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THE INTERNATIONAL RESPONSIBILITY OF THE UNITED NATIONS IN RELATION TO THE CONDUCT OF PEACE-KEEPING AGENTS: A CRITICAL VIEW[1]

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ABSTRACT

The United Nations (UN) was founded to safeguard international peace and security. It is recognized by its programs and its peacekeeping operations. These operations were established during the Cold War and had a military character. However, with the fall of the Berlin Wall and the diversification of threats in the new world order, it was necessary to rethink these operations. Therefore, multidimensional peacekeeping operations were developed based on new principles; among them, the Responsibility to Protect (R2P). This principle is based on the international non-indifference regarding the violation of rights, which is controversial because it can be interpreted as a mechanism for legitimizing interventions as well as the violation of rights. As a holder of international legal personality, the UN can be sued; however, the it has never been punished for the violations perpetrated by its "Blue Helmets". Considering this, this paper aims to analyze the United Nations international legal responsibility regarding the violation of rights committed by the "Blue Helmets" during peacekeeping operations. For this, we applied the hypothetical-deductive method as well as the techniques of bibliographic research and the analysis of primary and secondary sources.

Keywords: Blue helmets. UN. Peacekeeping operations. Responsibility to protect. International responsibility.

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INTRODUCTION

The United Nations (UN) emerges on the international stage aiming at preventing conflicts and maintaining world peace through cooperation between its member States. Today, the organization is widely respected because of the broad range of joint programs it conducts with governments of different countries and for promoting peace through its peacekeeping operations. Since the 1990s, due to the reconfiguration of international relations and the changing characteristics of conflicts, peacekeeping operations are no more just essentially military in nature and have also aimed to rebuild States in conflict by enhancing political, social and economic capabilities. Over time, the increased complexity of missions and the UN's inability to devise clear guidelines for their operation have increased the number of reported human rights violations.

In this sense, this paper aims to analyze the international legal responsibility of the United Nations regarding human rights violations committed by the "Blue Helmets" in peacekeeping missions. By having an international legal personality, the UN is subject to legal complaints, but there is no record that the organization has been ever penalized for these violations. To achieve its aim, the article is divided into three topics. The first will discuss the evolution of UN peacekeeping missions from their inception to the present; the second will discuss the legal basis and principles of peacekeeping operations, with particular emphasis on the principle of Responsibility to Protect (R2P); and finally, the UN's international responsibility for violations of rights perpetrated by the "Blue Helmets" in peacekeeping missions will be addressed, extending the debate about diplomatic immunities and the resulting impunity.

PEACEKEEPING OPERATIONS AND THEIR EVOLUTION

With the failure of the League of Nations and the end of World War II, there was an increasing debate about the creation of a collective security system and of legal instruments capable of maintaining a peaceful environment. With the establishment of the UN in 1945, new and improved mechanisms were adopted to effectively maintain international peace and security. In its charter, in chapters VI and VII, the UN States its commitment to the peaceful settlement of disputes and to actions concerning threats to peace, breaches of the peace and acts of aggression (NAÇÕES UNIDAS, 1945, p. 22 -31). In order to ensure the continuity of peace

processes and respond incisively to international demands, the United Nations has created peacekeeping operations, which are the main instrument for the preservation of international peace and security used by the UN (MAIDANA, 2013, pp. 43-44). Although these operations are not directly mentioned in the UN charter, they are increasing in number and complexity[5].

UN's early peacekeeping experiences were limited to sending unarmed military troops to oversee peace and ceasefire agreements between countries. These operations consisted of small military contingents due to low spending. In them, the troops involved were not allowed to use force, with the exception of extreme cases when there was no other solution available (NAÇÕES UNIDAS, 1945, p. 30-31). According to the UN, its first peacekeeping operations took place within the scope of activities of the United Nations Truce Supervision Organization (UNTSO) in 1948, which was responsible for observing truce negotiations between Israel and its Arab neighbors and was later extended to the territory of Kashmir, also aiming at observing activities in the area (GRASSI, 2011, p. 201). Already in 1956, in view of the limitations of the first peacekeeping operations - the prohibition of the use of force being one of the main obstacles, since the level of violence employed in the observed regions was very high - the United Nations undertook the United Nations Emergency Force I (UNEF I)[6], the first armed peacekeeping operation, which was essentially military in nature and aimed at the resolution of an interstate conflict.

The UN Charter does not directly provide for the implementation of peacekeeping operations under its command. However, the organization's objectives, outlined in its charter, justify the establishment of these operations. Thus, Chapter I, art. 1 – "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of

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This operation was a milestone in the history of UN peacekeeping missions, as it caused the organization to rethink its operations, specifying international security and human rights as its primary objectives (NAÇÕES UNIDAS, 1945, p. 5). These early experiences of UN-coordinated operations were classified as traditional peacekeeping operations (FAGANELLO, 2013, p. 46-47). This peacemaking nature[7] meant they aimed to promote peace and resolve ongoing conflicts through diplomatic actions, without concern for rebuilding the country or maintaining peace afterwards (FAGANELLO, 2013, p. 43-44).

Throughout the Cold War, peacekeeping operations followed the traditional pattern, operating in small contingents and with minimal use of force. The exception is the case of Congo in the 1960s, when the United Nations, through the United Nations Operation in the Congo (UNOC), in addition to using civilians in peacekeeping actions, realized that the use of nonviolent means would not be sufficient to fulfill the objectives of the operation, thus authorizing a "change from peace operation to effective peace implementation through the use of force" (GRASSI, 2011, p. 202).

After the Cold War ideological clashes ended in the 1990s, the decision-making capacity of the United Nations Security Council (UNSC) was unblocked, due to the new state of the relations between the United States and the Soviet Union. In this context, peacekeeping operations began to be deployed more often and employ non-military methods. Given the increasing violations of human rights, the nature of the conflicts of that period demanded from the UN a broader and varied response,

[7] According to Fontoura, "peacemaking actions are based on the means for peaceful dispute settlement provided for in Chapter VI of the United Nations Charter, which may include: […] diplomatic isolation and the imposition of sanctions, and then resorting to coercive actions provided for in Chapter VII" (FONTOURA, 1999, p. 34).

since the peace mission deployed so far "were not sufficient to secure peace in an environment of internal insecurity that opposed regular government forces and militias in clashes motivated by disagreements of an ethnic, religious and cultural nature" (FAGANELLO, 2013, p. 18). Thus, the reconfiguration of conflicts from interstate to intrastate disrupted the model of previous peacekeeping operations, inaugurating a second generation of multi-dimensional operations (MAIDANA, 2013, p. 52).

Aiming to employ different means in peacekeeping operations corresponding to the new context in 1992, UN Secretary-General Boutros Boutros-Ghali (1992-1997) established the Agenda for Peace, a document that served as "[…] an analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and for peace-keeping"[8]. In this sense, the agenda proposed by the UNSG established new forms of action that should be adopted by the United Nations and reinforced in UNSC Resolutions, aiming at peacekeeping. Taking into consideration the recommendations of the UNSG and the need to achieve a self-sustaining and lasting peace (FAGANELLO, 2013, p. 48), multidimensional peacekeeping operations have adopted a framework of action based on preventive diplomacy, peacemaking, peacekeeping, peacebuilding and peace enforcement.

Preventive diplomacy actions through dialogue and negotiations – without the use of force – the aim is to prevent a conflict before its outbreak or to contain it in case of escalation (FONTOURA, 1999, p. 33). Additionally, mechanisms of peacemaking, peacekeeping, peace-building and peace enforcement were integrated into peacekeeping operations. Peacemaking "designates diplomatic actions undertaken after the beginning of the conflict to lead the disputing parties to suspend hostilities and negotiate" (FONTOURA, 1999, p. 34). Peacekeeping actions, together with peacemaking efforts, take place at the locality of the conflict, following the involved parties' consent, and are carried out by the military, the police and civilians. Its aim is to oversee ceasefire agreements and implement peacekeeping and peace-building measures. Peacebuilding, on the other hand, emerges as a mechanism employed after peacekeeping actions were carried out, since it should be integrated into the post-conflict society (FAGANELLO, 2013, p. 48). Currently, the concepts discussed include peace consolidation and national reconciliation, with the implementation of "projects aimed at rebuilding institutional frameworks,

[8] BOUTROS--GHALI, 1992.

restoring physical infrastructure and helping to recover economic activity. […] These actions are basically aimed at the economic and social development of the host country" (FONTOURA, 1999, p. 34-35).

Finally, peace enforcement actions are employed when the UNSC declares the existence of threats to peace that cannot be contained through peaceful efforts, without the use of force. In this case, the use of armed force is authorized for the purpose of safeguarding international peace and security. The use of peace enforcement actions is provided for in chapter VII, art. 42 of the UN Charter, which states that if the UNSC considers inadequate the measures set forth in art. 41 of the charter, "it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (UNITED NATIONS, 1945).

Regarding the actions mentioned above, it is important to stress that for ensuring the proper deployment of peacekeeping operations UN missions should not just be a peacebuilding instrument (FAGANELLO, 2013, p. 42). Mechanisms of preventive diplomacy, peacemaking, peacekeeping, peacebuilding and peace enforcement reinforce each other and should be implemented together to achieve a satisfactory outcome (FAGANELLO, 2013, p. 43). One of the major problems presented by peacekeeping operations is the prevalence of peacekeeping in relation to other peacebuilding mechanisms. In this sense, "the results presented by these operations are not satisfactory. This is because they are intended to treat symptoms rather than the causes of conflicts" (FAGANELLO, 2013, p. 63). Thus, most of the UN's peacekeeping actions are directed to post-conflict scenarios and palliative, with no emphasis on preemptive measures. Thus, peacekeeping operations fail to meet their main goals.

LEGAL BASIS AND PRINCIPLES OF PEACEKEEPING OPERATIONS

Peacekeeping operations, although not explicitly provided for in the UN Charter, are a form of peaceful settlement of disputes, based on Chapters VI and VII[9] of the Charter.

These operations are linked to the Security Council, as it is the body which, in order to ensure prompt and effective action by the

[9] UN Charter, Chapter VII, art. 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."

United Nations, has the "primary responsibility for the maintenance of international peace and security", acting "in accordance with the Purposes and Principles of the United Nations" (UNITED NATIONS, 1945). Even if the UNSC does not have representatives and participation of the all the countries of the world, its Resolutions are legitimized by the UN member countries, since "the enforceable norms that characterize UNSC Resolutions are highly political […] and have a core impact[10] on Member States and international relations" (SEITENFUS, 2016, p. 144-145).

Following this reasoning, the Resolutions issued by the UNSC, and the mandate established by them, serve as regulatory frameworks for peacekeeping operations. The mandate is the document that provides the missions' legal basis, "framing it according to the context in which it will act in one position or another within the United Nations legal framework" (MAIDANA, 2013, p. 109). It should include the characteristics of the operation, its goals, the tasks and functions to be performed, the duration and the division of responsibility between the United Nations and other organizations (FAGANELLO, 2013, p. 51-52). Additionally,

> this document helps to distinguish these activities from other possible actions within the UN's scope of activities. While other actions are easier […] to refer to Chapters VI and VII of UN's Charter, peace operations, in turn, still do not have an established legal basis. (MAIDANA, 2013, p. 109)

Also, with regard to the mandate, it is important to note that its draft predates the Resolutions. The document begins to be drafted in response to a request from the SGNU to the UNSC. With the approval of the operation, the UNSC gathers the necessary information and issues a Resolution with the guidelines for the peace mission.

The Resolution is then forwarded to the Department of Peace Operations (DPO), where it is formalized, marking the launching of the operation (MAIDANA, 2013, p. 118).

Besides the mandate, there are other important documents for establishing the rights and duties of the parties involved in peacekeeping operations. These include the Status of Forces Agreement (SOFA), signed

[10] Para o autor, a essência dos Estados-Membros das Nações Unidas e das relações internacionais são a guerra e a paz (SEITENFUS, 2016, p. 144-145). According to the author, the essence of UN Member States and of international relations is linked to war and peace concerns (SEITENFUS, 2016, p. 144-145).

between the United Nations and the host country, which regulates UN's presence at the conflicted area. The SOFA refers to the military forces involved in the mission, establishing their rights and duties, and regulating the activities to be performed by these troops (FAGANELLO, 2013, p. 52). In addition, there is the provision establishing the privileges and immunities of Troop Contributing Countries (TCCs). The key provisions contained in the SOFA include the status of operations and their members, criminal and civil liabilities, as well as the jurisdiction to which members of the peacekeeping operation will be subjected, the manner in which conflicts and disputes will be resolved and the protection of United Nations officials (FAGANELLO, 2013, p. 53).

The responsibilities provided for in the SOFA are detailed in a Memorandum of Understanding (MOU). This document should be signed by the representative of the country's permanent mission to the UN and by the DPO's secretary general. The MOU also establishes administrative and logistical responsibilities of the UN and the contributing country, as well as the rules of conduct to be followed by the "Blue Helmets" and the commitment of the TCCs to exercise their jurisdiction over those responsible for criminal actions. Attached to the MOU are the Rules of Engagement (ROE), which sets the parameters and limits for military use of force in the peacekeeping operation.

The consolidation and legitimization of peacekeeping operations presuppose a joint action by the UNSC and the SGNU, even though the UNSC has the responsibility of providing international legitimacy and defining the framework for peacekeeping operations (MAIDANA, 2013, p. 120), the SGNU is the one who ensures the clarity and the proper operation of these missions. According to Uziel,

> […] if there is an autonomy of the secretariat in decision-making, after the establishment of the missions and in its operation it is even more noticeable. The Secretariat is responsible for developing the rules of engagement for the military and the police, and for negotiating agreements on the legal status of operations and the memoranda of understanding with the TCCs and PCCs[11]. All these documents require interpreting the mandate established by the Security Council, which can be done in different ways. (UZIEL, 2010, p. 140-141)

[11] Police Contributing Countries: those countries that contribute police forces.

Thus, it is clear that the mandate arising from the Resolutions is the normative, operational and legitimating basis of peacekeeping operations and is fully enforceable by the parties involved in the mission. Together with other documents defining the specific characteristics of the operation and its officials, it consolidates the legitimacy in order to "transpose it better into practice" (MAIDANA, 2013, p. 122).

THE PRINCIPLE OF RESPONSIBILITY TO PROTECT

As mentioned above, peacekeeping operations are not explicitly provided for in the UN Charter. Their creation is derived from the need to translate UN's principles into means to fulfill its purposes. Therefore, peacekeeping operations are governed by a number of principles aimed at ensuring their best functioning and compliance with international law. Understanding the principle of Responsibility to Protect (R2P) requires understanding the principles of non-intervention and non-indifference.

The evolution of the principles to be upheld in shaping peacekeeping operations became prominent with the end of the Cold War, with the inclusion of human rights-related issues as a priority in the UN's agenda. According to Ghisleni (2011, p. 42), issues such as international peace and security were not directly linked to the issue of human rights. In addition, according to the author, from the first deployment of peacekeeping operations until the end of the Cold War, only two UNSC Resolutions addressed issues of international humanitarian law and human rights (GHISLENI, 2011, p. 75). However, the Vienna Declaration and Programme of Action (1993) states that

> The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community. (UNITED NATIONS, 1993)

In this context, the expansion of UNSC's competences strengthened "the relationship between humanitarian intervention and peace operations" (BIERRENBACH, 2011, p. 121). Thus, with regard to

humanitarian interventions, Annan's report (1999)[12] to the UNSC suggested: (i) the ratification and implementation of international law instruments; (ii) the use of information and analysis collected by experts; (iii) to increase the use of targeted sanctions and arms embargoes; and (iv) consider the imposition of appropriate coercive measures – the last three points being only applicable when required in the situation. Additionally, in the report,

> […] (the proposals) were revolutionary in terms of the UN system's functioning. They linked the treatment of human rights issues to several of the Council's instruments of action, including, and with particular emphasis, the measures provided for in Chapter VII of the Charter. […] Kofi Annan encouraged the Council to establish a direct working relationship with the HRC[13] special procedures and with treaty monitoring bodies as part of a strategy to intensify preventive diplomacy efforts. It sought to institutionalize the handling of human rights issues by peacekeeping missions (GHISLENI, 2011, p. 57-58).

With the last recommendation in his 1999's report, Kofi Annan introduced the principle of the Responsibility to Protect, which led to an institutional rearrangement of how peacekeeping operations are implemented.

The theorization of the Responsibility to Protect was presented in September 2000 by the Canadian government, following the efforts of the International Commission on Intervention and State Sovereignty (ICISS), which aimed "to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty" (ICISS, 2000, p. 2). That is, to establish parameters and principles to be followed in humanitarian interventions.

According to the ICISS' report, intervention will be necessary when a state no longer guarantees fundamental rights to citizens. Thus, when a state fails to fulfill its primary responsibilities, the international community must intervene, and therefore have a secondary responsibility. Thus, "situations requiring military intervention should, according to ICISS, be brought to the UNSC at the initiative of the States concerned, of members of the Council itself or of the SGNU" (BIERRENBACH, 2011, p.

[12] Doc. S/PRST/1999/6.

[13] United Nations Human Rights Council.

133). Moreover, in the undertaking of these operations, it is emphasized that force should only be used as a last resort, after negotiations have been exhausted by peaceful means. Bierrenbach (2011) argues that,

> […] the state should be now held responsible for the life, safety and welfare of its citizens. […] To the three basic elements of a sovereign state, since Westphalia - authority, territory and population - a fourth would be added: respect for fundamental rights. The exercise of this responsibility becomes, precisely, the prime foundation of sovereignty (BIERRENBACH, 2011, p. 129-130).

Also according to ICISS, the power attributed to the UNSC is one of the most controversial points when justifying the actions guided by the Responsibility to Protect.

The controversy would be about the substantial powers given to the five permanent members (P5) of the Security Council over the directions to be followed in international security. It is important to note that the particular motives of each P5 influence the voting of Resolutions, so that the principle of Responsibility to Protect can be used as justification for particular motivations, which could have nothing to do with international security and peace. Even under criticism, the legality of the UNSC is still what legitimizes the international use of force and hinders ICISS' attempts to legally substantiate the new concept, which is based on international instruments and principles provided for in the UN Charter (1945); the Universal Declaration of Human Rights (1948); the Geneva Conventions (1949) and their Additional Protocols (1977); the United Nations Convention on the Prevention and Punishment of Genocide (1948); the Rome Statute (1998), which established the ICC; among others (BIERRENBACH, 2011, p. 130).

According to Bierrenbach (2011, p. 145), four years after the release of the ICISS report, "the concept of Responsibility to Protect was formally recognized by the international community during the 2005 World Summit," and in its final document the expression was directly mentioned in paragraphs 138 and 139. Note that the definition adopted in the document does not cover cases of serious human rights violations, as this term would be too broad and could possibly allow interventions carried out with poorly defined parameters. Thus, the Responsibility to Protect is associated with cases of genocide, war crimes, crimes against humanity and ethnic cleansing. The document also refers to an early

warning capability, in which interventions - and UNSC Resolutions - could also be approved to prevent such crimes, as a means of protecting as many human lives as possible, that is, perceiving threats would also be part of the Responsibility to Protect[14].

The author also comments on the 2009 UNSG report, which states that "it was no longer the case of reinterpreting or renegotiating the conclusions of the 2005 World Summit, but finding ways to implement its conclusions consistently" (BIERRENBACH, 2011, p. 153), that is, the issue now is how to apply the Responsibility to Protect. One of the criticisms that the UNSG sought to respond was that the UN's application of the concept would be a disguised interference of the North in the South - a neo-colonialism. The UNSG pointed out that two former Secretaries-General were from Southern countries and that the Constitution (2000) of the African Union (AU) itself provides for the right to intervene in cases of genocide, war crimes, crimes against humanity and ethnic cleansing, in accord with the principle of non-indifference[15]

UN RESPONSIBILITY IN RELATION TO HUMAN RIGHTS VIOLATIONS: THE LEGAL ISSUE

The UN is an international organization and as such has international legal personality. "The personality is often explicitly recognized in the founding treaties of organizations or in collateral instruments" (DINH et al., 2003, p. 607). However, the United Nations does not address in its charter the status of its international legal personality. For this reason, Seitenfus (2012, p. 62) argues that, "historically, the founding

[14] As a counterpoint to the principle of Responsibility to Protect, Brazilian President Dilma Rousseff proposed the principle of Responsibility while Protecting (RwP), which is a reaffirmation, during interventions, of the assurance of decision-making related to the protection of the population of states in which peacekeeping operations occurr. In this sense, these operations are intended not to worsen, but rather to reverse the course of the conflicts in question. This also reaffirms the values that the UN seeks to instill in its peace agents. In addition, the president suggested that coordinated policies be applied and insisted on the "interrelationship between development, peace and security [in addition to demonstrating the Brazilian desire for] development policies increasingly associated with Security Council strategies in the search for a sustainable peace" (BRASIL, 2011, s / p). As much as President Dilma Rousseff's speech made good impressions and questioned current policies on peacekeeping operations, the RwP, together with R2P, is still difficult to put in practice.

[15] Seitenfus et al. (2007, p. 12) argue that the new doctrine of non-indifference is necessary to meet the demands of the new period of the globalized world, and furthermore, it "has its roots in African popular knowledge that it is not permissible to look away while a neighbor's house is on fire."

treaties of international organizations did not express concern about their legal personality." However, according to DINH et al. (2003, p. 607), "the fact that the foundation treaties are silent on this point does not allow to doubt the existence of an international legal personality." In this sense, an organization must have legal personality to achieve its purposes and principles. It should be noted that this legal personality is related to the fact that international organizations are only established by the will of its member states, and because there are actions that a State cannot carry out alone. Thus, they cannot be reduced to a simple sum of the powers and opinions of the Member States or as a "superstate".

Moreover, international organizations have a unique way of acting and making their decisions internally. According to DINH et al. (2003),

> it is not allowed to reason in this regard by analogy with the legal personality of states. […] The goals set for the organizations make them international actors and oblige them to establish legal relations with other subjects of international law and with states' citizens. Their functionality must find a legal translation both in the international legal system and in national legal systems, in order to ensure the exercise of rights and the respect for international law (DINH et al., 2003, p. 608).

International organizations thus have a connection with international law and the backing of the Member States. Moreover, they do not have an exclusive relationship with these states and may then establish relations with other international legal actors.

Regarding the UN international legal personality, we should recall the episode involving Count Folke Bernadotte, a Swedish diplomat and mediator in Palestine, who was murdered in Jerusalem in 1948. At the time,

> as he was in the service of the United Nations, he decided to act and demanded from the state [of Israel], in which the act occurred, due reparations and indemnities. However, the lack of definition of legal personality made it impossible to formalize the demand (SEITENFUS, 2012, p. 62).

As a result, the United Nations General Assembly (UNGA) requested an advisory opinion from the International Court of Justice (ICJ)

on "the [UN's] ability to lodge an international complaint against a state on behalf of its agents, in particular Count Bernadotte, United Nations mediator in Palestine, murdered in the performance of his duties" (DINH et al., 2003, p.610). Thus, the ICJ was asked to advise whether to admit the legal personality of the UN and whether it could seek compensation from the state of Israel for being attacked - in the person of Count Bernadotte. After analyzing the situation, the ICJ admits in its opinion that the UN has legal personality, even though it is not provided for in the UN Charter, and could therefore legally oppose any state. "The Court firmly underscored that the UN's international personality allowed it to legally oppose all states, including Member States, regardless of any recognition on their part" (DINH et al., 2003, p.611). Thus,

> based on the permanence of the UN and certain elements of its structure, the Court first admitted that the Organization did have a legal personality […]. To demonstrate that this personality was an international personality, the Court evoked the UN's international mission: to maintain international peace and security, to develop international relations among nations, to carry out international cooperation of an economic, intellectual and humanitarian nature. For these missions to be carried out, the organization should at least implicitly have an international personality (DINH et al., 2003, p. 610).

Accordingly, UN's international legal personality is recognized by the international community and confirmed by the ICJ advisory opinion. From then on, the UN will be recognized as a subject of international law and, as such, will have rights and duties, which consequently lead to accountability for its actions. With regard to this international responsibility, DINH et al. (2003, p. 630) comment that as

> […] holders of rights, international organizations must meet the related obligations. As is the case of other subjects of international law, these organizations' main form of non-contractual obligation is the international responsibility, which could be compromised in the event of irregular and harmful exercise of its powers (DINH et al., 2003, p. 630).

Considering this, it is important to stress that this responsibility should not be at odds with the cooperative will of the member states of international organizations. Since they "are mediated or secondary subjects of international law, because they depend on the will of their Member States for their existence and for the achievement and effectiveness of the objectives pursued" (SEITENFUS, 2012, p. 64).

IMMUNITY VS IMPUNITY

Because of the recognition of international legal personality, agents of diplomatic missions have special rights and duties for the performance of their work, which grant privileges and immunities, which are differentiated according to their function. Art. 31 of the Vienna Convention on Diplomatic Relations (1961) states that "a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." The article then presupposes the granting of absolute criminal immunity to the diplomatic agent in the receiving state. However, under paragraph 4 of that article, "the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State." In this respect, Ribeiro (2011) argues that

> […] the immunity from criminal jurisdiction granted to diplomatic agents in the receiving State is absolute and is even valid for acts performed outside the exercise of their duties, which, however, does not exempt agents from responding for any crime in their State of origin (sending State). (RIBEIRO, 2011, p. 30)

It is worth of notice that the Vienna Convention on Diplomatic Relations warns that the diplomatic agent must, despite his privileged situation, respect the laws of the receiving state. Art. 41, first paragraph, provides that:

> without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State. (UNITED NATIONS, 1965)

Therefore, diplomatic privileges and immunities also extend to international organizations - with some caveats. This is necessary because these bodies also need independence of action for properly functioning. Thus,

> […] the aim is to grant full and absolute independence to the body and its officials, ensuring that representatives of the Member States, duly accredited by international organizations, stand on an equal footing. (SEITENFUS, 2012, p. 65)

With regard to the UN, the Convention on Privileges and Immunities of the United Nations (1946) guarantees this to its officials. Its Art. 4, regarding Member Representatives, provides in section 11, item 'a' that:

> Representatives of Members to the principal and - 3 - subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities:
> a) immunity from personal arrest of detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind. (UNITED NATIONS, 1946)

Thus, this Convention also guarantees criminal immunity to UN representatives - the same granted to diplomatic agents of states. This set a precedent for diplomatic privileges and immunities that may end up causing some problems during UN peacekeeping operations.

Considering this, the UN immunity system came under criticism due to the emergence of human rights violations – such as sex crimes and human trafficking. These problems damage the image that the UN tries to project around the world, because these violations are ultimately "covered up" by the immunities and privileges granted to agents during peacekeeping missions, which should serve to protect agents while they carry out their duties with complete independence and security.

To understand the system of privileges and immunities it is necessary to assess the military organization of "Blue Helmets" and to whom they report. According to Grassi (2011), these troops

> […] report directly to the force commander, who is the highest United Nations military authority on the site and must coordinate the missions carried out by the agents. Another local authority is the special representative, who is the highest authority of the UN diplomatic body in the host country. (GRASSI, 2011, p. 200)

Besides being subordinate to the commander, peacekeeping operations are governed by certain documents, as noted above. Among these documents, Grassi (2011, p.200) points out SOFA and MOU as the main regulations governing peace missions activities. It should be noted that these documents are not always drafted because, according to Grassi (2011), the UNSC may, if deemed necessary, not expect the consent of the country to receive the peace mission. Given this situation,

> for a long time, it was understood that peacekeeping operations could only be established with the consent of the parties to the conflict. Currently, however, it is understood that it is possible to deploy operations without the consent of the host country, with just the authorization of the Security Council, and the traditional principle of consent[16] would be therefore discarded (GRASSI, 2011, p. 203).

In addition to the understanding of privileges and immunities, it is necessary to differentiate the peacekeeping officials in UN missions. Faganello (2013, p.193) points out the 2006 UNGA document[17], which divides UN agents in two categories: peacekeeping personnel and peacekeeping troops (troops provided by Member States to the peacekeeping mission, called "Blue Helmets"). This classification refers to the different commands for each category, that is, to which command each staff category must obey. According to the UNGA document,

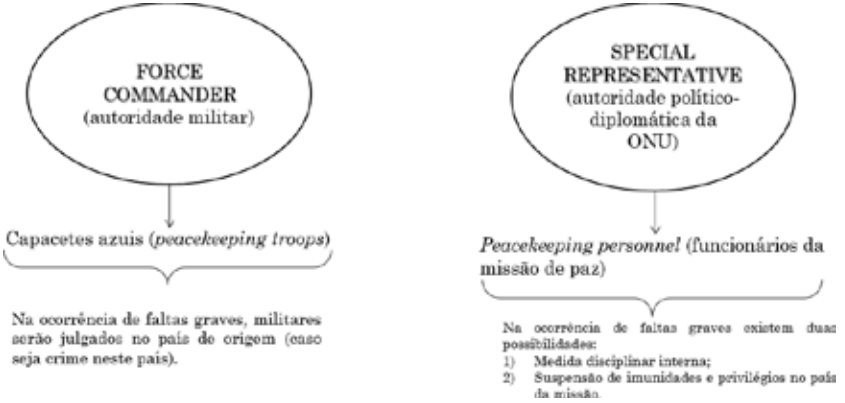
> […] the category of peacekeeping personnel comprises United Nations officials - including staff and volunteers - and experts on missions, including police officers, military observers, military liaison officers, military advisers and consultants. All members of

[16] The fundamental triad for peacekeeping operations would be formed by the principles of consensus, impartiality and non-use of force, except in self-defense or under a mandate.

[17] Doc. A / 60/980 of August 16, 2006.

> peacekeeping missions in this category are directly under the command of the United Nations and subject to its rules of conduct and discipline. (FAGANELLO, 2013, p. 194)

According to the author, peacekeeping personnel must follow United Nations orders and rules. If they commit a crime or a serious misconduct, they will be subjected to a disciplinary mechanism distinct from that applied to peacekeeping troops. For the purposes of this paper and considering what has been exposed so far, the following diagram illustrates the different authorities to which UN agents are submitted – reporting directly or indirectly to the organization.



Source: the authors, based on UN documents.

The differentiation of UN peacekeeping agents and the documents governing their action in peacekeeping operations make clear that the Convention on Privileges and Immunities of the United Nations refers not only to the legal capacity of the Organization, but also to its representatives, when it states that "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" (UNITED NATIONS, 1945). The Convention also establishes in art. 5, with regard to UN Officials, that the UNSG will specify the categories of officials to be benefited. A list of these categories should be formulated and submitted to the UNGA, and then communicated to the governments of the Member

States. This same article establishes that UN officials "shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity." Finally, the article states that immunities and privileges are not granted for personal benefit. Officials, thus, act in the interest of the organization and, consequently, the UNSG may waive their immunities and privileges when they no longer have the necessary attributes for holding such positions.

According to Faganello (2013, p.197), there is an omission in the Convention on Privileges and Immunities of the United Nations, as it does not address the status of blue helmets, which must be provided for in a SOFA. In addition, the author points out that even with SOFAs being specifically drafted for each mission, they are all based on the 1990 UNGA model. The model reaffirms the legal immunity and exclusive jurisdiction of the state of origin in relation to military personnel involved in crimes.

Because of the documents establishing privileges and immunities of international organizations and their staff, cases of human rights violations are increasingly recurring in peacekeeping operations, given the difficulty of prosecuting such cases. With the repercussion of the Zeid Report[18], the DPO released two documents to guide the conduct of such agents during UN missions, namely: i) Ten Rules: Code Of Personal Conduct For Blue Helmets[19] and; ii) We are United Nations Peacekeepers[20]. Despite these regulations, there is no public discussion about the legal or disciplinary consequences to those who commit serious misconduct and/or crimes. Thus, the documents lose strength in the face of the agents' faults.

In this context, Faganello (2013, p. 206) analyzes the bureaucratic procedures of disciplinary measures applied to officials, technicians and

[18] Zeid Raad Al-Hussein served as Jordan's Permanent Representative to the UN and as the United Nations High Commissioner for Human Rights. In 2005, his report denounced sexual abuse by UN peacekeepers.

[19] The following rules stand out: "[…] 1) respect the laws, culture, traditions and customs of the host country; 2) treat the local population with respect and courtesy; 3) do not indulge in acts of sexual, physical or psychological abuse or exploitation of the local population; 4) respect human rights" (FAGANELLO, 2013, p. 199).

[20] This document "compels members of peacekeeping operations to respect the rules of humanitarian law when they use force and apply the provisions of the Universal Declaration of Human Rights as the fundamental basis for their standards of conduct. […] peacekeepers commit themselves, among other things, to: fulfill their mandate; act impartially and professionally; respect local customs and laws; obey the superiors; respect mission colleagues; refrain from improper conduct capable of delegitimizing the operation; do not use alcohol and drugs; refrain from performing acts that may bring psychological, physical or sexual harm to the population, especially women and children" (FAGANELLO, 2013, p. 199).

troops, which are required in the event of serious misconduct during peacekeeping operations. According to the author (2013, p. 209), what differentiates the Blue Helmets from the other UN peace agents is the issue of repatriation (as a disciplinary measure):

> Whereas repatriation is a UN disciplinary measure for experts [and officials], for the troops of national contingents repatriation is an administrative measure, since disciplining the military is an exclusive task of the sending country. (FAGANELLO , 2013, p. 209)

Aiming at improving investigative methods of human rights violations perpetrated by peace agents during peacekeeping missions, the new model for MOU, of 2007, establishes that the government of the troops' sending country has the primary responsibility for investigating serious misconduct. The sending country should then immediately inform the UN if there is evidence of misconduct. If, after the misconduct has been confirmed, the state responsible for the offending agent does not take the necessary measures, the United Nations will initiate a preliminary investigation; and if that state subsequently fails to undertake the investigations, an inability or unwillingness to investigate is assumed (Faganello, 2013, pp. 209-210). Thus,

> if the evidence is consistent and indicative of the occurrence of the fact, the government will forward the evidence to the authorities competent to resolve the issue through disciplinary measures, and shall keep the United Nations Secretary-General regularly informed of progress made (FAGANELLO , 2013, pp. 210-211).

Considering this, with regard to the criminal jurisdiction of troops on peacekeeping missions, the troops will be judged for serious misconduct only in its home country[21]. However, this will only happen if in the sending country the act in question is considered a crime[22]. This

[21] "[…] because they are not submitted to the jurisdiction of the host state, the SOFA and MOU models expressly provide that the sending country shall guarantee to the Secretary-General the exercise of criminal jurisdiction in cases of crimes committed in the host country"(FAGANELLO, 2013, p. 213).

[22] "[…] if the conduct does not constitute a crime in the sending country, the perpetrator must be repatriated to the country of origin to be submitted to disciplinary sanctions

differs from the disciplinary measures applied to officials and experts. In such cases, officials will face disciplining by the UN itself, which is responsible for deciding whether to waive immunities and privileges. The offender, if suspended from duties, would thus be tried in the country where the crime was committed, in this case the receiving country of the peacekeeping operation.

In addition to all the founding documents discussed, it is important to note that the legal validation of the United Nations and its peacekeeping operations is based on the establishment of the Vienna Convention on the Law of Treaties (1969). According to Matias (2010, p. 14), the Vienna Convention is "essential to regulate the preparation, application and interpretation of treaties in order to ensure the security and predictability of these (international) relations." As Yoda (2005, p. 1) states, the number of treaties has grown rapidly in recent decades due to the fast evolution of international law in relation to customary law. In short, the Convention regulates the established practices between states, which are based on the principles of free consent, good faith and *pacta sunt servanda*. These principles express the need for international law, as it does not provide the means of coercion that states have in their territories. Thus, international law needs the commitment of states to be useful, aiming at a more harmonious relationship between countries, predictability of their actions and greater international security.

In addition to the Vienna Convention on the Law of Treaties, it was developed the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986), which emphasizes that the lack of ratification does not mean that international actors can do whatever they want, as the rules of customary international law continue to govern unregulated issues.

These events, together with the fact that the United Nations and other international bodies have international legal personality, "grant organizations the right to establish conventions, that is, the right to enter international treaties and maintain diplomatic relations" (YODA, 2005, p. 8). However, the treaties that these organizations can sign cannot go beyond the principles and purposes for which they were developed.

With regard to the UN, Barbosa (2014, p. 13) attributes to the General Assembly, based on article 13 of the UN Charter, the aim to develop international law in establishing the International Law Commission

because of the serious misconduct" (FAGANELLO, 2013, p. 213).

(1947). According to one of the papers presented to this Commission, it was already clear the central role of the International Court of Justice should have in resolving disputes, because it settles controversial issues that permeate international law in a more concrete way. However, "it has an eminently optional jurisdiction, which is absolutely distinct from the domestic judicial bodies of states" (SEITENFUS, 2012, p. 157).

With regard to the settlement of disputes by the ICJ, it is important to note that there are two ways in which a case may reach the Court: the first concerns a specific case, already established as a fact, which a certain state decide to refer, regardless of being or not an UN member. The second is by anticipation, subdivided into two modes: a provision in a treaty that the Court will be responsible for deciding questions arising from it; or a declaration by a state that it is subject to the jurisdiction of the Court, whether on a permanent basis, for a specified period or under conditions of reciprocity. Even though in the ICJ Statute of the Court (1945) establishes in art. 59 that the "decision of the Court has no binding force except between the parties and in respect of that particular case" and, in art. 60, that the "judgment is final and without appeal" (UNITED NATIONS, 1945), compliance with ICJ rulings may still be denied due to the voluntary nature of international law.

Regarding human rights violations, the ICJ is not of notice. The Court could be instrumental in holding the United Nations accountable in the case of unlawful acts committed during its peacekeeping operations. However, in practice, the ICJ is silent on the issue. A possible legal innovation would be devolving to Member States the power to request opinions directly of the ICJ, and not by the UNGA, as it is today, according to the Court's Statute[23]. The Member States that could request advisory opinions on human rights violations perpetrated by Blue Helmets in peacekeeping operations have no political will to do so and are unwilling to bear the possible consequences and constraints of such action before the Organization and the other states. What is in question are the immunities of United Nations agents, especially Blue Helmets – which are less directly subordinated to the United Nations. Some argue that the penalties for unlawful acts should be reviewed, because the immunities and privileges are used to protect perpetrators of human rights violations during peace

[23] Art. 65: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request" (UNITED NATIONS, 1945).

operations. Greater control is needed in the definition and organization of peacekeeping operations, while carefully observing the parameters required for the implementation of these operations. It is essential to review the legal mechanisms to prevent rights violations so that they can function fully and effectively.

FINAL CONSIDERATIONS

The United Nations is an important multilateral forum where countries can discuss how to meet current demands, as stated by Boutros Boutros-Ghali in his Agenda for Peace. The principles of international law governing the UN and the treaties and agreements ratified by it are important for maintaining order, but in practice, the UN is lacking because it is not capable of complying with all its agreements, resulting in serious violations. Due to its international legal personality, the UN has rights and duties, including denouncing and being denounced. If any state feels abused by United Nations practices, it is allowed to lodge complaints to the ICJ. However, in most cases, states have no political will to push the demand forward and fear retaliation.

With the establishment of peacekeeping operations, the UN broadens its responsibility in maintaining world peace, yet it is far from ensuring the proper deployment of these peacekeeping forces, resulting in cases of human rights violations by its agents, especially the "Blue Helmets". Due to the immunity system provided for in the UN Charter and the documents that legitimize peace operations, violations committed by peace agents in receiving countries are rarely taken to court. Thus, reparations to victims are unlikely. It would be necessary to establish a stronger policy obliging the sending countries to investigate the alleged perpetrators. Moreover, the impunity of the agents could be questioned in the ICJ, which is competent to decide controversial issues of international law. However, this institution is hampered by politically oriented votes from its judges.

The United Nations should find a way to redress the grievances of receiving countries and of the people victimized by unlawful acts. When recognizing its mistakes, the UN would have to take responsibility for its actions, as well as publicly apologize and offer the right to reparation to the aggrieved. By denying and concealing violations perpetrated by its officials, the UN puts its reputation and credibility at risk.

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