BRILL
NIJHOFF

JOURNAL OF INTERNATIONAL PEACEKEEPING
19 (2015) 142-173

JOUP
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Sexual Exploitation and Abuse on Peacekeeping Operations

Is the United Nations Responsible?

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Abstract

Allegations of sexual exploitation and abuse (SEA) have been made against many United Nations (UN) peacekeeping operations. Whilst it may be argued that the UN should be held responsible for these violations, establishing the responsibility of the UN under international law is not straight forward. This article will examine the extent to which the responsibility of the UN can be established for SEA on its peacekeeping operations. This article will begin by considering the status of the UN as an international legal person and its legal rights and responsibilities. Then, the sources of law for the responsibility of international organisations will be discussed, including prohibitions against SEA and the obligations that these prohibitions may create for the UN. In particular, the *Articles on the Responsibilities of International Organizations* (ARIO) will be examined and the application of the ARIO to the case of SEA on peacekeeping operations will be explored. It will be concluded that the international law in this area is far from settled and, hence, many challenges remain in being able to establish the UN's responsibility for acts of SEA on its peacekeeping operations.

Keywords

United Nations – peacekeeping operations – sexual exploitation and abuse – Articles on the Responsibilities of International Organizations – international law

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 | DOI 10.1163/18754112-01902006

1 Introduction

The arrival of the 'blue helmets' and the flag of the United Nations (UN) signals to the world the arrival of soldiers who are committed to international peace and security and to protecting the local population from harm. Unfortunately, allegations of sexual exploitation and abuse (SEA) by UN peacekeepers have tainted the reputation of and trust place in many UN peacekeeping operations. For more than a decade, the UN has faced major sex scandals in West Africa,[1] Bosnia and Herzegovina,[2] and the Democratic Republic of the Congo,[3] to name a few. In fact, in 2012, the UN received allegations of SEA from 10 different peacekeeping missions[4] and against 45 UN entities, including offices of the Secretariat and different UN agencies, funds, and programmes.[5] The substance of these allegations have included rape, 'voluntary' prostitution, sex trafficking, sexual slavery, sex with children, child prostitution, and the exploitation of vulnerability to obtain sexual favours.[6] Understandably, these allegations have shocked the international community. Gita Sahgal, the former head of Amnesty International's Gender Unit, has summed up the problem by stating that: '[t]he issue with the UN is that peacekeeping operations unfortunately seem to be doing the same thing that other militaries do. Even the guardians have to be guarded.'[7]

1 Muna Ndulo, 'The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls By Peacekeepers During Peacekeeping Missions', *Berkley Journal of International Law*, vol. 28, no. 1, 2006, pp. 127–161, p. 140.

2 Amnesty International, *So Does that Mean I Have Rights? Protecting the Human Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo* (London: Amnesty International, 2004).

3 *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo* (New York: UN Doc A/59/661, 5 January 2005).

4 This includes the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), United Nations Mission in South Sudan (UNMISS), United Nations Mission in Liberia (UNMIL), United Nations Stabilization Mission in Haiti (MINUSTAH), and United Nations Operation in Côte d'Ivoire (UNOCI). See *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the Secretary-General* (New York,UN Doc A/67/766: 28 February 2013), p. 4.

5 For example, the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), and the UN World Food Programme (WFP). See *ibid,* p. 2, 17 and 18.

6 Promotion and protection of the rights of children: Impact of armed conflict on children, Note by the Secretary-General (New York: UN Doc A/51/306, 26 August 1996), p. 24.

7 Quoted in Michael J Jordan, *Sex charges haunt UN forces- The Christian Science Monitor,* http://www.csmonitor.com/2004/1126/p06s02-wogi.html (accessedon 12 August 2014).

This article will examine the problem of SEA on UN peacekeeping operations by considering the legal responsibility of the UN under international law for these violations. The legal responsibility of the UN is important because, regardless of the individual or State responsibility that may be engaged, the peacekeepers who have committed these violations have been deployed under the auspices of the UN. As an organisation that is founded upon the values of peace, security, and universal human rights, the UN needs to take responsibility when the actions of its agents actually destabilise peace, create further insecurity, and violate fundamental human rights. Hence, establishing the legal accountability of the UN is important to addressing and resolving the problem of SEA.

To begin, this article will examine the position of the UN as an international legal actor and the legal rights and responsibilities that this may entail. Then, the sources of international law on the responsibility of international organisations will be explored. In particular, the *Articles on the Responsibility of International Organizations* (ARIO) will be discussed. These discussions will include a consideration of if and how the ARIO may apply to the case of SEA on peacekeeping operations. Hence, this article will provide a critical analysis of the current legal regime on the responsibilities of international organisations and indicate whether this regime is sufficient to hold the UN responsible for acts of SEA on its peacekeeping operations.

2 The Problem of Sexual Exploitation and Abuse by UN Peacekeeping Personnel

Rumours of SEA by UN peacekeeping personnel have long circulated amongst local communities, NGO workers, and human rights activists. For example, in 1992 and 1993, UN peacekeeping personnel on mission in Cambodia were alleged to have frequented 'Thai-style' massage parlours and brothels.[8] This increased demand for sexual services reportedly quadrupled the number of prostituted persons in Cambodia from 6,000 to 25,000 and involved the prostitution of children.[9]

Reports of SEA have also emerged from the UN Mission in Ethiopia and Eritrea (UNMEE). Investigations into these allegations have resulted in the dismissal of several UN peacekeepers. This included the expulsion of three UN

8 Sarah Martin, 'Must Boys be Boys?: Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions' (Washington, New York, London: Refugees International, 2005), p. 4.

9 *Ibid.*

peacekeepers for having sex with a 13 year old Eritrean girl and the dismissal of a soldier for video recording himself having sex with an Eritrean woman who believed that the peacekeeper was going to marry her.[10] It was also alleged that the prostitution of local women and children grew significantly with the arrival of UN personnel.[11] One young peacekeeper, who was interviewed for a newspaper, described how he was encouraged by his superior to pay for sex whilst on mission.[12] He estimated that 90% of his fellow peacekeepers had bought prostituted women at some point.[13]

In 2001, the UN initiated its first broad investigation into the issue of SEA after the release of a report commissioned by the UN High Commissioner for Refugees (UNHCR) and Save the Children.[14] The report alleged the existence of widespread SEA by UN staff, security forces, staff of international and national NGOs, government officials, and community leaders.[15] In response to the report, the UN Office of Internal Oversight Services (OIOS) undertook its own investigation.[16] Although the OIOS Investigation Team was unable to substantiate the allegations in the consultants' report, it did uncover other cases of SEA. For example, in one substantiated case, a UNHCR volunteer, aged 44, had sexual relations with a 15 year old female refugee from Sierra Leone and, in return, had paid for her school fees. When she became pregnant, he abandoned her and refused to acknowledge paternity.[17] In another example, a child testified how he had initially trusted a UN peacekeeper who had approached him while he was fishing with his friends. The UN peacekeeper then led the child into an isolated bush area where he raped him. The peacekeeper gave the child some

10 Elise Barth, 'The United Nations Mission in Eritrea/Ethiopia: Gender (ed.) Effects' in Louise Olsson, Karen Hostens, Inger Skjelsbæk and Elise Fredrikke Barth (eds.), *Gender Aspects of Conflict Interventions: Intended and Unintended Consequences* (Oslo: Report to Norwegian Ministry of Foreign Affairs, 2004), pp. 9–24, p. 14.

11 *Ibid.*

12 *Ibid,* p. 18.

13 *Ibid.*

14 *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa* (New York: UN Doc A/57/465, 11 October 2002).

15 *Note for Implementing and Operational Partners on Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October – 30 November 2001* (New York: United Nations High Commissioner for Refugees and Save the Children UK, February 2002).

16 *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa.*

17 *Ibid,* p. 9.

money to keep quiet about the incident. However, the child reported the incident to his mother and the police, and attended the local hospital for medical treatment.[18] Similar allegations have also been made against other UN personnel, including a UNHCR Protection officer, a UNHCR driver, and a World Food Program staff member.[19]

Serious allegations of SEA have also emerged from the peacekeeping operation in Bosnia and Herzegovina. Reports by Amnesty International detail how allegations of prostitution use arose shortly after international forces entered Kosovo[20] and, by January 2004, 200 bars, restaurants and cafes had been identified as potential venues for prostitution and human trafficking.[21]

A wide range of international personnel were alleged to have used prostituted and trafficked women, including the International Police Task Force (IPTF) Deputy Commissioner,[22] UNMIK Police, and KFOR and NATO forces.[23] In addition, IPTF members were accused of not only patronising establishments with prostituted and trafficked women but also being involved in the trafficking of women themselves.[24]

Many reports have been published that detail the suffering of the women and girls who were trafficked or prostituted for the use of international personnel. For example, Amnesty International has compiled an extensive record of firsthand accounts of the abuses that were experienced. One young woman reported that she was subjected to 2,700 accounts of forced sex in one year, including group sex and sex at gun point.[25] Other women spoke of being bought and sold 'like a rag', being given food 'like we were animals' such as food that was left over on the plates of 'customers', and suffering continuous sleep deprivation as the women were forced to cook and clean in between sexually servicing 'clients'.[26] Similar first hand reports have been compiled by Human

18 *Ibid.*

19 *Ibid.*

20 Amnesty International, *So Does that Mean I Have Rights?*, p. 1.

21 *Ibid,* p. 7.

22 Jennifer Murray, 'Who will Police the Peace-Builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina', *Columbia Human Rights Law Review*, vol. 34, 2003, pp. 475–527, p. 505.

23 Amnesty International, *So Does that Mean I Have Rights?*, pp. 48–53.

24 See, eg, Murray, 'Who will Police the Peace-Builders?'; Ekrem Krasniqi, UN Kosovo police arrested for sex trafficking - International Relations and Security Network, http://isn.ethz.ch/Digital-Library/Articles/Detail/?lng=en&id=107214 (accessed on 16 July 2014).

25 *Ibid,* p. 17.

26 *Ibid.*

Rights Watch.[27] Women have reported being beaten, psychologically traumatised, starved, and prevented from leaving.[28] One staff member working for a shelter described to Human Rights Watch that women were arriving 'with cigarette burns, syphilis, (gynaecological) infections, head injuries, and fractures.'[29] These first-hand accounts are only some of the many stories that have been recorded by NGOs working in Bosnia and Herzegovina.

These accounts of SEA are just some of the many reports that are available on the abuses committed by peacekeeping personnel. These allegations demonstrate that there has been, and continues to be, a significant problem of sexual misconduct by UN peacekeeping personnel. Considering the serious nature of this misconduct and the potential violations of international human rights and humanitarian law, it is important to establish who should be held responsible for these violations. Whilst these allegations may engage the individual responsibility of the alleged perpetrator and/or the responsibility of the State from which the perpetrator came or in which the act occurred,the focus of this article will be on the responsibility of the UN for these violations. This article will now discuss the extent to which the UN's legal responsibility may be established under international law for acts of SEA on its peacekeeping operations, beginning with an examination of the UN's status as an international legal person and the legal rights and responsibilities that this may entail.

3 The Legal Responsibility of the United Nations

The United Nations: An International Legal Person

It is widely accepted that the UN possesses international legal personality. The international legal personality of an international organisation has been described as the 'possess[ion of] rights, duties, powers and liabilities distinct from its members or its creators on the international plane and in international law.'[30] The international legal personality of the UN was affirmed in the 1949 Advisory Opinion (*Reparation* case) of the International Court of Justice (ICJ).

27 Human Rights Watch, *Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution* (New York: Human Rights Watch, 2002). See also Sarah E Mendelson, *Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans* (Washington: Center for Strategic and International Studies, 2005).

28 Human Rights Watch, *Hopes Betrayed*, pp. 17–18.

29 *Ibid.*

30 Sanna Kyllönen, 'The Legal Framework For The Responsibility Of International Organizations', *Nordic Journal of Commercial Law*, vol. 1, 2010, pp. 1–34, p. 5.

In this matter, the Court considered whether the UN had the legal capacity to bring an international claim on behalf of its staff members against a non-Member State. In reaching its verdict, the Court needed to first determine whether the UN possessed international legal personality. The Court considered the powers given to the Organisation, both in the Charter and in practice,[31] and found that 'to achieve these ends the attribution of international personality is indispensable.'[32] After establishing the international legal personality of the UN, the Court unanimously held that the UN did have the capacity to bring an international claim against a State in order to obtain reparation for damages caused to the Organisation and/or to its agents.[33] In addition, the Court found that this capacity included the ability to bring an international claim against both Member States and non-Member States.[34] Hence, the UN was ascribed with an objective personality that was opposable to all States.[35] This meant that the UN's international legal personality was an 'objective' aspect of international law to be recognised by all States, regardless of their membership to the UN, and was not to be left to the 'subjective' opinion of a particular State as to whether or not it would recognise the UN as an international legal person.[36]

Although the Court attributed a 'large measure' of legal personality to the UN,[37] it cautioned that this did not mean that the UN was equivalent to a State or had the same legal rights and duties as a State.[38] Instead, the Court determined that the UN had international legal personality insofar as this was connected to the performance of its 'purposes and functions as specified or

31 The powers and activities of the UN considered by the Court included: the creations of organs within the UN that have been given special tasks to accomplish; the ability of the UN to carry out decisions by the Security Council; the provision of legal capacities, privileges, and immunities to the UN; the ability of the UN to conclude agreements between the organisation and its Members; the occupation of a position detached from its Members States and the duty of the UN to remind its Member States of their obligations; and the task of the UN to maintain international peace and security. See *Reparations for Injuries Suffered in the Service of the United Nations* (*Advisory Opinion*) [1949] ICJ Rep 174, pp. 8–9.

32 *Ibid,* p. 8.

33 *Ibid,* p. 13–14.

34 *Ibid,* p. 17.

35 *Ibid,* p. 15.

36 Finn Seyersted, *Common Law of International Organizations* (Leiden, Boston: Martinus Nijhoff Publishers, 2008), p. 63.

37 *Reparations for Injuries Suffered in the Service of the United Nations*, p. 9.

38 *Ibid.*

implied in its constituent documents and developed in practice.'[39] The Court's reference to the Organisation's 'implied' functions has created some controversy over the exact scope of its functions and, hence, the extent of the Organisation's legal personality.[40] It has been noted, however, that the recognition of its implied functions did 'mean… that the organization is conceived as a dynamic institution [that is capable of] evolving to meet changing needs and circumstances.'[41] Hence, the scope of the international legal personality attributed to the UN has the ability to grow and evolve as the Organisation itself grows and evolves in its international roles and duties.

The United Nations: Rights and Responsibilities

The attribution of international legal personality to the UN has general legal consequences for the Organisation. Three consequences of the attribution of legal personality to international organisations have been identified by Professor Gerhard Hafner.[42] The first is that the organisation becomes a legal subject and, thereby, becomes 'capable of acting within the field of international law and of producing legal effects within this legal order.' The second consequence is that the organisation may become the subject of legal attribution within international law as the organisation's legal personality means that there are now acts that may be attributed to the organisation that are separate to the acts undertaken by its member states. The third consequence is that the organisation itself now needs to assume international responsibility for its own acts. Therefore, Hafner concluded that '[a] ttributability and responsibility are the necessary consequence of the power to produce, by their own acts, legal effects separable of the effects of acts of the members.'[43]

It is logical that the UN's status as a legal subject means that it is: (a) able to produce its own legal effects; (b) able to have the legal effects of its own actions attributed to it; and, (c) may be held legally responsible for those attributed

39 *Ibid,* p. 10.

40 James E Hickey Jr, 'The Source of International Legal Personality in the 21st Century', *Hofstra Law and Policy Symposium*, vol. 2, 1997, pp. 1–18.

41 Derek William Bowett, *The Law of International Institutions* (London: Stevens and Sons, 1982), p. 338.

42 Gerhard Hafner, 'The Legal Personality of International Organizations: The Political Context of International Law' in August Reinisch and Ursula Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (The Hague: Eleven International Publishers, 2007), p. 81.

43 *Ibid,* p. 85–86.

acts. However, there is currently no treaty law and little case law to support this contention.[44] The principal case law continues to be the *Reparation* case. As discussed, in this matter it was determined that one of the 'legal effects' of the UN's international personality was the competency to bring an international claim for damages caused to the Organisation and its agents.[45] In the ICJ's Advisory Opinion, the examples that were given of this competency included the capacity to establish, present, and settle claims through methods such as protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court.[46] However, the accompanying duties that may flow from the UN's legal personality were not expressly addressed by the ICJ.[47]

Since the *Reparation* case, the principle that the UN is able to bring an international claim has become widely accepted.[48] However, the reverse proposition, that is, the ability of other legal actors to bring an international claim against the UN, has been much more difficult to establish.[49] This imbalance has been described as a 'rights-bias in the approach to the legal personality of international institutions' in which the establishment of international legal personality has become associated with the legal rights of the organisation, whilst the legal obligations arising from having legal personality have been 'almost completely ignored.'[50] It has been argued that this overemphasis on

44 The *Articles on the Responsibility of International Organizations* provides several reasons for this: 'The main reason for this is that practice concerning responsibility of international organizations has developed only over a relatively recent period. One further reason is the limited use of procedures for third-party settlement of disputes to which international organizations are parties. Moreover, relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it.' See *Articles on the Responsibilities of International Organizations* (UN Doc A/CN.4/L.778, 30 May 2011).

45 *Reparations for Injuries Suffered in the Service of the United Nations*.

46 *Ibid,* p. 7.

47 Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge, New York: Cambridge University Press, 2011), p. 65. Two further ICJ Advisory Opinions have implied that international organisations have obligations flowing from their international legal personality. These are:

- *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*(*Advisory Opinion*) [1953] ICJ Rep 47.
- *Interpretation of the Agreement of March 1951 between the WHO and Egypt* (*Advisory Opinion*) [1980] ICJ Rep 73.

For more information, see Verdirame, *The UN and Human Rights*, pp. 70–71.

48 Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (London: Thomas Reuters (Legal) Ltd, 2009), pp. 517–518.

49 *Ibid,* p. 518.

50 Verdirame, *The UN and Human Rights*, pp. 72–73.

rights rather than obligations conflicts with the fundamental purpose for the development of international legal personality which was 'to limit the arbitrary use of power [and] to confirm and capture in a legal notion the ruler's subjection to the law of nations.'[51]

Therefore, at least in principle, international organisations should have both legal rights and legal responsibilities.[52] In the case of the UN, it seems counter-intuitive and unjust that the UN may have the competence to bring international claims against legal persons for damages that it has suffered, but that other legal persons may not bring international claims against the UN for damages that it has caused. Although the UN may be 'exceptional' compared to other international organisations in regard to its political significance and near universal membership,[53] this does not mean that the Organisation should be granted an exception from assuming legal responsibility for its actions. In fact, it has been argued that it would 'be extremely disruptive for the international system to tolerate the presence of actors that are endowed with legal personality… but [who] are exempt from a body of universally or almost universally accepted rules.'[54]

Sources of Law for the Responsibilities of International Organisations

The legal responsibility of international organisations may arise from a number of different sources of law. This includes 'internal law', which are the rules of the organisation, and 'external law', which consists of international, regional, and domestic law. Legal responsibilities may also arise from private law obligations, such as through entering into contractual agreements. The exact content and scope of these legal obligations, however, continues to be an area of controversy and debate.

The starting point for discussing the responsibilities of international organisations is often the 'internal law' of the organisation.[55] The *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* defines the 'rules of the organization' as

51 *Ibid,* p. 73. Verdirame quotes JE Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (The Hague: TMC Asser Press, 2004), p. 78.

52 Sands and Klein, *Bowett's Law of International Institutions*, p. 518.

53 The ICJ refers to the UN as the 'supreme' international organisation in *Reparations for Injuries Suffered in the Service of the United Nations*, p. 179.

54 Verdirame, *The UN and Human Rights*, p. 71.

55 Ian Brownlie, 'The Responsibility of States for the Acts of International Organizations' in Maurizio Ragazzi (ed.), *International Responsibility Today* (Leiden, Boston: Koninklijke Brill, 2005), pp. 355–362, p. 359; Kylloenen, 'The Legal Framework for the Responsibility of International Organizations', p. 3.

'the constituent instruments, [the] decisions and resolutions adopted in accordance with them,' and the 'established practice of the organization.'[56] For the UN, this consists of the UN Charter, which is its constituent treaty, and any decisions, resolutions, and issuances that have been made in accordance with the Charter. The level to which different resolutions and issuances are binding and on whom they are binding varies depending on the authority of the resolution or issuance. For example, resolutions adopted by the UN Security Council under its Chapter VII powers are binding on all Member States,[57] whereas article 97 empowers the Secretary-General as the 'chief administrative officer' to promulgate administrative issuances that are binding on all UN staff.[58] These issuances by the Secretary-General form part of the 'internal law' of the Organisation.

One example of an administrative issuance is the Secretary-General's 2003 bulletin on *Special Measures for the Protection from Sexual Exploitation and Abuse* (2003 Bulletin).[59] The 2003 Bulletin is important because it prohibits acts of SEA by UN staff. The 2003 Bulletin defines sexual exploitation as 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.'[60] Sexual abuse is defined as 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.'[61]

The 2003 Bulletin states that acts of SEA constitute 'serious misconduct' and may be grounds for disciplinary measures, such as summary dismissal.[62] It also provides several examples of prohibited activities including sexual activity with persons under 18 years of age regardless of the local age of consent, and the exchange of money, employment, goods, or services for sex.[63] Furthermore,

56 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,* opened for signature 21 March 1986, UN Doc A/CONF.129/15, article 2(1)(j).

57 For further discussion on the legal effects of UN Security Council resolutions, see Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', *European Journal of International Law*, vol. 16, no. 5, 2005, p. 879.

58 *Charter of the United Nations*, article 97.

59 Kofi A Annan, *Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (UN Doc ST/SGB/2003/13,9 October 2003).

60 *Ibid,* p. 1.

61 *Ibid.*

62 *Ibid,* para. 3.2(a).

63 *Ibid,* paras. 3.2(b)–3.2(c).

the 2003 Bulletin 'strong[ly] discourage[s]' sexual relationships between UN personnel and beneficiaries of assistance due to the 'inherently unequal power dynamics' upon which such relationships are based.[64] Since its issuance, the prohibitions in the 2003 Bulletin have been part of a binding code of conduct for all UN civilian staff. In 2007, these prohibitions were incorporated into the UN Memorandum of Understanding (MoU), an agreement signed between the UN and the troop-contributing country.[65] This has made these prohibitions also binding upon all UN military personnel. Hence, these prohibitions form a part of the 'internal law' of the Organisation.

International organisations may also have legal responsibilities arising from 'external law' including domestic law and international law. The principle that international organisations are subject to the domestic law of the territory in which they are operating is widely accepted.[66] In regard to peacekeeping operations, this principle has been formally recognised in the Model Status-of-Forces Agreement (SOFA) which is a legally binding agreement signed between the UN and the host State to the operation.[67] The Model SOFA states that '[t]he United Nations peacekeeping operation and its members shall respect all local laws and regulations.'[68] Agreements for specific missions, such as the mission to Darfur (UNAMID SOFA), Haiti (MINUSTAH SOFA), and Sudan (UNMIS SOFA), contain similar provisions.[69] Therefore, depending upon the laws of the territory in which the UN is operating, it may have legal responsibilities under domestic law to not commit or to prevent acts of SEA.

64 *Ibid,* para. 3.2(d).

65 *Revised Draft Model Memorandum of Understanding between the United Nations and* [*participating State*] *Contributing Resources to* [*the United Nations Peacekeeping Operation*] (UN Doc A/61/494, 3 October 2006), Annex H.

66 See, eg, Sands and Klein, *Bowett's Law of International Institutions*, p. 469.

67 Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations* (Oxford: Oxford University Press, 2010), p. 34.

68 *Model Status-of-Forces Agreement for Peacekeeping Operations* (*UN* Doc A/45/594, 9 October 1990), section IV, para. 6.

69 *Agreement between the United Nations and the African Union and Government of Sudan concerning the status of the African Union/United Nations Hybrid Operation in Darfur*, http://unamid.unmissions.org/Portals/UNAMID/UNAMID%20SOFA.pdf; *Agreement between the United Nations and the Government of Haiti concerning the status of the United Nations Operation in Haiti*, http://ijdh.org/wordpress/wp-content/uploads/2011/11/4-Status-of-Forces-Agreement-1.pdf (Accessed on 12 August 2014); *Agreement between the Government of Sudan and the United Nations Mission in Sudan,* http://unmis.unmissions.org/Portals/UNMIS/Documents/General/sofa.pdf (accessed on 12 August 2014).

Another source of 'external law' from which obligations for international organisations may arise is international law. This includes both treaty law and customary law. The most obvious sources of treaty law that are applicable to the UN are the treaties that are concluded about the Organisation (e.g. *Convention on the Privileges and Immunities of the United Nations* (General Convention)).[70] The applicability of other treaties to the UN, however, remains uncertain. The UN is not a State and, therefore, is not able to sign, ratify, or accede to treaties that are concluded between States and that do not provide for international organisations to become a party to the treaty. This is currently the case for international human rights treaties and international humanitarian law (IHL) treaties.

In regard to the UN's responsibilities under IHL, the Secretary-General has issued a bulletin through which the UN has agreed to observe the fundamental laws and customs of war.[71] The Secretary-General's 1999 bulletin, *Observance by United Nations Forces of International Humanitarian Law*, commits the UN to conducting its operations 'with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel,' as well as the rules promulgated within the bulletin which at times even exceeded the obligations under IHL.[72] These obligations are now in force whenever UN forces are engaged in armed conflict, including during peacekeeping actions.[73] Therefore, UN peacekeeping forces are prohibited from committing acts of SEA to the extent that these acts are prohibited under IHL. For example, the 1949 Geneva Convention IV protects women from 'any attack[s] on their honour' such as rape, enforced prostitution, and any form of indecent assault.[74] In addition, the 1977 Additional Protocols I and II, which provide protections for victims of international and non-international armed conflict, respectively, considers some acts of SEA to be 'outrages upon personal dignity' and protects women from rape, enforced prostitution, any form of indecent assault, and humiliating or degrading treatment.[75]

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70 *Convention on the Privileges and Immunities of the United Nations,* opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946).

71 Kofi A Annan, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* (UN Doc ST/SGB/1999/13, 6 August 1999).

72 *Ibid,* sections 1 and 3.

73 *Ibid.*

74 *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,* open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

75 These treaties do not used the language of 'SEA' but the acronym SEA will be used in this article for consistency. *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,* open for

It can also be argued that a broad range of prohibitions against SEA are found under international human rights law. For example, article 6 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) obligates State parties to take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women.[76]All instances of SEA against children are also prohibited under the *Convention on the Rights of the Child* (CRC) and its second *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*(OP CRC).[77] Moreover, the general provisions within treaties, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* (CAT), may also be applicable to certain incidences of SEA if, for example, the act also fulfils the elements of torture or of cruel, degrading or inhuman treatment.[78]

Nonetheless, the extent to which the UN is legally bound to uphold the obligations under various human rights treaties is still under debate. The UN has not issued a bulletin that commits the Organisation to the observance of international human rights treaties and, as it stands, international human rights treaties do not provide for the signature or accession of international organisations such as the UN.[79] Hence, the scope of the UN's obligations under various human rights treaties have been a widely debated. Many authors have argued that international human rights law *should* be applicable to the UN and have argued that this is particularly important due to the increasing power of the UN to directly impact on the lives of individuals, such as through its military

signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), article 75(2)(b) and 76; *Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts,* open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), article 4(2)(e).

76 *United Nations Convention on the Elimination of All Forms of Discrimination against Women,* opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), article 6.

77 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Optional Protocol to Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2001).

78 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

79 However, there are three human rights treaties that have been developed that allow for the European Union to become a party to the treaty. These are: the European Convention on Human Rights (ECHR); the Convention on the Rights of Persons with Disabilities (CRPD); and the Convention on Action against Trafficking in Human Beings (CATHB).

operations and administration of territory.[80] However, it has been difficult to establish a clear legal basis for the UN's human rights obligations.[81] Without this clear legal basis, it is hard to argue that the UN can be held legally accountable for the violation of, or the failure to protect, human rights, including the human rights protections related to SEA.

Another form of international law that may be applicable to international organisations is customary international law. As international legal actors, it is logical that customary international law, which is binding on all international legal actors, is also binding on international organisations. This was affirmed in the ICJ's 1980 Advisory Opinion (*Interpretation of Agreement*) in which the Court held that '[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law.'[82] Whilst the Advisory Opinion does not expressly refer to 'customary international law', the phrase 'general rules of international law' has been interpreted as 'being shorthand for customary international law of universal or quasi-universal applicability and for general principles of law.'[83] More recently, the International Criminal Tribunal for Rwanda (ICTR) held in *The Prosecutor v Rwamakuba* that 'the United Nations, as an international subject, is bound to respect rules of customary international law, including those rules which relate to the protection of fundamental human rights.'[84]

Customary international law may include some prohibitions against SEA. The crystallisation of an obligation into a rule of customary international law

80 See, eg, Gabriele Porretto and Sylvain Vité, 'The Application of International Humanitarian Law and Human Rights Law to International Organisations' (Geneva: Research Paper Series No 1, University Centre for International Humanitarian Law, 2006), p. 41; Frédéric Mégret and Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', *Human Rights Quarterly*, vol. 25, no. 2, 2003, pp. 314–342, pp.338–339; Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law*, vol. 95, 2001, pp. 583–606. p. 599.

81 Noëlle Quénivet, 'Binding the United Nations to Human Rights Norms but Way of the Laws of Treaties', *George Washington International Law Review*, vol. 42, 2010, pp. 587–621, p. 588.

82 *Interpretation of Agreement of March 1951 between the WHO and Egypt* (*Advisory Opinion*) [1980] ICJ Rep 73, para. 37.

83 Verdirame, *The UN and Human Rights*, p. 71.

84 *The Prosecutor v Rwamakuba* (*Decision on Appropriate Remedy*) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44C-T, 31 January 2007), para. 48.

occurs when the obligation has fulfilled two criteria: (i) settled State practice; and (ii) *opinio juris*, which is the belief that a practice is undertaken because there is a legal obligation to do so.[85] Different views exist on the extent to which various obligations have crystallised into customary international law. Hence, the provision of a definitive list of customary international law is difficult as '[t]here are no single sources or evidences of [customary international] law; no single set of participants; and no single arenas or institutional arrangements for the creation, invocation, application, change or termination of such law.'[86]

Despite this uncertainty, some obligations have attained the status of *jus cogens* or peremptory norms and, therefore, have been widely accepted as a part of customary international law. The *Vienna Convention on the Law of Treaties* has defined a peremptory norm 'as a norm form which no derogation is permitted.'[87] The best settled examples of *jus cogens* are the prohibitions against the crime of aggression, genocide, crimes against humanity, war crimes, piracy, slavery, and torture.[88] In the case of SEA by UN peacekeeping personnel, the question needs to be asked as to whether any prohibitions against SEA have crystallised into customary international law. For example, some forms of violence against women may indeed be a prohibition, or an emerging prohibition, under customary international law, such as rape and other sexual violence crimes prohibited under international criminal law and international humanitarian law.[89] However, beyond these sexual violence crimes, the link between prohibitions against SEA and customary international law becomes more tenuous. Hence, customary international law may provide some basic

85 *North Sea Continental Shelf* (*FRG v Neth*) (Judgment) [1969] ICJ Rep, para. 77.

86 Jordan J Paust, 'The Significance and Determination of Customary International Human Rights Law: The Complex Nature, Sources and Evidences of Customary Human Rights',*Georgia Journal of International and Comparative Law*, vol. 25, 1995–1996, pp. 147–164, p. 147.

87 *Vienna Convention*, article 53.

88 These examples of *jus cogens* were discussed by the International Law Commission in its Commentaries to the draft articles on the Law of Treaties. See 'Reports of the Commission to the General Assembly' (15 November 1965 – 8 January 1966) [1966] II *Yearbook of the International Law Commission* 187, p. 248. For a summary of the development of jus cogens in international law, see Rafael Nieto-Navia, 'International Peremptory Norms ("jus cogens") and International Humanitarian Law' in Antonio Cassesse and Lal Chand Vohrah (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Leiden, Boston: Martinus Nijhoff Publishers, 2003) pp. 595–640, p. 610.

89 Maria Eriksson, *Defining Rape: Emerging Obligations for States Under International Law?* (Örebro: Örebro University, 2010), pp. 334–336.

prohibitions against SEA but not all prohibitions against of SEA have crystallised into a rule of *jus cogens*.

Lastly, legal responsibilities for international organisation may arise from its private law obligations, such as contractual agreements. This was affirmed in the aforementioned ICJ Advisory Opinion (*Interpretation of Agreement*) which recognised that obligations for an international organisation may arise from agreements to which it is a party.[90] In the case of the UN, its capacity to contract and its responsibility to settle disputes that arise from its contracts is also provided for in the General Convention.[91] This responsibility has been acknowledged in a memorandum issued by the UN Office of Legal Affairs which states that the UN will recognise the legal obligations and liabilities that arise for the Organisation from the legal contracts into which it has entered.[92]

Other liabilities of a private law character may also be applicable to the UN. The liability of the Organisation for tortious acts irrespective of a contractual link is evident in the adoption by the General Assembly of a resolution to limit the liability of the UN for tort claims arising from injuries to third parties in its Headquarters district.[93] The resolution limits the liability of 'any tort action or in respect of any tort claim by any person against the United Nations… [where] the United Nations may be required to indemnify such person… [for claims] arising out of any act or omission, whether accidental or otherwise, in the Headquarters district.'[94] The adoption by the General Assembly of a resolution to limit its liability for tortious acts implicitly acknowledges that the Organisation may indeed be liable for such acts.

A similar resolution has been adopted by the General Assembly to limit the liability of the UN in regard to its peacekeeping operations.[95] This General Assembly resolution was adopted following a report by the Secretary-General which outlined the peacekeeping-related activities for which the UN may be held liable, such as the non-consensual use and occupancy of premises, personal injury, and property loss or damage.[96] The resolution implements several

90 *Interpretation of Agreement* [1980] ICJ Rep 73, pp. 89–90.

91 *Convention on the Privileges and Immunities of the United Nations*,sections 1(a) and 29.

92 'Memorandum to the Controller' [2001] *United Nations Juridical Yearbook* 381, para. 44.

93 *Limitation of Damages in Respect of Acts Occurring within the Headquarters District* (UN Doc A/RES/41/210, 11 December 1986).

94 *Ibid,* para. 1.

95 *Third-Party Liability: Temporal and Financial Limitations* (UN Doc A/RES/52/247, 17 July 1998).

96 However, the report clarifies that liability may only be engaged for operational activities which were under the exclusive command and control of the UN, and that the Organisation would be exempt from liability for property loss and damage that resulted from

temporal and financial limitations on the liability of the Organisation in relation to third-party claims against the Organisation.[97] The resolution also clarifies that this damage must be a result of or attributable to peacekeeping personnel in the performance of their official duties[98] and that the damages were not the result of activities undertaken due to 'operational necessity.'[99] Hence, similar to the resolution regarding the UN Headquarters, a resolution limiting the liability of the UN for its peacekeeping operations implies that the Organisation may in fact be held liable for damage that is caused by its peacekeeping activities, such as acts of SEA committed by its peacekeeping personnel.

4 Codifying Responsibilities: The *Articles on the Responsibility of International Organizations*

The principles on the responsibility of international organisations have recently been compiled in the *Articles on the Responsibility of International Organizations* (ARIO).[100] The final draft of the ARIO was adopted by the International Law Commission (ILC) in July 2011 and forms a part of its work to progressively develop and codify international law.[101] The Commentaries to the ARIO acknowledge the 'limited practice' in this area of law and that the ARIO represents more of a 'progressive development' rather than a 'codification' of international law.[102] Nonetheless, the ARIO proceeds to set out a fairly extensive set of legal responsibilities for international organisations based on the ILC's *Articles on the Responsibility of States for Internationally Wrongful Acts* (ARS).[103] Even though the ARS (and the ARIO) 'do not have the status of treaty

'operational necessity'. See *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters* (UN Doc A/51/389, 20 September 1996), pp. 4–6.

97 *Third-Party Liability: Temporal and Financial Limitations*, para. 5.

98 *Ibid.*

99 *Ibid,* para. 6.

100 *Articles on the Responsibilities of International Organizations*, UN GAOR, 63rd sess, UN Doc A/CN.4/L.778 (30 May 2011), article 2(d) (*'ARIO'*).

101 *Statute of the International Law Commission*, article 1.1.

102 *Draft Articles on the Responsibility of International Organizations, with Commentaries* (30 May 2011), p. 3 (*'ARIO with Commentaries'*).

103 *Ibid.*

law and are not binding on States,'[104] the ARS has been found by the International Criminal Tribunal for the former Yugoslavia (ICTY) to be useful 'as general legal guidance' and that it was acceptable to 'use the principles laid down in the Draft Articles insofar as they may be helpful for determining the issue at hand.'[105] Although the ARIO has received some criticism,[106] it nonetheless constitutes the main source of codified principles on the responsibility of international organisations to date. The ARIO will now be examined and the usefulness of the ARIO for establishing the responsibility of the UN for acts of SEA on its peacekeeping operations will be discussed.

The Scope of the ARIO

The ARIO specifies the scope, definition, and elements of the responsibility of international organisations for internationally wrongful acts. Article 1 states that '[t]he present… articles apply to the international responsibility of an international organization for an internationally wrongful act.'[107] The ARIO is concerned only with responsibilities that arise from international law and not from the internal law of an organisation.[108] The ARIO also does not address responsibility for acts that are *not* prohibited by international law.[109] Therefore, the ARIO may be a useful for addressing the problem of SEA to the extent that SEA is a breach of international law.

For the purposes of the ARIO, an 'international organisation' is defined as 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.'[110] In regard to the applicability of the ARIO to the UN, the Commentaries state that it was

104 *Ibid,* p. 30; *Prosecutor v Nikolić* (*Decision on defence motion challenging the exercise of jurisdiction by the Tribunal*) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No. IT-94-2-PT, 9 October 2002), para. 60.

105 *Ibid.*

106 See, eg, Sienho Yee, '"Member Responsibility" and the ILC Articles on the Responsibility of International Organizations: Some Observations' in Maurizio Raggazi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden, Boston: Martinus Nijhoff, 2013), pp. 325–336; Niels M Blokker, 'Preparing Articles on Responsibility of International Organizations: Does the International Law Commission take International Organizations Seriously? A Mid-Term Review' in Jan Klabbers and Åsa Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Cheltenham: Edward Elgar Publishing, 2011) pp. 313–342.

107 *ARIO*, article 1.

108 *ARIO with Commentaries*, pp. 3–4.

109 *Ibid,* p. 4.

110 *ARIO*, article 2(a).

'not intended to exclude… the United Nations.'[111] Hence, the Commentaries indirectly affirm that the UN may be held responsible for internationally wrongful acts under the ARIO.

Article 66 also states that the provisions within the ARIO are to be 'without prejudice to any question of the individual responsibility under international law.'[112] Hence, whilst the ARIO focuses on the responsibility of international organisations, individual responsibility may exist alongside organisational responsibility.[113] This means that for allegations of SEA, the liability and prosecution of individual perpetrators may exist parallel to and independently from the organisational responsibility of the UN.

The Elements of an Internationally Wrongful Act

The elements of an internationally wrongful act are set out in article 4 which provides that:

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

It is important to note that 'conduct' includes both actions and omissions. The inclusion of omissions has been supported by the Special Rapporteur on the Responsibility of International Organisations, Giorgio Gaja, who has stated that '[c]learly, omissions are wrongful when an international organization is required to take some positive action and fails to do so… It would in any event be strange to assume that international organizations could not possess obligations to take positive actions.'[114] In his report, the Special Rapporteur refers to the failure of the UN to prevent genocide in Rwanda as an example of an omission.[115] Hence, the failure of an international organisation to take positive actions, such as to adequately prevent acts of SEA that are prohibited under international law, may amount to an omission that engages the responsibility of the organisation.

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111 *ARIO with Commentaries*, p. 104.

112 *ARIO*, article 66.

113 *ARIO with Commentaries*, p. 14 and 104.

114 Giorgio Gaja, Special Rapporteur, *Third Report on the Responsibility of International Organisations* (UN Doc A/CN.4/553, 13 May 2005), paras. 8–10.

115 *Ibid,* p. 4 para. 10.

The First Element: Attribution

The first element in article 4 states that an internationally wrongful act requires the conduct to be attributable to the international organisation under international law. Article 6 provides that the conduct of both an 'organ' or an 'agent' may be 'considered an act of that organization under international law.'[116] The definition of 'organ' is 'any person or entity which has that status in accordance with the rules of the organization.'[117] Peacekeeping operations, which have the status of a subsidiary organ of the UN, would fall within this definition.[118] The definition of 'agent' is 'an official or other person or entity… who is charged by the organization with carrying out, or helping to carry out, one of its functions.'[119] The Commentaries state that this definition is based on the ICJ's Advisory Opinion in the *Reparation* case in which '[t]he Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts.'[120] Hence, the definition of 'agent' within the ARIO is quite broad and would certainly encompass the civilian component of UN peacekeeping operations, such as staff, volunteers, civilian police, and experts on mission, who are carrying out the functions of the organisation.

Pursuant to article 7, the conduct of an organ *of a State* that is *placed at the disposal of* an international organisation may also be attributed to the organisation 'if the organization exercises effective control over that conduct.'[121] This may be the case for the military forces of Member States that have been placed at the disposal of the UN for deployment on its peacekeeping operations. Since the organ in article 7 retains a link with another international legal person (i.e. the State), it is necessary to establish the 'effective control' of the international organisation over the organ before the attribution of conduct can be made to the organisation instead of to the State.[122]

116 *ARIO*, article 6.

117 *Ibid,* article 2(c).

118 *Subsidiary Organs -United Nations Security Council*, http://www.un.org/en/sc/subsidiary (accessed on 12 August 2014).

119 *ARIO,* article 2(d).

120 *Reparations for Injuries Suffered in the Service of the United Nations*, p.177; *ARIO with Commentaries*, p. 12.

121 *ARIO,* article 7.

122 Verdirame, *The UN and Human Rights*, pp. 102–103.

The determination of 'effective control' continues to be a controversial subject, as demonstrated by the recent jurisprudence of the European Court of Human Rights (ECtHR). For example, in the joined cases of *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*, the Court considered, respectively: (i) the matter of the death of Gadaf Behrami and the serious injury of Bekim Behrami due to the explosion of undetonated cluster bombs left over from the Kosovo War; and (ii) the legality of the detention of Ruzhdi Saramati by the Kosovo Force (KFOR). In this matter, the ECtHR found that it was possible to attribute the conduct of peacekeeping forces to the UN.[123] The ECtHR held that the conduct of the UN Interim Administration in Kosovo (UNMIK) and KFOR were attributable to the UN because the UN Security Council (UNSC) continued to retain 'ultimate authority and control' over UNMIK and KFOR.[124] In regard to KFOR, the following factors demonstrated that authority and control remained with the UNSC: Chapter VII of the Charter allowed the UNSC to delegate its security powers to KFOR, which it did through the adoption of UNSC Resolution 1244; the delegation of power was prior and explicit; the resolution sufficiently defined limits and provided a fixed mandate with adequate precision in regard to objectives, roles, and responsibilities; and the military leadership was required to report to the UNSC.[125] Hence, the ECtHR concluded that 'the UNSC was to remain actively seized of the matter' and retained sufficient authority and control to have the conduct of the peacekeeping operation attributed to the UN.[126] In regard to UNMIK, the ECtHR concluded that as a subsidiary organ of the UN, the actions of the organ were also 'in principle, "attributable" to the UN.'[127]

Although the decision in *Behrami* and *Saramati* has been followed in a number of subsequent cases,[128] it has also been subject to intense criticism. These criticisms have included: that the ECtHR failed to apply the test of

123 *Behrami v France and Saramati v France, Germany and Norway* (European Court of Human Rights, Application Nos 71412/01 and 78166/01, 2 May 2007).

124 *Ibid.*

125 *Ibid,* para. 58.

126 *Ibid.*

127 *Ibid,* para. 62–63.

128 See *Berić and Others v Bosnia and Herzegovina* (European Court of Human Rights, Application Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1211/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, 16 October 2007); *Gajic v Germany* (European Court of Human Rights, Application No 31446/02, 28 August 2007); *Kalinić and Bilbija v Bosnia and Herzegovina* (European Court of Human Rights, Application Nos 45541/04 and 16587/07, 13 May 2008).

'effective control' set out by in article 7 of the ARIO, opting instead for 'ultimate authority and control;'[129] that the Court incorrectly weighted the exercise of 'territorial control' over the exercise of 'factual control' in regard to the impugned conduct;[130] that the Court did not consider the possibility of dual attribution to both the State and the UN;[131] and that the Court should have focused on the question of whether the impugned act can be attributed to the State rather than the question of whether the conduct can be attributed to the UN.[132] This last criticism is particularly pertinent as the ECtHR does not have jurisdiction over the UN but only has jurisdiction over its Member States. Despite these criticisms, *Behrami* and *Saramati* continues to be one of the principal cases on the attribution of the conduct of peacekeeping forces to the UN.

In comparison, different findings on the attribution of the conduct of peacekeeping forces have been made by domestic courts. In a recent judgment by the Supreme Court of the Netherlands, *Netherlands v Nuhanović*, the Supreme Court affirmed that it was the Dutch State that exercised 'effective control' over the Dutch battalion of UN peacekeepers ('Dutchbat') in regard to the impugned act.[133] This matter concerned the deaths of three men during the Srebrenica genocide after being turned away from a 'safe area' under Dutchbat control. Pursuant to article 8 of the ARS, the Court found that the Dutch State had 'factual control over specific conduct.'[134] The Supreme Court held that the context in which the disputed conduct took place differed from normal operations because the UN mission had failed and a joint decision had been made by the UN and the Dutch government to evacuate Dutchbat and the refugees in Srebrenica.[135] The Court found that during this time, both the UN and the Dutch government had control over Dutchbat and were closely involved in the

129 Giorgio Gaja, *Second Report on the Responsibility of International Organizations,* (UN Doc A/CN.4/541, 2 April 2004), para 26.

130 Roisin Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility Under International Law* (Melbourne: PhD Thesis, The University of Melbourne, 2012), pp. 233–234.

131 Verdirame, *The UN and Human Rights*, pp. 116–117; Gabrielle Simm, 'International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers', *Journal of Conflict & Security Law*, vol. 16, no. 3, 2011, pp. 473–506, pp. 494–495.

132 Verdirame, *The UN and Human Rights*, pp. 110–113.

133 *Netherlands v Nuhanović* [Supreme Court of The Netherlands] Case No 12/03324, 6 September 2013, para. 3.13.

134 *Ibid,* para. 3.11.3.

135 *Ibid,* para.3.12.2.

evacuation process.[136] Despite finding that the State was responsible for the impugned act, the Supreme Court also affirmed the possibility of dual attribution, thereby 'leaving open' the possibility that the UN also had effective control over the Dutchbat forces at the time.[137]

Hence, the attribution of the conduct of peacekeeping forces continues to be an unsettled area of law. In September 2013, the Netherlands Supreme Court even referred to this as an 'unwritten area of international law.'[138] This uncertainty has been acknowledged by Guglielmo Verdirame who has observed that, 'there can be no hard and fast rule on command and control of UN peacekeeping missions, and each instance of conduct can be attributed only on the basis of careful examination of the facts, including an assessment of command and control structures both as conceived and as implemented.'[139] Despite the disputed case law, the principle remains, as codified in article 7 of the ARIO, that the conduct of an organ of a State that is placed at the disposal of an international organisation *can* be attributed to the organisation, if certain conditions are met. Hence, in principle, the conduct of a State's military forces which are placed at the disposal of the UN for its peacekeeping operations may be attributed to the UN if effective control over that conduct can be demonstrated.

Assuming that the conduct of a particular peacekeeping operation is attributable to the UN, article 6(2) further states that this conduct must be 'in the performance of functions of that organ or agent.' This is clarified in the Commentaries as referring to conduct that is undertaken in the course of exercising functions given to the organ or agent by the organisation. It does not include acts undertaken in a private capacity.[140]

In regard to peacekeeping operations, a similar position distinguishing between 'official' and 'private' acts in the attribution of responsibility to the UN has been put forth by the UN Office of Legal Affairs. In a memorandum, the Office of Legal Affairs has stated that:

> United Nations policy in regard to off-duty acts of the members of peacekeeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts… We consider the primary factor in determining an 'off-duty' situation to be whether the member of a peacekeeping mission was acting in a

136 *Ibid.*

137 *Ibid,* para.3.11.2.

138 *Ibid,* para.3.7.

139 Verdirame, *The UN and Human Rights*, p. 201.

140 *ARIO with Commentaries*, p. 18.

> nonofficial/non-operational capacity when the incident occurred... [A] member of the Force on a state of alert may [also] assume an off duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated 'state-of-alert' period.[141]

The exclusion of acts undertaken in a private capacity may be an obstacle to establishing the organisational responsibility of the UN for acts of SEA. Committing acts of SEA would never be a part the official duties of UN peacekeeping personnel. However, the requirement of only 'official' acts being attributable to Organisation may not be as strict as the discussion thus far implies.

First, the ARIO is intentionally broad in what may constitute 'the performance of functions' of the organisation.[142] The Commentaries state that the ARIO 'intended to leave the possibility open that, in exceptional circumstances, functions may be considered as given to an organ or agent even if this could not be said to be based on the rules of the organization.'[143] This was affirmed by the Special Rapporteur who has stated that 'when practice develops in a way that is not consistent with the constituent instrument, the organization should not necessarily be exempt from responsibility.'[144] Hence, conduct such as SEA may not be provided for in the rules of the Organisation but this does not necessarily exempt the UN from responsibility. This argument may be even stronger for conduct that is systemic, widespread, and ongoing, as acts of SEA on by UN peacekeeping personnel appear to be.

The Commentaries also state that the mere fact that the conduct was undertaken in an off-duty capacity does not necessarily exclude the responsibility of the international organisation if the conduct breached an obligation of prevention that may exist under international law.[145] Therefore, the UN may still bear responsibility for the conduct of its peacekeeping personnel if the 'off-duty' misconduct breached the UN's positive obligations to prevent this misconduct.[146] The example referred to in the Commentaries is the case of the tortious acts committed by members of the UN Emergency Force (UNEF)

141 *ARIO with Commentaries*, pp. 28–29; 'Memorandum to the Director, Office for Field Operational and External Support Activities' [1986] *United Nations Juridical Yearbook* 300.

142 *ARIO with Commentaries*, pp. 17–18.

143 *Ibid,* p. 19.

144 Gaja, *Second Report on the Responsibility of International Organizations*, para. 24.

145 *ARIO with Commentaries*, p. 29.

146 Verdirame, *The UN and Human Rights*, pp. 126.

during their off-duty period.[147] In this matter, the UN Office of Legal Affairs advised that 'there may well be situations involving actions by Force members off duty which the United Nations could appropriately recognise as engaging its responsibility.'[148] Following the advice of the UN Office of Legal Affairs, the UNEF Claims Review Board proceeded to settle claims that had been lodged against the Organisation for damages caused by these tortious acts.[149]

Similarly, it may be argued that the responsibility of the UN may be engaged for breaching an obligation to prevent acts of SEA. This obligation may be found in: the mandates of some peacekeeping operations which expressly provide that one of the functions of the operation is to 'protect… civilians from violations of international humanitarian law and human rights abuses, including all forms of sexual and gender-based violence;'[150] the Charter which provides that the UN was established to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women;'[151] or in the obligations found under international human rights law and IHL, as discussed earlier. Therefore, it is not a clear-cut case that the UN bears no responsibility for its peacekeeping personnel simply because they were 'off-duty' at the time of the misconduct. Instead, this will depend on the nature of the misconduct, the circumstances of the misconduct, any failures to prevent the misconduct, and the responsibilities and functions of the particular peacekeeping operation.

In addition, in regard to UN military forces over which the UN has command and control, it has also been argued that the UN should follow the more stringent *lex specialis* on attribution within IHL.[152] Pursuant to article 91 of Additional Protocol I of the Geneva Conventions and article 3 of the Hague Conventions (IV), States 'shall be responsible for *all* acts committed by persons forming part of its armed forces.'[153] Hence, for UN peacekeeping forces operating under the same conditions, the UN should also be responsible for *all* acts

147 International Law Commission, *Responsibility of International Organizations: Comments and Observations received from International Organizations*, (UN Doc A/CN.4/637/Add.1, 17 February 2011), p. 15.

148 Quoted in *ARIO with Commentaries*, p. 9. Original quote reference given within the *ARIO with Commentaries* is: 'This passage of an unpublished opinion was quoted in the written comment of the Secretariat of the United Nations, A/CN.4/637/Add.1, sect. II.B.4, para. 4.'

149 International Law Commission, *Responsibility of International Organizations*, p. 15.

150 SC RES 1925, *UN* SCOR (UN Doc S/RES/1925, 28 May 2010), article 12(c).

151 *Charter of the United Nations,* preamble.

152 Verdirame, *The* UN *and Human Rights*, p. 127; Marten Zwanenburg, *Accountability of Peace Support Operations* (Leiden, Boston: Martinus Nijhoff Publishers, 2005), p. 84.

153 *Protocol* (*I*), article 91; *Convention* (*IV*), article 3 (emphasis added).

committed by its armed forces which would include acts committed in both an official and a private capacity. This would, thereby, include all acts of SEA regardless of their status as 'private' acts.

Second, article 8 of the ARIO provides that the responsibility of international organisations may be engaged for the *ultra vires* conduct of its agents and organs. Pursuant to article 8, '[t]he conduct of an organ or agent of an international organization shall be considered an act of that organization… if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.'[154] The Commentaries clarify that *ultra vires* conduct includes both conduct that is within the competence of the organisation but which exceeds the authority of the agent, and conduct that exceeds the competence of the organisation itself.[155]

The definitive formulation of *ultra vires* was developed by the French-Mexican Claims Commission in the case of *Caire* in which the actions of two Mexican officers caused the death of a French national. In *Caire,* it was held that responsibility may be attributed to the State if the officers 'acted under cover of their status as officers and used means placed at their disposal on account of that status.'[156] This formulation has been repeated in the ARS Commentaries which provides that the difference between private conduct and *ultra vires* conduct is that, in the latter, the organ or agent was 'acting in the name of the State.'[157] By extension, this could arguably include agents of an international organisation if the agents were acting in the name of the organisation.

In regard to the UN, the ARIO Commentaries refer to the ICJ's 1962 Advisory Opinion (*Certain Expenses of the United Nations*) in which the Court held that it may be possible to attribute the act of an agent of the UN to the Organisation if the act constituted *ultra vires* conduct.[158] Conversely, the ICJ's 1999 Advisory Opinion (*Difference Relating to Immunity from Legal Process*) cautioned that 'all agents of the United Nations, in whatever official capacity they act, must

154 *ARIO,* article 8.

155 *ARIO with Commentaries*, p. 26.

156 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN GAOR, 53rd sess (2001) 46 ('*ARS with Commentaries*'). Reference to the original case within the *ARS with Commentaries* is: 'UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929).'

157 *Ibid,* p. 42.

158 *ARIO with Commentaries*, p. 27; *Certain Expenses of the United Nations* (*Article 17, Paragraph 2 of the Charter*) (*Advisory Opinion*) [1962] ICJ Rep 151, p. 168.

take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.'[159]

It is possible that some instances of SEA by UN peacekeeping personnel may constitute *ultra vires* conduct. This may be the case if the act was perpetrated whilst the UN personnel member was acting under the cover of his peacekeeping authority and used means that were at his disposal because of his status.[160] For example, if a UN personnel member were to withhold services, protection, or aid from a beneficiary unless the beneficiary satisfied an express or implied request for sexual favours, this may constitute *ultra vires* conduct. In such cases, it may be argued that the UN personnel member was acting within his official function (e.g. the provision of services or aid) but exceeded his authority by asking the beneficiary for more than was required to receive the service provision or aid. Another example, as discussed earlier, is if a UN peacekeeper were to approach a child under the cover of being a UN peacekeeper and, after using his official status to gain the trust of the child, perpetrated acts of SEA against the child.

Third, the ARIO provides that conduct may be attributed to an international organisation if the organisation adopts the conduct as its own. Article 9 states that '[c]onduct which is not attributable to an international organization under articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.'[161] An organisation may have a range of motivations for accepting responsibility for a particular conduct. For example, the organisation may wish to uphold its own values and principles and to maintain its legitimacy, it may be trying to avoid condemnation from other international actors, or it may simply desire to do 'the right thing'. These reasons may be even more compelling for the UN considering the strong principles upon which the Organisation was founded and the damage that acts of SEA on its peacekeeping operations have caused.[162] The ARIO thus enables an international organisation to accept responsibility for a particular conduct even if that conduct does not fall neatly within the scope of an internationally wrongful act.

159 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (*Advisory Opinion*) [1999] ICJ Rep 62, 89, para. 66; *ARIO with Commentaries*, p. 28.

160 *ARS with Commentaries*, p. 46.

161 *ARIO,* article 9.

162 *Charter of the United Nations,* preamble.

Therefore, there are several ways in which acts of SEA may be attributed to the UN despite the conduct not being a part of the performance of the official functions of UN peacekeeping personnel. First, a wider reading of 'function' may be taken which could include the duty to protect the civilian population from harm. Hence, acts of SEA may be a violation of this wider function of peacekeeping operations. It may also be possible to hold the UN responsible for failing in the positive obligations it has to prevent acts of SEA. Second, it may be questioned whether a particular case of SEA was *ultra vires* conduct, where the agent acted under the cover of his status but in which the conduct exceeded the authority of the agent. Third, even if acts of SEA do not fall within the conduct provided for in articles 6 to 8, the UN may acknowledge and adopt the conduct as its own and accept responsibility for the conduct.

The Second Element: The Breach of an International Obligation

Article 4 sets out the second element for an internationally wrongful act which is that the conduct 'constitutes a breach of an international obligation of that organization.'[163] The Commentaries clarify that 'the term "international obligation" means an obligation under international law and that this includes obligations established by customary international law, by a treaty, and by a general principle applicable within the international legal order.'[164] Article 10(2) states that this may also include 'the breach of an international obligation that may arise for an international organization towards its members under the rules of the organization.'[165] Therefore, the demarcation between 'international law' and 'not international law' is important for determining the scope of the conduct that may or may not engage the responsibility of an international organisation under the ARIO.[166]

As discussed, certain acts of SEA are prohibited under IHL and the Secretary-General has promulgated a bulletin committing the Organisation to the observance of IHL. Hence, a violation of IHL, including the provisions prohibiting specific acts of SEA, would be a breach of the UN's international obligations.

As also discussed, it may be argued that acts of SEA are a violation of international human rights law, such as CEDAW or the CRC and OP CRC. If acts of SEA by UN peacekeeping personnel are indeed violations of international human rights law, then these acts would be a breach of an international obligation. The question remains, however, whether the violation of international

163 *ARIO*, article 4(b).

164 *ARIO with Commentaries*, p. 31.

165 *ARIO,* article 10(2).

166 Verdirame, *The UN and Human Rights*, p. 98.

human rights law is also a breach of an international obligation *of the organisation*. Considering that international human rights treaties are only binding upon State parties, and that the UN is not a party to any human rights treaty, does the UN actually have any obligations under international human rights law? This issue remains unresolved among legal scholars.

The UN may also have international obligations arising out of its peacekeeping mandates, if the peacekeeping mandate constitutes 'international law'. The issue of whether peacekeeping mandates constitute international law has been considered by Guglielmo Verdirame. In regard to peacekeeping mandates that are Security Council resolutions, Verdirame has argued that the legally binding nature of Security Council resolutions means that these mandates constitute international law.[167] Therefore, the breach of a peacekeeping mandate based on a Security Council resolution would be an internationally wrongful act.[168] It follows, then, that if the duty to protect the local population from SEA was a part of that peacekeeping mandate, then committing acts of SEA would be a breach of an international obligation.

In regard to mandates that are composed of internal administrative regulations, Verdirame has stated that the conclusion is less clear. Referring to the ICJ's 2010 Advisory Opinion (*Declaration of the Independence of Kosovo*), Verdirame notes that in this matter the Court found that there may be some internal regulations that possess international law characteristics, such as the regulations adopted by the Special Representative on behalf of UNMIK.[169] Hence, a closer examination of any internal regulations pertaining to UN peacekeeping operations is required to determine whether the regulation may be characterised as international law. If the regulation is merely internal, the ARIO states that any obligations that arise are only 'towards its members.'[170] In this case, breaches of these regulations would only constitute a breach of an obligation towards the UN's Member States and not towards third-parties, such as survivors of SEA.

Furthermore, it is important to determine to whom the international obligation is owed. This is addressed in article 33 of the ARIO which provides that international obligations 'may be owed to one or more States, to one or more other organizations, or to the international community as a whole.'[171] The ARIO

167 *Ibid.*

168 *Ibid.*

169 *Ibid,* p. 99; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (*Advisory Opinion*) [2010] ICJ General List No 141.

170 *ARIO,* article 10(12).

171 *Ibid,* article 3.

also states that the provisions within it are 'without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization.'[172] However, injured or affected individuals do not fall within the scope of legal actors covered by the ARIO. In fact, the Commentaries provide the explicit example of 'breaches committed by peacekeeping forces and affecting individuals' as being 'not covered by the present… articles.'[173] This may be an insurmountable obstacle to applying the ARIO to the issue of SEA if the aim is to seek organisational responsibility for the harm committed against individual victims. An alternative, although more convoluted and laborious approach, may be for the State of an individual to claim the injury towards its citizen as an injury towards itself and for the State to then invoke the responsibility of the UN. However, this raises many legal, political, and practical challenges such as the lack of legal precedent, the motivation of a State to take such action, and the often precarious situation of victims who, for practical purposes, may not have a State to turn to for their protection, such as refugees or members of a persecuted minority. Therefore, the limitations within article 33 may constitute the main obstacle for victims of SEA to be able to establish the legal responsibility of the UN through the framework of the ARIO.

In sum, the ARIO represents a 'progressive development'[174] of the law on the responsibilities of international organisations for internationally wrongful acts. However, as an area of law that is not yet settled, the law on the responsibility of international organisations remains subject to varying interpretations and applications. Hence, the ARIO has been criticised for producing 'a highly heterogeneous and disparate concept[ion]'[175] of how and when a particular conduct may engage the responsibilities of an international organisation. This uncertainty is evident in the application of the ARIO to acts of SEA committed during peacekeeping operations where it is unclear if the act should be conceptualised as a private or off-duty act, as connected to the broader functions of the operation, as *ultra vires*, or as an act that may or should be adopted by the Organisation as its own conduct. Furthermore, certain provisions, such as the scope of to whom the obligations may be owed, limit the applicability of

172 *Ibid,* article 50.

173 *ARIO with Commentaries*, p. 59.

174 *Ibid,* p. 2.

175 Jean d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (Amsterdam: Legal Studies Research Paper No 2012–95, Amsterdam Law School, 2012), p. 10.

the ARIO to the issue of SEA. Regardless of these uncertainties, however, the general principle of the ARIO – that international organisations *should* be held responsible for internationally wrongful acts – is still important and contributes to the development of the law on the responsibilities of international organisations.

5 Conclusion

Undeniably, acts of SEA by UN peacekeeping personnel have caused pain and suffering to individual victims, their families, and their communities. Whilst, in principle, many arguments may be made for the UN's responsibility for these wrongful acts, in a strict legal sense, the responsibility of the UN is much harder to establish.

This article has discussed how the international legal personality of the UN has endowed the Organisation with certain capacities, rights, and responsibilities. These responsibilities may be found in the Organisation's internal law, in domestic law, and in international law. However, this article has also found that the exact scope of these legal responsibilities, such as those within the ARIO, is still a developing area of law and there is yet to be any clear authority on precisely how, when, and for what acts the UN may be held responsible. Hence, this creates difficulties in being able to establish the legal responsibility of the UN for acts of SEA committed on its peacekeeping operations.

Whilst the examination of the theoretical and legal principles underpinning the responsibilities of international organisations has been important, survivors of SEA also need a practical and effective avenue through which to hold the UN to account for the violations that they have suffered. The challenge that now confronts the international community is to find or establish an effective, impartial, and accessible process through which survivors of SEA may be able to obtain a sense of justice and reparation. The prohibitions against SEA under the UN's internal law, domestic law, and international law will need to underpin any attempts to establish the legal responsibilities of the UN, and the opportunities and obstacles contained in the ARIO will need to be addressed in any solutions that are proposed. This is the challenge that the international community now needs to face, as it is, indeed, a perversion of global justice for the world's most powerful international organisation to escape responsibility for the exploitation and abuse of some of the world's most vulnerable persons.