless, Ombudsperson in both cases turned out to be far weaker than a genuine accountability mechanism. In Kosovo, the office fell under the jurisdiction of SRSG and UNMIK, both of which were the main accused in the cases of HR violations (Chesterman 2004: 149-150, Whalan 2016).

A silver lining is the recognition granted by the Humanitarian Accountability Partnership (HAP) to the HAP Standard in Accountability and Quality Management. Its essence is contained in the following excerpt:

> Organizations that assist or act on behalf of people affected by conflict and crisis exercise significant power in their work to save lives and reduce suffering. In contrast, crisis-affected people have no formal control, and often little influence, over these organizations. As a result, it is difficult for those people to hold organizations to account for actions taken on their behalf" (Geneva, AP International 2001: 1).

The conduct of peace operations has undergone scrutiny at the theoretical level. Critical theorists emphasize the ideological underpinnings of global governance and the highly unequal (dis)advantages it produces for people across different sections. These theorists criticized the tendency of the mainstream approaches in overlooking the issue of power and interest while conceptualizing the process of global governance (Cox 1999, Murphy 2000, Barnett and Duvall 2005). Critics like Soederberg (2006), Duffield (2001), Gaan (2006) regard global governance as a hegemonic project in which principles of liberalism are advanced at the behest of the powerful actors.

In the opinion of Mary Kaldor, the practice of peacekeeping must entail the element of cosmopolitan law enforcement. At the heart of this perspective lies the idea of bringing local voices to the mainstream through their participation in planning as well as execution of PKOs. Another important concern raised by the critical theorists is the large amount spent on military aspect of the peacekeeping. Instead, they argue for the

greater share of civilian goods especially medicines and other basic needs of survival. It comes as no surprise that the critical literature emphasize a strong connection between development, security and governance (Bellamy and Williams 2004: 202).

Critical theory touches upon the notion of accountability in the international administrative missions like East Timor, Bosnia and Kosovo. During these missions, the UN acted with decrees and often taking arbitrary decisions. It is not that these missions are unaccountable but they are accountable to the bodies that appoint them for e.g. UNSC, member states, Secretary General etc. A reformist agenda must entail a component of accountability towards the local populace. The critical theory led reformist agenda also seeks actors beyond states and military. State centrism may run the risk of ignoring key players especially NGOs. Such collaboration is visible occasionally like in 2002 Britain instructed its Army and circulated official documents on how to collaborate with NGOs during the mission in Sierra Leone (Bellamy and Williams 2004: 204).

Critical theory digs deeper than mainstream theory by not assuming the problem as a given. The problem of creating stability in the troubled areas cannot be solved by imposing order from outside, the task undertaken by peacekeepers. The PKOs are part of the problem because they blindly aim to implement one-size-fits-all formula in all the cases overlooking the context and local content. In the name of peacekeeping, such armed personnel sustain a world order that serves the interest of rich and powerful states. The problem-solving approach of the PKOs operates within the structure of global political economy by resolving the problems of different dysfunctional components as and when they arise. The said structure is based on the premise of the ideology of liberal imperialism (Pugh 2004).

Critics point at the convergence of thought on peacekeeping between the liberals who are provoked by the tyranny of warlords and the realists who are concerned about maintaining the global power hierarchy. The peacekeepers are portrayed as agents of peace in “rogue” areas that are ruled by “psychopaths” (Mackinlay 2002). Thus, an important space of inquiry is exploring the nature of the world order within which PKOs operate. The overarching aim of deconstructing world order is to expose the

injustices and inequalities embedded in the current system and to seek structural transformation of societies so that they can attain emancipation.

The post-cold war solidarist approach is still at a distance from the cosmopolitan discourse as the former continues to rely upon states and in fact recognizes states as effective units of the benign campaign. As and when states fail to discharge their duty, they are subject to solidarist efforts of intervention. In contrast to such paradigms, the critical theory looks for alternatives that are likely to result in an equitable and just order. Such order is to be based on active civil society which would operate via voluntary organizations. An indispensable feature of such organizations would be the realization of their social responsibility and this order shall entail public regulation of foreign corporations (Pugh 2004: 52).

The role of peace operations would substantially minimize in such an order as the transformation is sought to remove injustices. Nonetheless, it would not be difficult to predict that opposition to such transformed emancipated era is inevitable and therefore the use of force would not completely disappear. The peace operations also remain relevant as the process of reformulating new structures of power would require swift operations that remain flexible in their approach. The peacekeepers in that scenario would not represent highly militaristic element but rather accommodate expert teams like those witnessed in disaster management with an aim to provide civilian protection, economic assistance and preventive action. The recruits of the military service would be individuals predisposed to universal or cosmopolitan values and must be devoid of nationalistic or patriotic feelings. The overall framework will be free of state centrism and would operate under the more transparent, equitable and accountable institutional structures. The units of such pluralistic, multi-civilizational system would consist of world cities or mini states (Kinloch 2004).

6. Beyond UNPKOs: Privatized Peace Operations and Regional Organizations

Privatized Peace operations

The peacekeeping operations are not just the prerogative of the UN. The UN Charter under Chapter VIII mandates UN to adopt measures for maintaining international peace and security in collaboration with regional organizations. Consequently,

number of regional organizations have come into play as a local response to the regional crisis. Moreover, lately, an experiment has been conducted in the field of peace operations in which the services have been provided by the private bodies.

6.1 Privatized Peace Operations

The use of private military on the international plane is not an alien thought. For instance, Dutch East India Company employed military experts to provide it security and thus it represents an example of a private body having the right to use force. Such instances mirror a fact that in practice states do not really possess the sole right to use legitimate force. However, in the absence of other alternatives, the status of Private Military and Security Company (PMSCs) appear more like those of mercenaries and the latter are often associated with criminal activities. This impacts the image of PMSCs. Moreover, while PMSCs operate under conditions of lawlessness, there runs a risk that their activities may cause human rights violations. Henceforth, the question of accountability arises and the controversial issue of attribution of responsibility needs to be addressed (Cockayne 2006).

The Post-Cold War era has witnessed the involvement of Private Military and Security Contractors (PMSCs) in UN peace keeping efforts i.e. Iraq and Afghanistan (Isenberg 2007: 82-83). The selling point of PMSCs is their on-time availability and efficiency given the delays and deadlocks visible in arrangements wherein UN relies on contribution by states. Observers like Lehnart (2009: 204) argue that outsourcing by UN is not really a novel phenomenon as after the stillborn concept of UN standing army, it has outsourced the task of troop contribution to states. However, outsourcing to non-governmental actors is a relatively new development and brings with itself its own political, legal and implementation problems.

Angola was one of the very first examples wherein the PMSCs were employed to secure oil depots as well as diamond mines. The operation was praised as quick, cost effective and carrying minimum loss of civilian lives. However, it lacked the element of impartiality and appeared more like an event in which mercenaries were hired for a specific task. During the Sierra Leone operation in 1995, Executive Outcomes and Sandline as two PMSCs were employed by the government. The former could repel rebels away from the diamond mines and capital in just 11 days. Unlike Angola, the

Executive Outcomes also offered the services to conduct elections and resettlement of displaced, both of which are a hallmark of PKOs. In 1997, Executive Outcomes was replaced bySandline who played a major role in removing military dictatorship by restoring the elected President to power (Buchan et al 2011: 288-289).

The PKOs by private sector have played a role in the Yugoslavian conflict. It has performed the following functions during the mission. First, the organization, Military Professional Resources Incorporated (MPRI) supported the American Army by training the Bosnians and Croats.MPRI was employed by US to unleash reforms in security sector which helped in executing the Dayton Accords. Second, the privatized peace operations also provide logistical and intelligence inputs to the peacekeepers for e.g. DSL support in East Timor. Such support is less controversial since the private agencies are just providing a background support instead of being actively involved on the field. Third, such private actors have also been employed by various INGOs and IOs to provide security to its officials and staff. Various stakeholders in the peacekeeping missions like ICRC, UNICEF, World Food Programme (WFP) etc. have used private security as mobile guards. Fourth, the final role played by the private peace keepers is in the form of combatants (William and Bellamy 2004: 190-193). Elaborating this role, Peter Singer states-

> "When a genocide or humanitarian crisis occurs and no state is willing to step forward to send its own troops, the intervention itself might be turned over to private firms. Upon their hire (by the UN, or anyone else willing to pay), the firm would deploy to a new area, defeat any local opposition, set up infrastructures for protecting and supporting refugees, and then, once the situation was stabilized, potentially hand over control to regular troops" (Singer 2003).

Private parties are increasingly viewed as an effective logistical support system employed at UN i.e. UNASMIL in Sierra Leone as well as regional level i.e. ECOWAS. These private players possess the capability to offer different services for different problems. Private security is provided to UN officials in Iraq. In Afghanistan, these forces were used to conduct election. Similarly, NATO utilised them in Kosovo to ensure aerial support.

Buchan et al. (2011) regards the act of outsourcing peace keeping jobs to private sector as externalization. The PMSCs are the profit-making companies that provide security services in peace keeping tasks. The services offered by them can be broadly classified into three categories- security and policing, logistical support, frontline troops. The major argument in favour of PMSCs is that it a cost effective and professional substitute in times when western states are showing severe lack of enthusiasm in contributing troops (Patterson 2008).

Cockayne (2006: 7) terms this function as 'Third Party Security'. Such employment of private actors reflects ad-hocism with a clear absence of any effective accountability mechanisms. The growing involvement of PMSCs in peace operations raises both economic and legal questions. The former looks at this issue solely from the cost- benefit analysis while the latter poses some serious questions of their place in the domain of international law.

From the economic perspective, it can be argued that given the UN history of cost ineffective operations, private sector is a desirable option. The UN operations are generally accused of poor management, delay in troop deployment and ambitious mandates. Taking note of such inefficiencies, the Brahimi Report recommended- better intelligence gathering, clearer mandates and better integration of the command structure (Buchan et al 2011: 288).

Estimates suggest that private agencies can be cost effective in discharging the functions of peacekeeping for e.g. Executive Operation estimated that it could have undertaken the Rwandan operation for six months with a cost of 1520 million dollars. It was found to be far less than the actual cost that UN incurred- UN- $3 million a day. Also, market forces will drive out the inefficient companies which would contribute towards professionalization of peace missions (Buchan et al 2011: 288, William and Bellamy 2004: 190-193).

Sceptics argue that PMSCs are driven by profit maximization and given a situation, they may have an incentive to prolong the conflict. Largely, the PMSCs have remained untested on the ground level and much of such scepticism is not grounded

on facts. As a counter argument, it is claimed that market forces will professionalize the PMSCs as the most efficient firms will be able to fetch the contracts. This will bolster accountability of PMSCs in the long run (Cockayne 2007).

Advocates of privatized operations also claim that those peace operations by private agencies convincingly overcome the problem of political will when states are reluctant to send their forces on the ground. Rwandan genocide is viewed as the most horrifying example of the lack of political will among the members of UN and thus the need for PMSCs was most strongly felt in this case. In the context of Rwanda, it is argued that those situations where key strategic interests are missing, western states are unwillingness to take the lead specifically in the domain of troop contribution (Cockyane 2007).

Given the power peace keepers enjoy during PKOs and the growing accusations on UN peace keepers of recurring misconduct, questions of the regulation of the conduct of PMSCs is likely to be raised vociferously. The attribution of responsibility on PMSCs for the unlawful acts faces the complexity as the private companies do not enjoy the status of legal personality under international law. The practice of attribution of responsibility of UN peacekeeping operations seems to be of relevance to settle this issue in the context of PMSCs. In case of peace operations, two important principles are enunciated to resolve the matter of attribution of responsibility- 'Effective Control' and 'Overall Authority'. Broadly, the determining factor is the degree of command, authority and control exercised by the UN over a mission (Cockayne 2006).

6.2 Regional Initiatives

According to Diehl (2000), the kind of organizing agency that sanctions and executes a peacekeeping mission is a key factor influencing its outcome. Missions may vary from unilateral interventions like French forces in Rwanda to collective actions undertaken by universal body like UN. In some cases, regional organizations like Organization of African Unity (OAU), ECOWAS etc. have also taken the lead in planning and implementing a mission. There are also instances wherein ad-hoc groups

like 'coalition of the willing' or military alliance like NATO have been the bastions of the mission. The PKOs led by collective agencies accords legitimacy to the sensitive matter of breach of sovereignty. The collective approach allows states to come together and reach consensus over rules of actions on the ground and on the issue of logistical requirements. It also facilitates action in case states are reluctant to act independently.

On various occasions when UN authorizations has not come by, unauthorized operations have also been conducted under the garb of moral or political legitimacy i.e. Kosovo in 1999, Iraq in 2003. The statesmen have not refrained from explicitly linking PKOs as wars for justice, morals and humanitarian impulse. For instance, Tony Blair, former PM of Britain declared intervention in Kosovo as a battle for values to prevent occurrences of mass violations of human rights by authoritarian regimes. Such connotation of humanitarianism or morals to global governance is used as a means to justify use of force in international affairs. In case of NATO intervention in Kosovo, it was clear strategy to deal with the veto by Russia and China. Hence, in a post cold war period, there has been a strategized construction of intervention not on the grounds of order maintenance but achievement of justice (Pugh 2004: 48-49).

In the light of occasional paralysis caused by the UNSC members as in Somalian operation which witnessed shortage of peacekeepers (Secretary General asked for 34000 troops while only 7000 were provided by the states), a new approach known as 'New York orthodoxy' has emerged. This approach seeks to divide the peacekeeping task between the powerful coalition of states or regional organizations and the UN. This task sharing is said to be based on common normative principles. However, in reality it showcases an arrangement in which the hard enforcement tasks being undertaken by powerful hegemon(s) while the UN is relegated to undertake soft roles.

In recent years, the peacekeeping efforts have been increasingly undertaken by regional organizations or by the 'coalition of the willing'. In accordance with this trend, consultations between the regional organizations and UN as envisaged under Chapter VIII of the UN Charter have also witnessed depth. Nonetheless, the role of regional organizations in maintaining international peace and security suffers from the

absence of proper theoretical framework within they may operate. Secondly, the practices of regional organizations have also been such that these bodies first undertake the operation and then they seek UN blessings i.e. ECOWAS in Cote d'Ivoire. Instead, a proper legitimate approach would demand prior permission from UN. Third, the idea of regional PKOs may invoke apprehensions concerning the role of the regional hegemon. Indeed, the formative years of the UN saw debate surrounding the regional measures for maintaining international security yet they were dumped due to the fears of the regional spheres of influence. Fourth, peacekeeping in troubled areas is far from being a simple task. Even full-fledged organization like UN finds it difficult to solve the multifaceted issue like peacekeeping. This problem was witnessed during the ECOWAS led mission in Cote d'Ivoire wherein despite assistance from powerful states like France, US, Britain etc. the mission lacked necessary funds. Fifth, certain regional organizations like League of Arab States have complained that UN discriminates among the regional bodies. Finally, it has been noticed that regional organizations are more reliant on militaristic techniques while the problem that most crisis reflect are related to terrorism which certainly is a political problem and its resolution demands much more than mere physical force (William and Bellamy 2004).

To sum up, the UNSC authorised peace operations have undergone transformation from being traditional (consent based, non-use of force, inter-state, and impartial) to modern (application of use of force, warlike situations, intra-state, broad mandate). Contrary to the expectations that end of the Cold War germinated about the prospects of messiah like role of UN, the peace operations shocking got involved in SEA related offences at gross level. The unacceptable criminal behaviour of peace keepers pushed UN to set up institutions of accountability. The collective pandemonium caused by different entities- media, civil society actors, INGOs etc.- triggered both preventive and remedial UN response. However, the UN is conscious that preventive measures are the best response to this crisis given the state's unwillingness in punishing their own nationals. Although there are cases where states have acted swiftly to carry out prosecution but it remains a very rare exception. Despite all UN efforts and strong resolve of all Secretary Generals (since the time this issue has been raised) in eliminating this scourge from peace operations, the crimes have persisted. Pessimism sets in as soon as one observes that within first quarter of 2018, the UN has received

54 cases related to SEAs. Needless to mention that many go unreported. At this juncture, it seems that the immunity cover accorded on staff members needs to be reconsidered seriously. After all, the raison d etres of IO immunities is that it facilitates IO functioning but given the nature of crimes being committed by peace personnel, UN is turning out to be profoundly dysfunctional. In case of offences as grave as SEA's, the only parameter to evaluate any accountability mechanism is its effect on the ground. Given the persistence of these offences and adaptation of the culture of impunity, it would be no exaggeration to claim that the accountability mechanisms to address peacekeepers crimes have by and large failed.

CHAPTER 6
Conclusion

The time-period covered in this study, 1999-2014, captures the fault lines dividing the societies and civilizations (if one is to borrow Samuel Huntington's thesis). The eve of 21st century laid down the foundation for the upcoming century by elevating the issue of terrorism as the most complicated security issue facing the world community today. Thus, the 9/11 was a culmination of seeds already sown in the 1990s i.e. 1998 bombing of US embassy in East Africa. The UNSC took note and responded with 1267 sanctions committee in 1999. The concluding years of 20th century also started to highlight the grave injustices (in the form of SEAs) embedded in the UNSC practices like peace operations. Since then IO accountability has become a matter of utmost significance. Given the scope and range of its activities, the UNSC found itself under excessive perform pressure as well as under crisis of legitimacy.

The post-cold war transformations in the international arena happens to be tectonic having nearly fundamental effects on ideas and practices of both policy making and academic world. The multiplicity of influential actors—states, IOs, INGOs, MNCs, advocacy groups etc.—and different ways of their functioning has qualitatively transformed the nature of global affairs. This transformation although being a gradual phenomenon of decades suddenly sprinted in the aftermath of Cold War. Consequently, various theoretical frameworks like global governance were manufactured to systematically explain developments that traditional theories like realism could not convincingly do.

One of the most prominent (arguably after states) entities that perplexed the international arena are the IOs, however not because of the novelty of their existence but due to the lately showcased activism. Importantly, this activism is of a different kind in comparison to the nature of activities that IOs have traditionally been doing. Unlike the beginning days, when IOs were regarded apolitical entities due to largely technical functions they were mandated to pursue, the current scenario point rather the opposite. It is getting increasingly difficult to find IOs of purely technical nature as

the imprints of global politics can be traced in the decision-making structures and operational activities of IOs.

It should not come as a surprise that being responsible for a task like maintaining international peace and security, the UN particularly UNSC is susceptible to be dragged into dynamics of international politics. It can be reiterated by the observation that almost all its means of maintaining international peace and security — collective security, peace operations, sanctions including targeted sanctions etc.— have been a matter of immense controversy for variety of reasons. This trend has become extremely illuminating since the end of Cold War.

The effect of the end of Cold War on the UN is significant. On one hand, it revitalized UNSC in the light of almost undisputed American power while on the other hand it filled its agenda with large number of instances of state collapse or intra state conflicts, also known by the term- 'failed states'. Freed from the Cold War deadlock, UNSC embraced the different character of challenges that came its way and used sanctions especially targeted sanctions and peace operations.

Another important observation of this phase is the quantitative jump in the variables that qualify as factors causing 'threat to peace or breach of peace'. Traditionally, UNSC has largely viewed aggressive behaviour of a state as a sole factor that may trigger invocation of measures under Article 41and 42. However, the phenomenon of failed states impelled reconsideration of this premise and therefore factors other than state aggression like HR abuse, terrorism, pursuance of nuclear weapons programme etc. are increasingly viewed as factors that may jeopardise international peace and security. The cumulative effect is the increase in the number of cases when UNSC takes decisions or acts.

The UNSC's activism is not a random or confounding phenomenon but is underpinned by the theoretical developments pertaining to the field of IR. At least, three conceptual innovations played a leading role in influencing UNSC's post-Cold War approach towards unstable regions thus making it more active. First, the conventional notion of security metamorphosed into a much broader and humane version, namely human security. Secondly, the R2P was to a significant extent

succeeded in addressing the apprehensions associated with humanitarian intervention. As a result, not only being a hit in western world, it was able to garner support from developing-emerging world too. Third, although R2P as a matter of principle managed to attain wide support (no way universal, neither among states nor among academic circles) yet its practical application raised many eyebrows. One of the conceptual response to such dilemmas was the Brazilian proposal in the form of RwP. These ideational or normative breakthroughs has gained significant ground in today's global affairs. Indeed, it is almost impossible to think of any measure of maintaining international peace and security that do not pay due diligence to HR centric concepts.

The mix of two crucial developments proved decisive in determining the course of global affairs since the end of Cold War. First, the conceptual reformulations in favour of HR norms and second, the UNSC's resolve to actively engage with new problems (intra-states). Given these developments, it was anticipated that the stage is set for the commencement of unique set of HR oriented decisions and actions in IR. These developments brought the UNSC in direct interaction with HR norms. Since 1990s, the UNSC proclaimed that HR violations in a state can no longer be characterised as a domestic issue but rather has international implications i.e. refugee outflow in neighbouring states. However, apart from this instrumental view of conceiving HR protection as a 'means' to achieve another 'end'— international peace and security, UNSC's practice is also influenced by noticeable degree of conceptual evolution in favour of HR.

To materialise the ambitious goal of worldwide protection of HR, the UNSC identified targeted sanctions and peace operations as the best devices in its toolkit. Paradoxically, these tools that were meant to protect and promote HR dragged UN into a plethora of relentless controversies. The source of such controversies is two-fold—first, the denial of fair trial rights that came forth as an unfortunate offshoot of targeted sanctions; and second are the criminal activities of peace keepers especially countless cases of SEAs.

Enough evidence exist that supports the proposition that IOs like states can do considerable harm. Events especially of past few decades have broken the myth that IOs are benign creatures that can allowed to function without proper accountability

systems. Unsurprisingly, the mismatch between the scope of substantially enhanced IO power and the absence of accountability mechanisms impelled inquires to address potentially dangerous accountability gap. While the intellectual process, in scholarly as well as policy making circles, was underway, the dangers of the absence of IO accountability structures already materialised. Soon, the UN found itself in a humiliated situation where on one hand its decisions and actions violating HRs animated a series of powerful criticisms while on the other hand its corrective measures failed miserably. The central point of the criticism rooted in the failure of UN to meets its obligation to prevent damages and render justice to third parties.

One of the earliest questions— that grappled intellectuals in the wake of HR violations by UNSC authorized targeted sanctions and peace operations— is accountability to whom? It was not that IOs have conventionally been unaccountable entities without any element of supervision, control, information sharing, answerability etc. Rather, IOs have been held accountable by its member states, though there is a variation in terms of the degree of control exercised by different members which is usually skewed in favour of powerful members. However, the UNSC's post-cold war activities made accountability a more relevant concept from the vantage point of third parties- especially organizations and individuals. Such state of affairs raised the necessity of having appropriate accountability mechanisms for those who do not exercise formal authority over IOs but bear the effects of its decisions and actions.

Soon, it was realised that any pragmatic formulations of IO accountability that would operate at international level are likely to fundamentally different from the domestic variants. Thus, the logic of domestic analogy has serious shortcomings. Any conceptualization of accountability at international level preconditions dropping domestic analogy where effective mechanisms like elections, checks and balances system etc. are instrumental in delivering desired accountability (though this not to naively suggest that accountability mechanisms within a country are flawless). One of the seminal contributions focusing on IO's external accountability is the pluralistic model developed by Keohane that rests on eight accountability mechanisms. In legal parlance, the concept of external accountability is known by the 'responsibility to third parties emanating from international wrongful acts or omissions'.

Nonetheless, the idea of concretizing external accountability faces challenge given the traditional provisions of international law. The legal provision of immunities and privileges of IOs and its personnel have sustained the pressures created by the developments in the field of HR. Traditional norms pertaining to sovereignty continues to overshow the demand for dilution of IO immunities as the states are not at ease with the possibility where their nationals are tried outside their jurisdiction. Although UN Secretariat, specifically the office of Secretary General, has shown strong intent in addressing the fallout of the deviant behaviour shown by UN personnel yet the same level of political will is still missing among states.

The recent showdown in Haiti Cholera Epidemic Case has reinforced the grim reality that the pursuance of justice in case of a harm suffered due to an IO activity is a cumbersome affair. Legally, it seems impossible to hold IOs and its personnel accountable as far as immunities protect them from a lawsuit. The best, an IO like UN is doing is a hard talk against HR violations. Through its awareness campaigns and training programmes, UN is trying to convey to its personnel that deviant behaviour is an unpardonable crime which has system wide ramifications. However, as seen in Haiti Case, the initial UN response was to side-line the matter by claiming that occurrence of cholera cannot be attributed to UN. This UN stand sustained even after various scientific studies concluded that there is no other explanation for the outbreak of this epidemic in Haiti except for UN presence. It is only recently that UN admitted its role in cholera epidemic. Yet, however, the US Court upheld the UN immunity.

The UN peace operations now face a dilemma. The UN would continue to try its level best to ensure that its peace keepers don't engage in any sort of misconduct during deployment. The UN efforts may include prior agreement with TCCs for prosecution, training programme aimed at sensitizing peace keepers, empathizes on zero tolerance policy etc. However, given all this, the UN as an IO and the host population would still need to bear the risk even if just one peace keeper commits a wrongful act. Suggestions like all female contingent forces as a solution to SEAs in peace operations faces practical constraints especially due to the paucity of such forces among TCCs.

To be fair to UN, the organization has been playing an important role in maintaining international peace and security. There is some merit in the argument that immunity facilitates effective UN functioning. A hypothetical situation of doing away with UN immunity is likely to paralyze the organization with flocks of lawsuits rupturing it financially and would also kill the will to undertake new operations. It is estimated that if UN were to lose the Haiti case, it would cost around $40 billion to UN, an amount equivalent to five times its annual budget on peace keeping (figure estimated by Prof. Philip Alston, an advisor to UN on HR issues). The UN is acutely aware of the legitimacy loss that has already happened due to peace keepers misconduct and that is why it is making all preventive measures to protect UN credibility. On one hand, it is striving hard to ensure that no stone is left unturned in preventing abuse by peace keepers while on the other hand, if a crime is reported, the UN legal department ensures that UN escape any 'legal obligation' by invoking immunity cover. At best, UN has committed itself towards 'moral obligation' to address the harmful effects of peace operations. The question is to what extent the measures adopted by UN arising out of its moral obligation enough to render justice to the victims.

The issue of secondary responsibility of member-states of IOs for internationally wrong acts has a been matter of serious debate in scholarly world. Some major events like collapse of ITC in 1985 showed the ramifications of insolvency of an IO on the creditors if the secondary responsibility of members is not put in place. The DARIO has laid down conditions under which secondary responsibility of member states could be called for. However, it remains anybody's guess as to how would these legal provisions be applied on UN especially given the fact that international sphere lacks any institutions where UN can be prosecuted.

One institution that could have been played a paramount role in prosecuting deviant UN personnel is the International Criminal Court. After series of ad-hoc measures like ICTY, ICTR etc. the ICC is created as a permanent institutional response to carry out prosecution of those individuals found guilty of committing international crimes. However, series of UNSC resolutions-1422 (2002), 1487 (2003) and 1497 (2003) spearheaded by US has ruptured the likelihood of ICC exercising jurisdiction over peace keepers. Moreover, case after case, it has already been proven that domestic courts are incapable of prosecuting UN and its personnel if immunity remains.

Another factor that has added complexity to the issue of IO accountability is the wide variety that these entities showcase. Recent noticeable attempts to fix IO accountability like One World Trust accountability model, ILC's DARIO, ILA's work on IO Accountability etc. acknowledge this aspect. Nonetheless, they all justify the requirement of a common set of accountability rules, law and principles and norms to provide an overarching framework of IO accountability cutting across their wide variation.

In the realm of international legal scholarship, the topic of IO accountability has been discussed at length in atleast two major forums- ILC and ILA. The international legal approach towards IO accountability is framed as 'IO responsibility emanating from internationally wrongful acts'. The ILA took note of this issue in 1996 and came forward with 4 reports in 1998, 2000, 2002 and 2004. The Final Report entitled- 'ILA Rules and Recommended Practices on Liability/ Responsibility of International Organizations'- was pronounced during 71st session in 2004 at Berlin. The contribution of these reports is in the form of RRP-s which is composed of comprehensive set of accountability principles at all the three levels of accountability (as identified by the ILA). Nonetheless, ILA as a non-governmental organization has a consultative status with various UN agencies. In that capacity, its work is purely academic and advisory. Given the conservative approach of member states, the enforceability of this precious work remains a political issue.

In the domain of international legal responsibility of IOs, the stature of ILC's DARIO is unprecedented. The ILC had spent most of the latter half of 20th century to frame rules for states responsibility which culminated in the form of 'Draft Articles on Responsibility of States for Internationally Wrongful' in 2001. After decades of experience on working on the topic of responsibility, the work on IO accountability in the form of DARIO materialised in a relatively short span of time. The work comprehensively addresses various intricacies involved in the issue of accountability of IOs.

At present, there is no dearth of rules, principles, guidelines and norms to regulate the behaviour of IOs. The real problem lies in its enforceability. The whole gamut of

secondary rules that are formed to make IOs account for their ill-effects on third parties has its basis in the legal and normative force of HR law. However, the unresolved mystery is whether UNSC, an organ with a mandate to maintain international peace and security has limits emanating from HR law.

The hitherto UNSC behaviour shows that it does recognize the vitality of HR standards and has therefore increasingly recognized their violations as a threat to international peace and security. Although the UNSC's enthusiasm in all cases has not displayed stability and show significant fluctuations yet one of the common factor in post-cold war peace operations is the UNSC's commitment (of varying degrees) to intervene to protect HR. This inconsistent pattern is noticeable both in UNSC's language and action. The former relates to the text used in the resolutions passed by UNSC while the latter relates to the interventions made by the UNSC in the name of HR. The inconsistency of language reflects a deliberate intent to prevent precedent setting on the question of UNSC's commitment on R2P while the inconsistency of action can be attributed to factors like exercise of veto, dependence of UNSC on member states for resources including troops, absence of UN standing army etc.

The UNSC's stand on issues of HR is two faced. On one hand, UNSC acts to protect HR and thus in this sense convey respect for its standards and norms. On the other hand, when its peace keepers go deviant and violate HR of host population, the UN blocks the victim's recourse to justice by invoking immunity. This situation points at one of the most important debates on the issue of IO accountability- Can UNSC be bound by HR and IHL standards in the absence of its explicit consent?

The debate on limits on UNSC powers remains unsettled. The scholarly community remains divided on this issue while the Courts. Nonetheless, the unsettled nature of this debate has not prevented UNSC in unleashing large number of targeted sanctions most notably since 1999 (year marks as the birth of 1267 regime). Similarly, on one hand the peace operations became more robust and multidimensional while on the other hand the widespread systematic sexual abuse of the host population by the peace keepers also deepened. Hence, the UNSC remained a very active organ of the UN in the 21st century.

Initially, lot of expectations were placed on sanctions policy as a mechanism of resolving deadlock in international affairs through various effects like forcing recalcitrant states to approach the negotiating table, carrying out regime change, giving a strong signal of disapproval to the target by the senders etc. The policy of sanctions has evolved from comprehensive to much more target oriented in the wake of the HR violations the conventional approach has brought forth. The different approach of sanctions policy did not relieve it from the allegation of HR violations because even the targeted sanctions appeared problematic. The problems associated with targeted sanctions, namely denial of *due process or fair trial rights* invoked criticism which spilled into various accountability mechanisms. The current order represents a state of disequilibria caused by the fractured balance between dual goal of maintaining international peace and security and upholding the legal as well as moral obligation to respect HR rights of all.

The trajectory of accountability mechanisms has also witnessed progressive path from absolute absence towards creation of institutions. In the past decade, the accountability gap that existed in the context of targeted sanctions has certainly declined. In the context of targeted sanctions, the UN led initiatives like formation of the 'Office of UN Ombudsperson for the ISIL (Da'esh) and the Al Qaeda Committee' has been an important interlocutor in facilitating delisting requests.

Similarly, the willingness of the judicial institutions like European Court of Justice to examine the question of the obligatory character of the UNSC resolution on sanctions implementation in the light of *Jus Cogens* norms is another welcome development. The Court in *Kadi Case* has very carefully addressed the issue of targeted sanctions by striking a balance between the unprecedented status of UNSC resolutions and the sanctity of HR norms in EU emanating from European Convention on Human Rights. The initiatives taken by several states like Stockholm process, Bonn-Berlin process etc. showcase not just the priority placed on the policy of sanctions but also the resolve to protect HR by streamlining security related policies in accordance with other Charter provisions.

The functionality of peace operations has turned robust and multi-dimensional shedding its traditional traits — consent, impartiality and non -use of force. Issues like

protection of HR, nation-building, humanitarian assistance etc. have been incorporated in the name of robust peacekeeping, peace enforcement and administrative missions. However, the phenomenon of upgrading peacekeeping forces and loading them with offensive weaponry along with the approval to use force to defeat the identified 'enemy' generated violations of IHL and HR law. Moreover, the power asymmetry between the peacekeepers and the local population especially the young girls and children have proved fatal in creating chronic pattern of SEAs.

The magnitude of damage such instances have caused to the legitimacy of UN is beyond calculation. Triggered by the loss of substantial legitimacy and reputation, the UN responded with several preventive and remedial measures. Some of the notable preventive measures are as follows. The mandatory pre-deployment troop training to be conducted by the respective TCC based on the material provided by UN. In 2007, an office of Conduct and Discipline Unit was created under the Department of Field Support to address the issue of SEAs. The UN Model SOFA has also been institutionalized in UNSC authorized peace operations that defines the rights and duties of the personnel. From the perspective of the accountability of member states, it seeks to take formal assurances from the troop contributing countries for criminal prosecution if the accused personnel belong to its nationality. Other institutional measures include the formation of the Office of Internal Oversight Services. One of the most important functions performed by this branch of UN is investigating cases of human rights abuse by the troops or staff sent by UN in troubled zones.

Among other cases, the creation of ICC is a path-breaking development to hold individuals accountable for the crimes they commit and shield behind the veil of a state. An attempt to bring the peacekeepers within the jurisdiction of ICC has been impeded by the political consideration of states. Thus, the international nature of the work of the peacekeepers has not resulted in the dilution of the claims of sovereignty. However, given the political nature of the Security Council and the extensive powers allocated to it in the Charter, any limit on it is likely to be slow and incremental. The accountability mechanisms are therefore to be judged not in the absolute sense but within the framework of extraordinary power of the UNSC within which they operate.

To bolster the cause of international accountability, several innovative ideas have been put forth. According to Monbiot (2003), such accountability vacuum can be filled with the following two steps. First, to reform the current system in the domain of security, justice, rights etc., the UNSC should to be replaced by a fundamentally reoriented UNGA with votes weighted in proportion to the population. Secondly, in the domain of socio-economic rights, it is suggested to replace the existing neo liberal IFIs with set of institutions based on Keynesian theory with a focus on world poor.

The key towards effective accountability lie in the extent to which states cooperate in closing the accountability gap. The international realm may have significantly changed in recent years in terms of number of actors and their role yet the exclusive hold of states over processes and functions of IR is unparalleled. The UN has started to play an important role in world affairs yet for delivery of justice (situation of which may emerge during its operations) it must rely upon states. In response to the crisis of legitimacy that emerged in both sanctions and peace operations, the UN Secretariat has taken large number preventive and disciplinary steps to relieve the organization from the status of perpetrator of crimes related to human rights. However, punitive measures corresponding to the gravity of the crimes committed has remained a far cry due to variety of factors.

The UN Secretariat has taken noticeable steps to contain the menace of SEAs and other human rights abuse conducted by peace operators while on mission. Despite efforts i.e. training of staff, outreach or awareness programmes with locals, repatriation etc., elimination of such abuse remains a distant dream. The virtues of justice and accountability in case of peace operations have not been to crystallize through judiciary due to the prevalence of immunities granted to IOs and its staff under international law. Only states can revoke immunity of its citizen found guilty of crimes committed abroad and prosecute in domestic courts. However, such political will has remained a far cry. This is not to suggest that states are indifferent towards crimes committed by their citizens abroad but they are more than reluctant in prosecuting them for crimes against foreigners. As a result, the foundations of accountability in peace operations have remained under developed and undesirable. The glaring gap seems wide when one compares the punishment that may follow for the same crimes committed within a nation. Very rarely have states shown inclination

to implicate their own nationals for the crimes committed in an outside territory. Whether UN led measures will be able to act as a perfect substitute is yet to be seen. Given the strong resolve that the new Secretary General has shown towards implementing the policy of zero impunity, it can only be hoped that he succeeds.

The study finds substantial evidence that confirms the hypothesis that accountability mechanisms in case of peace operations are likely to weaker than ones created in the context of targeted sanctions due to the presence of immunities in former case. All UN efforts to regain its lost credibility are failing due to the stubborn character of sexual abuse rampant across UN missions. Comparatively, a sanctioned individual with targeted sanctions despite institutional faults, the office of Ombudsperson for 1267 committee has been successful in getting petitioners delisted in majority of cases. As far as the UNSC accountability in targeted sanctions are concerned, the current situation may not be ideal but a proper analysis should be made retrospectively not idealistically.

Annexure 1

(Transcript of the Interviews)

Date of Interview: 4th April, Tuesday

Interviewee: Prof. Thomas G. Weiss, Presidential Professor of Political Science, Director Emeritus, Ralph Bunche Institute for International Studies, The Graduate Center, CUNY.

Place: New York

Q1. One of your seminal contributions is the concept of 'Third UN'. The concept is appealing to me as it somewhere addresses the issue of UN accountability, do you think that the activeness of the third UN has democratized the UN as an organization?

Response. "Democratization" is a loaded term. At best, the UN has opened itself to different perspectives and opened itself to better conversations. Unlike the 1970s when NGOs were kept at bay, now discussions are more "normal." For example, a week back, a conference took place on banning nuclear weapons and NGOs were to be an essential part. Similarly, NGOs are active in pointing out cases of abuse during peacekeeping which serves the cause of UN accountability. The Third UN is helpful in pointing out as to why states are not doing anything e.g. in Darfur. At least an explanation was demanded for inaction. States act when the national and common interest coincides.

Q2. In your 1999 piece entitled as *"Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses"* (published in journal of peace research), you argue that given the uncertainty over the possible benefits of the sanctions policy coupled with almost certain humanitarian implications, armed intervention may serve the cause better than the sanctions. In the light of the growing instances of human rights abuse by peacekeeping forces since 1999- Do you still prefer armed intervention over sanctions (comprehensive or targeted as a policy) as a tool to maintain international peace and security?

Response. Yes, I still maintain that. Sanctions are helpful only at the margins and at times can be counter-productive. For example, in a poor country like Haiti, their impact was mainly excessive deforestation in a country with very little to start. In addition, the export-oriented industry shifted to the Dominican Republic. Reliance only on sanctions would have not removed Gaddafi from Libya or Saddham Hussein from Iraq.

Q3. How do you assess the role of the UN Ombudsperson in addressing the issue of accountability?

Response. It certainly is a step in the right direction. Other steps include the long-standing Joint Inspection, but political support is a key for their successful operation.

Q4. You have written a lot on global governance. The practice of UN peacekeeping is perceived as one of the vital mechanisms of global governance. However, critics like Kate Seaman (book-Un-tied Nations) regard it as a tool of imposing a particular value laden western liberal order on the rest of the world. From this viewpoint, UN peacekeepers are guardians of an agenda of the west and certainly contain elements of neo-imperialism. How do you respond to these critics?

Response. I don't know whether its value-laden or not. The important point is to intervene and sustain and follow up. In Kosovo, post intervention, follow up happened while in Libya follow up was non-existent. Follow up is a key towards successful post-conflict transformation.

Q5. In the article entitled – *R2Pafter9/11andWorldSummit* published in Winconsin International Law Journal, you seem to suggest that the real threat to human security does not lie in excessive use of force for insufficient humanitarian reasons but rather in situation where the international community stands like a mute spectator and witness mass killing of Africans in Sudan, DRC and Rwanda.

Response. I still hold that position. Syria is an example of lack of willingness to intervene. Vetoes by Russia and China provide a convenient excuse for no action by the West. Of course, we have numerous previous instances of the absence of a willingness to intevene in Rwanda.

Q6. You have been engaged in the UN Intellectual History Project and while doing so, you attempted to fill certain gaps? Which gap do you find most critical?

Response. This is easy to pick. The compliance gap is missing virtually everywhere. Unlike in the economic domain where you have WTO with a measure of enforcement capability, there is no compliance system for other issues with the exception of security on those rare occasions when the Security Council agrees.

Q7. Do you also see global governance as highly oriented towards the field of security?

Response. It has always been. UN's focus has largely been oriented towards peace and security. PKOs budget is three times the annual budget of UN.

Q8. The concept of R2P has always been a highly contended idea. The countries of the South have claimed it being imperial in nature. At present, what according to you is a bigger danger to its legitimacy? Fear of South or Unwillingness to intervene?

Response: Unwillingness to intervene. For example, in Libya, there were no imperial gains, just as there were none in Somalia. The most convenient excuses can result in easy escape from responsibility.What do you think is the biggest danger to the UN's reputation, too much or too little intervention?

Q9. In your work entitled- *Governance*, *goodgovernance* and *globalgovernance* (2000), you concede that the authority of the states is eroding. Do you think dilution

of state sovereignty will also impact the UN peacekeeping missions in a way that states would gradually allow prosecution of accused peacekeepers in the host state?

Response: Until now, the UN is begging for soldiers and finance. I hope the current Secretary-General will take a tough step against the issues of sexual abuse. Force Commanders will play a key role in preventing such abuse.

5th April 2017, Wednesday
Interviewee: Prof. Michael Doyle, Professor, Columbia University.
Place: New York

Q1. One of your seminal contributions is the Democratic Peace Theory. How is democratic peace different from other kinds of peace?

Response: Peace can be attained in various ways in IR. During Cold War, instances of balance of terror and nuclear peace also prevented direct military engagement between US and USSR. On the other hand, peace in IR may results from distance e.g. there is not likelihood of New Zealand and Iceland going to wage a war against each other. Peace may also result because of the existence of mutual enemies. For instance, if Iran disappears, then probably Saudi Arabia and Russia come together. Peace may be contingent in character e.g. between US and Pakistan. Besides all these, democratic peace is unique as it is not dependent upon the above described factors and hence it is more sustainable.

Q2. You have acted as Asst. Secretary General, how is your experience? Also, since your work links philosophy and ethics with IR, how does that reflect in UN?

Response: I was appointed by Mr. Kofi Annan to address bigger issues UN is facing. For instance, we worked on MDGs, migration, Global Compact etc. My work in UN was more giving inputs in policy planning. It was about changing the agenda.

Q3. UN is bad at war but good at peace. But how to address the situations of war that it confronts all the time?

Response: Stay out and attempt to reduce the damage. In most cases, it is found there is no responsibility after intervention. Better peace building techniques need to be designed. Create sustainable peace by engaging locals effectively. A successful redevelopment requires very strong will like the one displayed post Second World War to reconstruct Germany and Japan. The peace building exercises are hampered by political interests and lack of political will. New Cold War tensions are visible today.

Q4. There seems to be a big gap between the way R2P is conceptualized as well as projected and the way it has been implemented. In particular, I am referring to the apprehension of developing countries regarding neo-imperial tendencies visible in the prolonged warfare in Afghanistan and subsequent annexation of Iraq and Libya. How do you find a space for ethics in IR when political manipulation and military adventurism exploit the notions like R2P for clear strategic gains?

Response: A good compromise was reached wherein intervention is based on the criteria of the nature of crimes. The crimes- genocide, war crimes, crimes against humanity and ethnic cleansing- would invoke intervention.

Q5. How do you in your ethical framework of IR look at the issue of prevalence of SEA in PKOs?

Response: The moral standards for the UN forces have to be much higher than any other typical army. It is true that states do not want their peacekeepers to be involved in SEA related crimes. Mechanisms like SOFA, national courts are standard part of accountability. International accountability has been noted in the past in various forms like ICTY, ICTR and now ICC.

Date of Interview- 6th April 2017, Thursday

Prof. Rajan Menon, Professor, City College of New York; Senior Research Scholar at the Saltzman Institute of War and Peace Studies, Columbia University.

Place: New York

Q1. In your book entitled - *Conceit of Humanitarian Intervention* published in 2016, you seem to take an anti-interventionist stance. What are the major observations that you made before reaching this conclusion?

Response: R2P qualifies sovereignty. It clearly modifies its practice but in reality it has serious implications for only selected number of states. I am not opposed to R2P per se but to its selective application. Is it not true that it is conveniently ignored when we are dealing with states that have powerful allies which includes all P-5 members? Given the atrocities these states commit, it is very much relevant there but made irrelevant by the politics of powerful states. Iraq is a clear example, first it was WMDs then the whole argument was that Saddam was a bad guy so we must liberate Iraqi population.

Response: According to you (from the above mentioned book), the advocates of intervention believe that critics like you fall in either of the two category- people who lack moral or ethical commitment; and those who are apologists of the human right abusers or totalitarian regimes.

You counter them by suggesting that opposition to intervention does not mean lack of ethical commitment or support to brutal regimes. Rather you highlight the double standard shown by the liberal democracies in undertaking intervention. The decision to intervene is not dependent upon any principled approach towards human rights but by consideration of interest. For instance you suggest that intervention does not come by when - either the brutal repressor is an ally or the conflict zone is strategically unimportant. Moreover, the liberal democracies may not fight against each other but their complicity in the violence committed by their allies (no matter how brutal they

are) is not hidden. Will you support intervention if a principled approach is first constructed and followed?

Response: As I said I do not oppose intervention but I have problems in the manner in which it is carried out. I remain a skeptic of R2P because states are genetically meant to modify norms. Any thought of intervention must follow a well established protocol. It should neither be random nor selective in nature. It must follow something like this- Earning Warning Signs, Third Party Mediation, Name and Shame, Targeted Sanctions and finally Intervention. In other words, intervention should be the last resort.

Q3. If intervention or the norm of R2P is so problematic, then how did the UN Summit Outcome Document (2005) featuring R2P manage to secure the support of only just developing countries but also Russia and China?

Response: UN Summit Outcome Document is a very ambivalent document. Very odd coalitions came to support them but consensus is achieved through compensating precision and that dilutes the effectiveness of this document. There are others like famous international lawyer, Geoffrey Robertson, who also claim that R2P is diluted.

Q4. In the work entitled- *Beijing and Moscow Balk at Interference* published in 2012, you suggest that the nature of the evolution of the practice of humanitarian intervention has taught certain lessons to Russia and China. Libya was certainly an eye opener for these two countries as the regime change that followed in the name of non flight zone hardened the stance like never before. The Russian and Chinese veto in case of Syria is an exemplar of these lessons learned. Do you think that the hardest nuts to crack before R2P becomes an uncontested norm are Russia and China?

Response: Undoubtedly, China and Russia are going to be the toughest nut to crack. Especially the Libyan intervention has taught them a lesson about being very careful in identifying strategic interest behind the rhetoric of humanitarianism.

Q5. What do you think is the most critical aspect of peacekeeping from the perspective of human rights?

Response: The need to Follow up. Intervention entails huge responsibility. It involves in most cases effective nation-building. Given that most peace operations are sanctioned under Chapter VII, these interventions relates to the notion of Jus Post Bellum, something which was once relevant only for states. If you see the political will, the UNAMIR was a complete failure. The Arusha deal between Hutus and Tutsis was fragile. The reluctance of participation was noticeable as UNAMIR had just 240 troops. Belgium withdrew after losing 10 soldiers. Clinton already faced a lot of wrath for the killings of US troops in Somalia. There was absolutely no plan for Rwanda.

Q6. In the article entitled *Breaking the State* published in 2011, you argue that the interveners especially when they are liberal democracies face pressures of accountability from their own citizens about declaring an 'exit strategy'. Do you see any scope of accountability pressures in which the interveners can be held accountable to the host population for their performance?

Response: It is true that intervening states especially democracies have to be answerable and its implications are visible even in the field. For instance, during the Kosovo conflict wherein 90% of the KFOR constituted US troops, Clinton was inclined towards having 'zero casualty operations'. But you know, R2P can also be misused by weaker states like Robert Mugabe of Zimbabwe or Omar Bashir of Sudan invoke nationalism by connecting R2P with imperialism and justify some of their wrong acts.

7th April 2017, Friday

Interviewee: Ms. Catherine Marchi-Uhel, UN Ombudsperson to the ISIL and Al Qaeda. Place: New York

Transcript of the recorded conversation

Q1. In view of the fact that the Office of Ombudsperson to the ISIL and Al Qaeda Sanctions is created by the UNSC and its mandated is also extended by its resolution till 2017. It is also clear that the office is dealing with the most pressing issue of world affairs today- terrorism. Given this context, it seems obvious that this office must be subject to some political pressure. How does the Office maintain its autonomy under conditions of political constraints?

Response: The level of independence required is the assessment of the facts before her; it should be impartial and independent from the state interference but let's be clear that in part Ombudsperson is dependent upon the information provided by the states. When I receive a request, my first step is to inform the sanctions committee and ask them to provide me relevant information. Of course, I am not limiting myself just on the views of the states of the committee but I also approach other relevant states who are not part of the committee. Therefore, being independent doesn't mean that I am not taking into account the views of the state. I am dependent upon states for providing me information that will become the part of my assessment.

I will also conduct an independent review to gather more information and might find material which is not provided by the state, which is often the case. I have to take into account the views of the state whether the person should remain on the list or not but how I perceive my independence is that I should take those views into consideration, I should not ignore them rather than being bound by them. Therefore, there is a nuance, my independence is that I independently review the facts before me and make recommendations. So, you shouldn't be bound by the powerful states. If a powerful state or any state objects to the removal from the list, my question would be give me convincing grounds for non-removal. If a state provides a reasonable argument for non-removal then it may influence my determination. States may not communicate all the information to me. States decide which information they want to share with me.

At times, I might question (if I am having specific reasons to do that) the state whether it has an agenda vis-à-vis the individual or entity in question. If I have that element to put into question, I will just to an idea how I can counter that. I will put different specific questions to the state but they may answer or not answer, I will try to make sure that the information that I get from other states, I would try to seek confirmation by the other states that the information they got is not coming from that particular state because you never know how information ends up to you. State may share the information they have that I actually came from the state which you think may have an agenda.

However, we have to be very cognizant of the fact (that goes back to our conversation in the lift) that we are not in a judicial system. The information I have is not in the form of evidence most of the times. Sometimes I may come across something very close to evidence. If I interview my petitioner, I am not in a same position when I interview a person as a judge. If I interview an accused as a judge, I would be almost in a same situation to test the credibility of my petitioner. If it's though rare but it happens, I get to interview a particular person almost as a witness in a trial. I will have the same tools. The information coming various forms like states, reports etc. unlike a judge cannot be tested like the way it is done in the judicial system. I am unaware of the source. Testing evidence in a judicial system is very different from testing information provided by states or reports etc. That's a major difference. It doesn't impact my independence in a sense that I have to be cognizant of this environment and I have to apply a standard which is lower than criminal law standard but I have to be conscious that I am not determining my recommendation on having excluded every reason bold out. Rather the standard is that whether do I have enough credible evidence or information to maintain listing. Therefore, the standard is different from the one applied in criminal law arrangement.

Q2. In reference to the letter written by the previous Ombudsperson, Ms. Kimberly Prost, to the UN Secretary General on 13 July 2015, concerning the non-realization of the full commitment towards the UN Ombusperson's office. She specifically pointed out the issues in "contractual, administrative and organizational arrangements" which

according to her threaten the independence and sustainability of the mechanism. How do you evaluate this implementation lag?

Response: The Ombudsperson is recruited as a consultant. It's not that being a staff member would guarantee more independence but there are arrangements in UN to recruit international judges which are more coherent and guarantees independence than a consultant. One of the problems of the status of being a consultant is that you are not the supervisor of your own staff, here it is DPA. It is like when your staff is recruited, you are not the hiring manager; you may be consulted and you are consulted but you are not the final decision maker. It's like that a political body of a mission is evaluating the judicial component, hence it is incompatible.

As a consultant, DPA has to confirm that my performance was satisfactory for me being paid. Is it compatible with the independence? Any political composition to confirm the performance of a judge is incompatible. Probably not. May be another body. I am judge in France, and as a Judge, I am evaluated but by the judges at the higher level but not by the political part of the government. So, it is not the Minister of Justice who is doing my evaluation but judges. Therefore, Ms. Prost's assessment is correct. We have tried to overcome that during the course of last year, several proposals made. UNSC Resolution 2253 (2015) include request by the UNSC to Secretariat to make a report to make this Office more independent and one of the proposals was the bringing this office under a new category- 'Official other than UN Secretariat Officials'.

It gives much more leeway because it is generally considered that judges when they are just to take judges example but it is applicable all other officials other than UN Secretariat, they can play a more prominent role in recruitment, they are not hiring managers but they are not first reporting officers for the staff but their views have to be taken into account. Exactly what were asking for and not submit to evaluation by the UN. Judges employed by the UN should not be evaluated by the UN, not the recent judges. I worked as a judge in Kosovo for UN and that time we were staff members so we were considered to be evaluated by the UN more recently the judges of the ICTY when I was a judge in Cambodia for the Criminals tribunal, I was not

evaluated I do not have problem for being evaluated but have a problem of being evaluated by DPA.

To tell the truth, it is more an appearance than real interference. First of all, I don't see any evaluation, I think it's a very low key, they do not intrude in my work but potentially they could because they have a right to do it. If it is established that one shouldn't be evaluated because it leads to encroachment by that body, let's have statues and be clear by that. Proposals were put forth in the committee but some states objected and since we need unanimity, they were not approved. What happened was that the committee asked the Secretariat to explore possible informal ways of arrangements in place to deal with such situations. Some solutions have been found and for e.g. the issue of evaluation of my staff, it is now stated in writing that my views should be taken into account and my predecessor had expressed in various reports that our views are not taken into account which is amazing, I mean how could it be, its only two staff- Legal officer and Admin assistant. The views of the Ombudsperson, for whom they work, were not taken into account. This is just unbelievable. I did this problem in practice, my views were taken into account but I wanted a written commitment. I do not want my successor or myself, if there is a change of person in DPA to reopen up the Pandora box and renegotiate. The unresolved issue is that of evaluation, not that there is reluctance in DPA, they have consulted the human resource department and waiting for the response. As far as the possibility of this office being a separate institution in terms of not being merged with budget with the monitoring team, it is not going to happen. That cannot be achieved by me atleast give the arrangement.

Q3. One serious point of critique against the functioning of Ombudsperson is that it does not allow the listed individual and the representative of the entity to come face to face with the Security Council. Instead, the Ombudsperson is expected to perform the role of an intermediary between the petitioner and the Council. Given this drawback, how does the office project itself as a legitimate interlocutor in the eyes of the petitioners? How is the legitimacy gained in the eyes of the petitioner?

Response: Basically, it not representing petitioner, its part of my role. The way I personally gain legitimacy is by telling petitioner that you will answer my questions.

First of all, I can put any information in front of the petitioner though I need to hide the name of the state who has provided me with this information but the petitioner knows the information that I have is either coming from states or from my independent research. If it's the latter, I will tell which report or article is it or if it through individual, I will also tell that. So, I am as transparent as possible with the petitioner and this is the first step towards gaining confidence. Secondly, I will also try to put the information on the website as much information I can with a view to increase transparency I think that's a way to gain the trust, unlike the previous situation where there was very limited information on the web, now the petitioner gets the understanding how Ombudsperson is dealing with the information and a number of issues are addressed on the website, so it's not exactly the same as being having an access to all the comprehensive reports which would be very transparent as in a court system but atleast its much better than having no information.

Third, I am sharing with the petitioner the way I am summarizing their position to the Committee. I do a recording of the conversation and then prepare a transcript for my own work, I am not sending the transcript to the Council as it would be too long. Traditionally, an interview with a petitioner may range for 3-7 hours depending upon the complexity of the case. Sometimes, I might see a petitioner twice. I am not sending the transcript as that would be very bulky and impractical but I provide a substantive summary of the position of the petitioner. The petitioner may review and can tell me this you misunderstood. So, they get to see actually the way their views are presented. But I am not petitioner's counsel so my independence means I am also independent from the petitioner himself. Unlike counsel, I am not bound by the best interests of my client. If I feel, the petitioner is not faithful, I may draw negative inference. To have total trust in the system, I think the petitioner requires to see my report and that's where the system is not entirely transparent. The petitioner doesn't get to see the report in its own case. What they get to see is a letter containing reasons. Let us first see how committee takes a decision.

It's a very different system than the traditional decision making for the UNSC or its committees because if my recommendation is that a particular individual or entity must be delisted, this is going to happen unless all 15 members disagree. So, out of 15, if 14 say the person must remain on the list but even one agrees with me, the

person will be delisted. So, it's a very powerful recommendation. If the committee is to disagree, then all 15 have to disagree, if even one of them decides to refer the matter to UNSC, which can happen too. Since the Ombudsperson is given the power to make recommendation, it has never happened. None of these scenarios have been. All the recommendations for delisting till now have resulted in delisting. The reason why I am raising that is because there is a requirement in the resolution that the Committee should provide reasons but in practice it doesn't give its reasons and instead provide summary of the analysis made by the Ombudsperson. It's a very bizarre thing.

Probably you couldn't have reasons of the committee unless there is unanimity. How can they agree on reason if they are not unanimous in their assessment? But because the Ombudsperson's recommendation prevails unless all 15 object, so what the committee has chosen is to act is by providing a summary of Ombudsperson. In the beginning the reasons were limited to nothing, quite formal. There was no consensus to overrule the recommendation. They were the procedural as opposed to substantive reasons. My predecessor has really worked hard to convince that reasons are very important. Soon, it was admitted that in retention cases, it would be important to provide reasons and there was more reluctance to provide substantive reasons in case of delisting.

When I took office, if you read last report of my predecessor, Ms. Prost was still showing reservations about the quality or sufficiency of reasons given. Initially, for the first year of my term, I was preparing the summary of the draft. I was able to provide as much information as I could. I did not put any confidential information in the report and clearly not in draft reasons letter. Recently, for last six months, it's much more complicated, I am asked to cut the number of pages of the report and I am resisting. At the end of the day, I have no control over it. I am not allowed to reveal anything that committee does not approve. I am trying hard to convince the member states in the committee about the significance of reasons.

If you look at the importance of reasons from the situation of litigation in domestic judicial setting or regional ones like ECtHR or ECJ, especially in case of retention, it is a part of fair trial to provide reasons. But it is also important in terms of

demonstrating to states that there are good reasons to retain the person. For instance, Yusuf case in UK, where the possibility for the Court to have access to the reasons letter sent to the petitioner was enabling the court to satisfy that there are good reasons to keep the person on the list. The same would occur if reasons letter was shared by the ECtHR so it very important for the individual and it is also a part of the trust.

Again it also relates to your previous question of building trust. In case of delisting, atleast the petitioner would be pleased for being delisted but the petitioner would be impressed by the impartiality of the Ombudsperson's review if he sees all the issues are addressed and the arguments he made and the possibility of being convinced by the reasoning. There are situations when the petitioner disagrees but it is minimum to have the reasons listed for the same. This is how the system gets closer to judicial one as the judges have the obligation to give reasons. The UNSC and its committees are a political body but they are making decisions that directly impact individual's rights and the entities. Thus, under conditions of rule of law, it is reasonable to demand reasons for such decisions.

To answer your question that what if someone is unfairly put on the list, the Ombudsperson does not look at the issue of whether someone should have been listed, it's not the primary focus, the focus is do we have enough reason to maintain the listing. By default or as a side effect, if since the listing there is no more information gathered, I mean the assessment gets very close to determining whether there was enough evidence on the first place, it will never be labeled as but it would be easy to draw a conclusion for the reader. Again getting reasons as to why are you delisted today, your delisting could be for different reasons. There could be many reasons for delisting like lack of information or if there is nothing since the time of narrative summary (information that caused listing), then delisting is done. However, it is not openly said that you should have not been listed but that was the hidden message.

On the other hand, there could be situation where it was proved that somebody was associated but shown signs of dissociation, it is very different message that Ombudsperson knows that you were associated but you have remained for substantial amount of time without association or you have taken steps to disassociate like

making public statement or going through de-radicalization process etc. Through delisting, the efforts of the petitioner to dissociate are acknowledged. It's not compensation but recognizing your situation and it is a very important part of the trust. It's a very important part of the interaction between the UN and the individual concerned in a sensible manner. Much more sensible and respectable than saying we are not communicating with you, you are there and that's it.

So, a lot has been done to improve the situation of the petitioners. In the early days, they were not even given the reasons for listing; the practice of narrative summary came later. The delisting should be considered as a part of listing. The amount of guarantees you can give to someone that are put on the list if they want to go out is making listing credible. You can't look at the two separately. If you ask a state, whether is it ok for them to put someone on the list, some states are very clear yes it is acceptable if we provide them appropriate remedies because we operate in a rule of law environment. Some states are more sensitive than others.

Q4. Is there is a follow up mechanism after somebody is delisted in terms of- firstly, are there any problems that are faced by that person e.g. Problem in getting visa; and secondly, is there a time frame during which the delisted person is monitored by some international agency or for that matter, domestic agency?

Response: There is no institutionalized surveillance unless states themselves decide to pursue. First of all, UN delisting does not mean national delisting as the latter may be based on other information. So, they are two separate processes. States may decide within their framework whether to continue some form of surveillance, I suppose. If these individuals are charged for crimes domestically, they may be dealt by the judicial system within a country. The delisting just affects the implementation of the UN sanctions. The impact of the UN delisting is that the assets should be defreezed and travel ban should cease to exist. But if EU imposed sanctions in pursuance of the UNSC resolutions, that will be removed.

Q5. How far states comfortable in sharing information with the office. I saw a list of states that have an agreement with the Ombudsperson, and in the list most of the developed countries appear, is there a specific reason for them to share information?

Response: Yes, the states that show willingness to share information, they do it at the request of the UNSC because the resolution encourages states to accept to have those frameworks. Now a difference has to be made between making an arrangement or agreement and actually sharing the information. The agreement sets the framework for the states that are willing to share, instead of having to negotiate on case by case basis with the states. So if a state decides to share the information, how should we do it, it's already set. Remember that states are in control of whether they have the information which is relevant and whether they are willing to share it. You will have states that have an agreement but will not share certain information that they have because they consider it is too sensitive to share even within these frameworks and I will never know whether they have it or not because they will only tell me. First of all, state who have agreement to share confidential information also have to share non-confidential information, so that should be the first thing when they receive my letter, they look for any open source information they share or declassified information they can share. And the importance of doing so is that I am sharing with the petitioner any piece of information that is not classified. The more you have material of that kind the more you are transparent and give the opportunity to the petitioner to know the case against him.

Some states may not have agreement but still provide information like Syria. We don't have an agreement but they said we are willingness to share confidential information on case by case basis. The way it works is that some states first send non confidential information, which means I know they have information but if in my view they don't have information, I will come back to them and ask- are you willing to share classified information. Other states may send you both. Some states will say we have information and we are ready to share on confidential basis. And basically why they want to do it is because the deadlines are very short for gathering information so it helps if we already have a setting in place. But having one doesn't mean that the states will systematically share everything they have, they share what they think is good for them.

Of course, if its shared via these agreements or arrangements, they are in full control of the information. I have no right to write about the information in the report even to the sanctions committee so the committee members don't know what kind of information they share. They don't know which state. They are in the same situation as the petitioner but i will look at it which brings some fairness issues – To what extent is it fair for the Ombudsperson to rely upon the material she can share with the petitioner? So i am trying to draw a line between and trying to balance the security interest and to give you an example, it becomes more problematic in situations like these when a classified information goes to the part of the conduct alleged against the petitioner but this person is not aware of say that you are listed because of your financial support to the listed group. And now I review information which shows that infact you also did provide weapons or recruited foreign fighters but i am not entitled to tell you that. If I also have non confidential information showing that you finance, its not less fair to maintain listing and I have enough information to show you were financing but if the only thing that would be sufficient is the information contained in the classified information so basically I don't have enough support that you finance but I am relying on the evidence that you recruited foreign fighters. That is raising serious fairness issues because you have no clue that I have that kind of information. If you are aware of that, you may be able to give me good argument so that I disregard this information.

Since I have not given the source of the classified information and often of the non classified information let's take a fictitious example, suppose you have live in a country where torture is used and during your detention and use of torture, you have made a confession that you recruited freedom fighters. It's not for the reasons of listing you because it is considered classified by the state in question. They are conscious that if they are going to disclose the source, you won't rely on this information because torture has been used. But the petitioner does not know that I have this kind of information so you are not going to raise this issue. Say that the official reason for listing you is that you were financing, you are going to give me arguments about financing and the reason for that could be that you have made public statements asking for donors to send you money to support a particular listed group. So you are going to argue like the website that reflects my name in a statement does

not belong to me. And thus you are not going to tell me that by the way in some year i was detained by state X, I was submitted to torture and i made a confession that you shouldn't use because you don't know that it is also a part of information before me. If I realize that the only basis that i could hold given my standard would be that given the classified information, I am returning to the providing state and would request them that could you atleast declassify to which aspect of the conduct this information goes. I don't need to say i have seen classified information concerning this but can you allow me to share with the petitioner that it is also allege that you were involved in recruiting foreign fighters. What do you have to say to that?

I won't share the details communicated to me on confidential basis but if I am allowed to say that, then you know you will come to me and say that I suspect that you got this information because of the confession that I made when I was in detention and it is untrue as I was tortured which will raise valid argument and i am going to go back to state and ask what do you have to say about that and I ultimately decide not to rely on the classified information. So lack of transparency is really an issue and to achieve that Ombudsperson have to work very hard to limit the effect of this lack of transparency and the interference it has on the right of petitioner. But due consideration is always given to the fact that national or international security may be at stake and there could be very valid reasons as to why a particular piece of information is not shared. You need to find that balance and if you just look at it from the HR perspective, you may not be able to balance at the right level. You do not want anyone recommended delisted who uses this opportunity to send money to plant a bomb. But at the same time, you need to remember that the purpose of the sanctions is 'preventative it's not punitive'. And the fact that sanctions are imposed without time limit requires Ombudsperson to be taking that aspect into consideration. Are there sufficient information to make a credible and reasonable basis to maintain the listing?

Q6. I am kind of thinking since the kind of role that you play is very important and it could be dangerous in a sense that you are meeting people who are listed, many of them could be dangerous people having links, do you feel that security issue, kind of threatening when you meet the petitioner and how is your security guaranteed by the UN?

Response: There are no specific arrangements made in the sense that i am going to meet a petitioner with bodyguards and I think it won't be an appropriate way to do it. Honestly, the risk is much mitigated as you are the only recourse. First of all, when they meet you for the first time, they have zero interest to threaten you because for you to make report, they have to let you go. So their best chance is to convince you that they are sincere or that the case is very weak. Why would they harm you unless you are meeting someone who is totally out of mind or thinking that it is great to take Ombudsperson as a hostage? But you are no different from a UN official in a country with no security. The only protection that I get is that I need to take security clearance when I go somewhere where the security situation is too risky, I won't be allowed to go. In those cases, I have to look for alternatives either interviewing the petitioner remotely or to get to seek from the sanctions committee the authorization so that the petitioner could meet me at some other place.

Now, legitimately, the person on the list may be angry at me if I am recommending retention and they will know of it but at the same time I am the person whom they can talk to the second time. So it would be in their interest, imagine if they kill me, would the next Ombudsperson be sympathetic that person. So to look at risk from a holistic perspective, yes there is a risk if I were to travel to a country where there is no security issue before I go but security situation gets fragile when I reach, then I am at risk like anyone else. The only risk is when someone not thinking rational because it is not in the interest of the petitioner. Unless there is a petitioner who is furious for being retained on the list. My place of work is known but I don't feel threatened. I have served as international judge in many countries where I felt that my security is not adequately guaranteed particularly in Kosovo where threats were made against the local judges and they were some intimidating circumstances at times not in this position so far. So I hope it continues that way.

Q7. How is Security Council (who is primarily a body of maintaining international peace and security and the listing is also done under chapter VII) looking at the emerging international consensus that there should be limits to its power? Is the Council still preoccupied itself as the just the guarantor of international security (at any cost) or are there changes visible in a way that some space should be made to respect HR law?

Response: I am not sure whether I am the best person to comment on that but I must say within the strict limits of my work, the very existence of the office is a sign that the UNSC accepts that it has to abide by the HR considerations and rule of law more generally when it adopt sanctions. It is written in the resolution but at times there is a difference between what is written and how things work in practice. The scholarly reflection that you talked about have been also the criticism of the Courts like the decision in the Kadi Case clearly led to the establishment of the office. Now, they did not wanted to create a judicial body, they could have because they it in the context of international crimes, they have created judicial bodies- International Ad-hoc tribunals, UN backed hybrid tribunals. So for those aspects, it was determined that only judicial body was appropriate so all the criticism so far has not convinced the Council that a judicial body is required that would ensure independence and the decision making part which is lacking here despite the very high value of the recommendation of the Ombudsperson.

Recent developments concerning reasons show that (despite once Russia declaring openly that we are not in favor of giving substantive reasons, they consider it as a very sensitive area), inspite of that we need to work hard trying to argue that more transparency is needed. Reluctance from several states to increase the transparency of reasons at the same time number of states believe the opposite that as difficult and sensitive it is, it is the key for the integrity of the system to give those reasons. On a positive side, when I decided to give more information to petitioners, scholars, courts on how I assess the information and put it on the website, I don't do that without being open to the members of the sanctions committee I shared a draft with them so that they could look at it and I received no objection specifically some states actually said that I am an independent office and I should be doing it if I feel it's important. It's not a perfect ideal setting under body of law but yes I think member of UNSC are right that transparency should guide the action, they also in many respect show that they care about it. They show willingness. There are some areas more sensitive than others where reluctance exists; it's also a reality so I need to give you a nuanced answer to that.

Q8. There is a case no 3 in which the petitioner withdrew the delisting application, so it appears to be an outlier as there is no other case where such thing happened, why do you think could be the reason?

Response: I am not sure; i have to check whether there are others. But what is your question?

Q9. I was wondering what led to the withdrawal?

Response: I won't be allowed to share the information on this. But you know as in a judicial setting, people make a claim and withdraw it, there can be many reasons to that.

Q10. Practically there are various stages of the functioning of this office (Information Gathering, Dialogue Period, Comprehensive reporting and Committee Discussion and Reporting), which one do you think is most significant stage and why?

Response: It depends, they are all very important. Information gathering is important because it totally affects what is going to be your ultimate assessment. I will give you 2 examples. Imagine that there are very good reasons to support retention of a person but the states are not willing to share so you will have very limited information at the information gathering phase to the point that your recommendation is going to be to delist. I don't think it's a satisfactory outcome, it is satisfactory for the petitioner but not for the general security. I would prefer that states should be little less reluctant to share the confidential information they have, making use of the confidential agreements that would be more satisfactory. My goal is not to delist everyone. My goal is to make an impartial and fair assessment of the facts before me but to do that I need to have facts before me.

Additionally dialogue phase is a key as it involves meeting the petitioner, putting the case before him, to share open source material with him so that he can reasonably defend himself. Imagine that security situation is such that I am unable to meet my

petitioner or petitioner is held in a security environment where I am not entitled to go. Usually, I am entitled to go to prisons to meet the petitioner if they are in prison, imagine if whatever reasons I am not able to that would be really problematic because I can't second guess what the petitioner would have told me or atleast I could have communicated with him over the phone or the video or whatever it compensates but if the case is very complicated if I need interpretation on top of it, it may really affect the substance of what I get from the petitioner.

If you look at the HR aspect, the dialogue phase is more important, if you see from the security angle, information gathering very important. Though these phases are separate, they are not absolutely isolated. It happens that after the deadline for gathering information, state is providing me the information, I usually consider that information and I will find a way so that this information is shared by contacting my petitioner via phone, email etc. and seek feedback on the new piece of information. Similarly, once I have gathered the information and met with the petitioner, the petitioner's statement may actually generate questions for the states. In those cases, I go back to the states and their response is in a way information gathering. So the two phases are not entirely disconnected. During the information gathering, I am reaching out to my petitioner, if only to agree on when to meet, so the steps that you take actually belong to the other phase.

The drafting and issuing of report ends the dialogue phase. Now the phase that is before the committee in terms of my role remains important as it is an opportunity, I don't consider the summary that I am making as key because if they have read my report, they know more than the summary that I make but they have the right to ask me questions so having read the report; they still may be having very important questions about certain aspect of the cases. It's going to be a very important phase because it allows me to answer those questions plus I may have to having issued my report receive a piece of information changing the outcome. So, during the decision making phase when I am in front of the Committee, that kind of key information I will be able to update my report, actually should be aware having issued report receiving this piece of information in my view it does affect or does not affect the assessment.

Q11. How many cases can you take up while meeting the committee? Always single or can multiple cases be taken up?

Response: Yes, actually informal meetings of the committee are set for various purposes. When there are one or more cases that are ripe for being put on the agenda of the committee, they do it. My next meeting with the committee will be for 2 cases and my last meeting was also for two cases. You have deadlines when the report is issued I am seeking interpretation of the rest of the five languages of the UN. When they have reported for all the six languages. There are 15 days to consider it. Then they have month from the beginning to consider the report and meet with me and to make their determination, this is set by the resolution and the annex.

Q12. Is there a role that NGOs play in this entire process of delisting? How often do you meet them and what kinds of interaction are they?

Response: Yes, not just with NGOs but also with other UN bodies. When I issued my update on the assessment from the website I shared my draft with the members of the committee, I also shared with the UNHRC and I got very valuable comments which I could actually incorporate some of them I could not for various reasons, I actually kept those remarks that they made and whatever I can work on them I will do. Mr. Emmerson, he is the in-charge of HR aspects in sanctions. He is appointed by the Secretary General; he is a special representative for Human Rights in the context of sanctions and terrorism. He is a UN official whose role is to alert the UN on (not just related to sanctions) the issues of HR in the context of fighting the terrorism. He has made reports in which he has criticized the process of Ombudsperson's work. He has asked for more transparency, he has asked for different standards. I haven't met him but my predecessor has met him.

In the context of NGOs, I have contacted NGOs writing reports on the HR issues in Syria especially cases that are relevant for my cases, I have contacted the authors of the report to get more information as required as depending on the needs of the case. I also established contact with the judge of ECJ.

Q13. How does this office relates to the other committees created under sanctions regime?

Response: There is no functional interaction but Ombudsperson do at times participates in workshops organized by Secretariat where other sanction committees are represented and experts are also present. But there is no institutionalized interaction. Instead, more institutionalized link is with the Focal Point. There are at times petitioners who seek humanitarian exemptions, in which case they need to write to the focal point but they write it to me by mistake and I then redirect it to the Focal Point so these kinds of interactions. Focal point is for those committees who do not have Ombudsperson (which means all except 1267 committee). If the person on the list wants to be delisted, they can write it to focal point. The focal point then contact states and informs them and seeks their views but there is no information gathering as I do, no assessment made by the focal point as I do, it's more like a mail box. The focal point has no mandate to make an independent and impartial assessment of the case.

Q14. How far your office has been able to give the element of accountability if you have to rate out of 10?

Response: Depends upon the criteria you put for the accountability, if it is about recognition of the wrong placement on the list, like I said it between the lines in some cases see this kind of dimension but the focus is different because the focus is whether today listing would remain or not. It is by incidence, reading between the lines one could draw conclusions about the initially listing. You cannot consider that this office is giving you a remedy in this respect, I will not pronounce on that and basically the only possible remedy is to go to the court, the domestic court or regional court and claim that I shouldn't have been put on list. My role in that is very indirect therefore I will rate very high on that scale but on compensation, if you consider delisting as a form of redress then the rating is very high. The proportion of those not being delisted

is 13% out of the 65 cases that are being completed. So you cannot rate just on one indicator.

Looking for a system where there is no scope of interaction between those listed and the committee, what this office brings is I think important. Those who do not go to Ombudsperson, the only thing they know is the 'narrative summary' and for some of those people especially those listed in the early days, the narrative summary is very dry so by going through this information gathering, the Ombudsperson is often times able to give more information to the petitioner about the case. So that is also a good outcome for the petitioner in terms of transparency but if you look at reasons letters, I would say middle score and there has been ups and downs. There were times when it was very low on the radar and other times when it is much better as I told you earlier, I was able to provide as much reasons as I sought appropriate and now for last 6 months, it is getting little complicated. I have to cut the things I think is appropriate to tell the petitioner.

Q15. How do you look at the future of this office when war on terror is eliminated as we have seen that offices or institutions once created they adapt and survive but not wither away?

Response: If the threat of terror is eliminated, I think it is the best thing. If the threat is eliminated with the delisting of Al Qaeda and ISIL, which does not appear realistic, you will see names of all the people being removed then this office will not remain anymore. As you probably know, there are calls by the like-minded states and by the high level review of UN sanctions calling for the extension of the mandate of the office to other sanctions committee which are unlikely to disappear in the future, there is no consensus in the committee clearly as to expanding the mandate so I don't know whether that will one day be the case. In which case, the threat of Al Qaeda and ISIL is disappearing; there could still be a reason for this office for the other sanctions committee.

Q16. Do all states look at this office in a similar way or some perceive it biased in some way?

Response: Biased, I don't think so. Every state is happy with, every state having access for the recommendation which is a limited amount of states, it concerns the state members of the committee and it concerns the relevant states- states of nationality and resident, designating state, those will have with the permission of the council, get access to the report so they may form a view as to the quality of the work of the Ombudsperson, they may disagree with the recommendation so I think it's healthy that there is no rosy picture. You try to do what is best possible work. You have to accept that you may be faulty, that there are ways to improve your work, so biased honestly I don't really think so but it may be my ignorance that I don't feel that every state agrees that there should be an office, that's a different issue, they may consider that I am not biased but they may still think that in this particular type of issue, states should be in full control, some states are certainly of that view. Now biased may be at times if they see that the recommendation does not go their way. They may think that I am not entirely impartial, it's not a question for me to answer, it's a question for states to answer, they do share with me their thinking about that.

Q17. How is interacting with individuals different from dealing with entities?

Response. First of all, when you are dealing with entities, you are dealing with the individuals representing the entities. So you still have to assess the credibility of that individual, now it's different because you are at different issues when dealing with entities. When you deal with the individual, you look at the conduct of the individual but when looking at the entity you look at the representative, how the entities have established itself as a way of functioning, it's broader its bit more complex I would say to look at an entity. To be frank with you, I have not yet dealt with an entity, my predecessor dealt with the entities. Only speculating. The procedures are same except that in case of entities you have to ascertain that the person coming to interact actually represent the entity.

Q18. On average, how many times an Ombudsperson meets a petitioner and what is the duration of the each conversation?

Response:
Duration: In a simple case it may be of 3 hours and may go to 6 hours depending upon the nature of the case. The more information you have, the same you put it in front of the petitioner, and the more questions arise from that. So that's really decided on the basis of the case.

Frequency: It is usually one meeting, I once had to meet a petitioner twice, he had a surgery and he was not well recovered. But that's the only case that I had to meet the petitioner twice and what is more frequent is that in addition to meeting in person, if there are follow up questions after, I explained to me sometimes based on the responses I go back to states and the information they gave me, as a result of the follow up may require me and in principle to meet the petitioner again, so when it's possible I do it over phone or at times in writing emails. And in some cases I had 6-8 exchanges before I present report to the committee. Some cases require large number of follow ups and sometimes via their counsel.

Q19. Does absence of counsel create a difference in the interaction?

Response: Yes, I am not sure whether it's worse, but at times because of the weight of the assessment of the credibility. I think the presence of the counsel guarantees that all the legal aspects have been taken care of but in person relationship is more important. I don't have a problem in having a counsel present, I think I would have a problem with petitioner who doesn't want to answer my questions but is asking the counsel to respond. But I think that would affect my capacity to assess the credibility and you won't be in favor of that person because it is the person who is at stake and not the counsel. When someone explains to you that his views have changed about Al Qaeda and why is that? you want to hear it from the person not the counsel.

Assuming that counsel is expressing exactly what the client has said in answering that question and the follow up question, it it's a counsel who is responding on behalf of

the person, how do I know it's worth, I would rather assume that these are words of the counsel to make the case more favorable. It would be useful for me to test some agitation, contradictions in the responses and its much more appropriate to hear it from the petitioner. And credibility plays a key role so that aspect is, the counsel present and entitled to ask questions, I have no problems on that, On the contrary, writing to the petitioner without a counsel and drawing his attention to the fact that should be useful for him to read material that I have put on the website. If the counsel is assisting, it's not certain but I can assume this material is going to be read and good use would be made of it if I have a person and don't know person have done it, if I realize the level of understanding of the petitioner is low, I will find other ways of expressing the things the person needs to know. I will adjust my language so that I am understood by the petitioner. The material I put on the website is written, I hope in intelligible way but for someone who really doesn't have a good understanding, may be you have to have more simple sentences and reinforce it in points, if you are having a direct conversation with the petitioner, you can measure that you can see that he getting you and then you say the same in a different way.

Q20. Don't you think there should be an automatic review mechanism having a time period within which the listing is reviewed?

Response: It exist, there is a triennial review by the committee. The monitoring team prepares the list and contact the relevant states for getting information but that review if I am not mistaken is actually for- if some states oppose for delisting and even if they don't give new information or reason for their opposition, there won't be delisting because you need consensus for delisting by the committee. If it is not following a recommendation of the Ombudsperson, you need the consensus, so it's good there is a review though it's not perfect, I would personally think in case the monitoring team does not get responses of the new information, it would be useful for the committee to ask the Ombudsperson to make an independent review and the recommendation that would lead to some additional delisting but I don't have that mandate. It was considered at some stage but then it did not proceed, I think it's clear that some states are not really willing to expand the mandate any way that would give more scope to the work of the Ombudsperson. They are tolerating its existence

because it's been created by the council, they don't favor its expansion. It's not the majority of the states but some states within the committee are of that view.

Q21. What kinds of law regulate your office?

Response: Human rights law apply, try to apply those that work in that environment within the limits and the limits are set by the UNSC. The basic law for me is the UNSC resolution, its annexes, the guidelines of the committee to some extent, if they recruit people for my staff, they apply rules of human resource, the law of contract applies to me, the consultancy contract, domestic laws less as they influence how domestic authorities dealing with confidential information or conducting trial. The access to confidential information is dictated by the agreements we discuss or states would act on another basis so this is what matters than the domestic so indirectly yes they deal with the confidential information is going to be reflected in the kind of agreement they set with me. But for instance, whether domestic laws allow wire tapping of an individual – legal or done in accordance with the permission of judicial or another body- that's not really going to affect my work because most of the times I don't know the source of the information. Information may have been obtained through a surveillance of someone's phone or internet but I won't be told so and usually not. I will be told the outcome, I won't have to deal with whether something was legal or not domestically, similarly, if I have the access to a judgment rendered by a domestic jurisdiction concerning some facts it is usually a different focus as they are looking at the crime as they find it domestically. I am not taking the conclusion of the Court as to the legal conclusion. The legal conclusion of the court is not relevant for me. What are relevant are facts that they establish and I am not bound by their assessment, if I have good reasons to lead to a different conclusion I will. But I take facts established by the courts as a piece of information.

Q22. In the beginning of targeted sanctions, the delisting procedure did not exist at all which means that certain states were not interested in providing any information let alone creating accountability mechanisms. It is only after the hue and cry made by the NGOs, judgments given by the domestic judicial bodies in various states and by EU

that this office has been created. How do you look at the journey from the original situation where the listed person could go nowhere to present situation where this office has succeeded in carrying out large number of delisting?

Response: It is a positive journey that a lot has been achieved in terms of transparency, in terms of delisting but also retentions. Good achievement because it shows that security interests are taken into account by the Ombudsperson so I would say it's a very positive development. Is it enough? I don't think so, I think more can be done particularly on these reasons, also on the issue of independence as I told you, issues remains to be solved on assessment of performance, I still think having an independent office institutionalized would be better visibility and in terms of perception of independence, I also think that there are some additional roles that Ombudsperson could be given for instance in the context that I mentioned, it's not for me to pronounce whether the role should extend to other committees, may be not to all of them but my only comment there would be that I fail to see why these individuals wouldn't benefit from the same remedy as people on the Al Qaeda and ISIL list. They may be less of them but that doesn't mean that the case of each individual is not warranting the same guarantees, it's not my role to comment, there may be reasons that I can't foresee, I personally feel it would be improvement for them, so good positive assessment and with more to do to have a perfect system. If you look for instance as the level of criticism courts have expressed vis-à-vis this office i.e. Kadi II case, you must have seen some domestic decision, if you look at more recent decisions, it's clearly not an excellent review, there is still a criticism but you could see that for example General Court of the EU and the UK Supreme Court have made in recent cases some assessment, the fact they referred to the office in a more positive tone in sense that they can build on the material gathered by the office for their own decision that they actually look at arguments according to which for instance the EU did not follow a standard as same as the Ombudsperson and they look at the standard and say yes indeed Al Barakaat case recently they did.

All this shows start of something, obviously this system does not amount to judicial body, if this is the only thing that will warrant these courts to stop adjudicating these cases, we are far from that and it's not going to happen but if you look at whether is there a benefit in having this office and some interaction with the work that this office

is doing and what the court are doing, yes I think there is a change, start of a change and I would say probably this will go a little further when for instance the ECJ will have the opportunity to implement a new provision on accessing the confidential information, may be we will be facing similar issues with different legal frameworks, may be they will be looking at what others are doing, I hope they look at what I am doing and I will definitely look at what they are doing in that area to refine my own practice and to be guided by the assessment of appropriate standards in that area. What I was telling you, I put the cursor at the moment in terms of balance between the security interest and the human rights, I would certainly be guided in this respect by the rulings of these court that have HR obligations and which is clearly relevant for my work.

Q23. What kind of questions do you encounter while dealing with the Council? Do they provide you a list of questions in advance? Do they ask same set of questions or it varies from case to case.

Response: They don't provide a list in advance, it's spontaneous. Questions are bit of both-some same, some vary. Some questions they already know the answer but they ask, probably to make a point, sometimes questions are driven by the nature of the case and issues arising from the case, it's a bit of both.

Q24. Can you give an example of a question?

Response: I am not entitled to share that.

Q25. If I hypothesize that office of Ombudsperson has made the UNSC a more responsive body, to what extend can I safely affirm this hypothesis?

Response: The mere fact that we now have a possibility for individuals affected by the decisions of the UNSC imposing sanctions on them, the fact that these individuals are interlocutors, they can make argument, that they are assured that their case will be impartially reviewed, obviously it makes the legitimacy of the action of the UNSC in

that area improved. It is legitimate as it acts under Chapter VII but the credibility and the legitimacy in a sense that it is not enough to say that we are abiding by the rule of law, we are taking duly account of HR protection, you need to put that in practice , this office has shown how to put in practice those principles and the work of the Ombudsperson in that complex environment is implementing on daily basis that into practice so obviously it increases the credibility of the sanctions regime in question (and states have informed me) that it has helped them implementing sanctions domestically. All those challenges are putting at risk the capacity of large number of states within the EU to actually implement and not just limited to EU, some states national constituency very concerned by the HR protection were facing difficulties. This has clearly helped the legitimacy, the credibility of the intervention, the committee in that area making it more acceptable as this remedy exist and in turn facilitates the execution of sanctions so improves the efficiency of sanctions, if you adopt sanctions and if they are not implemented because of domestic challenges then you are less efficient in these measures that you consider as a way to restore international peace, anything that is helping in making them more efficient should increase the efficiency of the measures.

It is like a vicious circle but I will make a parallel when in domestic systems adopting the possibility of having a counsel present in the police custody, when that was introduced for the first time in the domestic system, a lot of law enforcement officers were of the view that it is going to ruin the prospects of any efficient criminal investigation but later we know that not only did it not prevent making criminal investigation but it made them more efficient and acceptable, think in an area of terrorism, the way individuals are treated is very important, by not treating fairly people accused of involved in terrorism you actually reinforce the speech of those who want to bring more people in their groups so you need to treat very fairly and in abidance of law the individuals you put on list otherwise you reinforce the impression that states have to be combated as they are not treating us fairly. So you have on those list the individuals who will be able to demonstrate that they were not associated and those who were associated, the way you treat them is one element on that journey these associations from those extremists and terrorist groups, its very important the way you treat them.

I have seen individuals who have been detained, tried, the way they have been treated by the police, justice system, prison, by the correction system is very important as to how they perceive to be associated with these associations. And I think same goes for the way Ombudsperson is treating them but beyond the Ombudsperson, it is the UNSC, that's my personal I think very important. This humane dimension if you have to retain one thing out of that, this humane dimension which Ombudsperson mandate brings about with its dialogue phase is key in this respect. And if you don't have the possibility of seeing the individual in person, I think you miss a good part of that, you could still do a fair evaluation in writing, but this possibility of meeting a person explain things sometimes petitioners are very emotional, sometimes they are very bitter, the way you treat them, you listen to them, you respond to them even if you disagree with them and in the end they will be like she didn't believe me on that or she thinks that this is the valid argument for delisting, you need to give lot of effort in reasoning your recommendations. That's the proof of the credibility of your office.

It's the same as the judicial decision you may have all the highly regarded factor of the judiciary if you end out poorly reasoned decision, it is not going to be great. People who will receive your decision will be saying what is that? In the beginning of my career, I remember making decisions like removing a custody of a child from parents, I mean these are highly emotional sensitive situations, the way you explain to the child, to the parent or the guardians is the key, if you spend extra mile to be very approachable and reasonable in the way you lay out your reasons, the reaction is different, they may completely disagree with you but they will respect you and they will consider that they have been atleast fairly treated which is very important even if they appeal your decision. I am not expecting petitioners to be happy with me, that's not the purpose or to be grateful when I recommend that they should remain on the list but I hope to have worked hard enough so they respect the role I have played and my integrity in doing it, that's very important for me if I understood that I have failed in conveying that integrity or impartiality in dealing with them, I would consider I have failed in my test.

Annexure II

(Additional Information on Selected Peace Operations)

Somalia

Significance of the Case: The Somalian civil war turned out to be one of the most difficult challenges that UNSC came across in post-cold war times. This case is important as the intensity of conflict brought forward the issue of applicability of IHL and HR law on peace keepers. The case highlighted the shortcomings of the traditional peace keeping in situations which are war like.

Case of Somalia

CRISIS	**UNSC's RESPONSE**
-Downfall of Somalian President, Said Barre, in 1991 creating political vacuum. -Power struggle between interim President- Ali Mahdi Mohamed and General Mohamed Farah Aidid. -	-UNSC Res. 733 (1992) calling all parties to cease hostilities and implement embargo on weapons. Effectively execute humanitarian assistance and reach political solution by seriously pursuing the process of national reconciliation. In March 1992, Mahdi and Aidid signed a UN brokered 'Agreement on the Implementation of Ceasefire'. -UNSC Res. 746 (1992) provided for the creation of a Technical Team to monitor ceasefire. -UNSC Res. 751 (1992) established UNOSOM. The security personnel had a limited mandate i.e. protect UN personnel, secure supplies, provide security to seaports, airports etc. -Given limited resources and mandate, UNOSOM had a hard time preventing conditions of lawlessness in Somalia and incidents like attack on UN personnel, blackmail, robbery, extortion etc. continued. -In Nov. 1992, Secretary General called for the 'review of fundamentals of PKOs' to ensure uninterrupted supply to people starving in Somalia. He suggested a nation-wide show of force against those disrupting

Humanitarian crisis caused by the civil war that ensued between rival factions. -Conditions of Extortion, black money, robbery, absence of government, poverty etc. -General Aidid's non-cooperation. -Large scale migration and displacement (1.7 million in 1993) causing refugee crisis and problem of internal displacement.	humanitarian efforts as a 'credible deterrence'. This may either be carried out under direct UN command or by member states authorized by UNSC. However, the enforcement must be precisely defined and have a clear time frame so that it may return to normal peace keeping and peace building. - UNSC Res. 794 (1992) authorized the formation of force that can use 'all necessary means' to ensure smooth conduct of humanitarian activities. Consequently, UNITAF led by US was created and in the meantime, UNOSOM was to focus upon political aspects of crisis. -On 3rd March 1993, Secretary General recommended transition from UNITAF to UNOSOM II. Although UNITAF's presence had a positive effect on Somalian security yet incidents of violence, lack of governance etc. remained. -In view of the drought, famine, civil strife, widespread violation of humanitarian law, denial of rule law etc., UNSC through its resolution no. 814 (1993) called for the transition from UNITAF to UNOSOM II. UNOSOM II was created under Chapter VII to provide it with enforcement powers so that issues like preventing loot of humanitarian supplies, repatriation of refugees, resettlement of displaced people, disarmament etc. can be smoothly carried out. -Responding to the armed attack on UN personnel (in which 25 Pakistani soldiers were killed, around 10 reported missing and 54 injured), UNSC passed resolution no. 837 (1993) that intensified military operations against Aidid. In addition to UNOSOM II, US forces were deployed in Mogadishu to capture key aides of Aidid. -Nonetheless, the 'Black Hawk Down incident' in which two US helicopters were shot down and 18 American troops were killed served a serious dent in the political will vis-à-vis peace keeping. Specifically, pubic telecast of the bodies of American soldiers being thrashed on the

	streets of Mogadishu generated a wide public outcry against such missions. US President Clinton announced withdrawal of American troops by 31st March 1994. -UNSC res. 885 (1993) created Commission of Inquiry to investigate and arrest those involved in armed attack on UN. -UNSC res. 857 (1994) authorized continuation of UNOSOM II to achieve following goals- execute Addis Ababa agreement; disarmament; protect infrastructure and ports; facilitate humanitarian relief efforts; resettle refugees, facilitate political solution, safeguard UN and other agencies personnel and property. -In March 1994, Mahdi and Aidid signed 'Declaration on National Reconciliation' known as Nairobi Declaration. -On 14th October 1994, Secretary General noted that national reconciliation process has been slow and weak causing crippling security atmosphere. -UNSC declared to end UNOSOM II by 31st March 1995. Both Mahdi and Aidid factions declared their intent to give up violence and embrace principle of power sharing. They also accepted elections as a legitimate means to attain political power.

Source: https://unsom.unmissions.org

Key Points of the Case: The UN involvement in Somalia had a positive and negative results. On a positive side, the UN involvement provided immense humanitarian relief to millions of Somalians suffering due to civil war, drought, famine, hunger, poor health and sanitation. However, the UN failed to drive out violence and the national reconciliation process remained shaky.

UN in Former Yugoslavia

Significance of the Case: The impact of the end of Cold War, the collapse of USSR and the ethnic rivalry influenced the stability in Yugoslavia causing civil war. Because of the civil war, the Yugoslavia broke down into six independent republics- Serbia, Bosnia and Herzegovina, Croatia, Slovenia, Macedonia and Montenegro. Alongside, two autonomous regions- Vojvodina and Kosovo- were formed within Serbia. The Yugoslav crisis are important from different perspectives — like the role of force in halting civil conflict; international crimes and moves establishing individual criminal accountability i.e. ICTY, later ICC; ineffective UN response causing Srebrenica massacre; states responsibilities during peace operations in the light of recent judgment apportioning 30 percent responsibility on Dutch state for the Srebrenica killings; problems of immunity witnessed during Mothers of Srebrenica Case etc.

Case of Bosnia and Herzegovina

Crisis	**UNSC's Response**
-The crisis erupted in June 1991 in former Yugoslavia following Croatia and Slovenia's declaration of independence. -This call was opposed by Serbs in Croatia and the Yugoslav People's Army (JNA). -Attempts by the EC to settle the crisis failed. -Initially, UN efforts were	-UNSC resolution no. 713 (1991) took note of the seriousness of the fighting in Yugoslavia and called all states to implement general and complete arms embargo. The UNSC encouraged European Community (EC) and UN Secretary General to keep working on the dialogue towards peace process. -Taking note of the ceasefire violation, UNSC passed resolution no. 721 (1991) which clarified that the peace keeping operations would be possible only if all conflicting parties undertakes to abide by the Geneva Conventions. -On 15 Feb.1992, Secretary General noted that even though not all parties have shown intent of

concentrated on Croatia but later Bosnia and Herzegovina also witnessed violence between Bosnian Muslims and Bosnian Croats on one side and between Bosnian Muslims and Bosnian Serbs on the other. -Despite continuous UN efforts including the involvement of NATO, the Serb paramilitary units did not halt their aggression on Bosnian Muslims especially in Srebrenica. -The conditions in Bosnia and Herzegovina turned extremely violent in May 1993 when the fighting between Bosnian Muslims and Croats attained new heights. The conflict also blocked the routes and restricted movement of UNPROFOR and other actors. In response, UNPROFOR and UNHCR started 'Operation Lifeline' with an aim to protect main routes connecting to 2.7 million people.	cooperation yet a peace operation is desirable given the impending crisis that may emanate in its absence. He therefore recommended to the UNSC for the creation of United Nations Protection Force (UNPROFOR). -As an interim arrangement, UNSC resolution no. 743 (1992) established UNPROFOR having mandate straddling over all republics of Yugoslavia- Croatia, Bosnia and Herzegovina, Slovenia, Macedonia, Montenegro and Serbia. -In 1992, UNSC Res. No. 762 and 779 enlarged the mandate of UNPROFOR by authorizing it to monitor 'pink zones' (areas controlled by Serbs but were outside UNPA boundaries). Consequently, UNSC passed Res No. 802 (1993) that demanded immediate end of hostilities. - In the context of growing violence in Bosnia and Herzegovina, UNSC Res. No. 757 (1992) was passed under Chapter VII of UN Charter that imposed sanctions on FRY (then Serbia and Montenegro). The resolution also emphasized the significance of uninterrupted supply of humanitarian goods to Sarajevo and other security zones. To prevent further conflict, the UNSC through its resolutions- 758 (1992) and 761 (1992) enlarged the size of the mandate and equipped it with more weapons and personnel. -Taking note of the difficult conditions prevailing in Sarajevo that are complicating the task of UNPROFOR, the UNSC through its resolution no.

- On 28 January 1994, PM of Bosnia and Herzegovina raised the issue of Croatian aggression against his country. Croatia was reported to have launched attack through its regular army as well as the Bosnian Croat Army. -Approximately three to five thousand Croat regular army personnel were reported to be operating in Bosnia and Herzegovina. -In its January 1994 Summit, NATO showed keen interest in the conflict prevailing in Yugoslavia especially the humanitarian chaos and offered help in the form of air strikes. The key areas requiring support were identified as Sarajevo airport, Tuzla airport and Srebrenica. -Following talks between Bosnian Serbs and Russian officials, Tuzla airport was opened to restore humanitarian supplies. Also, troop rotation was permitted	770 (1992) acting under Chapter VII of the UN Charter urged all States to "take nationally or through regional agencies or arrangements all measures necessary" to ensure delivery of humanitarian assistance to Sarajevo and other conflicting areas. -UNSC Res. No. 781 (1992) created a 'no-fly zone' that banned all military flights except those operated by UN for its operations including humanitarian assistance. -On 13th March 1993, three aircrafts bombed two villages east of Srebrenica and fled towards FRY. The President of the UNSC condemned such violations of no-fly zone. By November, UN reported 465 incidents of violations of no-fly zone and demanded immediate explanation from Bosnian Serbs. The FRY denied any such violations. -Acting through resolution no. 816 (1993), UNSC urged all states as well as regional organizations to work in collaboration with UNPROFOR and through "all necessary means" to ensure compliance with the no-fly zone and maintain the sanctity of airspace. -The NATO came into action in April 1993 when its Secretary General informed UN Secretary General that former has made all necessary arrangements to execute flight ban in the airspace of Bosnia and Herzegovina. -Given the violence by Serb troops in Srebrenica, the

with Dutch contingent replacing Canadian troops. -Nonetheless, attacks on civilians continued. For instance, on 5th February 1994, a mortar round fired killed 58 civilians and 142 wounded. -Appalled by the incident, the UN Secretary General informed the UNSC about the necessity of air strikes. He also requested the NATO Secretary General to take approval from North Atlantic Council (NAC) for the authorization of air strikes. -Russia regarded NATO plan as one sided ultimatum. -During the March end, 1994, Serb forces carried out offensive in Gorazde, a UN designated safe- haven region, creating civilian casualties. -Various unfruitful attempts were made to resolve the conflict through peace plans like Vance-Owen plan, HMS	UNSC invoking Chapter VII passed resolution no. 819 (1993) demanding all parties to treat Srebrenica a "safe area" to protect civilians. The UNSC declared the Serb violence as "ethnic cleansing" and demanded strict compliance to help implement humanitarian assistance programmes. -UNSC Res. 824 (1993) enlarged the scope of the territory that must fall under safe havens. Apart from Srebrenica, Sarajevo and the towns of Zepa, Tuzla, Bihac, Gorazde along with their surroundings should be regarded as safe areas. Also, the UNSC urged Serb forces to withdraw and allow aid agencies as well as UNPROFOR to execute their responsibilities. -Through its resolution no. 836 (1993), UNSC acting under Chapter VII authorised UNPROFOR to 'use force' including air power so that 'safe areas' could be safeguarded against the bombardments carried out by Serbian forces. -In response to the intensification of battle between Bosnian Muslims and Croats, the UNSC through Res. No. 838 (1993) urged Secretary General to explore the possibility of deploying international observers at the borders of Bosnia and Herzegovina. The Secretary General raised concerns due to shortage of financial and human resources. However, on in July, the President of UNSC informed Secretary General that UNSC still believes in the desirability of deploying international observers. -On 9th November 1993, the UNSC President expressed deep concern over growing humanitarian

invincible package etc. Thus, deeper engagement of big powers seemed more relevant than ever. -Consequently, on 25th April 1994, a contact group was formed comprising foreign ministers of US, Russia, France, UK and Germany. The group formulated a map delineating new republics. It was accepted by Bosniac-Croat Federation, FRY and Croatia. Despite FRY's insistence, the Bosnian Serbs rejected it. To multiply the pressure, the FRY severed diplomatic and economic ties with Bosnian Serbs. -While assessing the HR situation in Bosnia and Herzegovina, the Secretary General found that violence against minorities carried out by Serbs stipulate a more holistic approach by UNCIVPOL (UN Civilian Police). -During the August-September 1994, conditions in	crisis and urged all parties to not hinder assistance of humanitarian character. -Reacting to the Croatian aggression against Bosnia and Herzegovina in January 1994, the UNSC President warned Croatia of serious consequences if fails to end its activities- referring to territorial expansion and ethnic cleansing. -Alarmed by the Gorazde offensive, NAC authorized air strikes if Serbs do not concede to the requirements of peace. Though Serbs did not meet all demands (but they agreed on a ceasefire) yet the UNPROFOR Force Commander ruled out air strikes at that stage. Also, it was believed that air assault would have impeded the successful delivery of humanitarian aid. -Given the non-cooperative behavior of Bosnian Serbs and FRY's call to severe ties with them, UNSC also strengthened sanctions on Bosnian Serbs through resolution no. 942 (1994). -Driven by the Secretary General's gloomy evaluation of HR situation in Bosnia and Herzegovina, the UNSC passed resolution no. 941 (1994) asking Serbs to completely stop their campaign of ethnic cleansing. Also, access should be allowed to UN and ICRC representatives to visit troubled areas like Banja Luka. The UNSC explicitly condemned breach of IHL especially Geneva Conventions, 1949 and warned that those found guilty would be held individually responsible.

Bosnia and Herzegovina continued to deteriorate due to sniping activities, heavy weapons attack targeting cities, suburbs, civilian vehicles, residences, UN personnel etc. At various times, humanitarian routes were impeded by Serbs. Overall, insecurities and vulnerabilities in areas like Sarajevo, Srebrenica, Travnik, Tuzla, Gorazde etc. made mockery of HR cause. -In October-November 1994, civilian life once again took a toll after the offensive and counter-offensive launched by Bosnian government and Serb forces in Bihac region increasing the number of displaced people as well as refugees. -On 18 November 1994, an aircraft of Serb forces dropped cluster and napalm bombs on UN designated safe area, Bihac, endangering civilians as well as UN staff. -In response to the NATO air	-Noting the violence in Bihac, the UNSC passed resolution no. 958 (1994) reinforcing the use of air power to protect safe areas. - On 21st November 1994, the NATO launched air strikes in Croatia. US, UK, France and Netherlands took part in these air strikes. The NATO strikes again became evident when Bosnian Serbs attacked British jets. -The Srebrenica massacre and the clashes after that proved critical in impelling NATO to launch 'Operation Deliberate Force'. Thus, the NATO strikes and the UNPROFOR's support fundamentally altered the character of the engagement in Bosnia and Herzegovina. -The NATO strikes and the 'Operation Storm' of the Croat forces in Krajina molded the dynamics in Bosnia and Herzegovina. -Following this, the process of Dayton Peace Accords began. The conclusion of this process comprised a General Framework Agreement along with eleven annexes. The goals of the Accords include cessation of hostilities; consolidation of Central government in Bosnia; and deployment of military and civilian program. -Under UNSC resolution no. 1031 (1995), the UNPROFOR was replaced by NATO led Implementation Force (IFOR) under the name- 'Operation Joint Endeavour'.

strikes, Bosnian Serbs continued their assault on UN personnel, restricted their movement and hindered free flow of humanitarian convoys. -UNPROFOR proposed a peace plan in Bihac area- unconditional ceasefire, demilitarization and handing over of safe area and interposition of peace keeping force. The plan was accepted by Bosnian government but Bosnian Serbs rejected it. - On 26th May 1995, NATO conducted air campaign in retaliation to the defiance of UN ultimatum by Bosnian Serbs. In an unprecedented move, the Serbs held around 400 UN troops as hostage and utilized them as human shields. The next day, the UN observation point located Vrbanja bridge was attacked. -Probably, the most controversial and horrific incident that shook the conscience of humankind was the Srebrenica massacre on 12	

July 1995. The massacre occurred despite Srebrenica being a UN designated safe area. The apparent cause of the massacre was that the Dutch battalion failed to control the aggressive and outnumbered Serb fighters. All it could do was to evacuate women and girls while thousands of men got butchered. The Serbs. Later, even the safe area of Zepa fell under the hands of Serbs.	

Source: http://www.un.org/Depts/DPKO/Missions/unprof_b.htm

Case of Croatia

Crisis	**UNSC's Response**
-The crisis erupted in June 1991 in former Yugoslavia following Croatia and Slovenia's declaration of independence. -This call was opposed by Serbs in Croatia and the JNA. -Croatia was attacked by Yugoslav Army and Serbs in Croatia. In response, the Croats sought to internationalize the issue and	-On 11 December 1991, the proposal for UNPROFOR, also called as Vance Plan was announced. It was conceived as a temporary arrangement pending the political solution. In Croatia, UNPROFOR stipulated withdrawal of JNA from the UN Protected Areas (UNPAs). The UNPAs were the areas having Serbs in majority or substantial minority and feature clashes of inter-community character. Protection of HR was a central goal and the UNPROFOR along with other humanitarian bodies need to work towards resettlement of displaced population. It also required that local authorities as well as police continue to

gained support of the West. -Nonetheless, Croats found it difficult to survive the onslaught of militarily superior Serbian forces especially because of imposition of arms embargo on whole of Yugoslavia. -Subsequently, EC dispatched a monitoring mission and sought mediation. -In 1993, Croatian government attacked areas adjacent to UNPAs and pink zones due to slow rate of progress in peace settlement. Serbs also responded violently provoking UNPROFOR to issue warning to both parties. -On 17 December 1993, Croats and Serbs inked a UNPROFOR mediated Christmas Truce Agreement ending all hostilities. -On 29 March 1994, Croatian government and local Serb authorities (in the presence of	operate under UN supervision. -UNSC through Res. No. 871 (1993) reaffirmed the significance of execution of peace keeping plan in Croatia and urged all parties especially FRY to cooperate. Further, the UNSC called for immediate ceasefire; restoration of necessities like electricity, water, communications etc. in Croatia; reestablishment of Croatian authority in Pink Zones; and commencement of Confidence Building Measures (CBMs). -The Croatian mission was taken over by United Nations Confidence Restoration Operation in Croatia (UNCRO) in 1995. Formed through UNSC res.no. 981 (1995), the UNCRO was established under Chapter VII of the Charter. -Following the signing of the Erdut agreement between Croatia and Serbs,, the UNSC terminated the mission through resolution 1025 (1995).

US and Russian representatives) concluded a ceasefire agreement to end all hostilities. -By May 1994, UNPROFOR reported complete compliance except a brief instance where Association of Displaced Persons of Croatia imposed blockades at cross points and within UNPAs.	

Source: http://www.un.org/Depts/DPKO/Missions/unprof_b.htm

Case of Macedonia

Crisis	**UNSC's Response**
In 1994, UN Secretary General assessed that the bigger problem in Macedonia were economic in nature. Unemployment and economic stagnation due to sanctions imposed by UN (against whole of FRY) and Greece pose a threat to social stability. -Another factor that complicated the Macedonia's fate was its strained relations with Greece and non-recognition of its border by	-Acting on the request of President of Macedonia and the recommendation of Mr. Vance and Lord Owen, Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia, UNSC through its resolution no. 795 (1992) authorized the formation of UNPROFOR in Macedonia. The objective of the mission was to prevent, monitor and report on the volatile situation occurring along the borders of Albania and FRY (then Serbia and Montenegro). -In 1993, a Nordic Battalion along with US contingents numbering 315 was deployed. -In 1995, the UNSC compartmentalised the UNPROFOR into three parts- one being UN

FRY. -Since 1995, the mandate of UNPREDEP has been renewed by UNSC. However, in 1998, situation profoundly changed with the dawn of conflict in Kosovo Province of FRY. -Following China's veto to extend the mandate of UN in Macedonia, UN's engagement in Macedonia ended abruptly. It is believed that China's decision is triggered by the establishment of Macedonia's diplomatic ties with Taiwan.	Preventive Deployment Force (UNPREDEP) to be stationed in Macedonia, thereby UNPREDEP replacing UNPROFOR through UNSC Res. No. 983 (1995). -The UNPREDEP active during 1995-1999 is the first and only preventive troop deployment mission launched in the history of UN peacekeeping. Like UNPROFOR, the UNPREDEP's mission remained focussed on monitoring border areas of Macedonia and report on developments that may possibly spark off instability. -Although UNPREDEP's primary concern was prevention of instability. The UNPREDEP also sought to promote dialogue among political actors in Macedonia, defend HR, prevent inter-ethnic clashes and facilitate betterment of socio-economic conditions. -Responding to the disturbances in the Kosovo province of FRY, the UNSC through its resolution no. 1160 (1998) reiterated its commitment towards political sovereignty and territorial integrity of FRY. It banned the sale and supply of arms to FRY including Kosovo. Moreover, the resolution called all states to refrain from training and arming terrorist activities in Kosovo. -In the wake of disturbances in Kosovo, UNSC Resolution no. 1186 (1998) increased troops availability to UNPREDEP to effectively monitor border areas (that appear riskier than ever due to

	illicit arms flow) and prevent clashes. The resolution emphasized the sanctity of territorial integrity and political independence of Macedonia. On 25th February 1999, China exercised its veto and the mandate of UNPREDEP could not be renewed further.

Source:http://www.un.org/Depts/DPKO/Missions/unprof_b.htm;https://peacekeeping.un.org/mission/past/unpred_b.htm

Key Points of the Case: The Yugoslav War were so deadly that the bloodshed during its occurrence is regarded as the worst since World War II. The case of Bosnia and Herzegovina revealed that certain intra-state conflicts cannot be settled in the absence of credible use of force. Thus, the Serbs need to be over powered with NATO air strike before they got down to the negotiating table. The UNPROFOR failed to recognize the hatred that Bosnian Serbs had for Bosnian Muslims which resulted in immense loss of human life. The Srebrenica massacre of 1995 and the subsequent series of efforts by victims and their families in pursuing justice are also a matter of serious consequence from the perspective of IO accountability. Another lesson learnt by UN was shortcoming of its strategy of creating "safe zones".

Rwanda

Significance of the Case:The Rwandan Case is known for the UN's act of omission. The world was shocked at the brutal Rwandan genocide that ensued due to the UN's reluctance to intervene in the war-torn country. The Rwandan incident has a strong bearing issues of R2P as well as IO responsibility.

Case of Rwanda

Crisis	**UNSC's Response**
-The decades old rivalry between the Hutu majority	-UNSC Res. 872 (1993) established UNAMIR to monitor ceasefire, monitor security situation till the

and Tutsi minority sharpened when the latter formed RPF in 1988 as a political and military outfit in Uganda with an explicit aim to repatriate Tutsi refugees back to Rwanda. -In Oct. 1990, RPF launched an armed attack with seven thousand militants on Rwandan government. -The Rwandan government claimed all Tutsi in Rwanda as accomplices to the assault and all moderate Hutus as traitors. -In 1993, the OAU led peacekeeping helped conclusion of Arusha agreement. -The peace process remained fragile. On 6th April1994, rocket attack hit the plane carrying Presidents of Burundi and Rwanda. -As a result, a campaign of systematic killing of Tutsi was carried out by Hutus militia, paramilitary and army	conduct of elections. -At the time of systematic massacre of Tutsis and Moderate Hutus, 10 Belgian peacekeepers were brutally murdered by Rwandan forces compelling Belgian withdrawal from the peace operation. Following that, UNSC's force was reduced from 2165 to mere 270. -Later, on June 22, 1994 the UNSC authorized French forces to carry out a humanitarian mission called 'Operation Turquoise' which claimed to have protected hundreds of people in South West Rwanda. -On 8th November 1994, UNSC established International Criminal Tribunal for Rwanda (ICTR) based in Arusha, Tanzania. The Court was given the jurisdiction cases of human rights abuse during January –December 1994. It had the power to conduct trial of former government officials, armed personnel and paramilitary forces that left the country. The first case began in 1997 and one of the high-profile case was the punishment of life sentence to former P.M., Jean Kambanda. It was for the first that the instances of rape were regarded as 'crimes against humanity' and 'crimes of genocide'. -By April 2007, the UN Tribunal pronounced 27 verdicts comprising 33 cases.

personnel. Approximately 8,00,000 Tutsi were exterminated and around 1,50,000-2,50,000 women were raped. -After the arrival of French forces, RUF managed to capture entire Rwanda territory while the Hutus involved in massacre fled to DRC. -The camps were set up to settle them, though thousands died of water borne diseases. These Hutu refugees also launched attacks on Rwanda (now under the RUF control) resulting in war between Rwanda and DRC in 1996.	

Source:URL:http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml

Key Points of the Case:The Rwandan genocide is regarded as the one of the biggest failures of the UN in post-cold war era. The R2P debate intensified post this disaster and probably it also convinced certain suspicious countries of global south that R2P may indeed be required in exceptional cases. The extensive support received from global south in the 2005 World Summit Outcome Document is a testimony to this.

Democratic Republic of Congo

Significance of the Case: The UN's involvement in DRC is one of the oldest. During Cold War, Katanga secessionism, triggered immense violence and UN intervened during 1960-64. India troops played a key role in that operation. However, since the post cold war's conclusion, the DRC has remained divided and violence remained a norm. This case is also relevant to see the cautionary UNSC's involvement in which it explicitly declares that innovative measures alike Intervention Brigade are exception than a norm.

Democratic Republic of Congo

Crisis	**UNSC's Response**
-As a result of Rwandan genocide in 1994, around 1.2 million Hutus settled in the Kivu region of DRC.	-Following Lusaka settlement, the UNSC through its resolution 1279 (1999) created (United Nations Organization Mission in DRC (MONUC) carrying mandate like observing ceasefire, disengaging combatants etc. -30 July 2006 marks a watershed moment as in the history of last 46 years first ever free and fair elections took place in DRC in which Jospeh Kabila (son of Laurent Desire Kabila) emerged victorious.
-In 1996, clashes took between President Mobutu Sese Seko and the rebel group led by Kabila (supported by Rwanda). In 1997, the rebels took over capital Kinshasa and changed the name of the country to DRC.	-Taking cognizance of the incidents of humanitarian crisis and human rights abuse in various forms like sexual misconduct, extra judicial killing, targeted attacks against civilians, use of child soldiers etc., the UNSC passed resolution S/RES/1925 on 28 May 2010. The resolution notes that protection of civilians including UN personnel, human rights defenders, humanitarian personnel etc. is vital aspect component of peace operation. -Realizing that DRC is entering a new phase of transition, the UNSC acting under Chapter VII, extended the mandate of United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) by giving it a new name United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).
-In 1998, Kabila government faced a rebellion and rebels took control of certain parts of the country. Kabila was extended	-Reaffirming the principle of R2P, the resolution pressed the point about the primary responsibility of government of DRC in protecting human rights of its population. It emphasized the importance disarmament and resettlement to bring DRC on the path of economic progress.

external support by states like Zimbabwe, Chad, Namibia etc. However, Uganda and Rwanda supported the rebels. The UNSC's call for ceasefire spilled into Lusaka agreement between the DRC and 5 regional states — Angola, Namibia, Rwanda, Uganda and Zimbabwe in July 1999. -The focus of the UN peace keeping efforts remained on the Eastern part of DRC.	-Through UNSC resolution 2098 (2013), an 'Intervention Brigade' was formed to bolster the strengthen of peace keeping mission. -Later, the UNSC resolution 2147 (2014) extended the mandate of Intervention Brigade but cautiously noted that it is an exceptional response without establishing any precedent. -While the mission was extended in 2017, the UNSC also emphasized the need for clear exit strategy keeping in view the developments on the ground.

Source: https://monusco.unmissions.org/en

Key Points of the Case:The mission reiterated the fact that modern peace operations are highly complex due to variety of reasons- absence of law and order, politics of regional states, intensity of violence etc. The use of Intervention Brigade highlights the cautionary mode of UNSC's functioning in which it does not want to over commit by setting a precedent.

Lebanon

Significance of the Case: It is one of the longest peace mission carried out by UN which marked its 40th anniversary in 2018. Lebanon case represents has a reflection of longstanding and multifaceted Arab-Israel conflict. It shows that peace operations may

Table: Lebanon

Crisis	**UNSC's Response**
-After its independence in 1944, the Lebanese political system was structured through a power sharing model that facilitated rule of Christians over Muslim majority. -The Southern Lebanon (around the city of Tyre) had the presence of Palestine Liberation Organization (PLO) which attained recognition through the Cairo agreement concluded between PLO and the Lebanese army. This allowed PLO to launch attacks against Israel from Southern Lebanon territory. -In April 1975, mutual suspicion between the Christians and the Lebanese Muslims (supported by PLO) spilled into civil war. Thus, the power sharing model failed to sustain the conflicting aspirations fueled by changing demographics. -In June 1976, Syria intervened to safeguard Christians followed by a deployment of Arab League's peace keeping force (Arab Deterrent Force). During the heights of Lebanese civil war in the year 1975-1976, option of peace keeping force was seriously mooted. However, reservations made by some parties brought the idea to a standstill. -The major factor that turned the table was the Israeli occupation of Lebanon in 1978. The UNSC responded with UNFIL. -Following the onset of skirmishes at the Israel-Lebanon border in 1982, Israel again occupied Lebanon. - In 1996, 120 Lebanese civilians lost their lives and 500 wounded due to the Israeli attack. In 2000, the Israeli government communicated to the UN Secretary General about its intentions to totally withdraw from Lebanon as stated in UNSC Res. No. 425 (1978) and 426(1978). - With the political support from Egypt, Syria and Jordan as well as technical assistance from	-Lebanon raised the issue of its Israeli invasion of Lebanon (1978) in UN prompting UNSC to pass two resolutions- 425 and 426- the same year. The resolutions urged Israel to withdraw from Lebanese territory and established UNIFIL (UN Interim Force in Lebanon). -Post the Israeli reoccupation of Lebanon in 1982, UNIFIL confined itself to limited role of providing humanitarian relief. In 1985, Israel withdrew partially and retained control over a part of South Lebanon. -In 2000, the Secretary General confirmed that Israel has withdrawn in accordance with res. 425 (1978). However, later, UNIFIL reported breach of withdrawal line by Israel. Following Secretary General's visit to the conflicted area, the Israel committed not to violate its obligations in future. -The problem ensued now in the form of Hezbollah's rocket attacks and Israel's air strikes. Noting this, the UNSC in its res. 1496 (2013) urged all parties to exercise restraint. Following this, municipal elections took place in which the whole of Southern Lebanon (conflict zone) participated. -Nonetheless, violent skirmishes continued from both from Israel and Hezbollah's side. Events like assassination of former Lebanese P.M. Rafic Hariri created further instability in Lebanon. -In 2006, a 34-day war occurred between Israel and UNIFIL reiterated cessation of hostilities. -The politics behind the scenes reflected US and France favoring Israel while most Arab

cartographers, a line was drawn as a temporary arrangement dividing Lebanon and Israel. -Between 2002-2003, tensions intensified in Israel and militancy aggravated due to activities of Hezbollah and Palestinians. The sanctity of withdrawal line continued to be violated by all parties.	states approached Secretary General on behalf of Lebanon. -Post the 2006 conflict, Maritime Task force (MTF) was instituted. The missions active today.

Source: http://www.un.org.lb/english/home

Key Points of the Case: The desire of the US and UN to sustain the Middle East Peace Process brought the matter of Lebanon to the limelight. One of the major hurdles that UNIFIL came across was the non-cooperative behavior of the parties to the conflict. Moreover, both US and USSR did not arm twist their allies in showing respect towards UNIFIL due to geopolitical considerations. The US despite being the early enthusiast in supporting the UNIFIL did not support it with enough force to make it effective on ground.

LIBERIA

Significance of the Case: The Liberian mission was jointly conducted with the ECOWAS's prior presence. The mission is also important as it showcase creation of first ever post conflict peace building office by UN.

Table: Liberia

Crisis	**UNSC's Response**
-Liberia suffered a civil war for a period of 14 years between 1989-2003 that claimed around 2,50,000 lives and created 8,50,000 refugees in neighboring states. -The source of the conflict is the power struggle between the government and the opposition group, National patriotic Front of Liberia (NPLF) led by Charles Taylor.	-Before UNSC's intervention, Economic Community of West African States (ECOWAS) took initiatives to kick start a peace process. -In 1990, UN supported the ECOWAS through a military observer group known as ECOMOG. Later, in 1992, an arms embargo was imposed by UNSC to establish peace in the country. -Following a peace agreement between the warring parties in Cotonou, Berlin in 1993, the UNSC created United Nations Observer Mission

-Even after the Cotonou agreement and the involvement of ECOWAS and UNOMIL, clashes between the warring parties continued. -Finally, in 1997, elections were conducted in which Taylor emerged victorious. UNOMIL attained its aim when Taylor announced his intent of pursuing national reconciliation and unity. -The process of national reconciliation remained fragile due to the severity of human rights violations, lack of security sector reforms and exclusion of political opposition. -With the steep rise in the fight between the warring parties, the then Secretary General recommended the creation of multidimensional UN peace operation.	in Liberia (UNOMIL) whose task was to assist ECOMOG in executing the elements of Cotonou peace agreement. It was for the first that the UN peace operation has worked along with an operation already managed by another organization. -In 1997, UN established its first ever post conflict peace building office known as United Nations Peace-building Support Office in Liberia (UNOL). -The UNOL undertook efforts towards facilitating good governance, strengthen national reconciliation, promote human rights, bolster reconstruction and development. -Recognizing the need for a modified approach, UNSC passed a resolution no. 1497 in 2003 that approved the establishment of a multidimensional UN peace operation named UN Mission in Liberia (UNMIL). -Since its formation, the UNIMIL's key focus remained on protection of civilians, reform of security or justice institutions, protection as well as promotion of HR etc. -The mission was formally called off on 30 March 2018.

Source: https://unmil.unmissions.org

South Sudan

Significance of the Case: South Sudan is a newest member in the comity of nations. It came because of secessionist movements prevalent in Sudan. However, the declaration of independence has not settled political struggles within the country and immense political suffering is visible consequently.

UN Mission in South Sudan

Crisis	**UNSC's Response**
-The conclusion of Comprehensive Peace Agreement (CPA) in 2005 set the groundwork for a six-year peace process finally prospering into the birth of the newest nation in the world in 2011, namely South Sudan. - The CPA ended the 20-year-old civil war between the government of Sudan and the Sudan People's Liberation Movement (SPLM). -One of the vital components of CPA was to carry out referendum to determine the creation of South Sudan. The referendum took effect in January 2011 in which 98.83% people voted for independence. -In 2013, violence sparked off in Juba, capital of South Sudan and later spread to other regions like Lakes, Central Equatoria etc. -The relationship between the government and the UNMISS started to deteriorate owing to the spreading	-Following South Sudan's declaration of independence in July 2011, the UNSC passed resolution no. 1996 (2011) establishing UN Mission in the Republic of South Sudan (UMISS). The aim of the mission was to consolidate peace, promote conductive conditions for development and help the new nation to establish good relations with neighboring countries. -Due to the fighting that ensued in South Sudan, large number of South Sudanese arrived at UNMISS compounds in places like Juba, Malakal, Merut etc. The mission engineers at UN compounds prepared around 8 sites to accommodate some 85,000 civilians. -Noting the paucity of resources relative to the problems at hand for UNMISS, the UNSC passed resolution no. 2132 (2013) that increased the troop and police availability to the mission. -In consonance with the advice made by

perception that UNMISS had anti-government bias. This perception soon turned into anti-UN demonstrations in areas like Rumbek, Aweil etc. Moreover, the freedom of movement of peacekeepers was also obstructed. -The fallout of the political crisis was visible on the HR situations wherein thousands of civilians were killed due to the ethnically targeted attacks committed by the conflicting parties. These were clear violations of IHL and HR law. -It was reported that within a month, around 5,00,000 were displaced and more than 74,000 took refuge in neighboring states. The magnitude of HR violations continues to rise and by February 2014, total displacement reached 9,00,000 out of which ,1,67,000 crossed national borders. Other indicators like acute food insecurity covered 3.2 million people. -The upgradation of the mission through the surge capacity deployment saved civilian lives. Assessing the ground conditions, the UN Secretary General on 6th March 2014 requested UNSC to extend the deployment for 1 year pending resettlement of internally displaced people.	the UN Secretary General on 6th March 2014, the UNSC through its resolution no. 2155 (2014) reprioritized the objectives of UNMISS emphasizing protection of civilians, safeguarding HR and promoting humanitarian assistance. -Following the advice of Secretary General in 6 March 2014 report, the UNSC also authorized formation of Intergovernmental Authority on Development (IGAD) within UNMISS. The IGAD was supposed to act as a task force to execute the goal of HR protection. -Under resolution no. 2406 (2018), the UNSC extended the mandate till 15 March 2019. Invoking Chapter VII of the UN Charter, the UNSC demanded immediate ceasefire. It is provisioned that UNMISS would make use of its good offices. It shall also keenly participate in the ceasefire and transitional security arrangements monitoring mechanism. The regional protection force is mandated secure freedom of movement through application of robust force. Most importantly, the UNMISS is expected to work towards promoting the cause of HR.

-The Secretary General also suggested that the UNMISS must be reoriented from peacebuilding to an impartial operation without which effective implementation of revised priorities would remain uncertain. Rather, the central attention should be directed at protecting civilians, safeguarding HR, promoting humanitarian assistance etc.	

Source: https://unmiss.unmissions.org

Key Points of the Case: The trend of state collapse or intra-state continues to cast a serious doubt on the prospects of world peace. The role of UN remains highly relevant in such situations with primary focus on protection of HR.

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