SEXUAL MISCONDUCT AND THE UN PEACEKEEPING FORCES: A STUDY INTO THE EFFECTIVE TEST FOR THE ATTRIBUTION OF CONDUCT OF INTERNATIONAL ORGANIZATIONS

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ABSTRACT

Setting the focal point around the International Law Commission's Draft Articles on the Responsibility of International Organizations (DARIO) and how the conduct of state organs put at the disposal of international organizations can be attributed under the high threshold of the "effective control" test stipulated in Article 7 thereof, this article addresses the principle of Responsibility of International organisations under international law. This poses issues of cognition: Could the UN be held accountable for the UN peacekeeping forces' unlawful actions? The question is all the more pressing in light of the multiple allegations of sexual misconduct and exploitation brought against UN Peacekeeping forces in East Timor, Liberia, Sierra Leone, South Sudan, Cambodia, Haiti, the Central African Republic, Democratic Republic of Congo, and Bosnia and Herzegovina, among others. Notwithstanding the severity of the situation, both the UN and the troop-contributing states have been slow to respond and resolve the crisis, thwarting the victims' entitlement to redress and reparation. It was only in 2005 that the Zeid Report to eliminate sexual exploitation and Abuse in the Peacekeeping Forces of the UN was published. Previously, the UN had dealt with these matters privately on a case-to-case basis with the countries whose peacekeeping forces had been accused of such wrongdoing. This article acknowledges that because of the disparate players on the ground, assignment of Responsibility in multilateral operations is difficult to achieve, and this aspect, combined with the host countries' inability to speak for their citizens, has created an accountability gap that will be difficult to close. To this end, after laying the groundwork for the comprehensive literature on the legal framework for the protection of victims of sexual assault by UN peacekeepers, this article delves into the related judicial decisions including the ICJ judgements in the Military and Paramilitary Activities in and Against Nicaragua, Armed Activities on the Territory of the Congo, and Bosnian

Genocide to assess the degree of the UN's control over its peacekeeping forces to determine the attribution of conduct. In its concluding statement, this article argues that dual attribution of the same conduct to the UN and the contributing state may be allowed where it is unclear if the national contingent was performing functions on behalf of the sending state or the organization. 'Extent' of control over the peacekeeping forces can serve as a determinant for the attribution of responsibility for the wrongful conduct.

Keywords: sexual exploitation and abuse, international institutions, UN Peacekeeping Forces, Draft Articles on the responsibility of international organizations, attribution of conduct, ICJ

I. INTRODUCTION

One of the most contentious issues of international law has long been about Responsibility. The ambiguities in the word itself are one of the problems that plague any treatment of responsibility, whether within or outside of the law. The term "*responsibility*" has a plethora of interpretations, each of which plays a unique role in legal and moral reasoning. International Responsibility is often inextricably linked with adherence to international law and the proper functioning of the International legal system.

The International Law Commission (ILC), a subsidiary organ of the United Nations General Assembly, played a critical role in the codification and progressive development of the law of International Responsibility. The discourse concerning Responsibility has particularly heated up since the drafting of the International Law Commission's (ILC) Articles of State Responsibility for Internationally Wrongful Acts (ARS)[1] in 2001 and the Draft Articles on the Responsibility of International Organizations (DARIO)[2] in 2011, which were subsequently adopted by the United Nations General Assembly resolutions 56/83[3] and 66/100[4].

Concomitantly, the intermingling of sovereign states and International Organizations (IOs) in situations where these result in internationally wrongful actions has received considerable

[1]International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chp.IV.E.1 (Nov 2001).
[2] International Law Commission, *Draft Articles on the Responsibility of International Organizations*, UN Doc A/CN.4/L.778 (June 3, 2011).
[3] UN General Assembly, *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, GAOR, UN Doc A/RES/56/83 (Jan 28, 2002) and corrected by UN Doc A/56/49 (Vol. I) /Corr.4.
[4] UN General Assembly, *Responsibility of International Organizations*, GA Res 66/100, GAOR, UN Doc A/RES/66/100 (Feb 27, 2012).

attention at the global level.

Wrongdoings on a global scale are broadly made up of two components:

(a) *the attribution to a State/IO of a course of action that;*

(b) *results in breach of an international obligation of that State or International Organization.*

A. *Responsibility, Rules Of Attribution And The International Law Commission's Draft Articles on Responsibility*

The element of attribution, in particular, has been extensively discussed in the scholarly literature. It is also the main concern of this paper. The Rules of Attribution deal with a well-known legal issue, i.e. states and IOs are legal individuals or corporate bodies. Since they don't take on a physical form, they can't act independently.

As per Hans Kelsen's pure theory of Law, "*The idea of a State or an IO as an acting person is not a reality but an auxiliary construction of legal thinking*."[5]

Human beings, or people of flesh and blood, instead behave on their behalf. As a result, attribution laws have become a logical requirement. Under International law, attribution of conduct determines if a person's act or omission is considered the act or omission of a State and/or an IO.

Indeed, as argued by Christiane Ahlborn, '*attribution of conduct to corporate actors is crucial for their very existence*'.[6]

The International Law Commission (ILC) sought to codify the laws of attribution as part of its project to codify the law of international accountability. The Articles of State Responsibility for Internationally Wrongful Acts (ARS) have received widespread acclaim from the international community. They are regarded as "*in whole or in large part an accurate codification of the customary International law of State Responsibility*," despite the fact that

[5] Hans Kelsen, *Pure Theory of Law* 292 (Lawbook Exchange ltd., New Jersey, 2nd edn., 1967).
[6]Christiane Ahlborn, "To Share or Not to Share? The Allocation of Responsibility between International Organizations and Their Member States" 88 *Die Friedens-Warte* 48 (2013).

they are not formally binding.[7]

The Draft Articles on Responsibility of International Organizations (DARIO) elicited a more mixed reaction. Many critics have chastised the ILC for assembling the DARIO in a copy-paste manner, drawing clear parallels from the ARS. While some Critics contend that this is inappropriate since "*International Organisations are unquestionably not States*,"[8] there are others who have hailed the adoption of the DARIO as a ground-breaking initiative towards the potential growth of Public International law, as well as international affairs and governance. International Organizations' status as subjects of international law were strengthened as the law of International Responsibility was codified, developed and established. DARIO has the potential to elevate the International Organization's International Legal Personality to previously unheard-of levels, particularly when compared to the supreme international actor, the State.

The substances of rules of attribution, which are integrated into the very definition of a legal person, are a matter of International legal concern. The attribution rules in the Articles of State Responsibility are a precise codification of Customary International law on State Responsibility. The Customary rules on the attribution of International Organizations, on the other hand, could be missing due to a lack of consistent practice at the global level.

On one hand, the above-mentioned ILC Draft Articles codify pre-existing rules of International customary law, and on the other, they process new rules regarding topics that are not yet governed by international law. International responsibility, we might claim, serves a dual purpose. First and foremost, states and international organisations must compensate victims for the harm they cause by their wrongful acts; second, responsibility serves to discourage wrongful conduct and encourage subjects of international law to meet their international obligations.[9]

Under International law, rules of attribution specifically deal with conduct. According to Article 2 of the Articles of State Responsibility for Internationally Wrongful Acts (ARS) and

[7] James Crawford, *State Responsibility: The General Part* 43 (Cambridge University Press, Cambridge, 1st edn., 2013).

[8] Alain Pellet, "International Organizations Are Definitively Not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations", in Maurizio Ragazzi (eds), *Responsibility of International Organizations: Essays in memory of Sir Ian Brownlie* 41 (Martinus Nijhoff Publishers, 2013).

[9] Emmanouella Doussis, *United Nations - International Responsibility and Peace Operations* 8 (Thessaloniki: Sakkoulas, Athens, 2008).

Article 4 of the Draft Articles on the Responsibility of International Organizations, "*conduct*" refers to "*both acts and omissions.*"

Attribution chains in international law can be perplexing, and how organisations become bound by international law is far from straightforward. Without a specified basis of accountability and a specific and expansive set of International legal obligations, it becomes difficult to hold organisations responsible for their acts or omissions under the International Legal framework. While there is a wealth of literature on International Organizations' accountability for their acts, there is a scarcity of relevant legal literature on the concept of "*omission*" in the law of international responsibility, and discussions in the International Law Commission when planning various sets of articles on responsibility are neither extensive nor comprehensive.

Since attribution rules deal with conduct, the questions related to when should subjects of International Law accept responsibility for the acts of others often arise. This inquisition has been addressed in this paper, particularly in the context of UN Peacekeeping forces.

Despite the UN's efforts, news of UN peacekeepers committing crimes in the countries where they are stationed continues to circulate throughout the world. One reason is that the responsibility of troop-contributing states for the activities of their peacekeepers is not properly charted out, as is the UN's threshold of responsibility as an International Organization for the behaviour of its agents. Before delving into the merits of the attribution dilemma, a few preliminary estimations must be chalked out in order to explain and restrict the reach of the present study.

This paper has made an attempt to tackle the issue of UN peacekeeping forces' accountability, especially in light of numerous allegations of sexual misconduct and abuse brought against them in East Timor, Liberia, Sierra Leone, South Sudan, Cambodia, Haiti, the Central African Republic, the Democratic Republic of Congo, and Bosnia and Herzegovina, among other places.

II. THE UN PEACEKEEPING FORCES AND THE ATTRIBUTION OF CONDUCT: NORMATIVE IMPLICATIONS

The use of domestic courts to seek redress and reparation for damages sustained during multinational peacekeeping operations is not a new phenomenon in recent years. The House of

Lords was asked in 1969 to decide whether the United Kingdom had to pay compensation for acts committed by British forces participating in the UN Peacekeeping Forces in Cyprus (UNFICYP).[10] A decade later, the Oberlandesgericht Wien had to decide on a similar claim brought against Austria for the actions of an Austrian Contingent member involved in the UN Disengagement Observer Force.[11]

However, there has been a substantial rise in the number of lawsuits filed in domestic courts in the last decade including claims for compensation for damage caused by national contingents deployed in international peacekeeping operations. This situation is likely due to the increased prominence of international organisations, especially the United Nations, in the field of maintaining international peace and security after 1990. The UN's expanding scope of activities in the last two decades may explain the increased number of cases that raise questions about the organization's or states' responsibility in peacekeeping operations. Simultaneously, there is a growing understanding of the need to devise methods for making international organisations more accountable.

Reparation claims are often made explicitly against the organization itself. For example, several lawsuits were filed in a US court against the UN, alleging that it was responsible for a cholera outbreak that broke out in Haiti in 2010 as a result of the involvement of Nepalese peacekeepers who were part of the United Nations Stabilization Mission in Haiti (MINUSTAH). However, in the vast majority of cases, such allegations are made against troop-contributing states, with the presumption that such states will be held liable for the actions of their troops when participating in a multinational peacekeeping mission.

It's simple to understand why these types of cases are typically filed against the troop-contributing state rather than the organization. As a series of recent cases have demonstrated, international organisations enjoy extensive immunity in domestic courts. Since International Organizations are not typically parties to human rights treaties, individuals cannot file lawsuits against them before international human rights tribunals or other regulatory authorities.

In theory, internal processes set up by the organization to redress individuals injured by actions during a peace operation could be used. However, in actual practice, mechanisms of this type,

[10] House of Lords, *Attorney General v. Nissan*, All England Law Reports 1969 p. 64.
[11] *N.K. v. Austria*, International Law Reports 1979 Vol. 77 p. 470.

with a few exceptions, are usually absent or lacking. For example, any conflict or allegation of a private law nature to which the UN peacekeeping operation is a party must be resolved by a standing claims tribunal, according to any Status of Force Agreement established by the UN with states hosting peacekeeping operations. No such commissions have ever been established in practice. Consequently, submitting the case against the troop-contributing state often constitutes for the injured individuals the only practicable means for seeking redress.

While claims of reparation are usually brought against the troop-contributing state, the issue concerning the responsibility of the organization which sponsored and operated the operation comes up in most of these instances. This is because the defendant states' the strongest argument for avoiding liability is that the wrongful conduct in question was committed by the organization, not by them. As a result, before considering the content of the plaintiffs' allegations, a judge is often asked to determine if the conduct at issue is to be traced to the organization or the troop-contributing state.

When approaching the issue of attribution about the actions of UN peacekeeping forces, a range of factors must be considered. While each factor helps to determine who is responsible for the actions of peacekeeping forces, some are more important than others.

A. *Legal Status of Forces in Peacekeeping Missions*

The first aspect towards the attribution of conduct of UN Peacekeeping forces is the legal status of these forces under the organization's laws. The United Nations has long accepted that member states' forces placed at its disposal as part of a peacekeeping force formed by the Security Council or the General Assembly are UN subsidiary organs. The legal status of the UN's organs, according to the UN, would have legal ramifications that went beyond the issue of attribution for international obligation.[12]

However, national contingents continue to serve as organs of their respective states when allocated to the UN peacekeeping force, despite their status as UN organs. National contingents are not put under the UN's sole authority, and they continue to serve in their home countries to some degree.

[12] International Law Commission, *Responsibility of International Organizations: Comments and Observations Received From International Organizations,* UN doc. A/CN.4/545 (June 25, 2004).

'Though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service,' as Lord Morris of Borth-y-Gest observed in the House of Lords judgement in the Nissan case. As a result, the British troops continued to remain Her Majesty's soldiers.[13] Indeed, the UN has operational command over UN peacekeeping forces, but certain key command functions such as the exercise of disciplinary powers and criminal jurisdiction over the forces, as well as the power to withdraw troops and end their involvement in the mission remain "*the purview of their national authorities*."

Military and civilian personnel from sending countries serving on the territory of a receiving country have a unique legal status.[14] In every other territory, including the host and transit states, they are immune from legal action. This privilege extends not only to heads of state or government or secretaries of state for foreign affairs (ratione personae), but also to any state organ (ratione materiae). Immunity does not only apply to state organs, but also to military and civilian personnel of entities of international legal personality, such as the United Nations and other international or regional organisations.

It is critical to understand that immunity does not imply impunity for members of a sending state's or international organization's military or civilian forces. Immunity does not preclude a state or international organization from being held accountable. Rather, it prevents the host state from taking direct action against representatives of a visiting force, whereas the sending state and/or international organization are held responsible. The sending state would prosecute the suspects individually through their domestic laws.[15]

The aim of such immunity is not to provide personal advantages to individuals but to ensure that they can carry out their official duties without interference, to respect the equality of states under the law, and to keep away outside interference inconsistent with the purposes of the UN. The success of any peacekeeping mission relies heavily on state immunity. Immunity is required for representatives of participating military forces, including their civilian component, to carry out the mandate impartially and efficiently, which is a requirement for the mission's

[13] House of Lords, *Attorney General v. Nissan*, All England Law Reports 1969 p. 646.
[14] Ola Engdahl, *Protection Of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law* 29–56 (Martinus Nijhoff, Leiden, 2007).
[15] Dieter Fleck, "The legal status of personnel involved in United Nations peace operations", *International Review of the Red Cross* (2013).

success. In jurisprudence, members of the International armed forces have always had immunity for actions performed in their official capacity.

The International Court of Justice (ICJ) upheld the customary rule that "*the conduct of individual soldiers... is to be considered as the conduct of a state organ*" in the *Armed Activities on the Territory of the Congo case*[16]. The ICJ did not doubt the *Jurisdictional Immunities of the State case* that actions committed by armed forces abroad in the course of their duties must be classified as acts *iure imperii* – that is, acts covered by absolute immunity.[17] The Hague Court of Appeal ruled in *Mothers of Srebrenica et al. v. Netherlands and the United Nations* that it is impossible to bring the UN before a Dutch court due to the UN's protection from prosecution provided by international conventions, and that the Netherlands should share UN immunity in this regard.[18] Later, in the case of *Netherlands v. Hasan Nuhanovic*[19], the Dutch Supreme Court found that the Netherlands was to blame for the deaths of three Muslim men in Srebrenica and that the relevant actions of Dutchbat, as part of a UN peacekeeping force, could be traced to the Netherlands. In this situation, public international law required the sending state's conduct to be applied to it rather than the UN, as long as the state had effective control over the contested conduct. Since the Court was ruling on the actions of national military personnel in this particular case, immunity was not invoked. The Court instead concluded that the UN did not have or no longer had exclusive operational control over Dutchbat and that the Dutch state was responsible for such acts under Domestic tort law.

B. *Control As A Requisite For The Attribution Of Conduct of Peacekeeping Missions*

Several measures have been used to determine the necessary elements for subjects of International Law to assume responsibility for the actions of others. It's usually a matter of control. The doctrine of attribution, which defines the legal relationship between states, International Organisations ('IOs'), and individuals, requires control.[20] Control is also a

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[16] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgement)* [2005] ICJ Rep. 2005, para.213.

[17] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) (Judgment*) [2012] I.C.J. Rep. 2012, para. 9978.

[18] *Association of Citizens Mothers of Sebrenica v. State of the Netherlands and United Nations*, Appeal Court in The Hague(Judgment) [2010].

[19] *The State of the Netherlands v. Hasan Nuhanovic´,* Supreme Court of the Netherlands (Judgment) [2013].

[20] James Crawford and Jeremy Watkins, "International Responsibility", in S. Besson, & J. Tasioulas (eds.), *The Philosophy of International Law* 283(Oxford University Press, 2010).

consideration in deciding what is legitimately under a state's or IO's purview, as well as the legal distinction between the public and private spheres.[21]

Control tests, although designed to function according to objective standards, have significant normative ramifications. Control tests, in particular, can be used to assess the outer limits of state action and the responsibility distribution between states and IOs.[22] Control tests can be divided into two categories: control over territory and control over individuals. The first form of control test focuses on spatial control, in which a state or IO's territorial presence can cause positive obligations to act, such as preventing certain harms, ensuring human rights and respect, or protecting communities in territories under a subject's jurisdiction. The second type of control test, on the other hand, is concerned with the attribution of conduct in which one entity exerts influence over another.

Unless primary norms or *lex specialis* dictate otherwise, the classical view remains that the strict "*effective control*" test is sufficient for attributing private conduct to a state and allocating responsibility between states and IOs.[23] In developing the Articles on Responsibility of International Organizations, with Article 7 of DARIO, the central provision on the attribution of conduct between IOs and states, the ILC adopted the concept of "*effective control*" as a "*base unit of analysis*", providing:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.[24]

The effective control standard for IOs has been largely conceived in the peacekeeping context. The UN questioned the effective control standard in its comments to the International Law Commission, claiming that it has exclusive control over national contingents in a peacekeeping force in principle. An act of a peacekeeping force, as a subsidiary organ of the United Nations,

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[21] Gordon A Christenson, 'The Doctrine of Attribution in State Responsibility' in Richard B Lillich (eds.), *International Law of State Responsibility for Injuries to Aliens* 321 (University Press of Virginia, 1983).
[22] Kristen E Boon, "New Directions in Responsibility: Assessing the International Law Commission's *Draft Articles on the Responsibility of International Organizations*" 37 *Yale Journal of International Law Online* (2011).
[23] James Crawford, *State Responsibility: The General Part* 156 (Cambridge University Press, 2013).
[24] Draft Articles on the Responsibility of International Organizations, 2011, art. 7.

is in principle imputable to the Organization, and if performed in violation of an international obligation, entails the Organization's international responsibility and compensation liabilities.

UN peacekeeping operations, unlike UN-authorized operations, are performed under the UN's exclusive command and control. In a comment to the ILC, the UN puts it this way:

members of the military personnel placed by Member States under United Nations command [...] are considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and members of the force are bound to discharge their functions with the interests of the United Nations only in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be.[25]

However, courts and commentators have recognized that the assertion above is not as clear-cut as it might seem because who makes the decisions and who is in operational command is critical in any attribution evaluation. Even if restricted forms of command or control, mainly operational control, but not complete command or control, may be exercised by the international organization concerned, the majority of personnel engaged in peace operations is and will be contributed by sending states.

The UN peacekeeping force's chain of command is more complicated than it seems at first glance. The fact that national contingents are put under the operational control of the UN force commander but not exclusively under UN command is an essential aspect of this command structure. The force commander's orders and instructions must be communicated to the contingent through the national contingent commander, who is appointed by the sending state.

The position of the national contingent commander is extremely delicate. It has been observed that the sending state can exercise, at least theoretically, power over its contingent through the national contingent commander, and can even determine whether to comply with or reject the UN force commander's instructions provided to its contingent. The fact that the sending state

[25] International Law Commission, *Responsibility of International Organizations: Comments and Observations Received From International Organizations,* UN doc. A/CN.4/545 (June 25, 2004).

is in a position to interfere with the chain of command leading to the UN is bound to affect the overall evaluation of the attribution issue.

The three ICJ judgments concerning the attribution of conduct of non-state actors to governments include that of the *Military and Paramilitary Activities in and Against Nicaragua*[26], *Armed Activities on the Territory of the Congo*[27], *and Bosnian Genocide* cases[28], which provide the central jurisprudence on the control threshold in the doctrine of attribution. In each of these three cases, the ICJ applied an effective control test and eventually determined that, despite often substantial state support, the state in question did not directly and factually control the related non-state actors' actions.

The International Court of Justice's decision in Nicaragua in 1986 helped establish the current paradigm of responsibility. The ICJ listed two related levels of control when investigating this case: strict control and effective control.

Strict control is based on total dependency, which entails determining if an entity's actions are those of a de facto state organ. In essence, the de facto organ must be shown to have lacked real autonomy and freedom and to have operated as a tool of an outside force.

Effective control, on the other hand, is founded on partial dependency, in which the state controls particular actions of private individuals or groups. To meet the effective control test in this case, the applicant would have had to show the following:

i. *a de facto link through factors like funding, organizing, training, target selection, and planning, and;*

ii. *control such that it is clear that the actions were ordered or enforced on the appropriate individuals and entities by the state.*

Although the ICJ's decisions are unquestionably important, they are not formally binding on parties outside the dispute, which limits their applicability. This trend demonstrates that the

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[26] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgment)* [1986] ICJ Rep. 14.

[27] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168.

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgement)* [2007] ICJ Rep 43.

principle of control is a controversial one that, despite its widespread use, has been incorporated into a broader discussion about international law's possible scope.

III. SEXUAL EXPLOITATION AND SEXUAL ABUSE (SEA) BY UN PEACEKEEPING FORCES

The Associated Press and other news organisations have reported on sexual abuse and sexual exploitation by UN peacekeeping forces in Haiti, East Timor, Liberia, Sierra Leone, South Sudan, Cambodia, the Central African Republic, the Democratic Republic of Congo, and Bosnia and Herzegovina for years. The specifics are startling.

The UN defines sexual exploitation and sexual abuse as two separate violations. Sexual Exploitation is defined 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*."[29]

Sexual Abuse is "*actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions*."[30]

As per the UN Secretary General's Bulletin on Special Measures for Protection from Sexual Harassment and Sexual Abuse from 2003[31], sexual relations in a situation where one takes advantage of the other, regardless of the victim's age, and all sexual relations where the victim is less than 18 years old are prohibited. Prostitution and transactional sex are also prohibited. The zero-tolerance policy does not forbid all sexual contact with locals, but it finds the majority to be unequal and therefore "*strongly discouraged*." Due to a lack of effective oversight mechanisms, these preventative steps and prohibitions have not been implemented in practice.

Peacekeepers are scattered across the world, speak various languages, and have different relationships with the UN depending on their status. Although troop-contributing countries (TCCs) maintain disciplinary authority over their military forces, UN personnel, including civilians and police, are subject to administrative sanctions such as fines, dismissal, or

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[29] United Nations*, Conduct of UN Missions: Glossary, available at* <https://conduct.unmissions.org/glossary#:~:text=Sexual%20exploitation%20is%20any%20actual,the%20sexual%20exploitation%20of%20another.> (last visited on 26.04.2021)

[30] *Ibid.*

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

repatriation. While the UN investigates reports of sexual harassment or rape, peacekeeper responsibility is up to the country that sends the troops. Haiti is only one of several countries where peacekeepers have abused women and girls or sexually exploited them in return for food or support. As a consequence, even after media attention and indignation, convictions have been rare.

Given the scope of the violations and the conditions in which they arise, implementing successful Sexual Exploitation and Sexual Abuse (SEA) policies presents a number of operational challenges. These include:

i. Firstly, it's possible that victims would be unable to report Sexual exploitation and sexual abuse. If they reveal cases of sexual harassment, many victims face stigmatization and ostracism from their families and communities. Victims may also be concerned about retribution from the suspect, who may be armed.

ii. Secondly, UN peacekeepers hail from approximately 120 countries, each bringing their own cultural perspectives and experiences to each mission. The legality of prostitution, as well as the age of consent and marriageability, varies by region.

iii. Finally, not the UN, but their home country has sole jurisdiction over peacekeeping troops. Military personnel are usually free from prosecution in the host country under the UN Model Status of Forces Agreement (SOFA). The Troop Contributing Country is in charge of investigating allegations of wrongdoing and has the exclusive authority to prosecute its military personnel.

While this immunity could be waived, it is rare in cases where the host state's justice system is broken and due process is undermined. On top of that, the UN has found it difficult to compel Troop Contributing Countries (TCC) to investigate and prosecute suspected offenders. Instead, the UN has used indirect tactics such as "*blaming and shaming*" the TCC into taking action. Many TCCs are hesitant to accept their peacekeepers' wrongdoings, particularly when the wrongdoing can be traced back to a lack of training, and would rather sweep the allegations under the rug.

Following numerous allegations of sexual exploitation and abuse (SEA) by United Nations (UN) peacekeepers making international headlines in 2004, the UN Security Council and the

US Congress discussed how to deal with the problem of peacekeepers exploiting the populations they were sent to protect.

His Royal Highness Prince Zeid Ra'ad Zeid al-Hussein, Jordan's Permanent Representative at the time, was ordered to prepare a comprehensive report on sexual abuse and violence in UN peacekeeping missions by late UN Secretary-General Kofi Annan. Prince Zeid Ra'ad Zeid al-Hussein had served as the UN ambassador for one of the largest peacekeeping troop contributors. The Zeid Report[32], released in March 2005, recommended that UN peacekeeping personnel develop and adopt a comprehensive strategy to eradicate SEA.

Individual disciplinary, financial, and criminal accountability were among the report's recommendations, which included:

i. promoting UN standards of conduct,

ii. reforming the investigative process,

iii. enhancing organizational, administrative, and command responsibility, and

iv. establishing individual disciplinary, financial, and criminal accountability.

It has been 16 years since the Zeid Report was released. The UN has taken significant steps to incorporate the findings of the Zeid Report. These include:

i. Standards of conduct were clarified for both civilian and military peacekeepers, and the UN's Administration of Justice System has undergone a complete overhaul.

ii. A Conduct and Discipline Unit (CDU) was established at UN headquarters to organize training, monitoring and enforcement activities of civilian and military peacekeepers, and investigation mechanisms have been reinforced.

iii. Standardized measures for outreach and training were established across all categories of personnel, as well as procedures to improve peacekeeper morale and welfare.

[32] UN Secretary General, *Report of the Secretary-General's Special Advisor, Prince Zeid Ra'ad Zeid Al-Hussein on A Comprehensive Strategy To Eliminate Future Sexual Exploitation And Abuse In United Nations Peacekeeping Operations,* UN Doc. A/59/710 (March, 2005).

iv. Civilian managers and military commanders have instituted more severe measures, such as curfews, lists of off-limits establishments, off-duty uniforms and abuse-reporting telephone hotlines.

v. Protocols for assistance and support to victims have been issued by the UN General Assembly and Secretariat to field missions.

vi. MOUs between the TCCs and the UN have been revised to unequivocally lay out the obligations of states regarding the conduct and discipline of their troops.

IV. CONCLUDING REMARKS

International law does not exist in a vacuum. It changes with the wider moral and political climate, much like every other legal framework. International Organisations have grown in importance as players on the international stage over the last fifty years or so, and individuals have become more influential as a result of the growth of International Human Rights structures and International Criminal law. The topic of international accountability has become more complex as a result of these reforms, but the fundamentals have not changed.

There are obvious gaps in the legal responsibility architecture, particularly with regard to non-state actors, who are increasingly implicated in many of the harms we face as a society. A global responsibility structure that applies to international organizations, joint ventures, public-private partnerships, and non-governmental organisations is particularly needed. Some of the struggles and contradictions evident in current control tests will be resolved by the establishment of a single set of principles that address States, IOs, non-state actors, and individuals.

The paper acknowledges that the United Nations has taken admirable measures towards addressing sexual exploitation and sexual abuse by the peacekeepers. Nonetheless, there is more work to be done as long as cases of sexual harassment and violence continue to occur. The UN should implement the Zeid Report's recommendations to avoid SEA, enforce standards, provide redress for violations, and improve transparency.

The effective control test has been prescribed for the conduct of organs of a state or organs or agents of an international organization put at the disposal of another international organization

under Article 7 of the Draft Articles on the Responsibility of International Organizations. Similarly, Article 6 of the Draft Articles on the Responsibility of International Organizations states that the actions of an international organization's organ or agent in the execution of that organ's or agent's functions shall be considered an act of that organization under international law, regardless of the organ's or agent's status in relation to the organization. These clauses have been used to assess the UN's responsibility for the sexual exploitation and abuse by its Peacekeepers, who are essentially considered UN organs. Article 7's provision of effective control must not be taken to mean that the organization's conduct of a lent organ can be credited to it only if it was exercising control over each particular act of that organ. It's possible that a lower level of control is enough to warrant attribution. When applying the criteria of attribution outlined in Article 7 to UN peacekeeping forces, how the transition of powers was formally negotiated between the organization and the troop-contributing state must take precedence.

It is argued that if the force is supposed to perform certain functions on behalf of the organization and under its formal authority, rather than that of the contributing states, it can be assumed that its actions were taken under the organization's sole direction and control and are thus attributable to it. Similarly, if peacekeepers carry out their duties under the formal authority of the organization, all of their actions, including those that are illegal, must be credited to the organization. Although the object of Article 7's attribution rule is to determine if the conduct of a state organ put at the disposal of an organization must be attributed to the organization or, instead, to the contributing state, in exceptional situations, dual attribution of the same conduct to the UN and the contributing state may be allowed where it is unclear if the national contingent was performing functions on behalf of the sending state or the organization.

It would be more fitting to recognize peacekeepers as being under the authority of both the UN and their TCC. As a result, the actions of peacekeepers should be attributed to both actors, and both will bear joint responsibility for the conduct, depending on how much they contributed to the conduct. This and other likely scenarios envisaged by Article 5 tend to be better accommodated by Special Rapporteur Gaja's suggested approach for conduct to be attributed to the "*extent*" that an organization exercises effective control.[33]

[33]International Law Commission, *Seventh report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur,* UN Doc. A/CN.4/610 (March 27, 2009*)*.

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