ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

THE RIGHT TO REMEDIES AND THE RESPONSIBILITY OF THE AFRICAN UNION PEACEKEEPING MISSIONS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

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Addis Ababa, Ethiopia

June, 2018

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A Thesis Submitted to the School of Law, Addis Ababa University, in Partial Fulfillment of the Requirements for the Degree of Master of Laws (LL.M in Human Rights Law)

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Approval Sheet by the Board of Examiners

THE RIGHT TO REMEDIES AND THE RESPONSIBILITY OF THE AFRICAN UNION PEACEKEEPING MISSIONS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

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Declaration

I, Amha Getachew, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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ACRONYMS

African Charter- African Charter on Human and Peoples' Rights

African Commission- African Commission on Human and Peoples' Rights

African Court- African Court on Human and Peoples' Rights

AMISOM- African Union Mission in Somalia

AU- African Union

DARIO – Draft Articles on the Responsibility of International Organizations

EC- European Council

ECHR- European Convention on Human Rights

ECtHR- European Court of Human Rights

EU- European Union

ICC- International Criminal Court

ICJ- International Court of Justice

ICTR- International Criminal Tribunal for Rwanda

ICTY- International Criminal Tribunal for the former Yugoslavia

MINUSTAH- United Nations Peacekeeping Mission in Haiti

PSC- AU Peace and Security Council

UN - United Nations

UNGA- United Nations General Assembly

UNMIK- United Nations Mission in Kosovo

UNSC- United Nations Security Council

Abstract

Article 4(h) of the Constitutive Act of the African Union (AU) empowers the Union to intervene in member states in order to prevent or halt grave situations such as war crimes, genocide, and crimes against humanity. Pursuant to this provision, the AU has deployed several peacekeeping operations for over a decade, including in Burundi, Darfur and Somalia.

As observed from the experiences of the UN in similar endeavors, peacekeeping missions can potentially commit human rights violations against civilians in territories where they are supposed to keep peace. In relation to AU's peacekeeping missions, a question arises as to who bears the responsibility for violations of rights recognized in the African Charter on Human and Peoples Rights if/when they are committed by AU peacekeeping missions against non-combatant civilians in the territories of member states of the AU. The problem is aggravated mainly due to the fact that these missions (under the various Status of Mission Agreements) and the AU itself have immunity from being subjected to domestic judicial systems.

As explained by the ICJ in the Reparations Case, international organizations do have an international legal personality derived from their purposes and functions and that they are given the right to bring claims to enforce their rights. The right to bring claims also entails the possibility of being sued. With this line of argument, a claim against the AU as the spearhead of these missions, at the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights would have made it possible for the victims to have redress for the violations. However, both the Commission and the Court declined to entertain claims against the AU and its predecessor OAU for the reason that the OAU and subsequently the AU are not state parties to the African Charter on Human and Peoples' Rights and that state obligations as per the treaties are not expected from the organizations. This scenario creates a potential gap between rights violations and remedies available under the African regional system of human rights to repair such violations. Thus, the thesis argues that the AU does have obligations to respect/protect human rights in line with its functional legal personality and in situations where violations of rights are committed by it, victims should be able to gain remedy by instituting an action against it.

In spite of the absence of a specific provision on the right to remedies in the African Charter on Human and Peoples' Rights, the thesis also argues that the right to a remedy is implicitly incorporated in the Charter by virtue of the principle: ubi jus ibi remedium (where there is a recognized right, there should be a remedy) as corroborated by the emerging jurisprudence of the African Commission and the African Court.

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Chapter One

1. Introduction

1.1 Background

International organizations such as the United Nations, World Bank, European Union and African Union play a significant role mainly in socio-economic development, peace and security maintenance on the international stage.[1] These organizations employ staff, administer territories, impose sanctions and engage in military operations, making a direct political and socio-economic impact on the lives of individuals. Nevertheless, the mechanisms available to hold them accountable for alleged violations of their human rights obligations are relatively underdeveloped, and in some cases non-existent.[2]

The burgeoning of international organizations and the increasing powers that some of these organizations have acquired on the world stage for the last century have inevitably been accompanied by violations of international law formally attributable to such organizations.[3] Such violations of international law and international human rights law have often undermined the legitimacy of these institutions and have called upon the development of accountability mechanisms, particularly against the backdrop of the failure of the classical domestic plans to ease these violations and their consequences.[4]

Of the several activities that the UN performs in furtherance of its mandate, none has become as central a tool in conflict prevention and peace preservation as peacekeeping operations.[5] Although UN peacekeeping operations have contributed to the maintenance of international peace and security in conflict and post conflict situations, UN peacekeepers have also been

[1]Jose Maria Beneyto , 'Accountability of International Organizations for Human Rights Violations (Report) ' (Council of Europe Parliamentary Assembly, 2013) p. 1 available at: www.website-pace.net>documents>20131106-OrganizationAccountability-EN.pdf last accessed on April 2, 2017.

[2]Ibid.

[3]Jean d'Aspremont, 'Abuse of the Legal Personality of International Organizations and the Responsibility of Member States' (2008) 4 *International Organizations Law Review* 91, pp.91-92, available at https://ssrn.com/abstract=126553 last accessed on March 27, 2017. See also, Kristen E.Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) 16(2) *Chicago Journal of International Law* 341, pp. 348-353, available at: http://chigacobound.uchicago.edu/cjil/vol16/iss2/2 last accessed on April 6, 2017.

[4]Ibid.

[5]Neha Bhat, 'Responsibility in the Time of Cholera: Liability of International Organizations for Wrongful Conduct ' (2013) , p.4 available at: http://ssrn.com/abstract=2213613 last accessed on April 6, 2017.

charged with complicity in human rights violations, and criminal conduct arising thereof. [6] Responsibility has been attributed to the UN for wrongful acts committed by its peacekeeping missions across the globe.[7]

Similarly the AU, in its mandate to maintain peace and security as per Articles 3(f) and 4(h) of its Constitutive Act, has deployed several missions on the continent but allegations of human rights violations by AU peacekeeping missions have surfaced repeatedly.[8] The right to seek and gain remedy for violation of human rights is the cornerstone principle of international human rights law and this right has been recognized under major international and regional human rights instruments.[9] The absence of a substantive right to remedies from the African Charter together with the reluctance of the African Commission and African Court to entertain cases against the Union has led to remedial shortfalls for victims of human rights violations in peacekeeping operations.

Responsibility has never been attributed to the AU for the violations of human rights committed by it peacekeeping operations and victims of such violations have not been able to access the domestic judicial systems of the state which hosts the peacekeeping mission due to the immunity of the AU from domestic jurisdictions. However, this thesis argues that immunity must by no

[6] Ibid.

[7] The Global Health Justice Partnership (GHJP) and L'Association Haïtienne de Droit de l'Environment (AHDEN) The Transnational Development Clinic, 'Peacekeeping without Accountability: The United Nations Responsibility for the Haitian Cholera Epidemic ' (Yale Law School 2013), available at, https://www.law.yale.edu.pdf>clinics>Haiti_TDC_Final_Report.pdf last accessed on March 20, 2017. See also, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, European Court of Human Rights, Grand Chamber, Decision, 2 May 2007.

[8] Richard J. Wilson and Emily Singer Hurvitz, 'Human Rights Violations by Peacekeeping Forces in Somalia' (2014) 21(2) *Human Rights Brief* 2, pp.3-7, available at www.digitalcommons.wcl.american.edu>cgi>HumanRightViolationsbyPeacekeepingForcesinSomalia.pdf last accessed on March 21, 2016, See also, Human Rights Watch, '"The Power These Men Have Over Us" Sexual Exploitation and Abuse by African Union Forces in Somalia ' (2014) pp. 18-42, available at https://www.hrw.org>report>2014/09/08 last accessed on March 29, 2017, Major Robert L. Feldman, 'Problems Plaguing the African Union Peacekeeping Forces' (2008) 24(3) *Journal of Defense & Security Analysis* 267, pp.275-276, available at https://wss.apan.org>2.3Problems-Plaguing-the-AU-Forces.pdf last accessed on March 19, 2017.

[9] See The Universal Declaration of Human Rights, UN General Assembly, 1948, Article 8, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2220A (XXI), December 16, 1966, entered into force on March 23, 1976, Article 2(3)(b), Convention on Elimination of All Forms of Discrimination Against Women, 18 December 1979, entered into force 3 September 1979, 1249 U.N.T.S. 13, Article 2(c), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 21 December 1965, entered into force on January 4,1969, 1465 U.N.T.S., European Convention on Human Rights and Fundamental Freedoms, adopted on November 4, 1950 and entered into force on September 3, 1953, Article 13, American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, on November 22, 1969, Article 10.

means lead to impunity and it is very critical that the AU, as an organization mandated to promote and protect human rights, develop principles for a mechanism of waiver of its immunity in the interests of justice and rule of law as international organizations should not escape from being bound by human rights.

Therefore, the objective of this research is to explore these remedial shortfalls for individual right holders whose rights have been violated by AU peacekeeping missions. The thesis also seeks to come up with recommendations in which they could find a way in the African human rights system for a remedy for their claims. Despite the silence of the African Charter on Human and Peoples' Rights on the question of the right to remedies, the thesis argues that the right to a remedy is implicitly incorporated in the Charter by virtue of the principle: *Ubi Jus Ibi Remedium* (where there is a recognized right, there should be a remedy) as corroborated by the emerging jurisprudence of the African Commission.[10]

1.2 Literature Review

A. Responsibility of the UN and the AU for Peacekeeping Operations

International Organizations[11] have been traditionally seen as guardians of international law instead of potential violators.[12] The crucial role of international organizations in the modern international community is undeniable as these organizations adopt measures which greatly influence or regulate interstate activities in many fields of international cooperation.[13] International organizations have the capability to exercise their mandates by virtue of their international legal personality and thus, they can also incur their own international responsibility

[10]See generally, *Social and Economic Rights Action Center (SERAC) & Another v. Nigeria*, AHRLR 60, (ACHPR 2001), paras. 60-68, this case has brought about a significant success in the Commission's work in declaring the justiceability of socio-economic rights and ordering due remedies for the victims. The Commission also invoked its principle of implied rights by asserting the implicit recognition of the right to housing and the right to food in the African Charter), *Commission National Des Droit de l' Homme et de Libertes v Chad*, (2000) AHRLR ACHPR 1995) , *Constitutional Rights Project v Nigeria* (2000) AHRLR 227 (ACHPR 1995).

[11] As defined in the Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission at its sixty-third session, in 2011, *Yearbook of the International Law Commission, 2011, vol. II. Part Two*. UN Doc. A/66/10, Ch. V Article 2(a).

[12]Krisitina Daugirdas, 'Reputation and the Responsibility of International Organizations ' (2014) 25(4) *European Journal of International Law* 991, p.992, available at www.ejil.org>pdfs>2543.pdf last accessed on March 23, 2017.

[13]Olga Gerlich, 'Responsibility of International Organizations under International Law ' (2013) p. 1 available at www.bibliotekacyfrowa.pl>Content>01_Olga_Gerlich.pdf last accessed on March 26, 2017.

similarly to primary subjects of international law.[14] However, there is a marked difference in the responsibility of states and international organizations as international organizations often resort to resources offered by member states because of structural deficiencies while exercising their mandates.[15] This intricate relationship between international organizations and their members is intensified in the event of a violation of international law by the international organization especially in relation to the allocation of international responsibility.[16]

Dating back to 1949, the ICJ has affirmed the international legal personality of international organizations and the fact that they are given the right to bring claims to enforce their rights.[17] The Court eventually arrived at the conclusion that the UN's legal personality must be derived from the founding states' will which is hidden behind the organizations' functions and purposes, and can be specified in or inferred from its constituent documents and developed in practice.[18] In a similar manner, the AU's legal personality can also be taken out from its powers and duties enshrined in the AU Constitutive Act so much so that it cannot execute its powers and duties without a distinct legal personality.[19]

The growth of international organizations as influential and autonomous actors has logically brought up the question of their legal accountability which prompted the UN International Law Commission to adopt the *Draft Articles on the Responsibility of International Organizations* in 2011.[20] As per Article 4 of the Draft Articles, an internationally wrongful act occurs "when conduct consisting of an action or omission: (a) is attributed to the international organization

[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports* 1949, P. 177.
[18] Olga Gerlich, above n.13, p.16.*See also*, Andrew Stumer, 'Liablity of Member States for Acts of International Organizations : Reconsidering the Policy Objections ' (2007) 48(2) *Harvard International Law Journal* 553, pp. 555-560, available at www.harvardilj.org>HILJ_48-2_Stumer.pdf last accessed on March 24, 2017.
[19] Constitutive Act of the African Union, adopted in Lome, Togo, on 11 July 2001 and entered into force on 26 May, 2001.
[20] EmanueleSommario, "Conduct of UN Peacekeepers: Who is to blame-the Contributing State or the UN?" in The ITCPM International Commentary, 'Peace Keeping Trends and Challenges in Africa ' (2014) 10(36) p. 54, available at www.itcpm.dirpolis.ssup.it/files2014/07/COMMENTARY_PK_ISSUE_JULY_2014.pdf last accessed on March 20, 2017, p.54

under international law; and (b) constitutes a breach of an obligation of that international organization."[21]

Considering the responsibility of the UN for acts performed by its peacekeeping missions under international law, the unlawful conduct of peacekeeping personnel, including the violation of human rights of local population gives rise to international responsibility and to liability for compensation.[22] A recent report compiled by a group of Yale Law School Professors and Students, claims UN responsibility for the outbreak of Cholera disease in its peacekeeping mission in Haiti although responsibility is denied by the UN.[23] The European Court of Human Rights (ECtHR) in two cases attributed responsibility to the UN for the actions of its peacekeeping missions in Kosovo.[24]

Despite this fact, the cases in the ECtHR were decided inadmissible as the Court held that the UN has a legal personality separate from that of its members and that the organization is not a contracting party to the European Convention on Human Rights.[25] Therefore, in examining whether the Court had jurisdiction *ratione personae* to entertain the applications, the Court held that the violations were not attributable to the respondent states but to the UN, which is not itself a party to the European Convention on Human Rights and found the applications to be incompatible with the Convention.[26] From a protection of human right point of view and from

[21]Ibid. Draft Articles, above n.11, Art.4 Sommario also tries to show the difficulties in attribution of responsibility to UN peacekeeping missions by explaining how Dutch courts interpreted the matter by using the "effective control test" in two cases involving Dutch peacekeepers deployed in Srebrenica, "Gerechtsohf's-Gravenhage (Court of Appeal of the Hague), *Mustafić-Mujić et al v. The Netherlands*, BR 5386, Judgment (English translation available at http://zoeken.recht-spraak.nl/detailpage.aspx?ljn=BR5386 and *Nuhamović v The Netherlands*, BR5388, Judgment (English translation available at http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388,both judgments issued on July 5, 2011"

[22] Ibid, p. 53

[23]The Transnational Development Clinic, above n 7, p.3 The Report outlines the UN responsibility for the cholera outbreak through its mission (MINUSTAH-UN Mission for the Stabilization in Haiti). The UN has denied responsibility for causing the epidemic and it has refused legal claims from cholera victims or to otherwise remedy the harms they have suffered. The UN General Assembly adopted a resolution for the compensation of victims of actions of peacekeeping forces in 1998 as per the report of the Secretary General. For more on this issue, *See*, American Society of International Law, 'United Nations General Assembly: Report of the Secretary-General, Administratinve and Budgetary aspects of the Financing of United Nations Peacekeeping Operations ' (May 1998) 37(3) *International Legal Materials* 700, 702-704, UNGA Res. 52/247, Third-Party Liability: Temporal and Financial Limitations, A/RES/52/2047, adopted 17 July 1998 on the report of the Fifth Committee (A/52/453/Add.3).

[24]*Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, above n.7.

[25]Ibid. Para 144-151.

[26]Marko Milanovic and Tatijana Papic, 'As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law ' (2009) 58 *International and Comparative Law Quarterly* 33, p.6 available at https://www.papers.ssrn.com/SSRN-id1216243.pdf last accessed on April 2, 2017.

the perspective of potential remedies available for victims affected by the actions of peacekeeping missions, this decision seems to be a setback.[27] From the African perspective, both the African Commission and the African Court declined to entertain claims against the AU and its predecessor the Organization of African Unity (OAU) for the reason that the OAU and subsequently the AU are not state parties to the African Charter on Human and Peoples' Rights and that state obligations as per the treaties are not expected from the organizations.[28]

Another challenge in attributing responsibility to the UN and the AU for human rights violations by its peacekeeping missions is the privilege that they maintain not to be subject to domestic jurisdictions. As per the UN Charter and the Convention on Privileges and Immunities of the UN, the UN is immune from suit in most national and international jurisdictions and due to this legal immunity, the UN must provide third parties certain mechanisms for holding it accountable if and when it engages in wrongful acts during peacekeeping operations, an obligation the UN Secretary General has publicly recognized.[29] Immunity of the AU is also enshrined in the Conventions on Privileges and Immunities of the OAU and the Status of Mission Agreement that the AU signs with host states. [30]

As far as limitation of liability is concerned, the UN and the AU have so far managed to address the scope of their liabilities in peacekeeping operations through Status of Forces Agreements

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[27]For a detailed discussion of the cases decided at the European Human Rights Court in this regard, *See*, Tobias Lock, 'Beyond Bosphorus:The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10(3) *Human Rights Law Review* 529, pp. 530-544, Sadia R. Sorathia, 'Behrami v. France: An Unfortunate Step Backwards in the Protection of Human Rights ' (2011) 26(1) *Maryland Journal of International Law* 271, pp. 276-285, available at http://digitalcommons.law.unmaryland.edu/mjil/vol26/iss1/14 last accessed on March 22, 2017, Caitlin A. Bell, 'Reassessing Multuiple Attribution: The International Law Commission and the Behrami and Saramati Decision' (2010) 42 *New York University Journal of International Law and Politics* 501, pp. 512-519, available at www.nyujulip.org>2013/02>42.2_Bell.pdf last accessed on March 29, 2017, Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20(1) *Duke Journal of Comparative & International Law* 1, pp. 14-30, available at https://ssrn.com/SSRN-id1372423.pdf last accessed on April 4, 2017.

[28]See, *Mohemed El-Nekeily v OAU*, ACHPR Communication No. 12/88, *Femi Falana Esq v The African Union*, African Court on Human and Peoples' Rights, Application No. 001/2011, para 72, *Michelot Yogogombaye v The Republic of Senegal*, African Court on Human and Peoples' Rights, Application No. 001/2008, paras. 36-38, *Atabong Denis Atemnkeng v The African Union*, African Court on Human and Peoples' Rights, Application No. 014/2011, para 39.

[29]The Global health Partnership, above n. 7, p.3. See, Charter of the United Nations of, signed at San Francisco, June 26, 1945, Article 105, Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, 13 February, 1946.

[30] See, General Convention on the Privileges and Immunities of the Organization of African Unity, signed 25 October 1965, CAB/LEG/24.2/13, "Status of Mission Agreement, The Transitional Federal Government of the Somali Republic-African Union", March. 6, 2007, para 54.

(SOFAs) signed with host countries.[31] In showing this limitation clearly, the Model Status of Forces Agreement prepared by the UN in 1990 specifically mentions the applicability of the UN Convention on Privileges and Immunities of the UN.[32] According to the report prepared on the UN responsibility in the Haiti situation, the Haitian government signed the status of forces agreement with the UN Mission for the Stabilization in Haiti (MINUSTAH) and in that agreement the UN specifically promised to create a standing commission to review third party claims related to torts or contracts arising from peacekeeping operation.[33] However, in spite of these obligations under this agreement, the UN has not established a claims commission in Haiti and in fact the report provides that the UN has promised similar claims commissions in over 30 agreements since 1990 but not a single commission was established to the date the report was prepared leaving countless victims of peacekeeper wrong doing without any remedy at law.[34]

With the increasing number of human rights violations being reported to have been committed by UN peacekeeping missions internationally, Catherine Sweetser strictly calls for concrete remedial mechanisms for victims of such wrongdoings.[35]

B. Peacekeeping missions under the African Union and the African Charter on Human and Peoples' Rights

Article 4(h) of the Constitutive Act[36] of the African Union (AU) empowers the organization to intervene in member states in order to prevent or halt grave situations such as war crimes, genocide, and crimes against humanity. Pursuant to this provision, the AU has deployed several peacekeeping operations for over a decade, including in Burundi, Darfur and Somalia.[37]

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[31] Model Status-of-forces agreement for peace-keeping operations, UN General Assembly, A/45/594, adopted 9 October 1990, Article 3. AMISOM Status of Mission Agreement, above n. 30, para 58.

[32] Ibid.

[33] The Global health Partnership, above n. 7, p.3

[34] Ibid.

[35] *See*, Catherine E. Sweetser, 'Providing Effective Remedies To Victims of Abuse by Peacekeeping Personnel' (2008) 83(5) *New York University Law Review* 1643, p.1646, available at www.nyulawreview.org>sites>file>pdf>NYULawReview-83-5-Sweetser.pdf last accessed on March 22, 2017.

[36] See, Constitutive Act of the AU, above n. 19, art 4(h). *See also*, AU Protocol Relating to the Establishment of Peace and Security Council of the African Union, Addis Ababa: African Union, 2002, Article 7(e).

[37] Tim Murithi, The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur, *Journal of Peace, Conflict and Development*, Issue 14, July 2009, p. 1, available at www.peacestudiesjournal.org.uk last accessed on March 17, 2017

Peacekeeping operations conducted by the AU is not also clean from allegations of human rights violation.[38] Wilson and Hurvits provide that wide spread sexual violence has occurred throughout South-Central Somalia in which the perpetrators are often alleged to be government security forces and military personnel from the African Union Mission in Somalia (AMISOM).[39] Feldman also presented evidences of torture and killing of civilians by Ugandan forces in the Democratic Republic of Congo.[40]

As regards the challenges of obtaining remedies for violations of human rights by peacekeeping missions, the AU signs Status of Mission Agreements (SOMA) with host countries just as the UN before deployment of peacekeeping missions. If one takes Somalia as an example, paragraph 54 of the agreement specifies clearly that all AMISOM personnel are immune from legal process for any act performed in their official capacity and paragraph 55(b) provides that military members of AMISOM who commit crimes in Somalia are subject to exclusive jurisdiction of their home state which implies that Somalia could not effectively prosecute military member of AMISOM for crimes that he or she commits with in Somalia.[41]

In cases where the accused person is a member of the civilian component or a civilian member of the military component of AMISOM, the agreement provides that the "Head of Mission (HOM) shall conduct any necessary supplementary inquiry and then agree with the Somali Government whether or not criminal proceedings should be instituted.[42] If such an agreement fails to be reached at, the Agreement leaves for the question to be resolved as provided in paragraph 59 which deals with amicable dispute settlement with the establishment of a Standing Claims Commission.[43]

Ironically, the agreement contains a provision requiring AMISOM personnel to respect Somalia's laws and regulations.[44] The agreement does not also lay any obligation on the home state to prosecute the perpetrators of the crimes once they are repatriated home which implies

[38]Hurvitz, above n .8 pp.3-7, Watch, above n 8 pp. 18-42, Feldman, above n 8, pp.275-276.
[39] "Somalia : Rape and Sexual Violence a Constant Threat for Displaced Women, Amnesty International, Aug. 30, 2013, http://amnesty.org/en/news/somalia-rape-and-sexual-violence-constant-threat-desplaced-women-2013-08-30; Somalia: Deeply Flawed Rape Inquiry, Human Rights Watch, Nov. 11, 2013, http://www.hrw.org/news/2013/11/10/somalia-deeply-flawed-rape-inquiry" in Wilson and Hurvits, above n. 24, p.1
[40] Feldman, above n.8, p. 275
[41]AMISOM Status of Mission Agreement, above n. 30, paras 54, 55(b).
[42]Ibid. para 55(a)
[43]Ibid.
[44]Ibid.para 8.

that their prosecution is left to the discretion of the home states. This leads to a no remedy situation, at least in terms of criminal prosecution of military members of the military component of AMISOM in the domestic legal system of Somalia and their home states.

Once the domestic remedy is impossible to get, a look at the international mechanism of redressing the violation would be more appropriate. The African Charter on Human and Peoples Rights is silent on the distinct right to remedies although it mentions some remedial provisions as part of already existing rights in the Charter.[45]

Musila argues that the omission of the right to remedies in the Charter can be explained in two factors: the first one could take the view that, it is one of the many substantive rights that should have been included in the Charter but were not, especially when the regional initiative is seen within the context of the general character as the tentative, sparsely drafted instrument described variously as 'opaque' and 'difficult to interpret' and which was perhaps the best that could be achieved, considering the prevailing political realities at the time of its adoption.[46] The other one relates to the possibility that the drafters of the African Charter could have considered it superfluous to include such a right, which would be considered as an implied right as reflected in the legal maxim *Ubi Jus Ibi Remedium* (where there is a recognized right, there should be a remedy) and that the right to a remedy is so self-evident that it need not be specifically enshrined.[47]

With respect to giving remedies in which the AU[48] and its predecessor organization the Organization of African Unity (OAU)[49] has been a party as international legal person, having rights and duties and the possibility of being sued (inferring from the *ICJ Reparations Decision*), the African Commission and the African Court have not been a fertile ground for such type of

[45]African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU DOC CAB/LEG/67/3 rev 5, entered into force 21 October 1986, Articles 1 and 7.

[46]Godfrey M. Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442, p. 447 See also, FransViljoen, Communication under the African Charter: Procedure and Admissibility, in Malcom Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights* (Cambridge University Press, 2nd ed, 2008), pp. 78-85.

[47]Ibid. *See also, Social and Economic Rights Action Center (SERAC) & Another v. Nigeria*, above n 10, paras 60-68 as the Commission invoked the doctrine of implied rights by recognizing the implicit protection of the right to housing and the right to food in the African Charter.

[48]*Femi FalanaEsq v The African Union*, above n. 28, Para 72, *MichelotYogogombaye v The Republic of Senegal*, above n .27 , Paras 36-38, *Atabong Denis Atemnkeng v The African Union*, above n. 28, para 39.

[49]*See, Mohemed El-Nekeily v OAU,*above n. 28

communications as both organs declined to entertain such cases for the very reason that the OAU and subsequently the AU are not state parties to the African Charter on Human and Peoples' Rights and that state obligations as per the treaties are not expected from the organization.

Although the majority opinions in the cases decided by the African Court ruled the cases inadmissible, the dissenting opinions aired the notion that since the AU is also established for the promotion and protection of human rights, it should therefore take responsibility when failing to do so.[50] These dissenting opinions in the African Court of human rights, though minority ones at the moment, could pave the way in which responsibility could be attributed to the AU for violations of human rights committed by its peacekeeping missions.

1.3 Statement of the Problem

With regard to AU's peacekeeping missions, question arises as to who bears the responsibility for violations of rights recognized in the African Charter on Human and Peoples Rights if/when they are committed by AU peacekeeping missions against non-combatant civilians in the territories of member states of the AU. The problem is aggravated due mainly to the fact that these missions (under the Status of Mission Agreements) and the AU itself have immunity from being subjected to domestic judicial systems of the host state.

As explained by the International Court of Justice (ICJ) in the *Reparations Case*, international organizations do have an international legal personality and that they are given the right to bring claims to enforce their rights.[51] Legal personality also entails the right to be claimed against. With such line of argument, a claim against the AU as the main organization mandating these missions, at the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights would have made it possible for the victims to have redress for the violations.

However, as will be seen in this research, both the African Commission and the African Court declined to entertain claims against the AU and its predecessor Organization of African Unity (OAU) for the reason that the OAU and subsequently the AU are not state parties to the African Charter on Human and Peoples' Rights and that state obligations as per the treaties are not

[50] *Femi FalanaEsq v The African Union*, above n. 28, Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M. Ngoepe and Elise N. Thompson, para 8.1.1.

[51] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports* 1949, P. 177.

expected from the organizations.[52]This scenario creates a potential gap between rights violations and remedies available under the African regional system of human rights to redress such violations.

1.4 Hypothesis

The research is based on the premises that peacekeeping missions in the African continent mandated by the AU should totally distance themselves from violating the rights of people that they are supposed to keep peaceful as the nature of the term implies. It is also based on the idea that for every right given, a remedy is attached to it *(ubi jus ibi remedium)* and that victims of human rights violations should be able to have their claim heard. That is no different to violations committed by peacekeeping missions mandated by the AU.

Thus, as an international legal person capable of having rights and duties and mandated to promote and protect human rights by its constitutive document, the AU should be responsible for such type of human right violations. Hence, the African human rights system, through its judicial and quasi-judicial mechanisms, should be able to create a platform where such kind of grievances could be redressed.

1.5 Research Questions and Objectives

The objective of this research is to demonstrate the remedial gap in the African human rights system for victims of human rights violations actually or potentially committed by AU peacekeeping personnel.[53] With this objective, the study will endeavor to answer the following research questions.

- What does the immunity of the AU entail in terms of its responsibility for human right violations and remedies for potential victims?
- What is the relationship between AU peacekeeping missions and host countries?
- Who is responsible for potential human right violations committed by AU peacekeeping missions in territories of African Countries?

[52]*Mohemed El-Nekeily v OAU,* above n. 27, *Femi FalanaEsq v The African Union,* above n. 27, Judgment, para 72,*Atabong Denis Atemnkeng v The African Union,* above n. 28, para 39.

[53]Sweetser, above n. 33, pp. 1646-1647. In highlighting the experiences of the UN, she explains that peacekeeping personnel do operate as employees of the organizations and are subject to the functional immunities of the UN including other broad immunities under specific agreements with the host states and as peacekeeping personnel are directly under the UN command, their behavior reflects most directly upon the organization. However, peacekeeping troops, part of the national military contingents, are usually subject to minimal control by the UN, which raise difficult questions on the responsibility of the UN.

- Is the AU responsible for violations of human rights in peacekeeping missions mandated by it?
- What is the role of the PSC in giving remedies to victims of human right violations in AU peacekeeping operation?
- What is the current legal situation of the AU and its peacekeeping missions in terms of immunity and accountability?
- What are the possible remedies for individual right holders whose rights recognized by the African Charter have been violated by peacekeeping missions?
- What is the position of the African Commission and the African Court in cases in which the AU is a party?

By answering these research questions, the research aims to address the following general and specific objectives:

General Objectives

The thesis has the following overarching objectives:

- It will examine the attribution of responsibility to the AU within the African Human rights system in light of the relevant international law.
- It will take a closer look at the right-remedy connection in human rights discourse.
- It will make a brief discussion about peacekeeping operations by the AU and the role of its PSC by relying on the experiences of the UN.

Specific Objectives

- It will address the right to remedies under the African Charter on Human and Peoples' Rights.
- It shall make a detailed discussion on how peacekeeping operations are handled by the AU and to what extent will the AU be liable for violations committed by these missions.
- It shall examine the attendant cases handled by the African Commission and the African Court and its predecessor organization the OAU to find out what possible remedies would there be for potential victims.

- It will make general and specific recommendations on possible remedies within the African human rights system so that victims' suffering would not be left unaddressed by the current complaint mechanisms within the system.

1.6 Significance of the Study

The study will be significant as it engages in a new effort to address the responsibility of the AU for human rights violations in peacekeeping operations. It also contributes for the development of the remedies jurisprudence in the African human rights system. Moreover, the study will provide additional perspective for future researches in the area of international organizations' responsibility in general and responsibility of the AU in particular and also responsibility for human rights violations in connection with peacekeeping operations.

1.7 Scope and Limitations of the Study

The scope of the research is limited to showing the remedial gaps in the African human rights system for redressing violations committed by peacekeeping operations under the AU. It does not concern itself with domestic remedies or remedies available in the UN human rights system. The research will also limit itself to discussions on African Union Mission in Somalia (AMISOM) as it is the only operation mandated by the AU itself.

1.8 Methodology

The methodology of the study is going to be doctrinal in making a critical analysis and research of the hypothesis. In order to achieve this, the study shall be carried out through review of literature on the subject matter, sourced from relevant UN and AU treaties, protocols, General Comments, Fact Sheets, books, and articles from various law journals and the internet.

The major part of the study will be undertaken by making an analysis of the African Charter on Human and Peoples Rights and its position on remedies. The Status of Mission Agreements (SOMA) between the AU and the countries where the AU has deployed peacekeeping missions will also be examined to show the extent of liability of the AU. In addition relevant case law of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights will be critically explored in order to achieve the objectives of the research.

1.9 Structure of the Study

The research will consist of five chapters. The first chapter introduces the study by providing background information, investigating the existing literature, identifying the problem, framing the research questions and objectives, and formulating hypothesis, scope and methodology.

The second chapter will deal with the responsibility of the AU for human right violations in its peacekeeping operations. This chapter will first discuss international legal personality of the AU and will show how this legal personality entails responsibility in its operations. It will further explore the role of the AU Peace and Security Council in the peace operations and whether the Council has any role in giving solutions/remedies to victims of rights violations in peace operations. The Chapter will also look at the AU's responsibility in peacekeeping operations by making an analysis of its immunity under the AU Convention on Privileges and Immunities of the AU and status of mission agreements that it signs with host countries for the peacekeeping operations. The chapter also looks at some of the experiences of the UN in a comparative analysis of the responsibility of the UN in similar instances as the UN's vast experience in peace operations over the years have led to various issues of its responsibility for human rights violations. This chapter of the thesis will also engage itself in a discussion of case law to show the various instances where the AU and the UN might have faced such responsibility.

Remedies are unequivocally the ultimate redress for violations of human rights and as such where there is a violation of right, the question of remedies should obviously follow. With this principle in mind, after showing the responsibility of the AU for human right violations in peace operations in the second chapter, the third chapter of the thesis goes on to explore what international human rights law and African human rights system have to say about remedies. The third chapter will also deal with the remedial jurisprudence of the African Commission and the African Court in order to find out whether it supports the AU's responsibility in peacekeeping operations.

The fourth chapter will dedicate itself at finding ways for potential remedies for victims of human right violations by AU peacekeeping missions in the African human rights system by showing the current remedial shortfall in this regional human right regime. In the end, the fifth chapter will conclude the findings of the study and makes some recommendations.

Chapter Two

Responsibility of the AU for Human Right Violations in Peacekeeping Operations

2.1Introduction

The contribution to international law generally made by the increasing number and variety of international organizations is undoubtedly immense.[1] The work of international organizations has had a significant effect in a number of fields although not often sufficiently recognized and appreciated.[2] International organizations have evolved from facilitators of intergovernmental cooperation into powerful actors in their own right and that their activities currently cover virtually every field of human activity and extend to all corners of the globe.[3]

The creation of international organizations as autonomous actors has naturally raised the question of their accountability in the performance of their activities.[4] It is very important to take into account that international organizations act as independent actors on the international plane expanding both their quality and quantity involvement.[5] International organizations have gradually been assigned with powers that were for a long time considered to be under the domain of sovereign powers.[6] It is because of international personality that international organizations are able to exercise their powers and duties.[7] With the ownership of a distinct international legal personality, comes international responsibility in which international organizations may incur while performing their activities enshrined in their establishing documents. The AU is no

[1]Malcolm N. Shaw, *International Law* (Cambridge University Press, 6th ed, 2008), p. 1295.
[2]Ibid.
[3]Aurel Sari, 'Autonomy, Attribution and Accountability: Reflections on the Behrami Case' in Richard Collins and Nigel D. White (ed), *International Organizations and the Idea of Autonomy* (Routledge, 2010) 257, p. 257, available at https://ssrn.com/abstract=1635803 last accessed on April 26, 2017.
[4]Ibid.
[5]Olga Gerlich, 'Responsibility of International Organizations under International Law ' (2013) p. 1 available at www.bibliotekacyfrowa.pl>Content>01_Olga_Gerlich.pdf last accessed on March 26, 2017.
[6]Ibid.
[7]Ibid.

different in this regard with its powers and duties enshrined in the AU Constitutive Act so much so that it cannot execute its powers and duties without a distinct legal personality.[8]

The main aim of this chapter is to show the responsibility of the AU for violations of human rights in peacekeeping operations. In making this effort, the chapter will also look at experience of responsibility arising from UN peacekeeping missions across the globe as peacekeeping is one of the major activities of the UN as per its obligation to maintain peace and order under the UN Charter.[9] The chapter will make a discussion of this experience in order to show how that can be used in the African system in ensuring AU's responsibility for such violations.

The second section of the chapter will be concerned with the essence of AU's legal personality and how responsibility can be attributed to the AU in peacekeeping operations from the perspective of the tests for attribution of responsibility and the Draft Articles on the Responsibility of International Organizations. The third section will deal with peacekeeping operations under the AU and the role of the AU Peace and Security Council in such operations. The section will also concern itself with allegations of human rights violations in AU peace operations as this will directly lead to the issue of remedies to be discussed in subsequent chapters of the thesis.

The fourth section of the Chapter will deal with immunity of the AU vis-à-vis its responsibility for human right violations by exploring immunity under the AU Convention on Privileges and Immunities of the AU and immunity clauses in the Status of Mission Agreements. The UN experience with regard to immunities and limitation of third party liability will also be explored in a comparative analysis.

The fifth section of the chapter will particularly concern itself with cases in which the AU and the UN have been a party to and responsibility has been attributed to them or managed to avail immunity clauses and avoided responsibility to show the trend of the jurisprudence.

[8]Constitutive Act of the African Union, adopted in Lome, Togo, on 11 July 2001 and entered into force on 26 May, 2001.

[9]See, Charter of the United Nations of, signed at San Francisco, June 26, 1945, Article 105, Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly, 13 February,1946, 1 U.N.T.S.

2.2Holding the AU Accountable

2.2.1 Legal Personality of the AU

A legal person is in essence a right and duty bearing unit and legal personality is the capacity of being a subject of legal duties and legal rights, performing legal transactions and of suing and being sued at law.[10] International organizations possess international legal personality that contains both right and duties on the international plane.[11]

The attribution of personality to international organizations has become indispensable in modern international law and it has become evident that without such recognition these organizations would not be able to carry out their tasks, because legal competences are necessary corollaries of duties and responsibilities.[12] The ability to bear responsibility by international organizations is both an indicator and a consequence of their legal personality under international law i.e. international organizations' responsibility must be considered a necessary consequence of their capacity to act under international law.[13] Therefore, as affirmed by the ILC in Article 2(a) of the Draft Articles on the Responsibility of International Organizations, international organizations' legal personality is a necessary precondition for them to bear responsibility under international law.[14]

The constitutional document of the organization regulates the terms of the legal personality of international organizations by not only conferring powers on them expressly as well as impliedly, but also forming the basis for institutional obligations.[15]According to the notion of derived legal personality of international organizations, legal personality under international law is deemed necessary for international organizations to perform their purposes through, for

[10]Guglielmo Verdirame, *UN Accountablility for Violations of Human Rights* (PHD Thesis, London School of Economics, 2001) , p.78 available at www.etheses.lse.ac.uk>U156099.pdf last accessed on April 3, 2017.

[11]Ibid p. 77.

[12]Nsongurua J. Udombana, 'The Institutional Structure of the African Union: A Legal Analysis ' (2002) 33 *California Western International Law Journal*, p.75, available at https://ssrn.com/abstract=180611 last accessed on September 16, 2017.

[13]A. Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful ' in A. Pellet J. Crawford, S. Olleson (ed), *The Law of International Responsibility* Oxford Commentaries on International Law (Oxford University Press, 1st ed, 2010) 75, pp79-81, in Olga Gerlich, above n.5, p.4.

[14]Ibid. *See* Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission at its sixty-third session, in 2011, *Yearbook of the International Law Commission, 2011, vol. II. Part Two*. UN Doc. A/66/10, Ch. V Article 2(a).

[15]Olga Gerlich, above n. 5, p. 4.

example, concluding international treaties, exchanging representatives or mobilizing international forces.[16]

This was authoritatively discussed and settled by the ICJ in the *Reparation for Injuries Suffered in the Service of the United Nations Case (Reparations Case).*[17] The Court held that the UN indeed had international legal personality as it was indispensable in order to achieve the purposes and principles specified in the Charter i.e. it was a necessary inference from the functions and rights the organization was exercising and enjoying.[18] Thus, the ICJ made a conclusion that while the UN did not enjoy the same breadth of legal capacity as a sovereign state, it certainly enjoyed necessary legal capacity to effectively discharge its functions.[19]

By the same token, the Constitutive Act of the AU does not confer the status of international personality to the AU expressly. But, this does not mean that the AU cannot be considered as an international legal person as in the absence of clearly indicated personality in an international instrument, it has become customary to look for indications of personality which implicate whether an international organization is intended to have international legal personality or not.[20]

In order to determine the legal personality of the AU, it is crucial to examine the features of the organization as enshrined in the Constitutive Act.[21] First, the AU was created to take up the many challenges confronting the continent and peoples in "light of the social, economic and political changes taking place in the world."[22] Although, it is brought into existence by the member states, it has a separate existence from them and it is endless in size and eternal in time, allowing for the admission of other members at any time after the entry into force of the Act.[23]

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[16]Henry G. Schermers and Niels M. Blokker, *Interantional Institutional Law: Unity within Diversity* (Martinus Nijhoff Publishers, 5th ed, 2011), p. 1005 in Olga Gerlich, above n.5, p.6.

[17]Malcolm N. Shaw, above n.1, p. 1297.*Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports* 1949, P. 177. *See also*, Phillpe Gautier, The Reparation for Injuries Case Revisited: The Personality of the European Union, *4 Max Planck Yearbook of United Nations Law 331*, pp. 332-336, available at www.mpil.de>pdf2>mpunyb_gautier_4.pdf last accessed on March 24, 2017.

[18]Ibid. p. 1298.

[19]Neha Bhat, 'Responsibility in the Time of Cholera: Liability of International Organizations for Wrongful Conduct ' (2013) , p.31 available at: http://ssrn.com/abstract=2213613 last accessed on April 6, 2017. *Reparations Case*, above n.16, p. 178.

[20]Ian Brownlie, *Principles of Public International Law*, Oxford University Press, 6th ed., 1998, p. 678, in Udombana, above n. 12, p. 75.

[21]Udombana, above n. 12, p. 75.

[22]Ibid. Constitutive Act of the AU, above n. 8, Preamble para. 5.

[23]Ibid. Constitutive Act of the AU, above n. 8, Article 29(1).

Moreover, the objectives and principles in the Constitutive Act are independent of its Member States, even though not diametrically opposed, and one of such principles is the peaceful co-existence of Member States and their right to live in peace and security.[24] Another important principle is the peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly.[25]

Nevertheless, the AU, being an artificial entity, does not have hands, legs, eyes, a brain and such other organs that are the natural attributes of a person and it can function only through various organs vested with special tasks and manned by physical persons.[26] To this end, the AU has established various organs with defined functions and these organs are of the Organization, not of the Member States, although they are composed of the States.[27]

The acquisition of international personality implies that the organization was a subject of international law and capable of having international rights and duties and of enforcing them by bringing international claims.[28] Thus, it was emphasized in the dissenting opinion of three judges in *Femi Falana Esq v The African Union,* that the AU, undoubtedly, is an international legal person, and it also has international legal responsibility extending beyond the Member States, as it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims and the ability to bring claims necessarily entails that the AU can also be sued and claimed against.[29]

[24]Ibid. Constitutive Act of the AU, above n. 8, Article 4(i).
[25]Ibid. Constitutive Act of the AU, above n. 8, Article 4(e).
[26]*Reparations Case*, above n.16, p. 177.
[27]Ibid.
[28]Neha Bhat, above n. 19 p. 33.
[29]*Reparations Case* above n.17, p. 177.Udombana, above n. 12, p. 76. See also, *Femi Falana Esq v The African Union*, African Court on Human and Peoples' Rights, Application No. 001/2011, Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M.Ngoepe and Elise N. Thompson, para 8.1.1. The international legal personality of the AU was also recognized in the majority decision of the Judges in this case although it dismissed the Case asserting that the AU was not part of the Protocol for the establishment of the African Court. Para. 70 of the decision reads: "In the present case, the African Union is not a party to the Protocol. As a legal person, an international organization like the African Union will have the capacity to be party to a treaty between States if such a treaty allows an international organization to become a party. As far as an international organization is not party to a treaty, it cannot be subject to legal obligations arising from that treaty".

Moreover, the fact that the AU is able to enter into status of mission agreements with Member States for peacekeeping operations is a reflection of its international legal personality in general and its status as distinct entity capable of bearing rights and duties in particular.[30]

In addition to this, a crucial point with regard to the responsibility of the AU is the fact that its personality has been recognized in status of mission agreements. The fact that the member states have made such an explicit recognition of its legal personality cements the issue of personality in a more concrete manner. For example, the Status of Mission Agreement with Somalia under Article 4 obliges the host nation, Somalia, to give recognition to African Union Mission in Somalia (AMISOM)'s legal personality and legal capacity.[31] The Agreement under Article 20 also treats AMISOM as a subsidiary of the AU which implies that the AU should be responsible for damages caused by its subsidiaries. Therefore, the legal personality of the AU implies that it should be held as a duty bearer for any violations of human rights in its peacekeeping operations.

2.2.2 Draft Articles on the Responsibility of International Organizations (DARIO) as applicable to the AU

With regard to the responsibility of international organizations, the International Law Commission explained how the rules comprised in the Articles on the Responsibility of States for Internationally Wrongful Acts are to be adapted to the responsibility of international organizations.[32] The provisions of the Articles on the Responsibility of States for Internationally Wrongful Acts, as explained in Article 57, are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.[33]

The International Law Commission adopted the DARIO in August 2011 and at a first glance, the DARIO seems to be the revised, extended version of the principles applicable to the responsibility of states contained in the Articles on Responsibility of States for Internationally

[30]For example, the AU Commission, as the executive arm of the Union signed the Status of Mission Agreement with Somalia for its peacekeeping mission there. See, "Status of Mission Agreement, The Transitional Federal Government of the Somali Republic-African Union", March. 6, 2007.
[31] Ibid. Article 4
[32]Olga Gerlich, above n.5, pp. 8-9.
[33]Ibid.

Wrongful Acts and similar as is in the case of the latter, their legal character is disputed.[34] As regards the legal character, one should emphasize here that, the Commission has been entrusted with the assignment of both the progressive development of international law and its codification and thus, the instruments drafted by the Commission can differ in their legal authority and represent an instrument of progressive development of international law or a codification of existing norms of customary international law.[35]

A contemplation of the legal responsibility of international organizations may bring about the question why international organizations can be held responsible at all in the first place.[36] The DARIO in attempting to answer this quest provides that "every internationally wrongful act of an international organization entails the international responsibility of that organization."[37] In relation to this, some do argue that this reflects a rule of international law, either by stating that it reflects a general principle of law[38] or by finding that this is a rule of international customary law while others base their reasoning on the international legal personality of international organizations.[39]

It is possible to find a political consideration for this legal argumentation which is based on the major role that international organizations nowadays play at the global level and because of this major role it would seem intolerable not to hold them responsible when violating international norms.[40] Article 3 of the DARIO which provides that every internationally wrongful act of an international organization entails the international responsibility of that organizations, is based on all of these legal considerations as it seems to interpret the international responsibility of international organizations as being part of customary international law by making a reliance on two references that can be interpreted as proof for "practice" on the one hand and *opinio juris* on

[34]Ibid.*See* ,Mirka Möldner, 'Responsibility of International Organizations - Introducing the ILC's DARIO' (2012) 16 *Max Planck Yearbook of United Nations Law* 281 p. 284 available at: www.mpil.de/files/pdf4/mpunyb_06_Moeldner_161.pdf last accessed on May 8, 2017.

[35]Olga Gerlich, above n.5, pp. 8-9.

[36]Mirka Möldner, above n. 34, p. 285.

[37]Ibid. p.286 Draft Articles on the Responsibility of International Organizations, adopted by the International Law Commission at its sixty-third session, in 2011, *Yearbook of the International Law Commission, 2011, vol. II. Part Two*. UN Doc. A/66/10, Ch. V Article 3.

[38]M.H. Arsanjani, 'Claims Against International Organizations', (1981) 7 *Yale Journal of World Public Order*, 131 et seq., in Mirka Möldner, above n. 34, pp. 286

[39]Ibid. Möldner mentions the works of the likes of M.Hirsch and Ian Brownlie in support of these arguments. See M. Hirsch, *The Responsibility of Internaitonal Organizations Toward Third Parties: Some Basic Principles,* 1995, p.8, I. Brownlie, *Principles of Public Intenational Law*, 2008, p.683 et seq.

[40]Ibid.

the other.[41] Besides, as per Article 2 of the DARIO, the responsibility of an international organization is linked to its international legal personality. Therefore the ILC, in a clear manner, is in favor of understanding the international legal personality of international organizations to be an "objective" personality, which does not need to be recognized by an injured state before considering whether the organizations may be held internationally responsible according to the DARIO.[42]

As regards, the scope of the DARIO, it is stated under Article 1 that the Draft Articles apply to the international responsibility of an international organization for an internationally wrongful act.[43] The Articles are also applicable to the international responsibility of a State for an internationally wrongful act in connection with the conduct of an international organization.[44] The DARIO defines international organizations as "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."[45] Consequently, an international organization, as understood here, cannot only be established by an international treaty, but also by a resolution adopted by another international organization or by a conference of states.[46] In this regard, not only intergovernmental organizations are covered, but also international organizations, that have been established with the participation of state organs other than governments or by other entities, and also entities, such as the European Union, that have diverged from being a classical international organization, are included in that notion.[47]

In describing the elements of internationally wrongful act of an international organization, the DARIO provides that there is an internationally wrongful act of an international organization when conduct consisting of an action or omission is attributable to that organization under international law and constitutes a breach of an international obligation of that organization.[48] The conduct of an organ or agent of an international organization in the performance of functions

[41]Ibid. p. 287.
[42]Ibid.
[43]Draft Articles on the Responsibility of International Organizations, above n. 37, Article 1(1).
[44]Ibid. Article 1(2).
[45]Ibid Article 2(a).
[46]Mirka Möldner, above n. 34, p.289.
[47]Ibid.
[48]Draft Articles on the Responsibility of International Organizations, above n. 37, Article 4.

of that organ or agent is considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.[49] Likewise, the conduct of an organ or agent of a State or an organ or agent of an international organization that is placed at the disposal of another international organization is considered under international law an act of the latter organization if the organization exercises effective control over that conduct.[50]

Although still at a draft stage and not a binding document at the international level, the DARIO sets the ground work with regard to the responsibility of international organizations which can be used by the African Commission and the African Court in employing the standards included in these Articles in cases where the AU's responsibility in human right violations for peace operations is at question.

2.2.3 Attribution of Conduct: Effective Control Test

Another principle which can be crucial in ensuring AU's responsibility for human rights violations in peace operations is the "effective control test" employed to attribute wrongful conduct to the AU.

Articles 6-9 of the DARIO deal with the principles of attribution of conduct to an international organization. The four articles comprise one general and three specific rules. The general rule under Article 6, addresses the conduct of organs and agents of the organization while Article 7 deals with the attribution of the conduct of a state organ placed at the disposal of an international organization.[51] Article 8 covers the attribution of ultra vires conduct and Article 9 deals with the attribution of conduct subsequently adopted by an international organization.[52]

These provisions collectively help define the framework for attribution of conduct to the AU, especially where such conduct is alleged to have been committed by AU Peacekeeping personnel.[53] Among these articles, Article 7 is the provision most relevant in terms of imputing the conduct of peacekeepers.[54] The article provides that 'the conduct of an organ of a state or an organ or an agent of an international organization that is placed at the disposal of another

[49]Ibid. Article 6.
[50]Ibid. Article 7.
[51]Guglielmo Verdirame, *The UN and Human Rights Who Guards the Guardians* (Cambridge University Press 1st ed, 2011) p.99
[52]Ibid.
[53]Bhat, above n .19, p. 36.
[54]Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations : Command and Control Arrangements and the Attribution of Conduct ' (2009) 10(16) *Melbourne Journal of International Law* 346, p.348 available at http://autlii.edu.au/au/journals/MelbJIL/2009/16.html last accessed on June 16, 2017.

international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.[55] As discussed above, in the case of AMISOM for example, the Status of Mission Agreement between Somalia and the AU treats, AMISOM a subsidiary organ of the AU. Thus, as per this principle, human right violations committed by the mission should be attributable to the AU as it exerts effective control over the conduct.

This article of the DARIO sets out the principle governing the attribution of conduct, which includes acts and omissions, of organs placed at the disposal of an international organization by a state.[56] As members of military forces of states, peacekeepers are undoubtedly elements of state organs, but are placed at the disposal of the AU by their states.[57] The 'effective control' test under this provision is not applied generally to the overall conduct of the organ, but rather to each specific unlawful act, in order to verify if the act in question of the organ was performed under the control of the international organization or the sending state.[58] Where the conduct is carried out on the direction and control of the international organization, the act should obviously be imputed to that international organization, but if the unlawful act was conducted on the instructions of the sending state, the conduct should be attributed to state.[59]

Speaking from the perspective of institutionalism, peacekeeping operations are established as subsidiary organs of the AU and members thereof are international agents authorized on behalf of the AU.[60] However, since the AU does not own a standing army, it enters into agreement with member states to acquire necessary troops and facilitate their deployment whenever a peacekeeping mission requires military personnel.[61] The troop contributing nations, in this type of arrangement, necessarily retain some degree of control over their national contingents although, the international organization, in this case the AU, exercise overall operational command and control over these troops.[62]

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[55]Draft Articles on the Responsibility of International Organizations, above n. 37, Article 7.
[56]Leck, above n. 54, p. 348
[57]Ibid.
[58]Ibid.
[59]Ibid.
[60]Bhat, above n .19, p. 37 See also, Leck above n. 54, p.352.
[61]Ibid.
[62]Ibid.*See*, Tom Dannenbaum, 'Translating the Standard of Effective Control into a system of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers ' (2010) 51 *Harvard International Law Journal* 113, p.

As a result, it assumes responsibility only for those acts of the peacekeeping personnel, which are subject to its exclusive operational control.[63] Judicial pronouncements and academics also endorse this effective control test for determining responsibility for wrongful conduct.[64] And thus, as Tom Dannenbaum affirms, the critical concept with regard to attributing liability between states and the international organization, in this case the AU, is that of effective control over the wrong doing.[65] Nevertheless, in this context, it is not effective control over territory or victims that is at issue, but effective control over the troops that perpetrate the human right violations and more particularly, effective control over their conduct in perpetrating those acts.[66]

With regard to the concept of effective control, questions may arise whether the AU or the UN can even be considered to ever have effective control of peacekeepers although scholars and jurists generally hold that peacekeepers are in general, under the effective control of the AU during the period that they are placed at the disposal of the AU, save for that rare instance when a troop contributing country may override the Force Commander's authority of the peacekeeping mission and assume effective control.[67] Scholars, on the basis of troop contributing countries retaining criminal jurisdiction and having conventional or customary law obligations, argue that the troop contributing countries remain attributable and responsible, perhaps with the AU, for violations committed by peacekeepers, while others simply note that dual or multiple attribution

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141-143, available at https:/www.harvardilj.org>uploads >2010>09HILJ_51-1.Dannenbaum.pdf last accessed on July 5, 2017.

[63]Ibid.

[64]Ibid.See, Dannenbaum, above n. 62, pp. 141-145, Leck, above n. 54, pp. 352-356, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits)* 1986 I.C.J Rep 14, *Application of the Convention on the Prevention and punishment of the Crime of Genocide (Bosnia and Herzogovina v. Serbia and Montenegro*) 2007 I.C.J Rep. 1, *Al Jedda v. United Kingdom* (2011) ECHR 1092, *Nuhanović v. The Netherlands* , Appeal Judgement, LJN: BR5388; ILDC 1742 (NL 2011), July 5, 2011,*Mustafić v Netherlands*, Appeal Judgement, LJN: BR 5386, July 5, 2011, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, European Court of Human Rights, Grand Chamber, Decision, 2 May 2007 on the admissibility of applications No. 71412/01 and No. 78166/01. *Kasumaj v. Greece* Decision of 5 July 2007 on the admissibility of application No. 6974/05, *Gajic v. Germany* Decision of August 28, 2007 on the admissibility of application 31446/02 in which the ECHR affirmed its view concerning the attribution to the UN of conduct taken by national contingents allocated to the NATO forces in Kossovo (KFOR).

[65]Dannenbaum, above n. 62, pp. 140.

[66]Ibid.

[67]Marten Zwanenburg, Accountability of Peace Support Operations, 2005, pp. 51-129 in Leck, above n. 54, p.356, BetiHohler, Responsibility of International Organizations: The Element of Attribution in the Context of Peacekeeping Operatioins (Paper presented at the Second Global International Studies Conference, Ljubljana, Slovenia, July 26, 2008) in Leck above n. 54, p. 356.

such as on the basis of instructions jointly issued is possible.[68] However, actual instances of dual or multiple attribution, appear to be few and far between, with the attribution of conduct to only one entity continuing to be the prevailing practice.[69]

Therefore, the effective control test is a useful tool if it is adopted by the African Commission as per Article 61 of the African Charter[70]in attributing responsibility to the AU for violations of human rights in its peacekeeping operations.

2.3 Peacekeeping Operations under the AU

2.3.1 The AU Council on Peace and Security's Role in Peacekeeping Operations

The birth of the AU at the dawn of the 21st century paved the way for engagement in peacekeeping initiatives as a tool to address conflicts and instabilities on the continent.[71] With the adoption of the AU Constitutive Act, African leaders were crucially conscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and the need to promote, peace, security and stability as a prerequisite for the implementation of a development and integration agenda.[72]

With this aim, the AU officially launched the Peace and Security Council (PSC) in May 2004 and at its launch African leaders emphasized the Council's potential significance, claiming that

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[68]Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: the Behrami and Saramati Cases ' (2008) 8 *Human Rights Law Review* 151, p. 150-160, available at http://ssrn.com/abstract=1317690 last accessed on May 3, 2017 in Leck, above n. 54, p. 356, Sari, above n. 3, pp.265-267, Kjetil Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test ' (2008) 19(3) *The European Journal of International Law* 509, p. 517 available at www.ejil.org>pdfs1628.pdf last accessed on March 29, 2017 in Leck, above n. 54, p. 356.

[69]Leck above n. 54 , p. 356. *See also*, Damien va der Toorn, 'Attribution of Conduct by State Armed Forces Participating in UN-authorized Operations: The Impact of Behrami and Al-Jedda' (2008) 15(1) *Australian Journal of International Law* 9, pp. 11-13, available at www.austlii-edu.au>AUIntLawJL>2.pdf last accessed on April 16, 2017, See also, Dieter Fleck, 'The legal status of personnel involved in United Natioins peace operations' (2013) 95 *International Review of the Red Cross* 613, pp. 614-618, available at https://www.icrc.org/irrc-891-892-fleck.pdf last accessed on April 13, 2017.

[70]African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU DOC CAB/LEG/67/3 rev 5, entered into force 21 October 1986.

[71]R.M. Charles, 'The Future of Peacekeeping in Africa and the Normative Role of the African Union ' (2010) 2(2) *Goettingen Journal of International Law* 463, p. 464-468 in, Adegboyega A.Ola and Stanely O. Ehiane, 'Missions with Hindrance: African Union (AU) and Peacekeeping Operations ' (2016) 5(1) *Journal of African Union Studies* 113, p. 115 available at https://www.researchgate.net/publication/305494869_Missions_with_Hindrance_Afrcan_Union_AU_and_Peacekeeping_Operations_JournalofAfricanUnionLawApril2016.pdf , last accessed on April 6, 2017.

[72]I. Brian-Vincent and J. Dauda, 'African Union, Conflict, and Conflict Resolution in Africa: A Comparative Analysis of the Recent Kenya and Zimbabwe Conflicts' (2011) 1(1) *International Journal of Development and Conflict* 61, pp. 62-65, in Adegboyega and Ehiane, above n. 71, p. 116 Constitutive Act of the AU, above n.8.

its establishment 'marks an historic watershed in Africa's progress towards resolving its conflicts and the building of a durable peace and security order'.[73] The PSC was not part of the AU Constitutive Act but it grew out a series of discussions in the Organization of African Unity (OAU) from 1993 onwards with the aim of reforming the Mechanism for Conflict Prevention, Management and Resolution.[74]

The effect of these discussions was the adoption of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol) in Durban on the 9th of July, 2002.[75] The PSC Protocol came into force after ratification by twenty-seven of the then fifty-three AU members and the Council officially began its work on March 16, 2004, at the ministerial level, at the margins of the 4th Ordinary Session of the AU Executive Council.[76] The PSC, up to March 2009, had held over 180 meetings, issued over a hundred communiqués, imposed sanctions against regimes in several African countries including Togo, Mauritania, Guinea and Madagascar and authorized peace operations in Sudan, the Comoros and Somalia.[77] The AU unilaterally leads a peacekeeping mission of more than twenty thousand troops and police in Somalia referred to as African Union Mission in Somalia, AMISOM.[78]

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[73]'Statement of commitment to peace and security in Africa, issued by Heads of State and Government of the Member States of the Peace and Security Council of the African Union' , 24 May 2004, para. I, available at: http://www.africa-union.org/News_Events/Calendar_of_%20Events/Lancement%20PSC/Statement.pdf in Paul D. Williams, 'The Peace and Security Council of the African Union: Evaluting an Embryonic International Institution ' (2009) 47(4) *Journal of Modern African Studies* 603, p. 603, available at: https://faculty.polisci.wisc.edu>schatzbergWilliams2009.pdf last accessed on October 5, 2017. *See also*, Jeremy I. Levitt, 'The Peace and Security Council of the African Union: The Known Unknowns ' (2003) 13 *Transnational Law & Contemporary Problems* 109, p. 111, available at: www.commons.law.famu.edu>viewcontent>ThePeaceandSecurityCounciloftheAfrianUnion:TheKnownUn.pdf last accessed on October 5, 2017, Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention ' (2003) 85 *International Review of the Red Cross* 807, p.817, available at: www.operationpaix.net>DOCUMENT5868~V~The_right_of_Intervention_under_the_African_Union_8217s_Constitutive_Act_From_Non_Interference_to_non-intervention.pdf last accessed on November 9, 2017, Ademola Jegede, 'The African Union Peace and Security Architecture: Can the Panel of the Wise make a Difference?' (2009) 9(2) *African Human Rights Law Journal* 409, pp. 409-415, available at: http://www.ahrlj.up.ac.za/jegede_ahrlj_vol_9_no2_2009_ademola_jegede.pdf last accessed on October, 5, 2017.

[74]Ibid, p. 604. See, 'Communiqué of the Ninety-first Ordinary Session of the Central Organ of the Mechanism of Conflict Prevention, Management, and Resolution at Ambassadorial Level', 2 April 2003, available at: www.african-union.org/root/AU/organs/psc/Protocol_peace%20and%20security.pdf last accessed on October 7, 2017.

[75] Protocol relating to the Establishment of the Peace and Security Council of the African Union, *(PSC Protocol)* adopted by the AU Assembly in Durban, South Africa, 10 July 2002, and entered into force on 26 December 2003.

[76]Williams, above n. 73, p. 607.

[77]Ibid.

[78]Ibid.

As per Article 5.2 of the AU Constitutive Act, Article 2.1 of the PSC Protocol established the PSC as a standing decision-making organ for the prevention, management and resolution of conflicts that should be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.[79] With regard to conflict management, the PSC is in principle able to authorize the entire spectrum of peace operations, from small peacemaking missions to large-scale interventions envisaged in Articles 4(h) and 4(j) of the AU Constitutive Act.[80]

Article 4(h) of the Act does establish the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity and after three years from this enactment, the AU added amendments to the Constitutive Act to extend the right of intervention to a 'serious threat to a legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the PSC.[81] Intervention as per this provision means a military intervention authorized by the AU Assembly and implemented by African forces in an African state, where at least one of the grave circumstances mentioned above exists.[82] Such intervention is decided upon unilaterally by the AU, and not requested by the state concerned, otherwise it would not be within the scope of article 4(h) but within that of article 4(j), which is deployed at the request of the state faced with war crimes, genocide or crimes against humanity.[83]

The various types of operations are set out in the six potential crisis management scenarios envisaged for the African Standby Force (ASF).[84] These are:

1. AU/regional military advice to a political mission.

2. AU/regional observer mission co-deployed with a UN mission.

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[79]Levitt, above n. 73, p. 111.

[80] Williams, above n. 73, p. 607, Constitutive Act of the AU, above n. 8, Article 4(h), 4(j).

[81]Gabriel Amvane, 'Intervention pursuan to article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorization ' (2015) 15(2) *African Human Rights Law Journal* 282, p. 283, available at http://dx.doi.org/10.17159/1996-2096/2015/v15n2a3 , last accessed on November 7, 2017, Protocol on Amendments to the Constitutive Act of the AU, 11July 2003, Article 4(h).

[82]Ibid.

[83]Ibid.

[84]AU 'Roadmap for the Operationalization of the African Standby Force', experts' meeting on the relationship between the AU and the Regional Mechanisms for Conflict Prevention, Management and Resolution, Addis Ababa, 22-23 March 2005, AU doc.EXP/AU-RECS/ASF/4(i), available at:
http://www.reliefweb.int/library/documents/2005/au-gen-23mar.pdf in Williams, above n. 72, p.609.

3. Stand-alone AU/regional observer mission.

4. AU/ regional peacekeeping force for Chapter VI and preventive deployment missions (and peace building).

5. AU peacekeeping force for complex multidimensional peacekeeping missions, including those involving low-level spoilers.

6. AU intervention, e.g. in genocide situations where the international community does not act promptly.

From the above mentioned scenarios, the ones mentioned from 1-3 should be self-sustainable for up to thirty days, and operations dealing with scenarios 4-6 up to ninety days.[85] Scenario 6 would have to rely on individual AU member states to provide the capabilities in the absence of an African defense alliance similar to the North Atlantic Treaty Organization (NATO).[86] For the other scenarios, the UN's Standby High Readiness Brigade (SHIRBRIG) offers a functional model.[87]

The relationship between the AU and the UNSC, especially over which body had the primary legal authority to sanction the use of military force, had caused a considerable controversy.[88] The question arose initially due to contradictory stance that Articles 16 and 17 of the PSC Protocol adopted on the issue i.e. while Article 16.1 stated that the AU had 'the primary responsibility for promoting peace, security and stability in Africa', Article 17.1 made an acknowledgment that the UNSC 'has the primary responsibility for the maintenance of international peace and security'.[89] Whatever the reasons may be for the framing of the above mentioned Articles of the PSC Protocol this way, it is clear that the issue of which organization had the primary authority with regard to sanctioning the use of military force was the source of considerable debate among AU members.[90] In fact, by March 2005, the Union was still claiming that it did not need to abide by the letter of Article 53 of the UN Charter, which obliges regional enforcement arrangements for

[85]Williams, above n. 73, p.610.
[86]Ibid. p. 610.
[87]Ibid.
[88]Ibid.*See also*, Syash Paliwal, 'The Primacy of Regional Organizations in International Peacekeeping: The African Example ' (2010) 51(1) *Virginia Journal of International Law* 185, pp. 216-221, available at: https://ssrn.com/abstract=1536966 last accessed on May 15, 2017.
[89]Ibid. PSC Protocol, above n. 75, Articles 16 and 17.
[90]Ibid. See, Levitt, above n. 73, pp. 125-126, Kioko, above n. 73, p. 821.

prior authorization by the UNSC, although it somewhat soften its stance.[91] Although, the Protocol provides that the UN has the primary responsibility to maintain peace and security internationally, I argue that the relationship between the two should be complimentary instead of a subordinate one i.e. the AU PSC should have a primary role of maintaining peace and security in the continent but if need be request the financial and technical support from the UN.

In spite of all these debates and controversies, the PSC has yet to recommend that the Assembly authorize military intervention of the type envisaged in Article 4(h) of the AU Constitutive Act.[92] This however, does not mean that the PSC never authorized a peace operation, which it did in the case of AMISOM.[93]Nevertheless, it had instead tended to focus on managing armed conflicts through constructive engagement with the parties concerned, although it has imposed sanctions in response to what the AU refers to as 'unconstitutional changes of government'.[94]

With regard to giving remedies to victims of violations of human rights in peacekeeping operations mandated by the PSC, the PSC Protocol does not give any powers to the PSC to involve in rendering remedies to victims. However, Article 19 of the Protocol provides that:

> The Peace and Security Council shall seek close co-operation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the PSC. [95]

This exchange of information between the two bodies may come out to bear a positive fruit in the future for the adjudication of cases of right violations in peace operations.

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[91]Ibid. p. 611.
[92]Ibid.
[93]Dawit Gebreyohannes Wondemagegnehu and Daniel Gebreegziabher Kebede, 'AMISOM: charting a new course for African Union peace missions' (2017) 26(2) *African Security Review* 199, p. 201, available at: https://doi.org/10.1080/10246029.2017.1297585.pdf , last accessed on November 15, 2017, *See also*, Tim Murithi, 'The African Union's Foray into Peacekeeping: Lessons from the Hybrid Mission in Darfur' (2009) (14) *Journal of Peace, Conflict and Development* 1, p.8 available at www.peacestudiesjournal.org.uk last accessed on March 17, 2017, AMISOM, Status of Mission Agreement, above n. 30, para.5.
[94]Williams, above n. 73, p.611.
[95]PSC Protocol, above n. 75, Article19.

2.3.2 Immunity of the AU vis-à-vis its Responsibility in Peace Operations

2.3.2.1 Immunity of the AU under the Convention on Privileges and Immunities of the AU and the Status of Mission Agreements for Peace Operations

One of the major obstacles in ensuring the accountability of international organizations is the immunity they enjoy in domestic jurisdictions. This is particularly evident in peacekeeping operations as peacekeepers are immune from being subject to the laws of the host states they are supposed to keep peace and order. For the purposes of AU peacekeeping missions, this immunity emanates from the AU Convention on Privileges and Immunities of the AU[96] and the Status of Mission Agreements[97] signed by the AU and the host states.

In the Status of Mission for the AU Mission in Somalia (AMISOM), it is expressly provided that AMISOM is a subsidiary organ of the AU and the Somali Government has recognized the legal personality and legal capacity of the mission in the Somali Republic.[98] The Agreement also provides for the application of the AU Convention for Diplomatic Privileges and Immunities for AMISOM, its property, funds and assets and its members, including Head of Mission (HOM) and Special Representative of the Chair Person of the African Commission (SRCC), members of all components of the mission including African Countries, the European Union, the United States.[99]As per the Agreement, the privileges in the AU Convention for Diplomatic Privileges and Immunities also extend to the participating States regarding national contingents that are involved in the AMISOM.[100] This immunity curtails a possible remedy that a victim may have access to the funds or property of the mission in order to acquire compensation for the damage he/she may have incurred.

With regard to immunities of military, police and civilian members of the Mission, paragraph 54 of the agreement specifies clearly that all AMISOM personnel are immune from legal process for any act performed in their official capacity.[101] As far as crimes are concerned, paragraph 55(a) of

[96]General Convention on the Privileges and Immunities of the Organization of African Unity, signed 25 October 1965, CAB/LEG/24.2/13.

[97]See for e.g. AMISOM Status of Mission Agreement, above n. 30, para 25-33. Status of Mission Agreement between the UN and the Government of the Republic of South Sudan, 8 August 2011, para. 15, Agreement between the UN and the Federal Republic of Somalia for Status of the United Nations Assistance Mission in Somalia, 6 February 2014, paras. 24-31

[98]AMISOM Status of Mission Agreement, above n. 30, para. 2 and para 7.

[99]Ibid. para 3. The privileges accorded to the Mission are enumerated under para 10 of the Agreement.

[100]Ibid. para 4.

[101]Ibid. para 54.

the agreement provides that "if the accused person is a member of the civilian component or a civilian member of the military component, the Head of Mission (HOM) shall conduct any necessary supplementary inquiry and then agree with the Somali Government whether or not criminal proceedings should be instituted".[102] Failing such agreement, the question shall be resolved in paragraph 59 of the present Agreement. Paragraph 59 of the Agreement deals with the establishment of a Standing Claims Commission for the settlement of disputes. Paragraph 55(b) provides that military members of AMISOM who commit crimes in Somalia are subject to exclusive jurisdiction of their participating state.[103]

This might seem like a possible remedy for victims of criminal acts committed in the host states; however, participating states are highly unlikely to prosecute their military contingents in their home states for acts committed in foreign territories as they are not obliged to prosecute by the Agreement except the provision of the home state having jurisdiction over its military members. In addition to this, victims of rights violations in conflict ridden host countries will have little motivation, due to language barriers, financial capacity and other factors, to go to the participating states and institute and follow up criminal proceedings.

As per paragraph 56 of the Agreement, if any civil proceeding is instituted against a member of AMISOM before any court of Somalia, and if that proceeding is certified by the HOM to be related to official duties of the Mission, such proceeding shall be discontinued and the provisions of paragraph 54 of the Agreement (full immunity from legal process) shall be applicable.[104] However, if the proceeding is not related to the official duties of the Mission, the proceeding may continue and in this regard paragraph 56(b) of the Agreement provides that, "if the HOM certifies that a member of AMISOM is unable because of official duties or authorized absence to protect his interests in the proceeding, the court shall at the defendant's request suspend the proceeding until the elimination of the disability, but for no more than ninety days. Property of a member of AMISOM that is certified by the HOM to be needed by the defendant for the fulfillment of his official duties shall be free from seizure for the satisfaction of a judgment decision or order. The personal liberty of a member of AMISOM shall not be restricted in a civil

[102]Ibid. para 55(a).
[103]Ibid. para 55(b).
[104] Ibid. para 56.

proceeding, whether to enforce a judgment, decision or order, to compel an oath or for any other reason."[105]

One positive aspect of this arrangement in the Agreement is that, it signals one sort of access to remedy for the victims of right violations as it enables civil proceedings to be instituted in Somalia. However, the fact that it leaves for the HOM to certify whether the proceeding is related to the official duties of AMISOM may lead to an arbitrary decision by the HOM in order to protect the interest of the mission and this would curtail access to remedy for the victims as some violations which would have not been related to the official duties may be regarded by the HOM as relating to the official duties of the member AMISOM. It would have been better if the Court would have been able to decide whether the proceeding is related to the official duties or not.

As regards the settlement of disputes, the Agreement provides that "any dispute or claim of a private law character, not resulting from the operational necessity of AMISOM to which AMISOM or any member thereof is a party and over which the courts of Somalia do not have jurisdiction because of any provision of the Agreement shall be settled by a Standing Claims Commission to be established for that purpose".[106] The decision of the Commission is final and not subject to appeal.[107] This may also have a negative effect on the remedies that victims may be able to acquire as it curtails the ability to appeal the decision of the Standing Claims Commission. In addition to this, questions of impartiality may also be raised with the Commission as its three members as per paragraph 59 of the Agreement are from the AU and the Somali Government. The Agreement does not also provide for any role to be played by the African Commission or the African Court in the process of dispute settlement or entertainment of cases relating to violations of rights. Thus, it would have been better if any appellate role for the local court or regional judicial mechanisms was available in order to broaden access to remedies for the victims.

If one looks at the experiences of the UN with regard to settlement of disputes, the Convention on the Privileges and Immunities of the United Nations (CPIUN)[108] under Section 29 provides

[105]Ibid. para 56(b).
[106]Ibid. para, 59.
[107]Ibid.
[108]Convention on the Privileges and Immunities of the United Nations, above n.9, Section 29(a).

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 UN is a party.[109] This requirement to settle claims thus acts to mitigate the daunting jurisdictional bar by the general immunity in Section 2 of the CPIUN.[110] Nevertheless, in the condition where claims cannot be settled amicably, claimants have no recourse to litigation in national courts unless the UN waives its own immunity, or if immunity is pierced by a national court.[111]

The CPIUN gives the right and the duty to the Secretary-General of the UN to waive the immunity of a UN official, member state representative or expert on mission "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 UN"[112] Nevertheless, the text of the CPIUN does not mention in an express manner whether the Secretary General has the power to waive the immunity of the organization as opposed to the official, in instances where the UN as a whole is a party to a proceeding, as it has been in *Mothers of Srebrenica* and *Haiti Cholera*.[113]

Despite the fact that there is no known example of the Secretary General waiving the immunity of the organization, Chang argues there is no reason to suggest that the Secretary General would be acting ultra vires if they were to do so.[114] Although the immunity of the UN and its officials might be indispensable for the efficient performance its activities across the globe, the invocation of immunity represents a major hurdle in the attainment of legal accountability, and a denial of the basic legal principle that all people should enjoy right of access to justice and a right to a remedy. [115]

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[109]Kevin C. Chang, 'When Do-Gooders Do Harm: Accountability of the United Nations Toward Third Parties in Peace Operations ' (2016) 20 *Journal of International Peace Keeping* 20, (Forthcoming), p.3, available at http://ssrn.com/abstract/=2821551 last accessed on April 6, 2017, p.7 Convention on the Privileges and Immunities of the United Nations, above n.9, Section 29(a).

[110]Ibid.

[111]Ibid.

[112]Ibid. Convention on the Privileges and Immunities of the United Nations, above n.9, Sections 20, 23

[113]Ibid. In both these cases, claims were rejected by the respective Dutch and United States courts due to the absolute nature of UN's immunity. See, *Delama Georges et al. v. United Nations* et al. U.S. District Court for the Southern District of New York, January 9, 2015 No. 1;13-cv-7146 *(Haiti Cholera), Mothers of Srebrenica et al v. State of the Netherlands and the United Nations (2012),* Case No. 10/04437, Supreme Court of the Netherlands. (*Mothers of Srebrenica*)

[114]Ibid.

[115]Marten Zwanenburg, 'UN Peace Operations: Between Independence and Accountability' (2008) 5 *International Organizations Law Review* 23, p. 26 in Chang, above n. 109, p. 8

2.3.2.2 Limitation of Liability

The AMISOM Status of Mission Agreement limits the liability of the AU for third party claims.[116] Paragraph 58 of the agreement provides that "third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to it, except for those arising from operational necessity, and which cannot be settled by the internal procedures of AMISOM, shall be settled by the AU in the manner provided for in paragraphs 54-56 of the present Agreement, provided that claim is submitted within six months following the occurrence of the loss, damage or injury, or if the claimant did not know or could not have reasonably known of such loss or injury, within six months from the time he/she had discovered the loss or injury, but in any event not later than one year after the termination of the mandate of the operation."

Similarly in the UN system, as UN peacekeeping operations have expanded in scope, size and temporal length, so have the third party claims against the UN has risen in number.[117] Thus, this led the UNGA to request the UN Secretary General to develop measures, criteria and guidelines for implementing temporal and financial limitations on the liability of the UN.[118] A report was presented to the General Assembly by the Secretary General and as per the report, measures to limit the temporal and financial nature of the UN liability for third party claims arising specifically out of peacekeeping operations were adopted by the UN General Assembly in 1998, via Resolution 52/247.[119]

Pursuant to this Resolution, the UN is not required to pay any compensation for third party claims for personal injury, illness or death, and for loss or damage of property, if such claims are attributable to activities of peacekeeping personnel performed in their official capacity or where such activities arise out of operational necessity.[120] As regards the temporal and monetary limit of claims, a claim has to be filed within six months from the time that alleged damage, injury or loss has occurred and a ceiling of 50,000 US Dollars has been set as the payable amount, save for

[116]AMISOM Status of Mission Agreement, above n. 30, para. 58.

[117]Sharga Daphna, 'UN Peacekeeping: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage ' (2000) 94 *American Journal of International Law*, p. 406 in Bhat, above n. 19, p.55

[118]U.N. General Assembly Resolution A/RES/51/13, U.N. Doc A/RES/51/13, U.N.G.A., 51st Sess., Agenda items 129 and 140(a), November 21, 1996

[119]Bhat, above n.19, p.55. U.N.G.A. Res. 52/247, Third-Party Liability: Temporal and Financial Limitations, A/RES/52/2047, adopted 17 July 1998 on the report of the Fifth Committee (A/52/453/Add.3).

[120]Ibid.

exceptional circumstances where this ceiling may be exceeded.[121] The UN has been putting these limitations to practice in recent peacekeeping operations as these limitations were incorporated in the Status of Agreement signed between the Government of Haiti and the UN.[122]

Thus, with regard to this limitation of liability Chang argues that the adoption of this liability limitation regime is a reflection of UN's capacity as a legislator capable of limiting its own legal liability through the establishment of internal rules, and together with the organization's lack of compliance with its obligations to settle claims through a standing claims commission, the current claims regime confers the UN authority as the maker, adjudicator and protected violator of its own legal responsibility towards injured parties which is a standard well below that required by principles of administrative justice and victims' right to an effective remedy.[123] Even though the AMISOM Status of Mission Agreement does not have a financial limitation as in the UN system, its temporal limitation on liability and its lack of detailed procedures on how and where these claims could be made puts hurdles on easy access to remedies for victims.

2.4 Allegations against AU Peacekeeping Missions in Connection with Violations of Human Rights

The human rights records of some of the military personnel constituting the AU peacekeeping forces are appalling.[124] Various accusations of rape and sexual exploitation of women, including young children have also been leveled against African forces in UN peacekeeping operations.[125] Human right groups have also made allegations that AMISOM troops have perpetrated acts of sexual violence.[126]

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[121]Ibid.

[122]Ibid. Agreement between the UN and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, U.N.-Haiti, Article 54 July 9, 2004 available at http://ijdh.org/wordpress/wp-content/uploads/2011/11/4-Status-of-Forces-Agreement-1.pdf last accessed on March 29, 2017

[123]Chang, above n. 109, p. 11.

[124]Major Robert L. Feldman, 'Problems Plaguing the African Union Peacekeeping Forces' (2008) 24(3) *Journal of Defense & Security Analysis* 267, p. 275 available at: https://wss.apan.org>2.3Problems-Plaguinng-the-AU-Forces.pdf last accessed on March 19, 2017.

[125]Ibid.

[126] "UN Humanitarian Wing Warns of Pervasive Sexual Violence in Somalia, UN News Center, August 16, 2013, http://www.un.org/apps/news/story/asp?NewsID=45641#.UvU0RUJDW21; Nicholas Kulish, African Union and Somalia to Investigate Rape Accusation, N.Y. Times, August 15, 2013, http://www.nytimes.com/2013/08/16/world/africa/african-unionand-somalia-to-investigaterapeallegations.html?_r=0; UNSOM Chief Wants Alleged AMISOM Troops Perpetrating Rape to be Held Accountable, Somaliland Sun, Aug. 19, 2013, http://somalilandsun.com/index.php/regional/3578-unsom-chief-wants-alleged-amisomtroops-perpetrating-rape-to-be-held-accountable; Somali Women Train to Fight Sexual Violence, Voice of America, Sept. 11, 2013, http://www.voanews.com/content/somali-women-trained-to-

The immunity of the peacekeeping missions in the status of mission agreements as stated above does indeed put an obstacle in the accountability of peacekeepers for damages caused on third parties and the victims' access to remedies. The increasing apprehension about immunity accorded to international organizations like the UN and AU and their officials aggravated by the alarming incidences of sexual abuse by peacekeepers, suggests that the international community has arrived at a moral threshold in the sense that for whatever rightful purpose, their immunity must not lead to impunity.[127]

The amendment of international treaties on the subject of immunity is very much unlikely to gain the support of member states as reducing their immunity will obviously result in curtailment of its autonomy, and may not necessarily bring about an overall positive effect.[128] It is understandable that a certain level of immunity is necessary for the functioning of the AU as it operates through many jurisdictions. However, one of the main objectives of the AU as per Article 3(h) of its Constitutive Act is "to promote and protect human and peoples' rights in accordance with the African Charter on human and peoples' rights and other relevant human right instruments".[129] This objective would have little meaning if the AU continues to limit access to remedies to victims of human right violations in its peacekeeping operations. Therefore, the promotion and protection of human and peoples' rights should be the major incentive for it to assert its immunity in a manner that conforms to international human right standards.[130]

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fightsexual−violence/1747700.html" in footnotes 8 and 36 of Richard J. Wilson and Emily Singer Hurvitz, 'Human Rights Violations by Peacekeeping Forces in Somalia' (2014) 21(2) *Human Rights Brief* 2pp.3-7, available at www.digitalcommons.wcl.american.edu>cgi>HumanRightViolationsbyPeacekeepingForcesinSomalia.pdf last accessed on March 21, 2017. See also, Human Rights Watch, '"The Power These Men Have Over Us" Sexual Exploitation and Abuse by African Union Forces in Somalia ' (2014), pp. 18-42, available at https://www.hrw.org>report>2014/09/08 last accessed on March 29, 2017

[127]Chang, above n. 109, p. 15

[128]Ibid.

[129]Constitutive Act of the AU, above n. 8, Article 3(h).

[130]Chang, above n. 109, p. 8.

2.5Case law showing the responsibility of the United Nations and the AU for human right violations

Although scrutiny on the accountability of peacekeeping operations have been significantly ignored for many there has been a growing interest towards this objective in recent times.[131] This added interest, which may be a product of the ever-growing scope and mandate of peace operations, is obviously incited by highly publicized and frequent incidences of sexual abuse perpetrated by peacekeepers.[132] As Chang notes, there has been a late recognition of the fact that the deployment of a large number of soldiers, police officers and civilian personnel will inevitably have effects on a war-torn society, some of which can be harmful and these effects are particularly serious when they result in harm to the local population.[133]

At various times, international organizations like the AU and the UN have faced legal action for violations of human rights in their operations. In this section of the chapter, a brief discussion of selected cases against the UN and the AU will be made to show the trend on how far the international community has come in ensuring the accountability of international organizations and how the veil of immunity has been used to protect their interests.

2.5.1 The Cholera Case in Haiti (*Delama Geroges, et al. v United Nations et al. "Haiti Cholera")*

Only months after the nation was devastated by a massive earthquake, Haiti was afflicted with another human tragedy: the outbreak of a cholera epidemic, now the largest in the world, which has claimed the lives of over 8,000 people, sickened more than 600,000 and promises new infections for a decade or more. [134] The tragic thing about the cholera outbreak in Haiti was that,

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[131]Ibid. See also, Larsen, above n. 68, pp. 517-522, Aurel Sari, 'Autonomy, Attribution and Accountability: Reflections on the Behrami Case' in Richard Collins and Nigel D. White (ed), *International Organizations and the Idea of Autonomy* (Routledge, 2010) 257, p. 257, available at https://ssrn.com/abstract=1635803 last accessed on April 26, 2017.

[132]Ibid.*See also* , Catherine E. Sweetser, 'Providing Effective Remedies To Victims of Abuse by Peacekeeping Personnel' (2008) 83(5) *New York University Law Review* 1643, pp. 1643-1646, available at www.nyulawreview.org>sites>file>pdf>NYULawReview-83-5-Sweetser.pdf last accessed on March 22, 2017 , Susan A. Notar, 'Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo' (2006) 14(2) *American University Journal of Gender, Social Policy & Law* 413, pp. 420-426, available at www.digitalcommons.wcl.american.edu/cgi/viewconentcgi?article=1273&contenxt=jgspl last accessed on April 13, 2017.

[133]Ibid.

[134]The Global Health Justice Partnership (GHJP) and L'Association Haïtienne de Droit de l'Environment (AHDEN) The Transnational Development Clinic, 'Peacekeeping without Accountability: The United Nations

it was caused by the UN peacekeeping troops who inadvertently carried the disease from Nepal to the Haitian town of Meye as the UN deployed peacekeeping troops from Nepal to join MINUSTAH (UN Stabilization Mission in Haiti).[135]

Investigations by scientists and journalists since the early days of the outbreak managed to trace the source of the epidemic to the site of the Nepali contingent of the MINUSTAH.[136] According to an investigation conducted for a year by health and legal experts from Yale University, the cholera was introduced by Nepali peacekeepers deployed form a part of Nepal that had recently experienced a surge of infections and that the report cites direct evidence that human feces from the base of the Nepali contingent in the town of Meye were inadequately treated and contaminated a tributary to the Artibonite River, on the largest water sources in Haiti.[137] The conclusion of the investigation showed that there was a direct link between the UN peacekeepers and the outbreak of the disease and this finding has been supported by numerous other studies including an investigation made by the UN itself.[138]

The UN refused to investigate the source of the cholera even months after the outbreak until it finally conceded under pressure to appoint an independent panel of experts.[139] The panel's report revealed that the peacekeepers were not screened for cholera prior to deployment, and affirmed the substantial evidence that MINUSTAH troops had brought the disease to Haiti.[140] Nevertheless, the panel blamed a "confluence of circumstances" devoid of identifying an alternative hypothesis as to the epidemic's origin and the UN relied on this conclusion in denying legal responsibility for causing the outbreak even if overwhelming scientific evidence that points directly to MINUSTAH troops as the cause of the outbreak.[141]

Responsibility for the Haitian Cholera Epidemic ' (Yale Law School 2013), *Yale Report*, p.6, available at, https://www.law.yale.edu.pdf>clinics>Haiti_TDC_Final_Report.pdf last accessed on March 20, 2017. See also, NehaBhat, above n. 19, pp.20-24

[135]Ibid.

[136]Ibid.

[137]Ibid.

[138]Ibid.

[139]Chang, above n. 109, p.12.

[140]Alejando Cravioto, Claudio F. Lanata, Daniele S. Lantagne and Balakrish Nair, *Final Report of the Independent Panel of Experts on the Cholera Outbreak in Haiti*, 2010, p. 27 available at http://www.un.org/News/dh/infocus/haiti/UN-cholera-report-final.pdf in Chang, above n. 109, p. 12.

[141]Ibid.

No longer denying its role in the causation, the UN vehemently rejected any legal responsibility for the epidemic although it engaged itself in efforts to contain the epidemic after its outbreak.[142] The Institute for Justice and Democracy in Haiti, seeking a relief pursuant to Articles 54 and 55 of the MINUSTAH Status of Forces Agreement (SOFA) that obliges the UN to settle disputes of contract or private law character, submitted a petition to the UN in 2011.[143] The UN dismissed the claim a year after it was presented stating the claim as "not receivable pursuant to Section 29 of the CPIUN" as the review of the claims would necessarily include a review of political and policy matters."[144] But such an exception is not found in the CPIUN or the SOFA and that this type of formulation never existed with regard to claims handling by the UN.[145]

The investigation by the Yale group of scientists and lawyers, also concluded that i) the UN's refusal to establish a standing claims commission as per Article 55 of the SOFA violates its contractual obligation to Haiti under international law; ii) the UN has failed to uphold its duties under international human rights law with its denial of any form of remedy to the victims and finally the UN's refusal to accept responsibility has violated principles of international humanitarian aid.[146]

Subsequent to the UN's refusal to the victims' request to meet or resolve the matter, through a claims commission as per the terms of the SOFA, a class action *(Haiti Cholera)* was filed in the Southern District Court of New York in October 2013 on behalf of 5,000 Haitian and Haitian-American victims.[147] In this case, the plaintiffs alleged that the UN was negligent for its failure to screen troops for cholera before their deployment to Haiti, failure to properly maintain waste treatment facilities utilized by such troops at the base of the Nepali contingent and failure to take immediate corrective measures to properly address the outbreak of the disease.[148]

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[142]Statement of the Secretary-General of the UN, Ban Ki-Moon, 21 February, 2013, available at http://www.un.org/sg/statements/?nid=6615 in Chang above n. 109, p.12.

[143]Chang, above n.109, p.12.

[144]Letter from Patricia O'Brien to Brian Concannon, 21 February 2013, available at http://www.ijdh.org/wp-content/uploads/2011/11/UN-Dismissal-2013-02-21.pdfin Chang above n.109, p.12.

[145] Bruce C. Rashkow, 'Remedies for Harm Caused by UN Peacekeepers', AJIL Unbound, 2 April 2014, available at http://www.asil.org/blogs/remedies-harm-caused-un-peacekeepers in Chang above n. 109, p. 12.

[146]The Global Health Justice Partnership (GHJP) and L'Association Haïtienne de Droit de l'Environment (AHDEN) The Transnational Development Clinic, *Yale Report*, above n. 134, p.7.

[147]*Delama Georges et al. v. United Nations* et al., above n. 113.

[148]*Haiti Cholera* Complaint Statement, available at http://ijdh.org/wp-content/uploads/2013/10/Cholera-Complaint.pdf in Chang, above n. 109, p.13.

The UN in its defense to the claim asserted that it has absolute immunity from all forms of legal process, and the Court eventually upheld that absolute immunity of the UN under Section 2 of the CPIUN and dismissed the case due to its lack of subject matter jurisdiction while rejecting the plaintiffs' claim that the UN's immunity is conditioned on its provision of alternative modes of dispute settlement.[149] The decision has been upheld by the United States Court of Appeals.[150]

One crucial argument from the plaintiff's side in this case has been the fact that the UN failure to establish an alternative mechanism for adjudicating victim's claims constituted a violation of its legal obligations and a denial of the victims' basic right to a remedy.[151]*Haiti Cholera* is the first known case where the victims have made use of the SOFA claims mechanism, but have been foreclosed from being allowed to access them.[152] In spite of the fact that a standing claims commission has never been established in the UN's history, it is not clear why MINUSTAH did not manage to receive claims through a local claims review board to hear from victims and attempt to settle amicably, which makes the UN's handling of the case a departure of locally settling disputes, and in doing so, signifies a novel approach to apply absolute immunity as a shield to deny effective remedy to victims. [153]

2.5.2 *Mothers of Srebrenica et al v Netherlands and the United Nations*

The *Mothers of Srebrenica* case stems from the notorious July 1995 attacks against Bosnian Muslims perpetrated by Bosnian Serb Forces in the East Bosnian enclave of Srebrenica.[154] Several courts including the ICJ (International Court of Justice), the Court of Bosnia and Herzegovina, and the International Criminal Tribunal for the former Yugoslavia (ICTY) have examined the attacks and confirmed that the attacks amounted to genocide.[155]

The Dutch government, in 1996, asked the Netherlands Institute for War Documentation to explain the failure of the UN Protection Force (UNPROFOR), particularly its 400-strong Dutch

[149]*Delama Georges et al. v. United Nations et al.*, above n. 113.
[150]*Delama Georges et al v. United Nations*, US Appellate Court Decision, No. 15-455 (2d Cir. 2016).
[151] Chang, above n. 109, p.13
[152]Rashkow, above n. 139, in Chang, above n. 109, p. 13.
[153]Chang, above n. 109, p. 13.
[154]Benjamin E. Brockman-Hawe, 'Questioning the UN's Immunity in the Dutch Courts: Unresolved Issues in the Mothers of Srebrenica Litigation' (2011) 10(4) *Washington University Global Studies Law Review* 726, p, 728, available at http://opernscholarhip.wustl.edu/law_globalstudies.pdf last accessed on May 4, 2017, *Mothers of Srebrenica et al v. State of the Netherlands and the United Nations (2012)*, above n. 113.

[155]Ibid. See, Hof's-Gravenhage [Court of Appeals] 30 mart *2010 (Association of Mothers of Srebrenica/the Netherlands & the United Nations)* (Neth.), available at
http://www.haguejusticeportal.net/Docs/Dutch%20cases/Appeals_Judgment_Mothers_Srebrenica_EN.pdf
(translating the case in an unofficial English version).

troop component (Dutchbat), to effectively deter the Srebrenica attacks.[156] The Institute, in its 2002 findings, came up with a report which blamed the Dutch Government and senior military officials for handing over Bosnian Muslim civilians to Serb forces.[157] The Report also blamed the UN for failing to provide proper support to Dutchbat.[158] The Srebrenica massacre and the fact that the UN became associated with it through its inaction was in a sense an unintended consequence of the UNPROFOR's failure. [159]

The Mothers of Srebrenica Association, a Bosnian non-governmental organization, and ten individual plaintiffs commenced a civil action against the Dutch government of the Netherlands and the UN in the District Court of The Hague.[160] They sought compensation from both the Netherlands and the UN as co-defendants. Moreover, the plaintiffs sought to compel both co-defendants to accept moral responsibility for the events at Srebrenica.[161]

The District Court on July 10, 2008 held that it was not competent to hear the action brought against the UN on account of the UN's immunity from suit before national courts.[162] The Court of Appeals upheld the verdict of the District Court by asserting the absolute nature of the UN's immunity there by denying the victims the possible remedies which may have been accorded to them.[163] This case signals another instance in which denial of effective remedies to victims of peacekeeping operations was witnessed.

2.5.3 *Behrami and Behrami v France and Saramati v. France, Germany and Norway*

The European Court of Human Rights (ECtHR) in the cases of *Behrami and Behrami v France and Saramati v. France, Germany and Norway* attributed responsibility to the UN for the actions of its peacekeeping missions in Kosovo (UNMIK).[164] UNSC Resolution 1244 of June 10, 1999

[156] Ibid. p.729.
[157] Ibid.
[158] Ibid.
[159] Frédéric Mégret, 'The Vicarious Responsibility of the United Nations for 'Unintended Consequences of Peace Operations" in Cedric de Cooning Chiyuki Aoi, Ramesh Thakur (ed), *The Unintended Consequences of Peace Operations* (United Nations University 2007) 250, pp. 251 available at https://ssrn.com/abstract=1266654 last accessed on May 4, 2017
[160] Benjamin E. Brockman-Hawe, above n. 154, p.730
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, European Court of Human Rights, Grand Chamber, Decision, 2 May 2007.See also,*AlJedda v. United Kingdom* (2011) ECHR 1092, *Nuhanović v. The Netherlands* , Appeal Judgement, LJN: BR5388; ILDC 1742 (NL 2011),

provided for the establishment of a security presence (KFOR) by members and relevant international institutions under UN auspices with substantial NATO participation but under unified command and control of the UN.[165] This Resolution also decided on the deployment, under UN auspices, of an interim administration for Kossovo (UNMIK) and requested the Secretary General with the assistance of relevant international organizations.[166]

The incident for the *Behrami* Case happened in the area controlled by French forces who were members of the KFOR contingent.[167] The area, which had many undetonated bombs which should have been detonated by the NATO Command, one day killed one of the plaintiff's sons and heavily injured the other. The *Saramati Case* was a result of prolonged detention of Mr. Saramati by Norwegian and French KFOR forces.[168]

The Court has attributed the actions of the KFOR to the UN as it held that the UN had effective command and control of the operation.[169] Despite this fact, the cases in the ECtHR were decided inadmissible as Court held that the United Nations has a legal personality separate from that of its members and that the organization is not a contracting party to the European Convention on Human Rights.[170] Thus, in examining whether the Court had jurisdiction *ratione personae* (by reason of the person concerned) to entertain the applications, the Court held that the violations were not attributable to the respondent states but to the UN, which is not itself a party to the European Convention on Human Rights and found the applications to be incompatible with the Convention.[171]As outlined in chapter one of this thesis, from a protection of human right point of view and from the perspective of potential remedies available for victims affected by the actions

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July 5, 2011,*Mustafić v Netherlands*, Appeal Judgement, LJN: BR 5386, July 5, 2011, *Kasumaj v. Greece* Decision of 5 July 2007 on the admissibility of application No. 6974/05, *Gajic v. Germany* Decision of August 28, 2007 on the admissibility of application 31446/02 in which the ECHR affirmed its view concerning the attribution to the UN of conduct taken by national contingents allocated to the NATO forces in Kossovo (KFOR).

[165]Aurel Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: the Behrami and Saramati Cases ' (2008) 8 *Human Rights Law Review* 151, p. 152, available at http://ssrn.com/abstract=1317690 last accessed on May 3, 2017 in Leck, above n. 54, p.356.

[166]Ibid.

[167]Ibid.

[168]Ibid. p. 358

[169]Ibid.

[170]Ibid.

[171]Marko Milanovic and Tatijana Papic, 'As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law ' (2009) 58 *International and Comparative Law Quarterly* 33, p.6 available at https://www.papers.ssrn.com/SSRN-id1216243.pdf last accessed on April 2, 2017.

of peacekeeping forces, this decision seems to be a setback.[172] However, the effective command and control test used by the Court to attribute responsibility to the UN could potentially be used by the African Commission or the African Court as per Art 60/61 of the Charter as inspirational sources.

2.5.4 *Mohemed El-Nekeily v OAU*

In the first and only case against the OAU at the African Commission, *Mohemed El-Nekheli v OAU*[173], a claim on wrongful dismissal, non-payment of salaries, etc based on Article 30 of the African Charter presented on May 28, 1988, the Commission declared the communication inadmissible stating that it is directed against a respondent that is not a State or a Party to the African Charter.[174] No other communication is available at the Commission against the OAU or its successor, the AU.

2.5.5 Femi Falana v The African Union

In the first case against the AU at the Court, *Femi Falana v.The African Union*[175], the applicant, Femi Falana, a human rights lawyer based in Nigeria, having failed to persuade the Nigerian government, to deposit the declaration required under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights establishing the Court[176], sued the AU to challenge the validity of Article 34(6) of the Protocol. The applicant sought remedy on the basis that Article 34(6) of the Protocol is inconsistent with several articles of the African Charter and claimed that the provision be annulled.

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[172]For a detailed discussion of the cases decided at the European Human Rights Court in this regard, *See*, Tobias Lock, 'Beyond Bosphorus:The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights' (2010) 10(3) *Human Rights Law Review* 529, pp. 530-544, Sadia R. Sorathia, 'Behrami v. France: An Unfortunate Step Backwards in the Protection of Human Rights ' (2011) 26(1) *Maryland Journal of International Law* 271, pp. 276-285, available at http://digitalcommons.law.unmaryland.edu/mjil/vol26/iss1/14 last accessed on March 22, 2017, Caitlin A. Bell, 'Reassessing Multuiple Attribution: The International Law Commission and the Behrami and Saramati Decision' (2010) 42 *New York University Journal of International Law and Politics* 501, pp. 512-519, available at www.nyujulip.org>2013/02>42.2_Bell.pdf last accessed on March 29, 2017, Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20(1) *Duke Journal of Comparative & International Law* 1, pp. 14-30, available at https://ssrn.com/SSRN-id1372423.pdf last accessed on April 4, 2017.

[173]*Mohemed El-Nekeily v OAU,* ACHPR Communication No. 12/88, 26 October 1988.

[174]Ibid.

[175]*Femi FalanaEsq v The African Union*, above n. 28.

[176]Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights, adopted 10 June, 1998, entered into force 25 January 2004.

This Article of the Protocol requires States to make a specific declaration so that non-governmental organizations and individuals could have access to the Court. Ironically up to April 2017, only seven African countries have made the Article 34(6) declaration.[177]

The Court, in the *Femi Falana* Judgment, as discussed in the first section of this chapter, although acknowledging the international legal personality of the AU, by a majority held that international obligations arising from a treaty cannot be imposed on an international organization, unless it is a party to such a treaty or it is subject to such obligations by any other means recognized under international law.[178] And thus, it concluded that the AU cannot be sued before the Court on behalf of its Member States, and that this was an application filed against an entity other than a State which has not ratified the Protocol and made the declaration to accept the jurisdiction of the Court, thus making the case fall outside the jurisdiction of the Court.[179] Therefore, the Court dismissed the case for lack of its jurisdiction on the matter.

In a dissenting opinion in this case, Vice-President Judge Sophia A.B. Akuffo, Judge Bernard M. Ngoepe and Judge Elise N. Thompson, held that the right to bring international claims carries with it the capacity to be sued and held that one of the duties imposed upon the AU, through the Charter, is the protection and promotion of human and peoples' rights independently of member states and thus such an obligation would have no meaning if it could not be enforced against the AU.[180] The judges also held that Article 34(6) is inconsistent with the Charter in the sense that it 'disables the Court from hearing applications brought by individuals against a state which has not made a declaration, even when the protection of human rights entrenched in the Charter is at stake'.[181]

2.5.6 AtabongAtemnkeng v The African Union

[177] African Court on Human and Peoples' Rights to Conduct Sensitization Seminars in Egypt and Tunisia, Press Release, 04 April 2017, available at: http://www.african-court/.org/en/index.php/news/press-releases/item/141-african-court-on-human-and-peoples-rights-to-conduct-sensitization-seminars-in-egypt-tunisia last accessed on April 21, 2017.

[178] *Femi FalanaEsq v The African Union*, above n. 29, Judgment, para. 70.

[179] Ibid. para 71 and 72.

[180] *Femi FalanaEsq v The African Union*, above n. 29, Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M.Ngoepe and Elise N. Thompson, paras 8.1.1, 8.3.

[181] Ibid. para . 16.

In a similar case instituted against the AU, *Atabong Denis Atemnkeng v. The African Union*,[182] the applicant, Mr. Atabong Dennis Atemnkeng, a Cameroonian national and a staff member of the AU Commission sued the AU to obtain a judgment stating that Article 34(6) of the Protocol is inconsistent with the African Charter and that it should be declared null and void.[183] The Court as in the *Femi Falana Judgment* ruled that 'in the present case where the Application is brought against a body which is not a state which has ratified the Protocol and/or made the required declaration, it falls outside the jurisdiction of the Court and consequently, the Court lacks the jurisdiction to hear and determine the said Application.'[184]In their dissenting opinion, Vice-President Judge Sophia A.B. Akuffo, Judge Bernard M. Ngoepe and Judge Elise N. Thompson, affirmed their position in the *Femi Falana Case*. They held that:

> The State Parties have the duty to ensure that the Peoples of Africa have access to judicial protection of their rights and this cannot be achieved with the clog of Article 34(6) of the Protocol. The right to access the court is an essential element in the protection of human rights. In ensuring access to Court, the Court is competent to set aside impediment. It is for the above reasons, together with the reasons we have already articulated in the aforesaid case of Femi *Falana v. The African Union that* we have no hesitation declaring Article 34(6) null and void.'[185]

Although, the judgments given by the majority votes in these cases represent a denial of justice, the dissenting opinions, reflect a ray of hope in the accountability of the AU as a an international organization for violations of human rights in general and in its peacekeeping operations in particular.

2.6 Conclusion

The role of international organizations such as the UN and the AU has had a significant effect in a number of fields. They have helped shape politics regionally and globally and changed the lives of millions for the better over the years. However, while performing their activities, they have done wrongs which have impacted the people they were established to serve. Thus,the main

[182]*Atabong Denis Atemnkeng v The African Union*, African Court on Human and Peoples' Rights, Application No. 014/2011, para. 1.
[183]Ibid.
[184]Ibid. para, 40.
[185]Ibid. Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M.Ngoepe and Elise N. Thompson, para. 12.

aim of this Chapter was to show the responsibility of the AU in its peacekeeping operations. In its discussions, it started off by showing AU'slegal personality derived from its purposes and functions as emphasized in the *Reparations and Femi Falana* cases and that this personality entails the right to bring claims as a right holder and be sued or claimed against as a duty bearer.

One of the major purposes for the establishment of the AU was the maintenance of peace and security in the African continent and as such the chapter discussed how the AU, through its PSC mandates peacekeeping missions and the role of the PSC in such missions. This chapter also dealt with immunity of the AU in the Convention on Privileges and Immunities of the AU and the Status of Mission Agreements the AU signs with host countries for the peacekeeping missions, in relation to its responsibility for human right violations in its peacekeeping missions by drawing the experience of the UN in similar situations.In addition, discussions were made on how the DARIO could be applicable for ensuring AU accountability and how the 'effective control' test developed by the ECtHR could be applied for attributing responsibility to the AU in peacekeeping operations.

Although there are a number of allegations of human right violations by AU peacekeeping missions, the aforementioned discussions showed that immunity of the AU is one major hurdle in ensuring the accountability of the AU. The analysis of the selected cases also indicate that immunity and jurisdictional issues present a major threat in ensuring the accountability of the AU. However, there is some hope at the end of the tunnel with the dissenting opinions from the Court in the *Femi Falana* and *AtabongAtemnkeng* cases and the "effective control" test employed by the European Court of Human Rights in the *Behrami and Saramati* cases which could be utilized in the African system as per Articles 60 and 61 of the African Charter.

Despite all the obstacles associated with making the AU responsible as an international organization, one thing remains true, i.e. it should not escape from liability for violations of human rights and should be able to give effective remedy to the victims it inflicts damage upon.

Chapter Three

The Right to Remedies in Human Rights Law

3.1 Introduction

The accountability of governments and other entities, as well as the availability of a remedy in cases of a violation, are indispensable elements of international human rights law.[1] One of the bedrock principles of contemporary international human rights law is that victims of human rights have a right to an effective remedy.[2] The right to a remedy entitles a right holder to seek remedy for a violation of his/her right. This right to seek and secure an effective remedy is covered under multilateral human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and also expressed in regional mechanisms such as the European Convention on Human Rights and the Inter-American Convention on Human Rights.[3]

The second chapter of the thesis has shown the responsibility of the AU for violations of human rights in peacekeeping operations. Once responsibility is attributed to the organization, the next step is to determine the possible remedies that may be available to victims. That will be a discussion for the fourth chapter of the thesis. Before one talks about the specific remedies

[1]Phillip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 1st ed, 2013).

[2]Sonja B. Starr, 'Rethinking 'Effective Remedies': Remedial Detterence in International Courts ' (2008) 83 *New York University Law Review* 693, University of Maryland Legal Studies Research Paper p.693, available at https://ssrn.com/abstract=1270045, available at https://ssrn.com/abstract=1270045 last accessed on March 27, 2017.

[3]See The Universal Declaration of Human Rights, UN General Assembly, 1948, Article 8, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN General Assembly Resolution 2220A (XXI), December 16, 1966, entered into force on March 23, 1976, Article 2(3)(b), Convention on Elimination of All Forms of Discrimination Against Women, 18 December 1979, entered into force 3 September 1979, 1249 U.N.T.S. 13, Article 2(c), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 21 December 1965, entered into force on January 4,1969, 1465 U.N.T.S., European Convention on Human Rights and Fundamental Freedoms, adopted on November 4, 1950 and entered into force on September 3, 1953, Article 13, American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, on November 22, 1969, Article 10.

available for victims in the African human rights system, it is crucial to deal first with what international and regional human right instruments have to say about the right to remedies. Thus, the main purpose of this chapter is to show the concept and application of the right to remedies in international and regional human right law regimes with a particular focus on the African Charter and the jurisprudence of the African Commission and the African Court.

The first section of the chapter deals with the concept of remedies in international human rights law followed by discussions on the doctrine of remedies in international courts, scholarship on remedies in human rights law and the stand of the African Charter on the right to remedies and the jurisprudence of the African Commission and African Court in its subsequent sub-sections.

3.2 The Concept of Remedies in Human Rights Law

The status of the victim with in international law has undergone a great transformation over the past few decades.[4] Whereas it is disputed that the individual's right to a remedy for state abuses has attained the rank of customary international law, this right is nevertheless expressly guaranteed by a number of global and regional human rights treaties.[5] Therefore, state parties to these treaties that have violated human rights of individuals within their jurisdiction are required to provide such persons with an appropriate remedy.[6] In a similar manner, as shown in the previous chapter, where the violation is inflicted by the AU, it must take responsibility and be able to redress the violation with a proper remedy.

The word 'remedies' is composed of two separate concepts, the first one being procedural and the second substantive.[7] Remedies in the first sense are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent authorities while the second notion of remedies refers to the outcome of the

[4]Thomas M. Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond ' (2008) 46 *Columbia Journal of Transnational Law* 351, p. 355, available at www.law.scu.edu/wp-content/uploads/Article20by20T_20Antkowiak.pdf last accessed on April 13, 2017.

[5]Ibid. p. 356.

[6]Ibid. Moreover, all human rights always have a procedural component, such as the obligations of states to provide adequate remedies and procedures of protection against human rights violations and investigation of these violations. The Inter-American Court of Human Rights, for example, held in its judgment in the case of *Velásquez Rodríguez v. Honduras* that as a consequence of the obligation to provide appropriate remedy, the States must prevent, investigate, and punish any violation of the rights recognized by the Convention and, in addition, if possible attempt to restore the right violated and provide compensation warranted for damages resulting from the violation. See, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C, No. 4, Para 66.

[7]Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2nd ed, 2005), p. 7, Godfrey M. Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442, pp. 445-447.

proceedings and the relief afforded to the successful claimant.[8] And thus, remedies are the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.[9]

In international and national law, other terms are usually used to address the two aspects of remedies, partially as 'remedies' has no exact equivalent in French and other official UN languages.[10] The different terms that are selected may be interpreted in several ways by international bodies, national judges, and authors.[11] Reparation, for instance is the most commonly used term in the law of state responsibility in the context of inter-state claims. It generally refers to the different ways by which a state may repair the consequences of a breach of international law for which it is responsible and may include all of the acts which also serve to redress.[12]

Reference is made in human rights instruments to the obligation of states to provide effective remedies for human rights violations and thus redress is the terminology most commonly applied in literature and national law to refer to the substantive remedies afforded to victims of violations.[13] The obligation to afford remedies for violations of human rights requires the existence of remedial institutions and procedures to which victims may have access.[14] The prevalence of access to justice does imply that the procedures are effective and capable of redressing the harm that was inflicted.[15]

3.2.1 Doctrine of Remedies in International Courts

The principal international formulation of the "no right without a remedy" principle comes from the 1928 decision of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case, as it held that "it is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".[16] The PCIJ further specified that the applicable remedial principle was a restoration of the status quo ante and

[8]Ibid.
[9]*Black's Law Dictionary* (West Group, 7th ed, 1999), p. 1296.
[10]Shelton, above n. 7, p.8
[11]S.L. Haasdijk, 'The Lack of Uniformity in the Terminology of the International law of Remedies ' (1992) 5 *Lieden Journal of International Law*, p, 245 in Shelton, above n. 7, p.7, J. de Arechaga, 'International Responsibility' in M. Sorenson (ed.), *Manual of Public International Law*, 1968, p. 564 in Shelton, above n. 7, p.8.
[12]Shelton, above n. 7, p.8.
[13]Ibid.
[14]Ibid.
[15]Ibid. p. 9.
[16]*ChorzówFactory , Germany v. Poland*, 1928, P.C.I.J (ser. A) No. 17, para 29, in Starr, above n. 2 p. 699.

affirmed that "the essential principle… is that reparation must, as far as possible, wipeout all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. It must consist of restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear."[17]

Starr argues that this is a full remedy rule in the sense that it allows no remedial shortfall except in cases of impossibility i.e. those damages that cannot be corrected through-in-kind restitution must otherwise be fully compensated.[18] The ICJ's continued acceptance of this full remedy rule persists in some tension with its reliance on certain equitable principles.[19] Nevertheless, the *Chorzów Factory* remains good law and is in fact the cornerstone of international claims for reparations, whether presented by States or other litigants.[20]

Another instance where the concept of remedies and reparation was put to avail was in the ILC's report containing Draft Articles on State Responsibility for Internationally Wrongful Acts, a highly influential but not legally binding document, which in a similar manner requires violators not only to cease the offending conduct but also to make full reparation for any damage whether material or moral.[21]Thus, *Chorzów Factory* and its successors in the ICJ, as well as the Draft Articles on State Responsibility, are concerned with disputes between states resulting from violations of states' obligations toward one another under treaties or customary international law while human rights law, on the other hand, governs the relationship between states and

[17]*Chorzow Factory*, 1928 , P.C.I.J inStarr, above n. 2, p. 699.
[18]Starr, above n. 2, p. 699.
[19]Ibid. Starr cites a number of cases in this regard. "Armed Activities on Territory of Congo: *Dem. Rep. Congo v. Uganda*, I.C.J, 19 December 1982, Gen. List No. 116, para 82, available at http://www.icj-cij.org/docket/files/116/10455.pdf (finding Uganda has obligation to make full reparations to D.R.C for injuries caused); Legal Consequences of Construction Wall in Occupied Palestinian Territory, Advisory Opinion, July 9, 2004, I.C.J, paras. 136, 198 (finding that Israel must make reparations for damages caused in constructing wall); Avena and Other Mexican Nationals, *Mexico v. United States*., March 31, 2004, I.C.J. para. 12, 59-60, (finding U.S. obligated to permit review of Mexican nationals' cases to remedy violations); Arrest Warrant of 11 April 2000, *Dem. Rep.Congo* v. Belgium, February 14, 2002 I.C.J. para 3, 31-32 (finding Belgium must cancel unlawful arrest warrant as remedy); Gabčíkovo-Nagymaros Project, *Hungary v. Slovakia*, September 25, 1997, I.C.J 7, paras, 80-81 (finding both countries responsible and entitled to compensation)" in footnote 8 of Star, above n. 2, p.699
[20]Ibid. p. 700.
[21]Ibid.*See*, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, UNGA, 56th Session, Supp. No 10, U.N. Doc. A/56/10, 2001, available at http://untreaty.un.org./ilc/texts/instruments/english/commentaries/9_6_2001.pdf accessed on April 6, 2017, Antkowiak, above n. 4, p. 361

individuals. However, the remedial principles governing human rights law are heavily influenced by the *Chorzów Factory* line.[22]

The right to an effective remedy, as discussed above, is included nearly in almost every major human rights treaty and this right is generally understood to embody both the procedural right of access to a hearing before an impartial decision maker and the substantive right to receive relief.[23] The treaty provisions on the right to effective remedy directly govern remedies provided by national authorities and also indirectly support international courts' remedial rules while some human rights treaties also directly authorize or require international judicial remedies.[24]

Although the general terms are used in the treaty provisions such as "effective", "fair", or "adequate", which allow the courts substantial flexibility, international courts have typically managed to construe them quite strictly.[25] Thus, the most common interpretation, particularly in cases involving claims for monetary damages, basically makes an application of the *Chorzów Factory* full remedy rule.[26] This rule has also been adhered to by the European Court of Human Rights as it has consistently held that such a remedy must restore as far as possible the situation existing before the breach.[27]

The right to an effective remedy also governs cases involving criminal defendants' procedural rights, including International Criminal Tribunals, which are not *per se* human rights courts, even though they often interpret and apply human right treaties while considering defendants' procedural rights.[28] The jurisprudence of the ICTR and ICTY, including that of their shared

[22]Shelton, above n. 7, p.99 and Dinah Shelton, 'Writing Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 *American Journal of International Law*, p. 834, in Starr, above n. 2, p. 700.

[23]Ibid. p. 701.

[24]Ibid.For e.g. Article 63(1) of the American Convention on Human Rights requires the Inter-American Court of Human Rights to order, "if appropriate, that the consequences of any Convention Violation be remedied and that fair compensation be paid."

[25]Ibid.

[26]Starr quoting the decision of the Inter-American Court in the *Velásquez Rodríguez* Case adhering to this rule states that "reparation of harm brought about by the violation of an international obligation consists in full restitution…which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages". See, *Velásquez Rodríguez v. Hondura,* above n. 6, in Star above n.2, p.702.

[27]*Lustig-Prean v. United Kingdom*, App. Nos. 31417/96, 32377/96, Judgment, E.C.H.R, 25 July, 2000, available at http://www.echr.coe.int/echr/en/hudoc in Starr, above n. 2, p. 702.

[28]Star above n.2, p.703.

Appeals Chamber, establishes that "any violation of the accused person's rights entails the provision of an effective remedy".[29]

In the attempt for the realization of the full remedies rule international courts have consistently treated the right to effective remedy as a powerful constraint on their remedial discretion despite the fact that the contours of the right remain contested.[30] The specific remedies that they adopt are determined by the nature of the violation and are, at least purportedly, designed to make the victim whole and they have not limited these remedies on the basis of competing interests, such as the public interest in punishing major crimes or other social welfare concerns.[31] And thus, they have nearly treated the right as an absolute right.[32]

3.2.2 Scholarship on Remedies in Human Rights Law

Although scholarly literature on the substantive aspect of the right to remedies is relatively limited, the existing one has almost uniformly endorsed the proposition that all human rights violations require a remedy.[33] As Dina Shelton, the author of the prominent book on remedies in human rights law reiterates, rights without remedies are ineffectual, rendering the government's duty to respect such rights to the point of illusion.[34] In addition to that, many scholars have specifically endorsed the *Chorzów Factory* formulation of the full remedy rule.[35]

Another important development in the right to remedy is the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[36]

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[29]See, ICTR and ICTY cases mentioned in footnote 31 and 32 of Starr, above n. 2, p. 703*Kajelijeli v. Prosecutor*, Case No. ICTR 98-44A-A, Judgment, 23 May 2005, para 255, (citing the effective remedy provision of the ICCPR), *Rwamakuba v. Prosecutor* Case No. ICTR 98-44c-A, Decision on Appeal Against Decision on Appropriate Remedy, 13 September 2007, para 23-26, *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19-A, Decision, 3 November 1999, paras. 72, 108, *Čelebići Case*, Case No. IT-96-21, Decision on Application for Leave to Appeal (Provisional Realease) by HazimDelić, 22 November, 1996, para. 22

[30]Ibid. p. 705

[31]Ibid.

[32]Ibid.

[33]Dina Shelton, above n. 7, p. 100, in Starr, above n. 2, p. 706, Lisa J. Laplante, 'The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition ' (2007) 23 *American University International Law Review*, pp.56-57, in Starr, above n. 2, p.706, Nahomi Rohrt-Arriaza, 'Reparations Decisions and Dilemaas' (2004) 27 *Hastings Journal of International and Comparative Law Review* 157, p.157, in Starr, above n.2, p. 706.

[34]Dina Shelton, above n. 7, p. 100, in Starr, above n. 2, p. 706.

[35]Frederic L. Kirgis, 'Restitution as a Remedy in U.S. Courts for Violations of International Law' (2001) 95 *American Journal of International Law*, p. 343, in Starr, above n. 2, p. 706

[36]Antkowiak, above n. 4, p. 361. See, UN Commission on Human Rights, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law, U.N. Doc.

These Basic Principles were adopted by the UN General Assembly in December 2005 following a grueling process of development that extends back to 1988.[37] These principles do emphasize that a right of reparation for human right violations be proportional to the violation and the harm suffered and the right includes restoration to the status quo ante in so far as it is possible and in addition to compensation for all damages. [38] Even though, these Basic Principles inevitably have shortcomings, and do not constitute a binding agreement in international law, they nevertheless have exerted a positive impact on the rights of victims for effective remedies.[39]

Thus, human rights scholars have had little to say about the legal theories surrounding the relationship between rights and remedies beyond the invocation of the full remedy rule and the right to effective remedy.[40] They have treated that relationship as one-directional in the sense that remedies flow from the nature and scope of rights violations.[41] This assertion is in line with the legal maxim *"ubi jus ibi remedium"* as this thesis argues in the following chapter, where remedies necessarily should be the consequences of violations. Scholars have offered little guidance on dealing with situations in which full compensation may be impossible or undesirable, nor developed principles for the identification of less-than-full remedies, and principles for the determination of whether remedial shortfall is permissible in a given situation.[42]

It is not uncommon to find in the literature the sharp disparity between ambitious treaty provisions and the harsh realities of weak enforcement and widespread violation and due to this disparity, contemporary human rights scholarship and advocacy substantially shifted the focus from rights articulations to enforcement.[43] As a result, scholars have pushed for new courts to have strong remedial powers and have criticized courts that have been cautious in their remedial

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E/CN.4/2000/62, 18 Jan 2000, prepared by M.Cherif Bassiouni and Theo Van Boven), Theo Van Boven, The United Nations Basic Priniciples and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2010, available at www.legal.un.org>avl>pdf>ga_60-147_e.pdf last accessed on September 16, 2017.

[37] Ibid.

[38] Starr, above n.2, p. 706.

[39] Antkowiak, above n. 4, p. 363.

[40] Dina Shelton, above n. 7, p. 16, in Starr, above n. 2, pp. 706.

[41] Ibid. p. 707.

[42] Ibid.

[43] Rohrt-Arriaza, above n.31, in Starr above n. 2, p. 707, Dinah Shelton, ' International Human Rights Law: Priniciples, Double, or Absent Standards?' (2007) 25 *Law and Inequality*, p. 470, in Starr, above n. 2, p. 707,

jurisprudence there by reflecting the prevailing notion that the more remedies are there, the better the protection of rights.[44]

3.3 The African Charter on Human and Peoples' Rights and its stand on the Right to Remedies

The African Charter on Human and Peoples' Rights (The African Charter)[45], unlike other international and regional human right instruments shown above, does not contain a specific stipulation of the right to an effective remedy. As explained in the first chapter of this thesis, the omission may have occurred for two main reasons; the first one could take the view that it is one of the many substantive rights that should have been included in the Charter but were not, especially when the regional initiative is seen within the context of the general character as the tentative, sparsely drafted instrument described variously as 'opaque' and 'difficult to interpret' and which was perhaps the best that could be achieved, considering the prevailing political realities at the time of its adoption.[46]

The other one relates to the possibility that the drafters of the African Charter could have considered it superfluous to include such a right, which would be considered as an implied right as reflected in the legal maxim *Ubi Jus Ibi Remedium* (where there is a recognized right, there should be a remedy) and that the right to a remedy is so self-evident that it need not be specifically enshrined.[47]Nevertheless, in addition to the general obligation of States enshrined under Article 1, the Charter contains some scattered provisions on remedies as attached to substantive rights recognized in the Charter.[48]

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[44]Fausto Pocar, 'The Proliferation of International Courts and Tribunals: A Necessity in the Current International Community' (2004) 2 *International Criminal Justice*, p. 307, in Starr above n. 2, p. 707, Adrian Di Giovanni, 'The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?' (2006) 2 *Journal of International Law and International Relations*, pp. 39-44, in Starr, above, n. 2, p. 707.

[45]African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU DOC CAB/LEG/67/3 rev 5, entered into force 21 October 1986.

[46]Musila, above n 7, p. 447.

[47]Ibid. *See also, Social and Economic Rights Action Center (SERAC) & Another v. Nigeria*, AHRLR 60, (ACHPR 2001), paras 60-68 as the Commission invoked the doctrine of implied rights by recognizing the implicit protection of the right to housing and the right to food in the African Charter.

[48]Ibid. p.448. Article 7(1) of the Charter does provide for recourse to national tribunals for human right violations and Article 21(2) provides for compensation for spoliation of natural resources respectively; article 10 of the Charter establishes expressly the right to compensation for miscarriage of justice; Article 7 of the Charter on the right to freedom and security of the person prohibiting arbitrary arrest and illegal detention provides for a right to remedies such as compensation where the right is infringed. Article 26 also obliges states to guarantee the independence of the courts and to allow the establishment and improvement of appropriate national institutions entrusted with the

3.4 Jurisprudence of the African Commission and the African Court

The African Commission was established by the African Charter as a quasi-judicial organ with no express mandate to consider individual communications and give remedial orders to victims of violations of rights recognized in the Charter.[49]However, its ability in considering individual communications has been institutionalized with little resistance and through time its procedure has increasingly taken a judicial nature.[50] This development is demonstrated in the increasingly detailed nature of its findings and reasoning, the issuance of remedial orders in instances of violations, the adoption of dissenting opinions, and the decline resort to amicable settlement.[51] As Viljoen argues, there may be several factors for such a trend, some of which may relate to the increased participation of legal counsel, improvements in the quality in submissions and the introduction of oral hearings.[52]

The African Commission was mostly silent with regard to remedies in its early years which might have been due to the absence of remedial measures in the Charter or the Commission's Rules of Procedure and the parties having had the chance to initially present written or oral arguments addressing the matter.[53] However, the Commission later began to make recommendations such that the State take the necessary measures to comply with the Charter, without making a specific mention of the measures.[54]The African Commission has been adopting remedial orders in a

promotion and protection of rights enshrined in the Charter, *See*, footnote 19 of Musila above n. 7, p.446, "The African Commission also notes in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Guidelines) Part C(b), the Commission notes that the right to an effective remedy includes access to justice, reparation for the harm suffered and access to the factual information concerning the violation."

[49]FransViljoen, Communication under the African Charter: Procedure and Admissibility, in Malcom Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights* (Cambridge University Press, 2nd ed, 2008), p. 77.

[50]Ibid.

[51]Ibid. *Bah Ould Raba v Mauritania*, AHRLR 197 (ACHPR 1997), dissenting opinion of Commissioner El Hassan in footnote 6 of Viljoen, above n. 46 . p.77.

[52]Ibid.

[53]Ibid.p. 79, See, e.g., Communications 64/92, 68/92 and 78/92, *KrischnaAchuthan (on behalf of AlekeBanda) and others* v. *Malawi*, Eighth Activity Report 1994–1995, Annex IX, para. 13 in footnote 18 of .Viljoen, above n. 46. P 79.

[54]Ibid. See generally, *Social and Economic Rights Action Center (SERAC) & Another v. Nigeria*, above n. 47, (this case has brought about a significant success in the Commission's work in declaring the justiceability of socio-economic rights and ordering due remedies for the victims, *Commission National Des Droit de l' Homme et de Libertеś v Chad*, (2000) AHRLR 74 (ACHPR 1995) , *Constitutional Rights Project v Nigeria* (2000) AHRLR 227 (ACHPR 1995).

detailed manner and recommendations may also come with requirements relating to the follow up or the implementation status of the remedy given.[55]

The Charter under Article 56 puts the conditions in which Communications must be submitted to the Commission and most importantly it states that communications must be submitted to the Commission after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.[56]An implication for victims of violations in peacekeeping operations in this instance would be the need for them to exhaust local remedies in the host countries before going to the regional body. As per this provision, if there is no remedy available in the host country or if it is proved to be unduly prolonged, then there may be a possibility for them to submit communications without having the need to exhaust local remedies.

In giving effect to the right-remedy congruence for example, in *Free Legal Assistance Group and Others v. Zaire*, the Commission provided that "the main goal of the communications procedure before the Commission is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of…". [57]

In another important decision, the Commission ruled that the internal remedy to which article 56(5) refers entails remedy sought from courts of a judicial nature.[58] In reiterating the need for the exhaustion of judicial remedies, the Commission also ruled in the *Jawara v. The Gambia* case that the "existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness and therefore, if the applicant cannot turn to the judiciary of his country because of generalized fear for his life (or even those of his relatives), local remedies would be considered unavailable to him."[59] In a similar manner, the Commission granted an exception to the exhaustion of local remedies rule

[55]Ibid. For e.g. in *Lawyers for Human Rights v Swaziland,* the African Commission recommended that the government of Swaziland inform it in writing within six months on the measures it has taken to implement the remedies it has indicated. *Lawyers for Human Rights v Swaziland,* (2002) AHRLR 251 (ACHPR) Annex III

[56]African Charter, above n. 45, Article 56 (2).

[57]*Free Legal Assistance Group and others v. Zaire*, 2000, AHRLR 74, (ACHPR 1995), para 37, in Musila, above n. 7, p.448.

[58]*Cudjoe v. Ghana*, 2000, AHRLR 127 (ACHPR 1999), para. 13, in Musila, above n. 7, p.449.

[59]*Jawara v. The Gambia,* 2000, AHRLR 107 (ACHPR 2000), para.35.

because the domestic process related to a discretionary, extraordinary remedy of a non-judicial nature.[60]

The insistence on judicial remedies is unduly narrow and injudicious as it does not contemplate all possible deployable measures as disclosed by state practice and this rigidity rules out other avenues of redress that may stratify state obligations relating to the right to an effective remedy.[61] In showing some flexibility to the judicial remedies rule in *Cudjoe v. Ghana*, the Commission managed to broaden the extent of judicial remedies by stating its dependence on a state's constitutional structure. In *Human Rights Council & Others v. Ethiopia*[62], it stated that:

> *Cudjoe v. Ghana* is really good authority and the Commission affirms it. However, the proposition for which its authority must be understood in light of the standard constitutional model by which the competence to adjudicate complaints/disputes usually vests in national organs known as "courts of law".

And thus in this particular case, the Commission held that a constitutional review is clearly a legal action that may lead to the redress of the complainant grievances at the domestic level and in this regard it is designed for vindication of rights as opposed to obtaining favors.[63]

It is argued that, to the extent that all disputes and cases in general end up in the courts, the Commission's position relating to judicial remedies would be correct, if it relates only to domestic avenues to be exhausted before recourse to the Commission or any other relevant international forum, and not as a general rule relating to what remedies are acceptable to remedy violations of rights recognized in the African Charter.[64] In supporting this position, also supported by the Fair Trial Guidelines of the Commission, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, recognizes the variety of remedies that may be used appropriately to provide redress. [65]

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[60]*Constitutional Rights Project v Nigeria*, above n. 54, para 10-11.
[61]Musila, above n. 7, p. 451.
[62]*Human Rights Council & Others v. Ethiopia*, Communication No. 445/13, 2016, ACHPR, para. 60.
[63]Ibid. para 72.
[64]Musila, above n. 7, p. 452.
[65]Ibid. See, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted on 11 July 2003 and entered into force on 25 November, 2005.

In contrast to the lack of specific provision on effective remedies, there is clarity with respect to the question of protective measures, which the African Commission has administered liberally.[66] And thus, a cursory reading of decisions relating to provisional measures discloses the same difficulties in implementation which affect its substantive case law.[67] The creativity and relative boldness of the Commission with respect to remedies, argues Musila, have been demonstrated in the unsure zone beyond sanctioned provisional measures although not entirely satisfactory.[68]

It appears substantively that none of the communications presented to the Commission has alleged specifically the violation of a right to an effective remedy.[69] If it had been the case, it would have been unlikely that the Commission would have entertained such complaint on its merits for lack of compatibility with the African Charter as one condition of submitting a communication.[70]

As discussed above, although the African Charter on Human and Peoples' Rights[71] (The African Charter) came short of including a distinct provision on the right to effective remedy, the preceding discussions showed the African Commission's efforts for a jurisprudential recognition of the right. Moreover, the main argument of the thesis is that the absence of a distinct right to effective remedy in the Charter does not make those other recognized rights meaningless and thus for all those recognized rights there should be a corresponding remedy in case of violations (*ubi jus ibi remedium*).

The jurisprudence of the African Commission and the African Court with regard to direct actions against the AU and its predecessor organization the OAU is not that welcoming as almost all cases against the Union were not accepted. The decisions of *Mohemed El-Nekheli v OAU*[72] *at* the Commission, *Femi Falana Esq v The African Union*[73]and, *Atabong Atemnkeng v The African Union*[74]at the Court, thoroughly discussed in the preceding chapter of the thesis, showed that direct actions against the AU may not be fruitful. In addition, the Court in its first ever judgment

[66]Ibid.
[67]Ibid. p, 454.
[68]Ibid.
[69]Ibid.
[70]Ibid.
[71]African Charter, above n. 45
[72]*Mohemed El-Nekeily v OAU,* ACHPR Communication No. 12/88, 26 October 1988.

[73]*Femi FalanaEsq v The African Union*, African Court on Human and Peoples' Rights, Application No. 001/2011
[74]*Atabong Denis Atemnkeng v The African Union*, African Court on Human and Peoples' Rights, Application No. 014/2011.

in the *Yogogombaye v Senegal* case held that the applicant, a citizen of Senegal, did not have a standing before the court as Senegal had not made the declaration as per Article 34(6) of the Protocol which requires States to make a specific declaration so that non-governmental organizations and individuals could have access to the Court.[75] The case could have gone through the Commission to the Court as per Article 5 of the Protocol[76] establishing the Court and Article 33 of the Rules of the Court which enable the Commission to submit cases to the Court.[77] This would have still not made a difference if the respondent state does not accept the competence of the Court as per Article 34(6) of the Protocol.

Although these cases were not accepted at the Court, the issue of direct legal action against the AU is not dead and buried. The dissenting opinions[78] relating to the responsibility of the African Union stemming from its international legal personality in the Femi *Falana v African Union* and *Atabong Atemnkeng v African Union* cases, as seen in chapter two provide a ray of hope that the AU should take responsibility for its wrongdoings.

3.4 Conclusion

One of the bedrock principles of contemporary international law is that victims of human rights have a right to an effective remedy. The right to a remedy entitles a right holder to seek remedy for a violation of his/her right. This right to seek and secure an effective remedy is covered under international and regional human rights instruments.

This chapter has reflected upon the concept of remedies in human rights law and made a greater look at the scholarly works relating to remedies. It has also shown how the decision made by the PCIJ in the *Chorzów Factory* other subsequent decisions by the ICJ and other international and regional tribunals shaped the concept of remedies, reparation and redress as they are often used interchangeably. The efforts of the UN in preparing the Basic Principles and Guidelines on the

[75] *Michelot Yogogombaye v The Republic of Senegal*, Court on Human and Peoples' Rights, Application No. 001/2008, Paras 36-38.Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights, adopted 10 June, 1998, entered into force 25 January 2004, Article 34(6).

[76] Ibid. Article 5.

[77] Rules of the African Court on Human and Peoples Rights, June 2010 (Rules of Court), Article 33.

[78] *Femi FalanaEsq v The African Union*, above n. 73, Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M.Ngoepe and Elise N. Thompson, paras 8.1.1, 8.3, *Atabong Atemnkeng v The African Union*, above n. 74 Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M.Ngoepe and Elise N. Thompson, para. 12.

Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law have also been duly discussed.

Finally, the right to remedies as relating to the African Human Rights Charter and the jurisprudence of the African Commission and the African Court have been discussed to show how the right to remedies has been recognized in the African human rights system in spite of the lack of a specific provision in the Charter.

Chapter Four

Remedies for Victims of Human Rights Violations in AU Peacekeeping Missions

4.1 Introduction

One of the purposes for which the AU was established is the promotion of peace, security and stability. This purpose is given to it by its constituent document.[1] To this effect, as discussed in chapter two of the thesis, the AU has mandated peacekeeping missions in a number of countries to alleviate the suffering of peoples and offer immense help for the rehabilitation of war thorn nations. While performing this noble cause, AU peacekeeping missions were not free of mistakes and criticisms for various human right abuses and allegations of violations of human rights have surfaced against them at various times.

The previous chapters dealt with how the AU can be responsible for such violations. This chapter aims to explore briefly the specific remedies which can be accessed by victims or potential victims of human rights violations by AU peacekeeping forces under the African Charter on Human and Peoples' Rights[2], as it argues that rights without remedies tend to be meaningless and victims or potential victims should have a right to suitable access to remedies although the substantive right to effective remedy is absent from the African Charter.

Therefore, the purpose of this chapter is to look for ways in which victims or potential victims of human rights violations by AU peacekeeping missions can get remedies. The span of possible remedies envisaged in this section stretch from direct action against the AU as a distinct entity with the possibility of being sued at African judicial and quasi-judicial mechanisms which will be dealt with in the second section of the Chapter to bringing an action against troop contributing nations to be explained in the third section.

4.2 Direct Legal Action against the AU

One possible remedy for victims or potential victims of violations of human rights by AU peacekeeping forces is by instituting direct legal action at the African Commission or the African

[1]Constitutive Act of the African Union, adopted in Lome, Togo, on 11 July 2001 and entered into force on 26 May, 2001 Article 3(f).

[2]African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU DOC CAB/LEG/67/3 rev 5, entered into force 21 October, 1986.

Court. In the analysis rendered in the second chapter of the thesis, the legal personality of the AU has been affirmed with the purposes and objectives of the Union and from the decision of the ICJ in relation to the UN's legal personality and thus, the attainment of legal personality for international organizations entails the right to bring claims and also the possibility of being claimed against in the international plane.[3]

As outlined in chapter two of this thesis, the AU, as the main organization mandating peacekeeping missions in the continent, should bear responsibility for human rights violations by these missions. The cases instituted against the AU at the Commission and Court mentioned in the previous chapters may not be that encouraging as they were all declared inadmissible but the dissenting opinions in the *Femi Falana*[4] and *Atabong Atemnkeng*[5] cases against the AU at the African Court provide some hope that submitted cases against the AU may have a possibility of being accepted in the future. The ECtHR , in the *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* cases attributed the actions of UNMIK in Kossovo to the UN holding that the UNMIK was a subsidiary organ of the UN.[6] This may give a ray of hope for a direct legal action against the mission and the AU in ensuring access to justice and remedies for potential victims of violations in peacekeeping operations.

However, before victims of human right violation by peacekeeping missions submit cases to the Commission or the Court, exhaustion of local remedies rule must be followed as per Article 56 of the African Charter, Article 6(2) of the Protocol establishing the African Court, Article 40(5) of the Rules of the African Court and Rule 93(2)(i) of the Rules of Procedure of the African Commission.[7]There may be little or no remedies to exhaust for victims in relation to remedies

[3]*Reparation for injuries suffered in the service of the United Nations,*above n.14, p.177, *Femi FalanaEsq v The African Union, above n. 16*, Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M. Ngoepe and Elise N. Thompson, paras 8.1.1, 8.3.

[4]*Femi Falana Esq v The African Union*, above n. 3.

[5]*Atabong Denis Atemnkeng v The African Union*, African Court on Human and Peoples' Rights, Application No. 014/2011above n. 74 Dissenting Opinion of Judges Sophia A.B. Akuffo, Bernard M.Ngoepe and Elise N. Thompson, para. 12.

[6]*Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, App. Nos. 71412/01 & 78166/01, European Court of Human Rights, Grand Chamber, Decision, 2 May 2007, para 67.

[7]Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights, adopted 10 June, 1998, entered into force 25 January 2004, Article 6(2)Rules of the African Court on Human and Peoples Rights, entered into force 2. June 2010 (Rules of Court), Rule 40(2), Rules of Procedure of the African Commission, approved by the African Commission, 2010, Rule 93(2)(i).

available locally for violations by peacekeeping missions as the peacekeeping mission is immune from the jurisdiction of the host state. [8]

In this regard, victims of human right violations in AU peacekeeping operations,may use the dispute settlement mechanisms outlined in the Status of Mission Agreements to gain some form of remedy. For instance, as mentioned second chapter of the thesis, the AMISOM status of Mission Agreements in its paragraph 56 provides that , if any civil proceeding is instituted against a member of AMISOM before any court of Somalia, and if that proceeding is certified by the Head of Mission (HOM) to be related to official duties of the Mission, such proceeding shall be discontinued and the provisions of paragraph 54 of the Agreement (full immunity from legal process) shall be applicable.[9]

However, if the proceeding is not related to the official duties of the Mission, the proceeding may continue and the victims may be able to acquire one form of access to a domestic remedy without having to travel anywhere. Thus, the positive aspect of this arrangement in the Agreement signals one sort of access to remedy for the victims of right violations as it enables civil proceeding to be instituted in Somalia.

However, as argued in chapter two, the fact that it leaves for the HOM to certify whether the proceeding is related to the official duties of AMISOM may lead to an arbitrary decision by the HOM in order to protect the interest of the mission and this would curtail access to remedy for the victims as some violations which would have not been related to the official duties may be regarded by the HOM as relating to the official duties of the member AMISOM. It would have been a better option if the Court in Somalia would have been able to decide whether the proceeding is related to the official duties or not.

With regard to settlement of disputes, the Agreement provides that "any dispute or claim of a private law character, not resulting from the operational necessity of AMISOM to which AMISOM or any member thereof is a party and over which the courts of Somalia do not have jurisdiction shall be settled by a Standing Claims Commission to be established for that

[8]Status of Mission Agreement, The Transitional Federal Government of the Somali Republic-African Union", Mar. 6, 2007.
[9] Ibid. para 56.

purpose".[10]The Agreement also provides that the decision of the Commission is final and not subject to appeal.[11]

As argued previously, this may also have an adverse effect on the remedies that victims may be able to acquire as it curtails the ability to appeal the decision of the Standing Claims Commission at a local or a regional judicial or quasi-judicial body. In addition to this, questions of impartiality may also be raised with the Claims Commission as its three members as per paragraph 59 of the Agreement are from the AU and the Somali Government. The fact that the agreement does not leave a room for a role to be played by African Commission or the African Court in the process of dispute settlement or entertainment of cases relating to violations of rights limits access to remedies for the victims as this leads to a remedial shortfall for violations of rights.

As per Article 5(1)(d) of the African Court Protocol, the state party whose citizen is a victim of human rights violation is entitled to submit cases to the Court.[12] This may be a viable option for victims who do not have the means to access remedies. In addition, it is a very good gesture for the state to stand for its citizens when their rights have been violated. However, this scenario is highly unlikely to happen in a war thorn nation whose government in power may be in need of external intervention through peacekeeping. Thus, the state may be reluctant to institute a case against the AU which still entails a lack of access for remedies for victims of violation in the host nation.

The issue of immunity may be raised as a possible defense in such a direct action against the AU, but immunity must not lead to impunity and it is very crucial to develop principles for a mechanism of waiver of immunity in the interests of justice and the rule of law as international organizations should not escape anywhere from being bound by human rights.[13] And thus, the

[10]Ibid. para, 59.
[11]Ibid.
[12]African Human Rights Court Protocol, above n. 7, Article 5(1)(d).
[13]See for instance, Kevin C. Chang, 'When Do-Gooders Do Harm: Accountability of the United Nations Toward Third Parties in Peace Operations ' (2016) 20 *Journal of International Peace Keeping* 20, (Forthcoming), p. 16, available at http://ssrn.com/abstract/=2821551 last accessed on April 6, 2017 Vezina, Renee A., 'Combating Impunity in Haiti: Why the ICC Should Prosecute Sexual Abuse by UN Peacekeepers' (2012) 1(2) *Ave Maria Journal of Internatioinal Law* 431 available at https://ssrn.com/abstract=2239478 last accessed on April 6, 2017, p. 450.

purpose that the AU was established for would have little meaning if its activities end up violating the rights of people it aimed to protect in the first place.

In order to make the AU answerable to Africa and its people, one commentator proposes that the necessary legal amendments should be made for the AU to accede to the Charter, the Protocol establishing the Court and also the Protocol to the African Charter on the establishment of the African Court of Justice and Human Rights by taking the experience of the European Union's accession to the European Convention on Human Rights.[14]Accession into the continent's human rights treaties would clearly reflect the AU's proper commitment in ensuring the promotion and protection of human rights and its willingness to be accountable for any violations thereof.

One positive change that this accession has brought about in the European system is the possibility of applicants being able to bring actions against the EU and its institutions for alleged violation of Convention rights.[15] The AU may benefit in drawing inspiration from this accession and make its own analysis the rationales given for such an accession.[16]

4.3. Legal Action against Troop Contributing States

Another avenue in which victims or potential victims of violations of human rights may get a redress for the damages inflicted upon them is by instituting an action against the troop contributing state in an AU peacekeeping operation for violations of rights by its contingents. Such types of suits may not face jurisdictional issues at the Commission and the Court as they will be instituted against state parties to the African Charter provided that the respondent states have made a declaration as per Article 34(6) recognizing the jurisdiction of the Court.

In addition, such claims may go in line with the notion of unified command and effective control employed in peacekeeping operations for attribution of responsibility.[17] This method has been

[14]Roopanand Amar Mahadew, 'Should the AU be accountable and answerable to the African Court on Human and Peoples' Rights ' (2012) , available at: https://africalaw.com/2012/07/11/should-the-African-Union-be-accountable-and-answerable-to-the-african-court-on-human-and-peoples-rights last accessed on November, 9, 2017.

[15]Ibid.

[16]Ibid.

[17]For a detailed discussion on the issue of effective control, See for instance, Christopher Leck, 'International Responsibility in United Nations Peacekeeping Operations : Command and Control Arrangements and the Attribution of Conduct ' (2009) 10(16) *Melbourne Journal of International Law* 346, pp. 348-355, available at http://autlii.edu.au/au/journals/MelbJIL/2009/16.html last accessed on June 16, 2017, Neha Bhat, 'Responsibility in the Time of Cholera: Liability of International Organizations for Wrongful Conduct ' (2013) , pp. 36-42, available at: http://ssrn.com/abstract=2213613 last accessed on April 6, 2017, Tom Dannenbaum, 'Translating the

thoroughly discussed in Chapter two of the thesis in connection with the provisions of the Draft Articles on the Responsibility of International Organizations (DARIO). As Damien Van der Toorn argues, in cases where the AU has authorized forces to operate under their own command, the actions would be attributable to the States themselves which implies that those with factual control over the conduct of forces are responsible for the conduct.[18]

If one is to follow this principle, an action against a troop contributing state having an effective control of its troops in an AU peacekeeping operation would be a viable option. Moreover, status of mission agreements normally reserve criminal prosecution to the courts of the troop contributing states.[19] For example, in the AMISOM Status of Mission Agreement,paragraph 55(b) provides that military members of AMISOM who commit crimes in Somalia are subject to exclusive jurisdiction of their participating state.[20]

As the author argued in chapter two of the thesis, this may seem like a possible remedy for victims of criminal acts committed in the host states; although participating states are highly unlikely to prosecute their military contingents in their home states for acts committed in foreign territories. Moreover, victims of rights violations in conflict ridden host countries will have little motivation, due to language barriers, financial capacity and other factors, to go to the participating states and institute and follow up criminal proceedings.

In *Luke Munyandu Tembani and Benjamin John Freeth v. Angola and Thirteen Others*[21], the African Commission considered that it could only base its decisions on claims of violations of the African Charter by member states in accordance with 45(2) of the African Charter. However, the Commission also "agrees with Complainant that, in appropriate cases, member states of an international organization could bear direct responsibility for the wrongful acts and omissions of

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Standard of Effective Control into a system of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers ' (2010) 51 *Harvard International Law Journal* 113, pp. 141-148, available at https:/www.harvardilj.org>uploads >2010>09HILJ_51-1.Dannenbaum.pdf last accessed on July 5, 2017.

[18]Damien va derToorn,, 'Attribution of Conduct by State Armed Forces Participating in UN-authorized Operations: The Impact of Behrami and Al-Jedda' (2008) 15(1) *Australian Journal of International Law* 9, p.27 available at www.austlii-edu.au>AUIntLawJL>2.pdf last accessed on April 16, 2017.

[19]See for instance, AMISOM, Status of Mission Agreement, above n. 8, para.5.

[20]Ibid. para 55(b).

[21]*Luke MunyanduTembani and Benjamin John Freeth v. Angola and Thirteen Others*, ACHPR Communication No. 409/12, 30 April. 2014, para 132.

that international organization, especially where the rights of third parties were involved".[22] This may also pave the way for claims against member states for the actions of the AU forces in peacekeeping operations.

4.4 Conclusion

The chapter has reflected upon the possible ways in which victims of human right violations in AU peacekeeping missions could have access to remedy by showing the various remedial shortfalls that exist within the internal dispute settlement mechanisms of the missions and the African Commission and the African Court. Jurisdictional issues and immunity take center stage in being major hurdles for the accountability of the AU for such violations and limit access to remedies for victims. The African Commission and the African Court decisions on direct actions have not also helped the victim's cause although growing dissenting opinions do provide for a glimpse of hope that the idea of AU accountability may not be farfetched after all.

One other avenue for victims to access remedy for violations in AU peace operations is to bring an action against the troop contributing states as these states often have some degree of control over their troops in such operations. AU Status of Mission Agreements such as AMISOM's leave criminal prosecution of crimes committed by military peacekeepers to the participating states. However, participating states do find little motivation to prosecute their military members for acts committed in foreign territories and victims in these war thorn nations may not have the financial means to follow up such proceeding which has an overall detrimental effect on access to remedies.

[22]Ibid.

Chapter Five

Conclusion and Recommendations

5.1 Conclusion

International organizations like the UN and the AU have developed over the last century from humble facilitators of intergovernmental cooperation into powerful actors in their own right and their activities now cover virtually every field of human activity and extend to all corners of the world.[1] They have not only become a crucial instrument of the world order in the hands of their member States, but increasingly they seem to be shaping that order in their own figure. The role that they play in the international community is undeniable as these organizations adopt measures which greatly influence or regulate interstate activities in many fields of global co-operation.

These organizations are able to exercise their powers and mandates by virtue of their international legal personality. The international legal personality of international organizations has been undoubtedly explained by the ICJ in its advisory opinion in the *Reparations Case*. And thus, the ability to bear responsibility by international organizations is both an indicator and a consequence of their legal personality under international law i.e. international organizations' responsibility must be considered a necessary corollary of their capacity to act under international law.

The emergence of international organizations and the powers and duties that they have acquired on the world stage have been accompanied by violations of international law formally attributable to such organizations. As such the violations of international law and international human rights law have often undermined the legitimacy of these institutions and have called upon the development of accountability mechanisms, particularly against the backdrop of the failure of the classical domestic plans to ease these violations and their consequences.

[1]Aurel Sari, 'Autonomy, Attribution and Accountability: Reflections on the Behrami Case' in Richard Collins and Nigel D. White (ed), *International Organizations and the Idea of Autonomy* (Routledge, 2010) 257, p. 257, available at https://ssrn.com/abstract=1635803 last accessed on April 26, 2017.

Aiming to tackle these problems, the International Law Commission (ILC) came up with a draft containing articles on the responsibility of international organizations in 2011. The effort of the ILC has been immense in crafting a dedicated legal framework for the responsibility of international organization in the Draft Articles for the Responsibility of International Organizations (DARIO). These Draft Articles, as discussed in detail in chapter two of the thesis, have shaped the way for the responsibility of international organizations by giving meaning to wrongful acts and putting the conditions for the attribution of responsibility to these organizations. The law of responsibility of international organizations is a developing legal area and although the draft is a non-binding soft law document, it provides a very good startup for ensuring the accountability of the AU.

One of the basic purposes in which the AU has been created was the maintenance of peace and stability throughout the world and in the African continent respectively. And thus, of the many noble activities that these organizations perform, none has become as pivotal a tool in conflict prevention and peace preservation as peacekeeping operations. However, while performing their peacekeeping activities, they have done wrongs which have impacted the people they were established to help out. Allegations of sexual abuses and other human rights violations have surfaced in AU peacekeeping operations. Chapter two of the thesis showed how the AU can be responsible for such types of violations by starting from its legal personality and showing the role of the PSC in its peacekeeping operations. In doing so, the author took the experience of the UN in similar situations as a major to tool to make analogous explanations.

International organizations do enjoy immunity from being subject to local jurisdictions by their establishing documents. The AU's immunity emanates from the AU Convention on Privileges and Immunities of the AU. Immunity of the AU is also included in the status of mission agreements that it signs with host countries for the administration of the peacekeeping operations. Immunity remains important for the functioning of the AU and it is not practical in administrative terms for them to subject themselves to the legal systems of each state in which they operate and it is critical that they are capable of performing its tasks independently without the interference of the host state.[2] However, it should be reminded that they should not use these

[2]Kevin C. Chang, 'When Do-Gooders Do Harm: Accountability of the United Nations Toward Third Parties in Peace Operations ' (2016) 20 *Journal of International Peace Keeping* 20, p. 14, available at http://ssrn.com/abstract/=2821551 last accessed on April 6, 2017.

privileges and immunities to curtail basic remedies to violations inflicted upon victims by themselves or their agents.

The thesis also analyzed selected cases to show how the AU and the UN have been claimed against for violations of human rights. It reflected upon how the UN used its immunity to avoid responsibility in *Haiti Cholera* and *Mothers of Srebrenica* cases where it successfully invoked its immunity to escape liability for violations of human rights by its peacekeeping missions in Haiti and Kosovo respectively. Although, the ECtHR, attributed responsibility to the UN due to the actions of its peacekeeping missions in Kosovo, in the *Behrami*and *Saramati* cases, the fact that the cases were declared inadmissible is also a major setback from the perspective of the protection of human rights in general and in affording effective remedies to victims in peacekeeping operations particular. The chapter also discussed three other cases against the AU, *Mohemed El-Nekeily v OAU, Femi Falana Esq v The African Union, and Atabaong Atemnkeng v The African Union* to show instances where the AU was subject to legal claims.

In the search for possible remedies for victims of human rights violations in AU peacekeeping operations, the thesis found it necessary to delve in first into the world of remedies in international human rights systems and the right to effective remedy in the African Human Rights system. And thus, it found that the right of victims to have to effective remedy is one of the bedrock principles of contemporary international law and that the right to seek and secure an effective remedy is included under major international and regional human rights instruments. The chapter in this regard investigated the influence of the *Chorzow Factory* decision by the PCIJ and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in the remedies jurisprudence.

The African Charter on Human and Peoples' Rights came short of including a provision on the substantive right to an effective remedy and a dedicated provision for the Commission to give remedies in the Communications it receives but that did not prevent the African Commission to develop its jurisprudence on remedies through its practice over the years. Thus, the chapter, being driven by the principle of *ubi jus ibi remedium,* discussed the jurisprudence of the African Commission and the African Court relating to remedies.

The thesis also dedicated itself in looking for possible remedies for victims of human rights violations in AU peacekeeping operations by showing the current remedial shortfalls in the African human rights system and came up with some solutions on how victims can go about ensuring remedies in this system in the future.

It argued that the African human rights system may entertain victims in two possible ways, the first one being direct legal action against the AU and the other being legal actions against the troop contributing states. Despite the disappointment in the majority decisions in the Commission and the Court on direct actions against the AU, recent dissenting opinions by judges of the Court in the *Femi Falana v. African Union* and *Atabong Denis Atemnkeng v. African Union* cases reflect a glimpse of hope that the idea of AU accountability may not be long overdue.

5.2 Recommendations

The AU, despite its relentless efforts in maintaining peace, stability and security in the continent, is not perfect and it may engage in activities to the detriment of the people they set out to protect in the first place.

Within this righteous cause, allegations human rights violations have surfaced in AU peacekeeping operations. Although the African Charter does not contain a specific provision on the right to an effective remedy, the core argument of this thesis has been the issue that the African human rights system as a distinct regional human rights system should be able to remedy victims and potential victims of human rights violations by AU peacekeeping missions as every right recognized should not be separated from possible remedies in the case of violations. Considering all the issues discussed in this thesis in this regard, the author wishes to forward the following recommendations.

1. Immunity as outlined in this thesis must by no means lead to impunity and it is very critical that the AU, having the objective to promote and protect human rights in its Constitutive Act, should develop principles for a mechanism of waiver of its immunity in the interests of justice and rule of law as international organizations should not escape from being bound by human rights. And as such, it is recommended that the African Commission and the African Court

insist on exercising jurisdiction on the AU in serious breaches of international law or gross violations of human rights in its peacekeeping operations.

2. The African Commission and the African Court, as quasi-judicial and judicial bodies should not overlook future violations of human rights in AU peace operations and find possible ways of making the AU accountable through communications and cases submitted to them, by taking the experiences of other human rights systems through Articles 60 and 61 of the African Charter.

3. Troop contributing countries are not free from responsibility in AU peace operations as far as the principle of effective control is concerned. And thus, as outlined in the thesis, it is recommended that they make a better use of their criminal justice system in bringing their military contingents who are alleged to have violated the human rights of the local population of the host states. Mechanisms in which civil liability of members of the mission could be ensured should also exist in the contributing countries so that civil actions could also be instituted against the members of the mission in these countries.
4. The host states, although ridden by conflict, must be able to have, to the extent possible, a judicial system locally which can entertain civil and criminal proceedings against the AU peacekeeping missions as exhausting local remedies is a critical step before reaching out to the African Commission and African Court for remedial quests.

5. The role of other stakeholders such as non-governmental organizations (NGOs) is also pivotal in the quest for remedies for victims of human rights violations in AU peacekeeping operations. These organizations help institute and follow up communications and cases for victims who are unable to do so, at the African Commission or the African Court respectively. Thus, NGOs working in host countries or located near host countries should engage closely with the local population so that they could extend their hand in helping victims attain the necessary remedies.
6. The AU, being part of human rights and being the main organization for mandating peace operations in the continent must be accountable for violations of human rights it sets out to protect. As such for ensuring remedy for victims through such accountability, accession of the AU to the African Charter will ease taking the AU to the African Commission and African

Court and those jurisdictional hurdles discussed in this thesis would not have to be a problem anymore.

7. Internal mechanisms of settling disputes in AU Status of Mission Agreements should also be strengthened with the establishment and effective functioning of standing claims commissions as included in the status of mission agreements. Decisions of such internal dispute settlement bodies in these agreements must be appealable to the local courts in order to broaden the remedial avenues for victims. Roles for the African Commission and/or the African Court as dispute settlement organs should also be envisaged in these status of mission agreements so that potential victims of human right violations by AU peacekeeping missions could avail from a wide spectrum of remedies.

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