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Whistleblower Protection as a Potential Piece of the Puzzle to End Sexual Exploitation and Abuse in UN Peacekeeping Operations

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CONTENTS

Summary

In 2014, Anders Kompass, a Swedish national working for the UN in Geneva, received a report of French peacekeepers exploiting and raping children in the Central African Republic (CAR). When Kompass handed over the report to France, in an attempt to stop the abuse, he was treated as a whistleblower and faced retaliation from the UN. The case of Anders Kompass is used as a case study to contextualize the two issues examined in this thesis: on the one hand the problem of sexual exploitation and abuse within the framework of UN peacekeeping operations, and on the other hand the treatment of persons reporting or taking action to end misconduct – i.e. whistleblowers.

The purpose of this thesis is to examine whether and how UN whistleblower protection can be part of the measures needed to end sexual exploitation and abuse in UN peacekeeping operations. This is done by examining the international responsibility of the UN for these acts and the role of UN whistleblower protection in that responsibility.

The instrument used to determine the responsibility of the UN is the International Law Commission's (ILC) Draft Articles of Responsibility for International Organizations (ARIO). In establishing responsibility under ARIO, the act needs to be attributable to the UN and constitute a breach under international law. Three categories of peacekeepers are treated separately in this thesis. Attributability for the acts of the first two groups, UN staff and so-called experts – civilian police and military observers – is not difficult since they are considered organs and agents of the UN. The third group, consisting of UN military contingents, i.e. soldiers sent by UN Member States, is more complicated since the sending state retains some control and therefore some responsibility. Consequently, it needs to be determined if the acts are attributable to the UN or to the state. The determining factor is, in line with ARIO, who was exercising effective control over that specific conduct. Establishing responsibility for the acts of

sexual exploitation and abuse is further complicated as these acts are typically taken in private capacity and are therefore not directly covered by ARIO. In addition to these aspects, the obligations of the UN relating to sexual exploitation and abuse are examined to find the second part of ARIO, namely a breach of international law. Finally, after a combined assessment, the general conclusion is that it is possible to establish responsibility of the UN for acts of sexual exploitation and abuse committed in UN peacekeeping operations, but that there are some hurdles on the way.

After determining the international responsibility of the UN in these cases, the role of whistleblower protection is examined in the context of that responsibility. It is found that whistleblower protection affects the likelihood of people reporting injustices and that the act of reporting is a factor in sexual exploitation and abuse being addressed and prevented. Therefore, it is concluded in this thesis that whistleblower protection is part of the UN's responsibility to address and prevent acts of sexual exploitation and abuse committed by peacekeepers and that the current protection for whistleblowers is insufficient.

Sammanfattning

År 2014 tog Anders Kompass, en svensk medborgare anställd för FN i Geneve, emot en rapport om franska fredsbevarande styrkor som utnyttjade och våldtog barn i Centralafrikanska republiken. När Kompass överlämnade rapporten till Frankrike, i ett försök att stoppa övergreppen, behandlades han som en visselblåsare och blev utsatt för vedergällning från FN. Fallet om Anders Kompass används som en fallstudie för att kontextualisera de två problem som undersöks i denna uppsats: å ena sidan problemet med sexuellt utnyttjande och sexuella övergrepp inom ramen för FN:s fredsbevarande styrkor, å andra sidan behandlingen av personer som rapporterar eller agerar mot oegentligheter – det vill säga visselblåsare.

Uppsatsens syfte är att undersöka om och hur visselblåsarskyddet inom FN kan vara en del av de åtgärder som krävs för att få ett slut på det sexuella utnyttjandet och övergreppen inom FN:s fredsbevarande styrkor. För att uppnå syftet undersöks FN:s folkrättsliga ansvar för dessa handlingar samt vilken roll FN:s visselblåsarskydd har inom det ansvaret.

För att fastställa FN:s folkrättsliga ansvar används FN:s folkrättskommissions kodifiering av ansvar för internationella organisationer (Draft Articles of Responsibility for International Organizations (ARIO)). För att etablera ansvar enligt ARIO måste gärningen vara hänförbar till FN samt bryta mot internationell rätt. Tre olika kategorier av fredsbevarande styrkor behandlas åtskilda i denna uppsats. Att hänföra handlingar utförda av de första två grupperna, FN-anställda och så kallade experter – civila polisstyrkor och militära observatörer – är inte svårt då de anses vara organ och agenter under FN. Den tredje gruppen, så kallade militära kontingenter, det vill säga soldater som skickats av FN:s medlemsstater, är mer komplicerad eftersom den skickande staten behåller en del kontroll och därmed en del ansvar. Till följd därav behöver det avgöras om handlingen är hänförbar till FN eller till staten. Den avgörande faktorn är enligt ARIO vem som utövade effektiv kontroll över den aktuella

gärningen. Att etablera ansvar för sexuellt utnyttjande och sexuella övergrepp är vidare komplicerat då dessa är typiskt sett privata gärningar och därmed inte direkt täckta av ARIO. Utöver ovanstående undersöks även FN:s möjliga förpliktelser kopplade till sexuellt utnyttjande och sexuella övergrepp för att hitta den andra delen av ARIO, närmare bestämt ett brott mot internationell rätt. Efter att ha undersökt dessa aspekter dras slutsatsen att det är möjligt att etablera FN:s ansvar för sexuellt utnyttjande och sexuella övergrepp som sker inom ramen för FN:s fredsbevarande styrkor, men att det finns ett antal hinder på vägen.

Efter att FN:s folkrättsliga ansvar i dessa fall har fastställts undersöks rollen av visselblåsarskydd inom ramarna för det ansvaret. Det konstateras att visselblåsarskydd påverkar sannolikheten att människor rapporterar orättvisor och att rapporteringen är en faktor i att sexuellt utnyttjande och sexuella övergrepp behandlas och förebyggs. Därmed är slutsatsen av denna uppsats att visselblåsarskydd är en del av FN:s ansvar att bemöta och förebygga sexuellt utnyttjande och sexuella övergrepp som utförs av fredsbevarande styrkor samt att det nuvarande skyddet för visselblåsare är otillräckligt.

Preface

The last five years of my life would not have been what they have been without the wonderful friends I have met during my legal studies. Amanda, Anneli, Cecilia, Clara, Klara, Louise, Lovisa and Sofia – thank you for your friendship these past five years and for the years to come.

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Sara Rävås

Abbreviations

ARIO	Draft Articles on the Responsibility of International Organizations
ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
Capstone Doctrine	UN Department of Peacekeeping Operations, 'UN peacekeeping operations: principles and guidelines'
CAR	Central African Republic
ECtHR	European Court of Human Rights
GAP	Government Accountability Project
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ILC	International Law Commission
JIU	Joint Inspection Unit of the United Nations System
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MISCA	African-led International Support Mission in the Central African Republic
Model SOFA	Draft Model Status-of-Forces Agreement between the United Nations and Host Countries
MoU	Memorandum of Understanding

OHCHR	Office of the High Commissioner for Human Rights
OIOS	Office of Internal Oversight Services
SOFA	Status-of-Forces Agreement
UN	United Nations
UN Charter	Charter of the United Nations
UNDT	United Nations Dispute Tribunal
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNSC	United Nations Security Council
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

1 Introduction

1.1 Presentation of the Subject Matter

[1]In July 2014, Anders Kompass, the Director of the Field Operations and Technical Cooperation Division at a United Nations (UN) office in Geneva, received a report. The report, which has been referred to as the 'Sangaris notes', included the stories of six children living in a refugee camp in the Central African Republic (CAR). The testimonies concerned French peacekeepers in the so-called Sangaris force sexually exploiting and raping children, often offering small amounts of food in exchange. In an attempt to effectively address the abuse described as soon as possible, especially in light of the fact that the abuse had been ignored for quite some time, Kompass handed over the report to the French delegation in Geneva.[2]

Several months afterwards, in the spring of 2015, the way in which the Sangaris notes had been transmitted to France began to be questioned by Kompass' superiors at the UN. Kompass was accused of a breach of protocol and was put on administrative leave. In the following months the UN Dispute Tribunal (UNDT) declared the suspension unlawful and Kompass was freed in both an internal and an independent investigation. Kompass had acted with the intention of stopping acts of sexual exploitation and abuse against children and was through the investigations declared to

[1] Sources and footnotes have in large been constructed according to the OSCOLA-system, with some stylistic changes. See Donald Nolan and Sandra Meredith (eds), *OSCOLA: Oxford University Standard for the Citation of Legal Authorities* (4th edn, University of Oxford 2012) available at: https://www.law.ox.ac.uk/research-subject-groups/publications/oscola accessed 14 May 2019.

[2] United nations General Assembly (UNGA) 'Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (23 June 2016) UN Doc A/71/99 [44], [47-55], [165]; Linda Haglund, 'FN och övergreppen: Del 1 & 2' (manuscript of the documentary with the same name) *SVT nyheter* (23 March 2017, updated 4 November 2017) https://www.svt.se/nyheter/granskning/ug/referens/fn-och-overgreppen-del-1-och-2 accessed 13 March 2019.

have acted within the limits of his job description. Still, Kompass was treated as a whistleblower and faced retaliation for his actions.[3]

The series of events in this example, which will be further considered in Chapter 2, illustrate the two parallel issues whose intercorrelation are explored in this thesis. Firstly, the situation of acts of sexual exploitation and abuse committed by peacekeepers in UN peacekeeping operations and the flaws with which the UN has handled these cases. Testimonies of sexual exploitation and abuse in UN peacekeeping operations have been reported since the 1990s and tracking systems that have been developed over the years show that it is a widespread problem. The number of reports is around 50 to 100 a year, representing an even greater number of victims since each report contains several incidents and victims.[4] The reports cover acts of rape, child pornography, sexual exploitation in exchange for money or food, trafficking, and so on. The victims are both adults and children.[5] A more precise definition of sexual exploitation and abuse will be introduced and developed in section 4.3.1.[6]

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[3] See for example Sandra Laville, 'UN whistleblower who exposed sexual abuse by peacekeepers is exonerated' *The Guardian* (18 January 2016) https://www.theguardian.com/world/2016/jan/18/un-whistleblower-who-exposed-sexual-abuse-by-peacekeepers-is-exonerated?CMP=share_btn_link accessed 13 March 2019; Report of an Independent Review (n 2) [160]; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).

[4] Bruce 'Ossie' Oswald, 'Sexual Exploitation and Abuse in un Peace Operations: Challenges and Developments' (2016) 20 Journal of International Peacekeeping 143, 146; UN, 'Sexual Exploitation and Abuse: Allegations' (2019) https://conduct.unmissions.org/sea-overview accessed 11 April 2019; UN, 'Sexual Exploitation and Abuse: Victims' (2019) https://conduct.unmissions.org/sea-victims accessed 11 April 2019.

[5] UNHCR/Save the Children, 'Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone' (February 2002) Available at: https://www.savethechildren.org.uk/content-/dam/global/reports/health-and-nutrition/sexual_violence_and_exploitation_1.pdf accessed 25 April 2019 6; UNGA 'Comprehensive Review of the Whole Question of Peacekeeping Operations in all Their Aspects' (24 March 2005) UN Doc A/59/710 [3]; Sarah Martin, 'Must Boys be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions' *Refugees International* (October 2005) Available at: http://www.pseataskforce.org-/uploads/tools/mustboysbeboysendingseainunpeacekeepingmissions_refugeesinternational_english.pdf accessed 25 April 2019 5; Róisín Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Brill Nijhoff 2014) 3.

[6] The concept of sexual exploitation and abuse is sometimes shortened to "SEA". This abbreviation will not be used as it "tends to mask the seriousness of the underlying conduct, which in many cases is of a criminal nature" – Report of an Independent Review (n 2) [25].

Secondly, the example of Kompass shows how persons who are considered whistleblowers have been treated. Whistleblower can be defined as "any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector".[7] In addition to Anders Kompass, there are several others who have experienced similar treatment as Kompass after reporting misconduct within the UN and in UN peacekeeping operations.[8] One example is Kathryn Bolkovac, a peacekeeper in Bosnia who discovered that other peacekeepers were involved in trafficking women for sexual purposes. When Bolkovac brought her findings to the UN, there was a lack of response and action and she soon lost her job in the peacekeeping operation. Bolkovac and a lawyer working for the UN in the Bosnia operation later exposed the story. As the experiences of Bolkovac were written about in a book and later turned into a movie, both called *The Whistleblower*, this might be one of the more famous cases of UN whistleblowers uncovering sexual exploitation and abuse in peacekeeping operations.[9]

The purpose of the UN, by extension also of UN peacekeeping operations, is the maintenance of international peace and security, including promoting respect for human rights.[10] Furthermore, an important task of modern peacekeeping operations is the protection of civilians, including from acts of conflict-related sexual violence.[11] It is unacceptable that an organization that is meant to protect people is involved in scandals like the one with the

[7] Council of Europe, 'Protection of Whistleblowers' (30 April 2014) Recommendation CM/Rec(2014)7 6; see more on the definition of whistleblower in section 3.1.
[8] See for example Emma Bürgisser, Nina Maria Hansen and Lucy O'Brien, 'Whistleblowing on the UN' (2015) 30:1 Peace Magazine 1; Joint Inspection Unit, 'Review of Whistle-Blower Policies and Practices in United Nations System Organizations, (2018) UN Doc JIU/REP/2018/4 [2]; Sophie Edwards, 'The high price of being a UN whistleblower' *Devex* (24 May 2018) https://www.devex.com/news/the-high-price-of-being-a-un-whistleblower-92752 accessed 12 May 2019; Government Accountability Project (GAP), 'Longest-running UN Whistleblower Case Ends with Settlement and UNHCR Statement of Regret' *Government Accountability Project* (5 June 2018) https://www.whistleblower.org/press/longest-running-un-whistleblower-case-ends-settlement-and-unhcr-statement-regret/ accessed 12 May 2019.
[9] Bürgisser, Hansen and O'Brian (n 8).
[10] Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI (UN Charter) art 1.1, 1.3.
[11] UN, 'Protecting Civilians' https://peacekeeping.un.org/en/protecting-civilians accessed 14 May 2019.

children in CAR. This "undermines promotion of the Rule of Law, respect for human dignity and the values of the international community as a whole".[12] As people have had to "blow the whistle" to draw attention to this serious problem, it is interesting to examine these two areas together.

1.2 Purpose and Research Question

The purpose of this thesis is to examine whether and how UN whistleblower protection can be part of the measures needed to end sexual exploitation and abuse in UN peacekeeping operations. Based on the purpose, the main research question can be formulated as follows:

- *What is the role of UN whistleblower protection in the larger framework of responsibilities of the UN under international law, specifically regarding instances of sexual exploitation and abuse in UN peacekeeping operations, and should the current whistleblower protection be changed to strengthen the capacity of the UN to uphold those responsibilities?*

In order to find an answer to this research question, a number of sub-questions can be identified as steps on the way.

(1) What kind of responsibility does the UN have in relation to acts of sexual exploitation and abuse committed by peacekeepers in UN peacekeeping operations?

(2) What is the role of UN whistleblower protection in that responsibility?

(3) Does the current UN whistleblower protection reach the level that is needed for it to fulfill that role?

[12] Burke (n 5) 9.

1.3 Delimitations

The thesis essentially covers three large areas: UN whistleblower protection, the problem of sexual exploitation and abuse in UN peacekeeping operations and the international responsibility of the UN for those acts. In order to have a meaningful discussion relevant to the research question, some delimitations have to be made.

Firstly, when studying whistleblowers and whistleblower protection a common focus is that of freedom of expression.[13] However, the focus of this thesis is not on the rights of the whistleblower per se. Instead, it concentrates on the function of whistleblower protection in a larger system. Moreover, the UN convention against corruption falls outside the scope of this thesis. The convention includes a provision encouraging state parties to the convention to protect "reporting persons" through law.[14] Although it is an important framework for the general discussion on whistleblowers, its focus on corruption is not relevant for this discussion. Additionally, it focuses on the responsibility of states, while the focus of this thesis is responsibility of international organizations, specifically the UN.

Secondly, the responsibility of states for the acts of peacekeepers will not be covered. In some situations where UN Member States contribute with troops for peacekeeping operations, they retain some responsibility and can also have joint responsibility with the UN.[15] Establishing responsibility for one does therefore not necessarily exclude the other. It is possible to leave a discussion on the responsibility for UN Member States out without it affecting the corresponding study of the UN. Potential prosecution or other

[13] See for example UNGA 'Promotion and Protection of the Right to Freedom of Opinion and Expression' (8 September 2015) UN Doc A/70/361 pt IV; developed case-law under article 10 – freedom of expression ECHR, see Council of Europe, 'Thematic factsheet: Whistleblowers and their Freedom to Impart Information' (May 2017).

[14] United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) UNGA res A/58/422 art 33.

[15] ILC, 'Draft Articles on the Responsibility of International Organizations' *Report of the International Law Commission on the Work of its 63rd Session* (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10 (ARIO) art 48.1; ILC, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' *Report of the International Law Commission on the Work of its 63rd Session* (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10 (ARIO with Commentaries) art 7 [1]; Burke (n 5) 265.

consequences for the individual perpetrator will neither be covered. Furthermore, only UN peacekeeping operations are covered by the scope of this thesis. The operations that can be categorized as peacekeeping but do not have a connection to the UN are therefore not discussed.[16]

Thirdly, the consequences of responsibility, i.e. remedies and reparations for the victims, will not be considered. The discussion is held on a more theoretical level of responsibility in order to connect the different aspects studied. A meaningful representation of the discussion surrounding the different ways that victims of sexual exploitation and abuse in peacekeeping situations can get justice is too comprehensive to include within the frames of this thesis.[17] Moreover, the underlying reasons for why sexual exploitation and abuse is a common issue in peacekeeping operations is not explored.[18]

1.4 Methodology and Material

In order to achieve the purpose of this thesis, the legal doctrinal method will be used. This method aims at seeking the answers to a specific legal question or problem in the relevant sources of law.[19] However, it is important to note that studying international law is somewhat different from domestic law. International law does not have a distinct hierarchy of sources of law and is in different ways built on or contingent upon the consent of states.[20] The legal sources of international law are commonly referred to as the sources cited in article 38(1) of the Statute of the International Court of

[16] About the different kinds of peacekeeping operations see Alex J Bellamy and Paul D Williams, 'Trends in Peace Operations, 1947–2013' in Joachim A Koops and others (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (4th edn, Oxford University Press 2015) 13; section 4.2.1.

[17] See section 5.1 for a further discussion on this.

[18] Examples of some reasons can be found in for example Comprehensive review (n 5) [13]; Jasmine-Kim Westendorf and Louise Searle, 'Sexual Exploitation and Abuse in Peace Operations: Trends, Policy Responses and Future Directions' (2017) 93:2 International Affairs 365, 374-376.

[19] Corresponds to the Swedish method "rättsdogmatisk metod", see Jan Kleineman, 'Rättsdogmatisk metod' in Fredric Korling and Mauro Zamboni (eds), *Juridisk metodlära* (1st edn, Studentlitteratur 2013) 21, 23.

[20] Stephen Hall, 'Researching International Law' in Michael McConville and Wing Hong Chui (eds), *Research methods for law* (2nd edn, Edinburgh University Press Ltd 2017) 182.

Justice (ICJ Statute).[21] The sources stated are international conventions, international custom as evidence of a general practice accepted as law, and the general principles of law recognized by civilized nations. Furthermore, the "judicial decisions and teachings from highly qualified publicists of various nations" are cited as a subsidiary source of law. [22]

There are no international conventions that cover the subject of this thesis. Therefore, mostly subsidiary sources of law have been used. The subsidiary sources, furthermore, sometimes contribute to understanding parts of primary law such as international custom and general principles of law. The material used has been chosen through a combination of appraising the most recognized authors and writings as well as evaluating what sources are most relevant for the topic at hand.

The first part of the thesis (Chapter 1) is a case study of Anders Kompass, introduced in section 1.1 above. The sources used in studying the case are a combination of official UN documents as well as media coverage of relevant events. This is not an area where the traditional sources from article 38(1) ICJ Statute apply and the sources are instead chosen in an attempt to get a justified picture of the events through authoritative (UN documents) and varied (media coverage) sources. Furthermore, one consequence of the events in the case was that an Independent Review Panel was appointed to review the different aspects of it. The completed report included an account of the events as well as an examination of the behavior of the UN. [23] Due to the comprehensive analysis contained in the report, it has been used as a central source. Additionally, a documentary called "FN och övergreppen" (translation: the UN and the abuse), broadcasted on Swedish National Television (Sveriges Television), has been used.[24] The documentary, in

[21] Statute of the International Court of Justice (adopted 18 April 1946) (ICJ Statute) art 38.1. See also Hall in McConville and Chui (n 20) 182-183; Burke (n 5) 13.
[22] ICJ Statute art 38.1 (a)-(d).
[23] Report of an Independent Review (n 2).
[24] This documentary has won international prizes, such as the Gold Dolphin at The Cannes Corporate Media & TV Awards and the Global Investigate at the British Journalism Awards, see Linda Haglund, 'FN och övergreppen en av vinnarna i British Journalism Awards' *SVT nyheter*. (12 December 2017) https://www.svt.se/nyheter/granskning/ug/fn-och-overgreppen-vann-brittiskt-journalistpris accessed 1 April 2019; Ella Hopf Berger,

combination with news articles related to the events, gives substance to the story and showcases how the case was portrayed in the media as well as provides public statements by the people involved.

The second part (Chapters 3 and 4) is more descriptive in character and examines the areas of UN whistleblower protection, UN peacekeeping operations and sexual exploitation and abuse in UN peacekeeping operations respectively. The sources used are a combination of internal UN documents, UN reports and legal literature. Furthermore, articles from various academic journals and reports from civil society organizations have been used. The literature is both of a more general character, such as *The Oxford Handbook of the United Nations* and *International Law* by Malcolm N. Shaw, and more specific, for example the book *Sexual Exploitation and Abuse by UN Military Contingents* by Róisín Sarah Burke and the legal journal article "The Protection of United Nations Whistleblowers against Retaliation" by Baptiste Martel.[25]

The last part (Chapter 5) concerns the establishment of international responsibility for the UN. There are no binding conventions on responsibility for international organizations. Instead, the main legal source is the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations (ARIO) and the connected commentary by the ILC. ARIO falls under the category of "teachings from highly qualified publicists" in the words of article 38(1)(d) ICJ statute, and is therefore a subsidiary source.[26] Although ARIO is not a primary source as such, it is the body of law in this area that is most broadly recognized by the

'"FN och övergreppen" vann pris i Cannes' *SVT nyheter* (28 September 2018) https://www.svt.se/nyheter/granskning/ug/fn-och-overgreppen-vann-pris-i-cannes-det-kanns-overvaldigande accessed 1 April 2019.

[25] Burke (n 5); Malcolm Nathan Shaw, *International Law* (8th edn, Cambridge University Press 2017); Baptiste Martel, 'The Protection of United Nations Whistleblowers against Retaliation' (2017) 16:2 Law and Practice of International Courts and Tribunals 264; Thomas G Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (2nd edn, Oxford University Press 2018).

[26] Cf Burke (n 5) 14.

international community and international courts such as the European Court of Human Rights (ECtHR).[27]

Again, legal literature and articles from academic journals have been used to get a more comprehensive picture of the topic and the academic considerations. The most used literary sources include *An introduction to international organizations law* by Jan Klabbers; *Bowett's law of international institutions* by Philippe Sands and Pierre Klein; "Sexual Exploitation and Abuse on Peacekeeping Operations" in *the Journal of International Peacekeeping* by Athena M. Nguyen; and the books mentioned above.[28]

1.5 Research Status

The research on whistleblowers in international organizations is limited. Reasons for this include the common lack of transparency in international organizations and the differences in structures between different organizations.[29] This thesis will not go further than exploring the internal situation for whistleblowers in the UN. The existing research on this consists of the article by Martel, articles on whistleblowers in connection to the internal UN tribunals dealing with these questions and UN studies such as a review of the effectiveness of whistleblower policies and practices across the UN by the Joint Inspection Unit of the United Nations System (JIU).[30]

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[27] ECtHR, *Behrami v France* Application No. 71412/01; *Saramati v France, Germany and Norway* Application no. 78166/01 (2 May 2007); Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge University Press 2015) 309-310, 317; Athena M Nguyen, 'Sexual Exploitation and Abuse on Peacekeeping Operations' (2015) 19 Journal of International Peacekeeping 142, 160.

[28] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (6th edn, Thomson Reuters 2009); Klabbers (n 27); Nguyen (n 28); see also n 25 specifically Shaw (n 25) and Burke (n 5).

[29] Kim Moloney, James S Bowman and Jonathan P West, 'Challenges Confronting Whistleblowing and the International Civil Servant' (2018) Review of Public Personnel Administration 1, 2.

[30] Review of Whistle-Blower Policies and Practices (n 8); Tamara A Shockley, 'Ethics and the United Nations International Civil Servant: The Jurisprudence of the United Nations Dispute Tribunals and the United Nations Appeals Tribunal on Workplace Retaliation - The

Many civil society organizations and scholars have through different perspectives studied the problem of sexual exploitation and abuse in peacekeeping operations. The works include accounts of incidents in different areas of the world, connections to gender and other attempts to find underlying reasons for the wrongdoings, and studies of the efforts taken by the UN to prevent and remedy incidents.[31]

Establishing responsibility for the acts of peacekeepers has been the subject of some research. Some peacekeepers are sent by states, leading to the sometimes-uncertain division of responsibility between states and the UN. Establishing responsibility for the acts of peacekeepers is a topic under development and it will be explored further in this thesis.[32]

The purpose of this thesis is to attempt to combine these different areas and problems. There is no previous research investigating UN whistleblower protection in connection to the responsibility of the UN regarding sexual exploitation and abuse in UN peacekeeping operations. The thesis attempts to fill this gap by examining whistleblowing protection as an aspect of the problem of sexual exploitation and abuse in UN peacekeeping operations.

1.6 Structure

The thesis is divided into six chapters. The following chapter, Chapter 2, will introduce the issues discussed by means of a case study. The case study will illustrate the problem of sexual exploitation and abuse as well as give an example of the way that whistleblowers have been treated within the UN. Chapters 3 and 4 will form the basis for the discussion by examining the areas of this thesis. Chapter 3 gives an account of the whistleblower protection in the UN, while Chapter 4 deals with UN peacekeeping operations and sexual exploitation and abuse. Then, Chapter 5 lays out the relevant international legal frameworks and applies the law in order to find what kind of responsibility the UN has in relation to acts of sexual

Rights of the Whistleblower in the United Nations' (2013) 20:1 Southwestern Journal of International Law 1.7; Martel (n 25).

[31] See a collection of sources in Burke (n 5) 22 n 92.

[32] Cf Burke (n 5); Nguyen (n 27).

exploitation and abuse committed by peacekeepers in UN peacekeeping operations. Lastly, Chapter 6 summarizes and analyzes the findings from the previous sections by examining the three sub-questions and the main research question, respectively.

2 Case Study: Anders Kompass

2.1 Introduction

In order to provide an example of both the issue of sexual exploitation and abuse committed by persons involved in peacekeeping operations, as well as the treatment of whistleblowers in the UN, a case study will be used. These two areas can easily become theoretical and abstract and considering the deep human suffering connected to them, contextualization through a case study can serve the purpose of keeping reality in mind.

2.2 Background

In 2013, CAR experienced an escalation of armed conflict following long-time insecurity in the country. A coup d'etat was followed by the creation of a self-defence militia and the order of the state started to break down. At the end of 2013 hundreds of thousands of people were fleeing the violence and human rights abuses deriving from the armed conflict and overall instability.[33] Camps for displaced persons were formed and one of these was the M'Poko camp, situated at an airport outside of the capital Bangui.[34]

In December of 2013, the African-led International Support Mission in the Central African Republic (MISCA) was deployed through a UN Security Council resolution.[35] Moreover, France was authorized to send troops to support MISCA.[36] The French forces, called "Sangaris" (meaning butterfly), formed a protective ring around the M'Poko camp and were generally

[33] Report of an Independent Review (n 2) [32].
[34] Report of an Independent Review (n 2) [33]; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[35] United Nations Security Council (UNSC) Res 2127 (5 December 2013) UN Doc S/RES/2127.
[36] Res 2127 (n 35) [50]; Report of an Independent Review (n 2) [36].

perceived as heroes.[37] Later, when the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) (which is still operating today) was established in 2014, the French troops were again authorized to "use all necessary means to provide operational support to elements of MINUSCA".[38]

The international efforts continued, but in the early months of the summer of 2014 incidents of sexual abuse conducted by peacekeepers on children in the camp started to become known. When the allegations first surfaced, a UN Human Rights Officer and a few United Nations Children's Fund (UNICEF) Child Protection Officers started conducting interviews and gathering testimonies. The stories from six children formed a report that have come to be called the "Sangaris notes", as it was mainly French Sangaris forces that were identified as alleged perpetrators.[39] The children, aged between 9 to 13 years old, told the interviewers about peacekeepers sexually exploiting and abusing them. The occurrences detailed in the report stretched from December 2013, when the Sangaris forces first arrived in CAR, to the time of the interviews. The allegations included peacekeepers forcing children to perform oral sex or having sexual intercourse with them, often in exchange for food. The abuse often took place at the military base or at checkpoints and in many of the cases there were more than one soldier present during or in connection to the acts.[40] In addition to the cases reported in the Sangaris notes, numerous other allegations of sexual abuse by peacekeepers in CAR have emerged.[41]

The Sangaris notes were first sent to a person in charge at MINUSCA as well as a section of the Office of the High Commissioner for Human Rights (OHCHR) in Geneva. In July 2014, after being sent from person to person,

[37] Andrew Sparrow and Kim Willsher, 'French troops sent into Central African Republic in effort to stop bloodshed' The Guardian (6 December 2013) https://www.theguardian.com/world/2013/dec/06/france-troops-central-african-republic-hollande-bangui accessed 15 March 2019; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[38] UNSC Res 2149 (10 April 2014) UN Doc S/RES/2149 [18], [47]; Report of an Independent Review (n 2) [36].
[39] Haglund 'FN och övergreppen: Del 1 & 2' (n 2); Report of an Independent Review (n 2) [8], [44].
[40] Report of an Independent Review (n 2) [47]-[55].
[41] Ibid [56]-[57].

the report landed on the desk of Anders Kompass, a Swedish citizen working for the OHCHR office in Geneva.[42] In his capacity of Director of the Field Operations and Technical Cooperation Division at OHCHR, Kompass read the report and concluded that the abuse was likely ongoing. He knew he must act quickly in order for the abuse to cease as soon as possible. Kompass knew that if he forwarded the report, an investigation could take a lot of time and that it could get stuck in the UN machinery.[43] Soon after receiving the report, Kompass had the opportunity to hand over the report directly to France through a delegate of the Permanent Mission of France in Geneva. He did so with the intention, and guarantee of the representative, that France would find and protect the children immediately as well as deal with the responsible soldiers.[44] At this time, a month had passed since the report was first sent to the OHCHR office in Geneva and more than half a year since the abuse reportedly started.[45] Fortunately, the French authorities took the information seriously and immediate action was taken.[46]

2.3 Anders Kompass Becomes a Whistleblower

By the beginning of 2015, people at the UN started questioning if Kompass had leaked the Sangaris notes to France in an inappropriate way.[47] High-level meetings took place where the actions of Kompass were discussed.[48] Then, in March 2015, Kompass was asked by his superior to resign from his position at the OHCHR. Kompass refused to do so, and he felt betrayed and

[42] Report of an Independent Review (n 2) [10], [165].
[43] Sandra Laville, 'UN aid worker suspended for leaking report on child abuse by French troops' *The Guardian* (29 April 2015, updated 29 November 2017) https://www.theguardian.com/world/2015/apr/29/un-aid-worker-suspended-leaking-report-child-abuse-french-troops-car accessed 13 March 2019; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[44] Report of an Independent Review (n 2) [165]; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[45] Report of an Independent Review (n 2) [10], [12].
[46] Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[47] Report of an Independent Review (n 2) [166]; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[48] Report of an Independent Review (n 2) [13].

shocked that he had not gotten a chance to defend himself.[49] In April 2015, Kompass was put on administrative suspension and an internal investigation by the Office of Internal Oversight Services (OIOS) was launched to assess the lawfulness of Kompass' actions.[50] On the day the suspension was announced, Kompass was escorted out of the building, required to hand over his keys, phone and computer. Being suspended is rare within the UN and Kompass felt horrible; concerned that his colleagues might think he was accused of something serious like embezzling or sexually harassing a colleague.[51] The reason for putting Kompass on administrative leave was that he was suspected of breaching UN protocol in handing over the Sangaris notes to the French authorities in its unredacted form, meaning that the names of the children remained.[52] However, within a month of Kompass being put on administrative leave, the decision was suspended by the UNDT and Kompass was allowed to return to work.[53]

During the turbulent spring of 2015, the matter also started circulating more and more in international media. The British newspaper the Guardian got the Sangaris notes leaked to them by Paula Donovan, a woman working to end sexual exploitation and abuse by peacekeepers. In the media, Kompass was introduced as the person who leaked the report to France and was soon described as a whistleblower.[54] The UN added their part of the narrative, at first criticizing Kompass for his actions, focusing on the fact that he had not removed the names of the victims before handing over the report to France.[55] After a few weeks the focus of the media coverage shifted to the larger problem of sexual exploitation and abuse in peacekeeping operations, as well as the way in which the UN had treated Kompass. It was even revealed that the superiors of Kompass had been discussing how to gather evidence to justify his dismissal. One of the consequences of the pressure

[49] Report of an Independent Review (n 2) [13]; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[50] Laville 2015 (n 43); Report of an Independent Review (n 2) [13].
[51] Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[52] Laville January 2016 (n 3); Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[53] UNDT, *Kompass v Secretary-General* (5 May 2015) Case no UNDT/GVA/2015/126 [50].
[54] Laville 2015 (n 43); Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[55] Haglund 'FN och övergreppen: Del 1 & 2' (n 2).

and controversy surrounding the "Kompass-affair" was that the UN took the decision to appoint an independent review in addition to the internal one.[56]

2.4 Anders Kompass' Conduct is Found to be Lawful

The Independent Review Panel, consisting of a former justice of the Supreme Court of Canada, the prosecutor of the International Criminal Tribunal for Rwanda and the Executive Director of the Foundation for Human Rights in South Africa, were appointed in June 2015 to review "the United Nations Response to Allegations of Sexual Exploitation and Abuse and Other Serious Crimes by Members of Foreign Military Forces Not Under United Nations Command in the Central African Republic".[57] Their mandate included the assessment of the events in CAR and how the UN responded to the allegations raised through the Sangaris notes; the procedures relating to such allegations; how the UN complied with those procedures in the case in question; and to make recommendations aimed at improving the way in which the UN responds to this kind of allegations.[58] Furthermore, the Review Panel was to determine if any senior officials had abused their authority in relation to the allegations, including "the communication of the allegations to one or more third parties".[59]

Thus, the Independent Review Panel examined if Kompass had used his authority in an improper way.[60] First, they considered if the action was within the limits of Kompass' authority. Within the UN there were different views on whether Kompass had the authority to give the Sangaris notes,

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[56] Report of an Independent Review (n 2) [14]; Haglund 'FN och övergreppen: Del 1 & 2' (n 2); Anna-Karin Hallonsten, 'Uthängd, avstängd, hyllad' *SRAT-informationen* (May 2017) 4 https://www.srat.se/globalassets- /srat/dokument/srat-informationen/tidigare-nummer/srat-info-2-2017-low.pdf accessed 20 March 2019.

[57] UN, 'Secretary-General Appoints Independent Review Panel on UN Response to Allegations of Sexual Abuse by Foreign Military Forces in Central African Republic' (22 June 2015) UN Doc SG/SM/16864-SG/A/1578.

[58] Secretary-general Appoints Independent Review Panel (n 57) [3], [8]; Report of an Independent Review (n 2) [15].

[59] Report of an Independent Review (n 2) [15]. See also Secretary-general Appoints Independent Review Panel (n 57) [3(4)].

[60] Report of an Independent Review (n 2) [167]-[168].

unredacted, to France. However, the Review found that policies, practices and the framework of Kompass' job description made it clear that the action was well within the limits of his authority.[61] Second, the panel quickly dismissed the argument that Kompass had self-interest in handing over the report to France.[62] Lastly, the fact that the transmitted document was unredacted, and included the names of the children, was according to the Independent Review an "overstated argument". Although respect for privacy and confidentiality was important, the Review found that, in this case, it was positive that the notes included detailed information so that targeted action could start right away.[63] Furthermore, the Review Panel pointed out that a number of UN staff members, including people with high positions, knew that France had already received the Sangaris notes before Kompass had handed them over, but without commenting on it. The reactions of the UN more than half a year later therefore suggest that accusing Kompass of misconduct was an afterthought and in the words of the Independent Review Panel, even – "disingenuous".[64]

In December 2015, the report of the Independent Review was made public, including the conclusion that Kompass had done nothing wrong and had not abused his authority.[65] One month later the internal review conducted by the OIOS reached the same conclusion. They asserted that misconduct could not be proven in the case of Kompass in relation to the transmission of the unredacted copy of the Sangaris notes to the French delegation.[66]

2.5 Aftermath

The way in which the situation surrounding the Sangaris notes was handled, and how Kompass was treated afterwards, ultimately led to his resignation

[61] Report of an Independent Review (n 2) [169], [171]-[173].
[62] Ibid [170]
[63] Ibid [175], [178].
[64] Ibid [174].
[65] Ibid [179].
[66] OIOS Investigation, available at: http://www.svtstatic.se/image-cms/svtse/1490271386/svts/article-12965748.svt/BINARY/Friad,%206%20januari%202016.pdf accessed 19 March 2019; Laville January 2016 (n 3).

from the OHCHR in June 2016.[67] The "lack of accountability"[68] combined with the lack of trust stemming from the fact that Kompass never received any kind of apology from his seniors at the UN, were central reasons behind his decision to leave.[69] Kompass was later employed by the Swedish Foreign Ministry.[70]

Regarding the children from the Sangaris notes, it has been shown that they received little help and support from the UN. According to the Independent Review, serious action to protect the children was only taken by UNICEF after international media had started reporting on the incidents during the spring of 2015.[71] In the Swedish documentary "FN och övergreppen" ("The UN and the Abuse") it was also exposed that a number of the children that the UN knew had been abused by peacekeepers had not received help, in contradiction to what UNICEF previously had claimed.[72]

2.6 Consequences

Kompass never saw himself as a whistleblower; he was just doing his job and what he thought was right. Yet he was treated as a whistleblower and faced unexpected and disheartening treatment from the UN.[73] It is important to note that the consequences of the UN's response go well beyond its

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[67] Sandra Laville, 'Child sex abuse whistleblower resigns from UN' *The Guardian* (7 June 2016) https://www.theguardian.com/world/2016/jun/07/child-sex-abuse-whistleblower-resigns-from-un accessed 13 March 2019; Haglund 'FN och övergreppen: Del 1 & 2' (n 2).

[68] Quote from: Obi Anyadike, 'Exclusive: Top UN whistleblower resigns, citing impunity and lack of accountability' *The New Humanitarian* (formerly IRIN News) (7 June 2016) https://www.thenewhumanitarian.-org/news/2016/06/07/exclusive-top-un-whistleblower-resigns-citing-impunity-and-lack-accountability accessed 20 March 2019.

[69] Laville January 2016 (n 3); Laville June 2016 (n 67); Haglund 'FN och övergreppen: Del 1 & 2' (n 2).

[70] TT, 'Wallström anställer Anders Kompass' SVT nyheter (5 July 2016, updated 13 March 2017) https://www.svt.se/nyheter/inrikes/wallstrom-anstaller-anders-kompass accessed 19 March 2019.

[71] Report of an Independent Review (n 2) [11].

[72] Haglund 'FN och övergreppen: Del 1 & 2' (n 2). See also Inna Lazareva, 'Broken promises for the children of Bangui abused by peacekeepers' *The Guardian* (28 March 2017) https://www.theguardian.com/global-development/2017/mar/28/broken-promises-children-bangui-reports-peacekeepers-abuse-central-african-republic accessed 13 March 2019.

[73] Radio Sweden, 'Anders Kompass never saw himself as a whistleblower' (Radio Segment) Sveriges Radio (27 June 2016) https://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=6460379 accessed 22 March 2019.

effects on Kompass. The attitude and actions of the UN in situations like these can risk deterring UN staff from speaking out against injustices and Kompass has highlighted the importance of him being cleared in the investigations on that risk not increasing.[74] Nevertheless, Kompass still feels that the mechanics for internal review are too weak and not independent enough of the UN leadership, leading to people not wanting to or having the courage to speak up.[75] He has described it as "the benefit to the individual of not behaving ethically is perceived as greater than the cost of taking an ethical stance".[76] Moreover, an indication that the problem is wider than this incident and that it warrants serious measures, is that Kompass, according to his own accounts, received many messages from people who had experienced similar acts of retaliation when attempting to speak out against sexual exploitation and abuse in peacekeeping operations.[77]

The Independent Review also directed serious criticism to the way the UN responded to the allegations in general and pointed to "a culture of impunity" as well as a "bureaucratic culture" in which many turn a blind eye when crimes are committed, with little responsibility or initiative to address the violations.[78] Additionally, it is note-worthy that the investigation and actions regarding the allegations in CAR were not taken seriously until Kompass had given the Sangaris notes to France.[79] Before this point, the issue had been "passed from desk to desk, inbox to inbox, across multiple UN offices, with no one willing to take responsibility".[80]

Even after the allegations were brought to light, the unbalanced self-directed focus of the UN overshadowed concern for the victims, resulting in inaction and inability to address and stop the ongoing violations.[81] Kompass has voiced concern that the organization sometimes becomes more important

[74] Laville January 2016 (n 3); Haglund 'FN och övergreppen: Del 1 & 2' (n 2).
[75] Hallonsten (n 56).
[76] – – 'UN Whistleblower Skeptical of Reform' (2016) 32:14 New American 7.
[77] Tom Esslemont, 'United Nations Must Act to End Sex Abuse 'Cover-Ups': Whistleblower' *Reuters* (22 January 2016) https://www.reuters.com/article/us-un-whistleblower-sexabuse-idUSKCN0V021L accessed 19 March 2019.
[78] Report of an Independent Review (n 2) [3].
[79] Cf Laville January 2016 (n 3).
[80] Report of an Independent Review (n 2) 2.
[81] Laville January 2016 (n 3); Report of an Independent Review (n 2) [3].

than people; that UN Personnel in New York and Geneva risk becoming isolated from reality, fixating on protocols and internal procedures. In this climate keeping quiet and not causing trouble risk becoming more important than protecting people.[82] The UN has a zero-tolerance policy against sexual exploitation and abuse and the Independent Review Panel noted that, in order to achieve this, the accounts of rape against children have to be treated as the serious crimes and violations of human rights that they are.[83] As the Report aptly points out, "zero tolerance cannot be achieved with zero action".[84] Additionally, the failure of the UN to respond to the allegations in CAR had implications beyond causing harm to the victims. In the words of the Independent Review Panel, incidents like these allow "the actions of a few predatory individuals to taint the important and valuable work of peacekeepers as a whole".[85]

[82] Erik Grönlund, 'Kompass besviken på Jan Eliasson efter FN-turbulensen' *SVT nyheter* (30 June 2016, updated 1 July 2016) https://www.svt.se/nyheter/utrikes/kompass-besviken-pa-jan-eliasson-efter-fn-turbulensen accessed 13 March 2019.
[83] Kofi A Annan, 'Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (9 October 2003) UN Doc ST/SGB/2003/13; UNGA 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse - Report of the Secretary-General' (28 February 2013) UN Doc A/67/766 [1]; Report of an Independent Review (n 2) [5]
[84] Report of an Independent Review (n 2) [7].
[85] Ibid [4].

3 Whistleblower Protection in the UN

3.1 Introduction

The purpose of this chapter is to examine the different measures and mechanisms that form whistleblower protection within the UN. The UN consists of a number of organs, programs and agencies, many of which with their own policies and routines for whistleblower protection.[86] It is not necessary, or possible within the structural limits of this thesis, to give a comprehensive account of these different forms of protection. Instead, the main points of protection will be examined, followed by an overview of how the protection has worked in practice.

The definition of whistleblower differs depending on the context in which the term is used. Generally, the definition can be said to consist of two aspects: who the person that unveils information is, for instance if he or she is an employee, an intern or holds another position in relation to the organization or company; and what kind of information has been revealed.[87] In 2014, the Council of Europe published a recommendation entitled "protection of whistleblowers" where a general definition is given. The definition reads as follows: ""whistleblower" means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector".[88] There is not a similar overall definition within the UN. However, a general idea of what the UN views as a whistleblower can be found in the UN Secretary-General bulletins on the topic which are examined below in section 3.2.[89]

[86] For a list of some UN organizations and their policies, as they were at the end of 2017, see Review of Whistle-Blower Policies and Practices (n 8) Annex II.
[87] Martel (n 25) 266.
[88] Protection of Whistleblowers (n 7) 6.
[89] Martel (n 25) 266.

Being a whistleblower in an international organization, such as the UN, is somewhat different from being a whistleblower in a state. Some factors that generally affect how people respond when they witness wrongdoing are risks of losing their job, risks regarding potential visas, and the possibility of retaliation. The decision to blow the whistle is sometimes based on a "benefit-to-cost differential" where the different factors are balanced. What the policies, training and organizational culture looks like as well as societal laws and values can also be included in the evaluation.[90] The special nature of international organizations has been shown to affect this balance in a way that sometimes makes these whistleblowers more vulnerable than domestic whistleblowers. One example is that many international employees rely on visas based on the employment, raising the stakes of potential job loss.[91] Moreover, there are factors specific to the UN that are relevant to consider when discussing whistleblower protection in this unique organization. The first is a strong sense of unity that is created and enforced to unite an otherwise fragmented group of employees, composed of people from all over the world.[92] Whistleblowers are often met with retaliation and negative reactions from a group, which is thought to be because the person is seen as a traitor to the group.[93] The strong sense of unity in the UN means that the risk of a whistleblower being seen as traitorous is amplified. The second factor is the specific type of work that the UN engages in. Human rights, humanitarian crises and working with vulnerable groups are all situations where careful considerations are needed to ensure that no one is negatively affected. Finally, a great deal of the work carried out by the UN derives from diplomacy and the diplomatic tradition, which often favors "discretion over public exposure".[94]

[90] Moloney, Bowman and West (n 29) 3.
[91] Ibid 3, 13.
[92] Martel (n 25) 269.
[93] Ibid 267.
[94] Ibid 269.

3.2 Measures for Protection

At the end of 2005, UN Secretary-General Kofi Annan took action to strengthen the protection for whistleblowers in the UN and published a Secretary-General bulletin called "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations".[95] Although the term whistleblower is not mentioned in this document, a definition of the term can nevertheless be understood.[96] The bulletin covers any staff member, including UN interns and UN volunteers, irrespective of their position and the duration of their employment.[97] Protection is extended to persons who in good faith report breaches of UN rules and regulations and cooperates with audits and investigations.[98]

The main way of reporting misconduct in the UN is through its internal mechanisms, namely the "Office of Internal Oversight Services (OIOS), the Assistant Secretary-General for Human Resources Management, the head of department or office concerned, or the focal point appointed to receive reports of sexual exploitation and abuse".[99] Reporting misconduct to external mechanisms is warranted in some cases, under a set of conditions. External reporting needs to be either necessary, to avoid substantial harm to public health, safety or the organization's operations, or concern a violation of national or international law. Using internal mechanisms must be ruled out either because of risks of retaliation, risk of losing evidence or because of the failure of internal mechanisms. Finally, the person must not enjoy any monetary or other benefits for reporting.[100]

Retaliation is defined in the bulletin defined as "direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy".[101] It is further stated

[95] Kofi A Annan, 'Secretary-General's Bulletin: Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations" (19 December 2005) UN Doc ST/SGB/2005/21.
[96] Martel (n 25) 266.
[97] Secretary-General's Bulletin: Protection Against Retaliation 2005 (n 95) [2.1].
[98] Ibid [1.1]-[1.2], [2.1(a)], [2.1(b)].
[99] Ibid Section 3.
[100] Ibid Section 4.
[101] Secretary-General's Bulletin: Protection Against Retaliation 2005 (n 95) [1.4].

that retaliation contravenes the obligation of UN staff to uphold the standards of the organization and that the act of retaliation constitutes misconduct with the potential consequence of disciplinary measures.[102]

In order to strengthen the protection of persons who have experienced retaliation, the UN Secretary-General established the Ethics Office.[103] Persons who have experienced retaliation or threat of retaliation as a consequence of "whistleblower-activities" shall report their complaints to the Ethics Office. Subsequently, the Ethics Office reviews the complaint and if the case is credible, they are to submit it to the OIOS.[104] The Ethics Office can also recommend the UN Secretary-General to take appropriate measures while the investigation is finalized.[105]

In 2017, UN Secretary-General Antonio Guterres replaced the 2005 bulletin with an updated version, bearing the same title as the earlier version.[106] While the majority of the document remained the same, a few important changes were made. The first change was the addition of contractors and consultants to the list of persons that are included under the protection.[107] The second notable change was the addition of a prevention mechanism. If the OIOS receives a report of misconduct, which they assess to include a risk of retaliation, and they have the consent of the person who reported the misconduct, the OIOS is to inform the Ethics Office. The Ethics Office will subsequently, in consultation with the reporting person, take preventive actions.[108] The third important addition was a review mechanism that allows the person who reported misconduct or retaliation to have the matter reviewed again if the Ethics Office concludes that retaliation or risk thereof does not exist. The complainant shall, within 30 days of the decision, send

[102] Ibid [1.3]-[1.4], [7].
[103] Secretary-General's Bulletin: Protection Against Retaliation 2005 (n 95) [5.1]-[5.10]; Kofi A Annan, 'Secretary-General's Bulletin: Ethics Office – Establishment and Terms of Reference' (30 December 2005) UN Doc ST/SGB/2005/22.
[104] Secretary-General's Bulletin: Protection Against Retaliation 2005 (n 95) [5.1]-[5.2], [5.5].
[105] Ibid [5.6].
[106] António Guterres, 'Secretary-General's Bulletin: Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations' (28 November 2017) UN Doc ST/SGB/2017/2/Rev.1 cf [13.2].
[107] Secretary-General's Bulletin 2017 (n 106) [2.1].
[108] Ibid [5.1]-[5.2].

the matter to the alternate Chair of the Ethics Office who will carry out an independent review.[109]

3.3 Protection in Practice

The Ethics Office and the measures introduced in the 2005 UN Secretary-General bulletin on protection against retaliation represented a significant step for whistleblower protection in the UN. Both the possibility to report misconduct externally, as well as the fact that a new mechanism was created to make the process of reporting retaliation smoother, signifies that there was a will to establish effective protection.[110] However, as time passed that intention was not reflected in reality. The Ethics Office has in practice provided protection for only a small number of individuals in relation to the number of claims received.[111] Many have appealed the outcomes of the Ethics Office to UN tribunals[112], resulting in a number of decisions on the status and position of the Ethics Office.[113] Ultimately, this resulted in the conclusion that the UN tribunals are not competent to try decisions of the Ethics Office, meaning that the decisions cannot be challenged at all. The protection of whistleblowers in the years 2005-2017, with its foundation in the idea of the Ethics office, have consequently been said to lack justice, be inefficient and undermine the protection of whistleblowers.[114] On the other hand, a report from the UN Secretary-General on the activities of the Ethics Office emphasized the contribution of the Ethics Office to the work to promote ethics, transparency and accountability.[115]

Following this criticism, Antonio Guterres answered the call for reform and published the 2017 UN Secretary-General bulletin for protection against

[109] Secretary-General's Bulletin 2017 (n 106) [9.1]-[9.2].
[110] Martel (n 25) 271-272.
[111] Martel (n 25) 273. See also GAP, 'UN Tribunal Announces Judgments in Two Key Whistleblower Cases, Defers on a Third' *Government Accountability Project* (30 June 2014) https://www.whistleblower.org/-uncategorized/un-tribunal-announces-judgments-in-two-key-whistleblower-cases-defers-on-a-third/ accessed 27 April 2019.
[112] Namely the United Nations Dispute Tribunal (UNDT) and the United Nations Appeal Tribunal.
[113] Martel (n 25) 273-277.
[114] Ibid 277.
[115] UNGA 'Activities of the Ethics Office' (16 August 2016) UN Doc A/71/334 [72]-[73], [77].

retaliation.[116] The updated bulletin included measures to strengthen the protection for whistleblowers, mainly in the form of prevention and independent review mechanisms. However, given that a request for review must be made to the alternate Chair of the Ethics Office, it is uncertain whether these mechanisms reach a satisfactory level of independence.[117] Whether the whistleblower protection in the UN, presently represented by the 2017 bulletin on protection against retaliation, is sufficient is too soon to tell. Nevertheless, one observation that has been made is that the protection is unnecessarily complex which can lead to additional concerns regarding efficiency.[118]

In 2018, the JIU published a review of the effectiveness of whistleblower policies and practices across the UN.[119] The JIU is the independent and external oversight body of the UN that works on crosscutting issues in the UN system by conducting evaluations, inspections, and investigations.[120] Following a request made by the United Nations Educational, Scientific and Cultural Organization, the JIU initiated this review with the purpose to ensure that whistleblowers were adequately protected, specifically against retaliation.[121] The JIU analyzed whistleblower policies from the different organizations in the UN system and rated them against identified best practices, conducted a global staff survey, as well as did interviews.[122] The result was a comprehensive review of the status of whistleblower protection in the UN. Notably, the review covered several different whistleblower protection documents as many organizations within the UN have separate policies.[123] This connects to the first recommendation of the review, namely

[116] Secretary-General's Bulletin 2017 (n 106); Martel (n 25) 278.
[117] Martel (n 25) 284-285.
[118] Ibid 285-286.
[119] Review of Whistle-Blower Policies and Practices (n 8).
[120] JIU, 'About the Joint Inspection Unit' https://www.unjiu.org/content/about-jiu accessed 16 May 2019.
[121] Review of Whistle-Blower Policies and Practices (n 8) [1].
[122] Ibid [10], [12]-[13], [16] etc.
[123] For full list of policies examined see Review of Whistle-Blower Policies and Practices (n 8) Annex II.

that a single policy document covering all relevant information would improve the overall protection.[124]

As a preliminary note, the JIU observed that many whistleblower protection policies have been adopted as a direct reaction to high-profile cases of whistleblowers, including those involving sexual exploitation and abuse in peacekeeping operations.[125] The different written policies were subsequently evaluated by the JIU on the basis of five criteria. The criteria regarded reporting of misconduct; protection against retaliation; support to those who report misconduct; the preliminary review of reports of misconduct and retaliation; and the general strength of the policy.[126] After reviewing these policies, the JIU concluded that none met all the indicators under the five different criteria.[127] They recommended that the organizations within the UN system should update their policies and generally evaluate their frameworks.[128] In connection to this, the JIU points out that an effective whistleblower policy is vital in preventing retaliation, encouraging people to report misconduct and building trust within the organization.[129]

Furthermore, the global staff survey provided some noteworthy statistics.[130] The first interesting point concerned awareness, namely how familiar UN staff members were with the policies for reporting misconduct and retaliation. The results showed that 20 % were not familiar with the policies, close to 50 % were partly familiar and about 30 % very familiar. Another result worth mentioning is that 12.8 % of the persons who reported misconduct said they had also experienced retaliation. Moreover, only 40 % of those who experienced retaliation had reported it.[131] Beyond this lack of reporting experienced retaliation, underreporting was additionally identified as problematic in relation to witnessed misconduct. About half of the 44 %

[124] Review of Whistle-Blower Policies and Practices (n 8) [37].
[125] Ibid [5].
[126] Ibid [34].
[127] Ibid [121].
[128] Ibid [124]-[125].
[129] Ibid [30]-[31].
[130] See the design and methodology for the global staff survey in Review of Whistle-Blower Policies and Practices (n 8) Annex IV.
[131] Review of Whistle-Blower Policies and Practices (n 8) [194].

who had witnessed misconduct between 2012 and 2016 had not reported it.[132] The reasons cited for not reporting included both personal fears, such as feared retaliation, and lack of confidence in the system to take action against misconduct or protect against retaliation.[133]

[132] Ibid [207].
[133] Ibid [211], Figure VII-VIII.

4 The Problem of Sexual Exploitation and Abuse in UN Peacekeeping Operations

4.1 Introduction

Before examining the different possibilities to attribute responsibility to the UN for acts of sexual exploitation and abuse committed by peacekeepers under international law, an account must be given of underlying structures. This chapter will first give a background to UN peacekeeping operations and their legal framework. This is followed by a section on sexual exploitation and abuse, covering some background of the problem, the approach and attitudes of the UN as well as the relevant rules of conduct.

4.2 UN Peacekeeping Operations

4.2.1 Definitions

A general definition of peacekeeping operations can be found in the *Oxford Handbook of United Nations Peacekeeping Operations*, which states that peace operations are operations where uniformed personnel are sent abroad with a specific mandate. The mandate can for example be ”to assist in the prevention of armed conflict by supporting a peace process; serve as an instrument to observe or assist in the implementation of ceasefires or peace agreements; or enforce ceasefires, peace agreements or the will of the UN Security Council in order to build stable peace”.[134] In more general terms, the United Nations Security Council (UNSC) sets the mandate with the tasks and functions that are to be carried out by the peacekeeping operation.[135]

[134] Bellamy and Williams in Koops and others (n 16) 13.
[135] Bruce Oswald, *Documents on the Law of UN Peace Operations* (Oxford University Press 2011) 5.

An important distinction is that between UN-led peacekeeping operations and UN-authorized peacekeeping operations. The former are commonly known as "blue helmet" missions (characterized by the blue helmets they wear) and are under the command and control of the UN. UN-authorized peacekeeping missions are mandated by the UN, usually the UNSC, but are not controlled by the UN in the field, but managed by a state or a regional organization.[136] Additionally, there are operations recognized but not mandated by the UN, as well as peacekeeping operations that are totally separate from the UN.[137] Non-UN peacekeeping missions are mostly smaller operations, typically observer-missions. The same goes for UN-recognized peacekeeping, with the exception of a few more average-sized peacekeeping operations in addition to the observer-missions.[138]

In addition to the distinction between UN-led, UN-authorized and other kinds of operations, peacekeeping needs to be put in perspective in relation to a variety of adjacent activities. Peacekeeping is traditionally practiced when fighting has stopped in order to help preserve peace and peace agreements. Modern peacekeeping does this in a more complex way, with several actors and factors working together. Sometimes, peacekeeping crosses over into "peacebuilding", where measures go deeper and try to contribute to a more comprehensive and sustainable foundation of peace.[139] Measures are then more long-term and also directed at supporting the capacity of the host state. Occasionally, peacekeeping has been used during on-going conflicts when the UNSC has determined the existence of a threat to the peace, breach of the peace or act of aggression, and authorized use of military force under Chapter VII of the UN Charter. These missions can have mandates with a broader scope of authorized force and are referred to

[136] Bellamy and Williams in Koops and others (n 16) 13; Report of an Independent Review (n 2) [28].
[137] Bellamy and Williams in Koops and others (n 16) 13.
[138] Ibid 28.
[139] UN Department of Peacekeeping Operations, 'UN peacekeeping operations: principles and guidelines' (18 January 2008) (Capstone) https://peacekeeping.un.org/sites/default/files/peacekeeping/en/capstone_eng.pdf accessed 23 May 2019 17-18.

as "peace enforcement" missions.[140] However, the line between peacekeeping operations and peace enforcement missions is not always clear. Moreover, somewhere between peacekeeping and peace enforcement falls another category, called peacekeeping operations with "coercive mandates".[141]

Finally, it is necessary to differentiate between the categories of persons that form the UN peacekeeping operations, as these have separate legal status and are governed by different rules. For the purposes of this thesis, three categories are relevant to keep separate. The first is UN civilian staff, followed by civilian police and military observers. The second group is commonly referred to as "experts". The final group is military contingents, in other words military personnel sent by UN Member States.[142]

4.2.2 The Development of UN Peacekeeping Operations

A foundational element of the UN is the prohibition of the use of force. The UN Charter provides that the Member States of the UN shall refrain from the threat or use of force against the territorial integrity or political independence of other states.[143] At the same time, a "UN army" was envisaged at the time of the drafting of the UN Charter. The army would be under the control of the UNSC to use in its work to maintain international peace and security. However, this possibility was never realized. In the space left by the unused enforcement option, there was a need for an alternative based on consent. This was the start of UN peacekeeping.[144] Thus, peacekeeping, despite forming part of the activities of the UN, does

[140] Capstone (n 139).
[141] Nigel D White, 'Peacekeeping and International Law' in Joachim A Koops and others (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (4th edn, Oxford University Press 2015) 45-46.
[142] See for example Comprehensive review (n 5) Annex; Oswald 2011 (n 135) 35, 44.
[143] UN Charter art 2(4).
[144] UN Charter art 24 (UNSC primary responsibility to maintain international peace and security); UN Charter art 43 (provisioning that Member States shall make armed forces etc available to the UNSC for the purposes of international peace and security); White in Koops and others (n 141) 44; Shaw (n 25) 938.

not have legal basis in the UN Charter.[145] Instead, peacekeeping operations have developed through "periods of intensive experimentation and growth punctuated by phases of retraction and caution".[146] This development has been arranged into categories or cycles, sometimes referred to as generations of peacekeeping.[147]

The early peacekeeping operations are commonly categorized as "traditional peacekeeping" and base their authority ultimately on the consent of the state where it is located. These operations were generally directed at post-colonial situations, for example in Congo after being decolonialized by Belgium. The main goal was stabilization and the use of force that was authorized was restricted to self-defence.[148] The peacekeeping efforts during this time were usually seen as successes or at least as being an important part in the process of resolving conflicts.[149] In sum, traditional peacekeeping operations were characterized by the principles of consent, impartiality in relation to the parties to the conflict, and the restriction of the use of force.[150]

Another phase in the development of peacekeeping happened at the end of the cold war. Peacekeeping operations were set up in states where Cold War proxy wars were coming to an end, and in large they followed the success of the traditional peacekeeping operations. Forces were also sent to places of ongoing conflict, where their work was more focused on providing humanitarian assistance. The UN proved to have bitten of more than they could chew with these operations, in terms of both size and ambition.[151] Although some operations had positive results in preventing the resumption of conflict and in delivering humanitarian aid, the failure of the UN to prevent large-scale violence in for example Rwanda and Srebrenica

[145] See for example Capstone (n 139) 13; White in Koops and others (n 141) 43-44; Shaw (n 25) 938.
[146] Richard Gowan, 'Peace Operations' in Thomas G Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (2nd edn, Oxford University Press 2018) 421.
[147] Ibid 421-423.
[148] Cf White in Koops and others (n 141) 44; Shaw (n 25) 941; Gowan in Weiss and Daws (n 146) 422-423.
[149] Joachim A Koops and others, 'Introduction: The United Nations and Peacekeeping' in Joachim A Koops and others (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (4th edn, Oxford University Press 2015) 6.
[150] Capstone (n 139) 31; Koops and others in Koops and others (n 149) 2.
[151] Gowan in Weiss and Daws (n 146) 424.

(Yugoslavia) seriously damaged its credibility.[152] The principles of traditional peacekeeping operations started to expand and evolve during this time. The actors involved in a conflict, other than the host state, were not always required to give consent. The idea of impartiality changed when peacekeepers took on a more active role in safeguarding norms of the UN Charter, international humanitarian law and potential peace agreements. The aim to restrict the use of force stared to waver and the scope of use of force that was authorized expanded to also include defense of the mandate.[153]

The generation of modern peacekeeping operations began in the late 1990s and has continued through the early 21st century. Modern peacekeeping operations have expanded into Africa with a greater emphasis on peace-building activities.[154] Another development is the increase in different cooperation constellations forming peacekeeping missions. The most common partnerships have been between the UN and the European Union, the Economic Community of West African States, the African Union, or the North Atlantic Treaty Organization.[155] After a few years of positive results and a good image of peacekeeping operations, challenges started to overshadow the successes.[156] The challenges were both systemic, including political differences and issues with financing, as well as field related. The latter category includes protection of civilians and maintaining good relations with local society.[157] It is in the context of field related challenges that the problem of sexual exploitation and abuse has become relevant.

Although some general developments can be observed, the development of peacekeeping operations is best explained as a process of ebbs and flows and as cycles of experimentation and of caution.[158]

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[152] Koops and others in Koops and others (n 149) 6; Gowan in Weiss and Daws (n 146) 424.
[153] Capstone (n 139) 31; Koops and others in Koops and others (n 149) 2-3.
[154] Gowan in Weiss and Daws (n 146) 425-426.
[155] Koops and others in Koops and others (n 149) 5; Gowan in Weiss and Daws (n 146) 431.
[156] Gowan in Weiss and Daws (n 146) 426-427.
[157] Ibid 428.
[158] Bellamy and Williams in Koops and others (n 16) 30; Gowan in Weiss and Daws (n 146) 421.

4.2.3 The Legal Framework of Peacekeeping Operations

Peacekeeping operations are most commonly established through a UNSC resolution.[159] As mentioned at the start of the section on the development of UN peacekeeping operations, this practice is not mentioned in the UN Charter.[160] Still, the legal foundation of these operations is usually understood to fall under the UN Charter. Traditional peacekeeping is most commonly linked to Chapter VI in the UN Charter, i.e. the peaceful settlement of disputes.[161] Nevertheless, as it is not necessary for the UNSC to explicitly state the legal basis for peacekeeping operations in their resolutions, Chapter VI has not been mentioned in any of the resolutions authorizing peacekeeping missions. Trying to label an operation with a specific legal basis can even be considered misleading. In reviewing an operation, the legal basis is more likely to be found in the mandate given by the UNSC as well as other documents relevant to that operation.[162] Moreover, peacekeeping operations with more coercive mandates, in the gray area moving towards peace enforcement, are commonly authorized under Chapter VII UN Charter.[163]

The UNSC is the only UN organ with the power to authorize the use of force in the mandates of peacekeeping operations. However, it was established by the International Court of Justice (ICJ) in the *Certain Expenses* advisory opinion that, even though the UNSC has the primary responsibility for the maintenance of international peace and security under article 24(1) UN Charter, this responsibility is not exclusive.[164] Therefore, the United Nations General Assembly (UNGA) also has competence to recommend traditional consensual peacekeeping operations.[165] Furthermore,

[159] Capstone (n 139) 14; Koops and others in Koops and others (n 149) 3.
[160] See section 4.2.2.
[161] Capstone (n 139) 13; White in Koops and others (n 141) 44.
[162] Capstone (n 139) 13-14.
[163] Capstone (n 139) 14; White in Koops and others (n 141) 44.
[164] ICJ, *Certain Expenses of the United Nations* (Advisory Opinion of 20 July 1962) ICJ Reports 1962 p. 151, 163.
[165] White in Koops and others (n 141) 45.

the UN Secretary-General generally has an important role in the establishment of a peacekeeping operation since the progress-reports of the Secretary-General often are central to the connected decisions of the UNSC.[166]

The legal framework governing a peacekeeping operation as such is a combination of international law, the law of the host state, and the law of the states contributing troops to the operations. Different rules apply to the contributing states and the individual peacekeepers, and general statements are difficult as situations, parameters and actors differ vastly between peacekeeping operations.[167] Nevertheless, the key documents are the resolution that establishes the operation, the Status-of-Forces Agreement (SOFA), and the Memorandum of Understanding (MoU). SOFAs regulate the relationship between the UN and the host state, granting the operation as well as peacekeepers rights, privileges and immunities required by the peacekeeping mandate. The starting point for the negotiations of the SOFA with the host state is the Model SOFA from 1990.[168] In turn, the MoU relates to the relationship between the UN and states that are contributing troops. It establishes the necessary practicalities as well as the UN standards of conduct that shall apply to the persons contributed by the UN Member States. The first MoU was created in 1991 and has subsequently been updated.[169] The rules related to peacekeepers and sexual exploitation and abuse are examined below in section 4.3.3.

A final aspect of the legal framework of UN peacekeeping operations that is worth mentioning is the principles that have been found vital for a successful peacekeeping operation. These principles include legitimacy, credibility and national and local ownership. The principles were identified

[166] The UN Secretary-General is entrusted with peacekeeping functions with the support of art 98 UN Charter; Koops and others in Koops and others (n 149) 3; White in Koops and others (n 141) 46.
[167] Oswald 2011 (n 135) 8-9.
[168] UNGA 'Draft Model Status-of-Forces Agreement between the United Nations and Host Countries' (9 October 1990) UN doc A/45/594 Annex (Model SOFA); Oswald 2011 (n 135) 34.
[169] Oswald 2011 (n 135) 51, 53ff.

in the Capstone Doctrine that collected principles and guidelines for UN peacekeeping operations.[170] Legitimacy is the result of the UNSC mandate and strengthened by the fact that the operations are directed by the UN Secretary-General as well as that many different states contribute to the operations with personnel and funding. Moreover, the legitimacy of a peacekeeping operation is closely connected to the way the operation is conducted and the behavior of the different sections of peacekeeper personnel.[171] Credibility signifies the trust that the international and local communities have in the mission and its ability. In other words, "[c]redibility is a function of a mission's capability, effectiveness and ability to manage and meet expectations".[172] Credibility is important to maintain, as it is hard to regain if it is lost. Low credibility can have serious long-term implications, with negative effects on legitimacy, the consent of the state, the moral of the personnel, and the effectiveness of the operation.[173] Lastly, national and local ownership is an important factor in order to achieve sustainable peace. Although the activities of peacekeeping missions sometimes include temporarily taking over some functions of the state, they should always aim to cooperate, consult, and ultimately help build national capacity.[174]

4.3 Sexual Exploitation and Abuse in UN Peacekeeping Operations

4.3.1 Definitions and Scope of the Problem

The definition of sexual exploitation and abuse that will be used in this thesis is one that was introduced in a 2003 UN Secretary-General bulletin on the subject entitled "Special measures for protection from sexual exploitation and sexual abuse". In this, "sexual exploitation" is defined as "any actual or attempted abuse of a position of vulnerability, differential

[170] Capstone (n 139) 36.
[171] Ibid 36-37.
[172] Ibid 38.
[173] Ibid 37-38.
[174] Capstone (n 139) 39-40.

power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another", while sexual abuse is defined as "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions".[175]

Reports of sexual exploitation and abuse by soldiers deployed in UN peacekeeping operations are not one-off events. The number of reported cases has varied between 50 and 100 a year between the years 2007 and 2018.[176] The allegations involve both child and adult victims. It is also worth noting that the allegations are not representative of the number of victims. From 2010 to 2019 the allegations reached the number of 634, corresponding to a total of 917 victims.[177] Moreover, it is highly likely that the number is even higher because of underreporting and shortcomings in the way the UN tracks violations.[178] The perpetrators are most often military personnel, but police and UN staff are also represented in the statistics.[179]

Sexual exploitation and abuse in peacekeeping operations include rape of both adult and child victims, child pornography, trafficking and buying sex from prostitutes.[180] The abuse can either be opportunistic, planned and sadistic, or transactional in nature. It is sometimes also connected to criminal networks, for example in cases involving trafficking or soldiers frequenting brothels that are involved with trafficking.[181] An illustration of what the abuse can look like has been given in the case study of peacekeeping in CAR above in Chapter 2. There are other similar examples of peacekeepers taking advantage of children, as well as adults, that are desperate for food or money. The context of peacekeeping operations is often one of vulnerability, poverty and insecurity. The situation of people

[175] Secretary-General's Bulletin 2003 (n 83) [1].
[176] UN 'Allegations' (n 4).
[177] UN 'Victims' (n 4).
[178] Report of an Independent Review (n 2) [41], [283].
[179] UN, 'Sexual Exploitation and Abuse: Alleged perpetrators' (2019) https://conduct.unmissions.org/sea-subjects accessed 11 April 2019.
[180] UNHCR/Save the Children (n 5) 6; Comprehensive review (n 5) [3]; Martin (n 5) 5; Burke (n 5) 3.
[181] Westendorf and Searle (n 18) 368, 374.

engaging with peacekeepers in need of food, money or services is sometimes referred to as "survival sex".[182]

While prostitution is legal in some areas of the world, it is problematic when done by persons involved in peacekeeping operations as well as a breach of the UN code of conduct. Prostitution in vulnerable societies in which peacekeeping missions operate is a complicated issue for a number of reasons. First, it can affect the trust between peacekeepers and the local populations. Second, it can be hard to ascertain if the acts are consensual, for example since there are accounts of rape afterward being disguised as prostitution. Third, there are several documented occurrences of so-called "peacekeeper babies", namely babies conceived by peacekeepers. The mothers are most often left abandoned and without support, leaving them even more vulnerable and helpless.[183]

There are several implications of sexual exploitation and abuse occurring in the context of peacekeeping operations. Victims of rape often experience strong psychological trauma, especially victims that are children, which is further exacerbated by social stigma and lack of psychological support.[184] In addition to the psychological trauma and temporary physical trauma there is also an increased risk of future longer-term medical problems, such as HIV/AIDS. Moreover, the recognized problem "peacekeeper babies" often leads to stigmatization, isolation from the community and risk of falling deeper into dependency.[185] Sexual exploitation and abuse can also have negative effects on the credibility and legitimacy of the peacekeeping operation, ultimately affecting the effectiveness of the mission.[186]

[182] UNHCR/Save the Children (n 5) 7; Burke (n 5) 4.
[183] Comprehensive review (n 5) [6]; see more on peacekeeper babies: Olivera Simić and Melanie O'Brien, '"Peacekeeper Babies": An Unintended Legacy of United Nations Peace Support Operations' (2014) 21:3 International Peacekeeping 345.
[184] UNHCR/Save the Children (n 5) 7; Burke (n 5) 7.
[185] Comprehensive review (n 5) [10]; Burke (n 5) 7.
[186] Comprehensive review (n 5) [10]; Capstone (n 139) 37; Machiko Kanetake, 'Whose Zero Tolerance Counts? Reassessing a Zero Tolerance Policy against Sexual Exploitation and Abuse by UN Peacekeepers' (2010) 17:2 International Peacekeeping 200, 202.

4.3.2 Efforts Taken by the UN

For the purposes of this work it is not necessary to give a comprehensive account of the efforts and measures that have been taken by the UN. However, it is still relevant to consider some key actions in order to contextualize and understand the development of the UN's approach to the issue.[187]

When allegations of sexual exploitation and abuse in peacekeeping operations first emerged in the 1990s, not much was done do address the issue. The response was instead aimed at keeping the visits to the brothels discreet and preventing the spread of HIV. The time period is illustrated by an infamous quote by the Secretary-General Special Representative to the peacekeeping mission in question. His comment to the allegations was simply: "boys will be boys".[188]

One of the first comprehensive documents produced by the UN dealing with the problem discussed is the 2003 bulletin "Special measures for protection from sexual exploitation and sexual abuse" issued by UN Secretary-General Kofi Annan. The definition introduced in the beginning of this section was first introduced in the 2003 bulletin and was later incorporated into the MoU.[189] The bulletin prohibits sexual exploitation and abuse, clarifying that there already exists a general obligation to prohibit these acts in the UN Staff Regulation and Rules. Some aspects are especially highlighted. Firstly, the bulletin makes clear that sexual activity with persons under 18 is prohibited under all circumstances. The local age of consent and arguments that the age was unknown are irrelevant. Secondly, exchanging money, services or goods for "sex, including sexual favours or other forms of humiliating, degrading or exploitative behaviour" is prohibited. Thirdly, the bulletin strongly discourages sexual relationships between UN staff and those who receive assistance, due to the "inherently unequal power dynamics" in those relationships. Acts of sexual exploitation and abuse are

[187] For a more comprehensive see for example Oswald 2016 (n 4).
[188] Oswald 2016 (n 4) 146; Westendorf and Searle (n 18) 366.
[189] Burke (n 5) 30.

considered serious misconduct and thereby constitute grounds for disciplinary measures. Furthermore, the bulletin points to the obligation to report suspicions of misconduct as well as creating and maintaining a preventive environment.[190]

The 2003 bulletin on protection against sexual exploitation and abuse is the starting point and basis for the UN's zero-tolerance policy for actions falling under this concept. Although there is no explicit mention of zero-tolerance in the 2003 bulletin, this is not only the spirit but also the subsequent interpretation of this document. Additionally, zero-tolerance has been reaffirmed in the UN through UNGA and UNSC resolutions and is therefore an established feature in the system.[191]

Another important document is the so-called Zeid Report.[192] The report is the result of an advisor, Prince Zeid, appointed by the UN Secretary-General to examine the still-present problem of sexual exploitation and abuse in peacekeeping operations. The Zeid Report outlines the relevant rules and makes a number of recommendations.[193] The recommendations include that the 2003 bulletin should be applicable to all categories of UN peacekeepers, that the investigation mechanisms should be improved and that there should be more serious and clear consequences for offenders.[194] The need for preventative measures is emphasized, with the overall message that the efforts by the UN so far have been inadequate, stating "what is needed is a radical change in the way the problem is addressed in peacekeeping contexts".[195]

The Independent Report, that was initiated to examine the events of sexual exploitation and abuse and its aftermath in CAR, has also been cited as an

[190] Secretary-General's Bulletin 2003 (n 83) [3.2].
[191] UNGA, 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Cross-Cutting Issues' (15 August 2005) UN Doc A/RES/59/296; UNSC Res 2272 (11 March 2016) UN Doc S/RES/2272; Oswald 2016 (n 4) 159.
[192] Comprehensive review (n 5).
[193] Oswald 2016 (n 4) 148.
[194] Comprehensive review (n 5) [27], [36], [91].
[195] Ibid [11]-[12].

important part of the efforts taken.[196] The content of the report has been studied in the case study above.[197]

The efforts have continued and been reinforced in the later part of the 2010s. In 2016, the UNSC issued the first resolution on the subject. The resolution includes expressed support for the zero-tolerance policy and encouragement for troop-contributing countries to hold responsible peacekeepers accountable.[198] The UN Secretary-General has annually since 2004 published a report on the special measures needed for the protection from acts of sexual exploitation and abuse.[199] Nevertheless, the UN has been criticized for not managing to incorporate a comprehensive strategy dealing with this and that overall very little has been achieved.[200] Another point of critique has focused on the efforts of the UN to protect its image and this coming in the way of actually dealing with the issue and supporting the victims, which is illustrated in the case of Anders Kompass.[201]

4.3.3 Relevant Rules of Conduct

Another aspect that is interesting in understanding the UN's approach to this problem is the rules of conduct. When giving an overview of the rules relevant to sexual exploitation and abuse in peacekeeping operations, it is important to remember the different categories of UN personnel. These are UN staff, experts on mission (mainly civilian police and military observers) and military contingents.[202]

As a primary note, the 2003 bulletin and zero-tolerance policy are central regulations regarding acts of sexual exploitation and abuse.[203] The 2003

[196] Oswald 2016 (n 4) 150.
[197] See section 2.4.
[198] Res 2272 (n 191) Preamble, [11].
[199] All the reports can be found at: UN, 'Reports of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (2019) https://conduct.unmissions.org/reports-secretary-general-special-measures-protection-sexual-exploitation-and-sexual-abuse?page=2 accessed 16 May 2019.
[200] Report of an Independent Review (n 2) [41]; Oswald 2016 (n 4) 150.
[201] Kanetake (n 186) 209.
[202] See section 4.2.1.
[203] Secretary-General's Bulletin 2003 (n 83). See also section 4.3.2.

bulletin in itself only applies to UN staff.[204] In 2005, at the time of the Zeid Report, this was considered a "serious shortcoming" of the document.[205] Experts on mission, namely civilian police and military observers, have through a revision been included in the documents they sign when starting in a peacekeeping mission.[206] Moreover, military contingents are bound by the zero-tolerance policy through a number of amendments to the model MoU.[207] The main consequence of the zero-tolerance policy is that a number of disciplinary measures are available in relation to the different actors.[208]

Members of UN staff in peacekeeping operations fall under a set of different rules of conduct. Firstly, as staff of the UN, they are chosen on the basis of article 101(3) in the UN Charter that is aimed at securing the highest standards of efficiency, competence, and integrity. Furthermore, staff are bound by the Staff Regulations and Rules. This framework connects to the issue of sexual exploitation and abuse by requiring staff to uphold integrity, to observe local laws as well as not engage in acts of sexual harassment.[209] In addition to the binding rules of the Staff Regulations and Rules there also are specific standards of conduct for staff to abide by.[210]

Civilian police and military observers, so called experts, must observe local laws and regulations in accordance with paragraph 6 in the model SOFA.[211] They are also covered by various rules of conduct. Firstly, the standards of conduct that apply to UN staff have also been extended to experts on mission. Next, when peacekeepers join a mission they undertake to follow the rules of conduct entitled "Ten Rules: Code of Personal Conduct for Blue Helmets" and "We Are United Nations Peacekeepers".[212] Rule 4 in the "Ten Rules" declare "[d]o not indulge in immoral acts of sexual, physical or

[204] Secretary-General's Bulletin 2003 (n 83) [2.1].
[205] Comprehensive review (n 5) [14].
[206] Oswald 2011 (n 135) 368-369, 432.
[207] Ibid 52, 432.
[208] Ibid 433.
[209] Comprehensive review (n 5) Annex [A.9].
[210] Comprehensive review (n 5) Annex [A.10].
[211] Ibid Annex [A.14], [A.16].
[212] Ibid Annex [A.17]-[A.18].

psychological abuse or exploitation of the local population or United Nations staff, especially women and children".[213]

Lastly, there is the category of national military contingents. All those participating in a peacekeeping operation must respect local laws and regulations, similarly to other groups.[214] They must also agree to follow the "Ten Rules: Code of Personal Conduct for Blue Helmets" and "We Are United Nations Peacekeepers".[215]

[213] 'Ten Rules Code of Personal Conduct for Blue Helmets' available at: https://peacekeeping.un.org/en-/standards-of-conduct accessed 21 May 2019.
[214] Model SOFA (n 168) [6]; Comprehensive review (n 5) Annex [A.27].
[215] Comprehensive review (n 5) Annex [A.30].

5 International Responsibility of the UN

5.1 Introduction

The previous chapter provided the background necessary for the examination of the international responsibility of the UN. Although it has been proven in many cases that peacekeepers have committed crimes of sexual exploitation and abuse while acting as UN peacekeepers, it is not clear whether the UN can be held internationally responsible for those acts and to what extent.

The first step to establish international responsibility for an international organization is to determine that it has international legal personality.[216] The two concepts are interconnected; in having legal personality, international responsibility may follow and if a subject has international responsibility that subject accordingly has legal personality.[217]

The second step is to examine the rules of international responsibility. To structure this, a general distinction can be made between primary and secondary rules. The group of primary rules are substantive rules, in other words the rules that establish what obligations an international organization has. The secondary rules can in turn be described as the structural, or procedural, rules that cover the legal consequences of the breach of a substantive rule.[218] This division of rules was initially established in order for the ILC to concentrate on the latter category of secondary rules in their process of creating the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[219] Correspondingly, when the

[216] Shaw (n 25) 1001.
[217] Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 6.
[218] Eric David, 'Primary and Secondary Rules' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 27-28.
[219] ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' Report of the International Law Commission on the Work of its 53rd

ILC created ARIO, they constructed them after the same model and focused entirely on secondary rules of international law.[220]

Although the classification of primary and secondary rules is not perfect, having for example been criticized for being "a sometimes artificial distinction" not always unconditionally applicable to reality, it is sufficient and helpful in structuring this work.[221] Accordingly, this chapter will follow the structure of first considering the possession of international personality, next exploring the different sources of law that constitute the primary rules as well as the secondary rules as codified in ARIO from the perspective of the UN, and lastly studying the results of applying the law to the situation of sexual exploitation and abuse in UN peacekeeping operations. The findings are summarized and discussed in Chapter 6 when answering the first sub-question of what kind of responsibility the UN has.

However, before continuing it is relevant to clarify the terminology of responsibility, accountability, and liability. Responsibility is something that can arise when an international organization with legal personality breaches an international obligation.[222] The consequences of responsibility can, within the framework of ARIO, include the cessation of a continuing wrongful act, guaranteeing of non-repetition and reparations for injuries.[223] The term liability is commonly used in relation to domestic law and sometimes for the internal rules of an organization.[224] It can also be used to describe a more tangible obligation, in relation to a more abstract idea of responsibility.[225] In turn, accountability is a broader concept that includes responsibility as well as the possibility to hold an actor accountable for that action. Accountability is often thought of something that an international organization owes in relation to another actor or group that has the ability to

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Session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 (ARSIWA with Commentaries).

[220] ARIO with Commentaries (n 15) General Commentary [3].

[221] David in Crawford and others (n 218) 29-32.

[222] Shaw (n 25) 1002.

[223] ARIO (n 15) art 30-31.

[224] Pierre Klein, 'Responsibility' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2017) 1028.

[225] Klabbers (n 27) 323.

realize the consequences attached to that accountability.[226] The three terms are interrelated but the focus of this chapter, and of this thesis, is on matters relating to responsibility, specifically in the context of ARIO (introduced in section 5.4). Moreover, the consequences of responsibility, such as potential reparations and remedies, are not be covered.[227]

5.2 International Personality

International personality has long been a topic for discussion in the area of law for international organizations.[228] The question of whether international organizations can have legal personality is settled, they can, but the foundation of that personality and discussion surrounding the details of international legal personality for international organizations are still important and relevant to our discussion.[229] A commonly used definition of international personality is "having international legal personality for an international organization means possessing rights, duties, powers and liabilities etc. as distinct from its members or its creators on the international plane and in international law".[230] Moreover, international legal personality is separate from personality under domestic law. The latter concerns legal engagements such as entering into contracts and dealing in property under a state's jurisdiction, while international legal personality is more relevant to having capacities on the international arena.[231]

There are different theories on how international legal personality for international organizations is determined. There are two paths that are sometimes considered two separate schools of thought, the first known as

[226] Shaw (n 25) 1006; Mathias Koenig-Archibugi, 'Accountability' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2017) 1146-1148.
[227] Cf section 1.3. For an examination of the different consequences such as reparation as well as ways to hold the UN to account for acts of sexual exploitation and abuse in peacekeeping operations, see Burke (n 5) 293-310.
[228] See for example Chittharanjan F Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press 2005) 66; Tarcisio Gazzini, 'Personality of International Organizations' in Jan Klabbers and Åsa Wallendahl (eds), Research Handbook on the Law of International Organizations (Edward Elgar 2011) 33.
[229] Gazzini in Klabbers and Wallendahl (n 228) 33.
[230] Amerasinghe (n 228) 78. See also Gazzini in Klabbers and Wallendahl (n 228) 34.
[231] Gazzini in Klabbers and Wallendahl (n 228) 44.

the will-theory and the second as the objective theory.[232] The will-theory gets its name from the idea that organizations have legal personality as a result of their will to have it. Since the possession of meaningful legal personality requires third parties to accept it and enter into agreements with it, some argue that recognition is an additional requirement under this theory. Those who argue against recognition instead say that the legal personality automatically becomes objective, meaning that others must accept it.[233] The main method to express the will to have personality is to include it in the constituent treaty of the organization. However, there are very few relevant examples of this.[234] Next, the objective theory suggests that personality is a natural consequence of an organization becoming an organization under international law. Hence, it is the more objective requirements of when and how an international organization is formed under international law that forms the base for personality, rather than the more subjective will of the organization.[235]

The will-theory and the objective theory are mostly theoretical. A more practical approach is to consider the practices and characteristics of the organization. One such indicator is that the organization accepts international responsibility for internationally wrongful acts.[236] Another relevant factor is if the organization concludes international treaties, which signifies a will to have personality.[237] Lastly, claiming and being granted immunity through agreements with states can indicate legal personality. Nevertheless, this aspect has limited applicability, as immunity and legal personality do not always go hand in hand.[238]

This practical approach is the one supported by the central case in regard to this discussion, namely the 1949 ICJ judgement *Reparation for Injuries*

[232] Gazzini in Klabbers and Wallendahl (n 228) 34-35.
[233] Klabbers (n 27) 46-48.
[234] Klabbers (n 27) 47; Shaw (n 25) 991.
[235] Klabbers (n 27) 46, 48. The theory was developed by Finn Seyersted, see Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations - Do Their Capacities Really Depend upon the Conventions Establishing Them' (1964) 34 Nordisk Tidsskrift for International Ret.
[236] Gazzini in Klabbers and Wallendahl (n 228) 38-39.
[237] Ibid 40.
[238] Ibid 41-43.

Suffered in the Service of the United Nations.[239] The Reparations for Injuries Case sheds some light on the concept of international personality, as well as establishes that the UN has such personality, stating that the UN is "a subject of international law and capable of possessing rights and duties".[240] The international legal personality of the UN cannot be assumed from the UN Charter, but must instead be based on this more practical approach. The essence of this method is that the personality can be "inferred from the powers or purposes of the organization and its practice".[241] It is concluded in the Reparations for Injuries Case that the intention of the UN and the practice of the UN both point to it being an organization with international personality and that the international personality is a necessity for the UN to do what it was entrusted to do through the UN Charter.[242] Furthermore, the legal personality that the UN enjoys is objective, meaning that, apart from being valid in relation to UN Member States, it is also valid in relation to Non-member States without them having to recognize the personality.[243]

If an international organization has international legal personality, it means that it possesses rights and duties as well as the capacity to bring international claims.[244] In the Reparations for Injuries Case, the UN was for example able to assert the rights of the organization as opposed to representing their agents.[245] In other words, the organization can act independently and not for or through their members or agents. An additional consequence of international personality is that the organization can be held internationally responsible.[246] Still, legal personality of international organizations is not equivalent to that of states. For example, organizations do not have governmental powers over populations or territory. Furthermore, they do not have general competence since their powers are limited by what the founding states entrust it with. Subsequently, the details

[239] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion of 11 April 1949) ICJ Reports 1949 p. 174.
[240] Reparations for Injuries Case (n 239) 179.
[241] Shaw (n 25) 991.
[242] Reparations for Injuries Case (n 239) 179; Shaw (n 25) 991.
[243] Reparations for Injuries Case (n 239) 185; Amerasinghe (n 228) 86; Shaw (n 25) 992.
[244] Reparations for Injuries Case (n 239) 179.
[245] Ibid 184.
[246] Shaw (n 25) 992, 1001.

of the effects that come from international personality are dependent on circumstances. The discussion on the powers of an international organization is a separate discussion which is not relevant for the purpose of this thesis.[247]

5.3 Primary Rules of International Responsibility

In examining the obligations of the UN, the sources of law can be categorized as internal and external sources of law. A potential third category is that of private law obligations. These are obligations that arise from for example contractual agreements.[248] The groups of internal and external legal sources warrant further explanation and will be examined in turn together with relevant examples of the UN.

5.3.1 Internal Sources of Law

The internal law governing international organizations, in other words the rules of the organizations, have been defined in the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (VCLTIO) as "the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".[249] Moreover, the same definition can be found in ARIO.[250]

The constituent instrument of an international organization, most often a founding treaty, lays out the functions and frameworks of the organization. In some cases, the constituent instrument can be helpful in determining which rules and legislation, national and international, apply to the

[247] Reparations for Injuries Case (n 239) 179; Gazzini in Klabbers and Wallendahl (n 228) 43; Shaw (n 25) 99.
[248] Sands and Klein (n 28) 447; Nguyen (n 27) 151.
[249] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986) (VCLTIO) art 2 (1)(j).
[250] ARIO (n 15) art 2(b).

organization.[251] Clauses concerning the responsibility of the international organization in the constituent instruments are however not that common and can only be found in a small number of specialised organizations.[252] The constituent treaty of the UN is the UN Charter.

The second form of an internal legal source is the decisions and resolutions that have been adopted by the international organization. This category can consist of legally binding and non-binding products and it is not always clear whether a document is binding or not.[253] The same goes for UNSC and UNGA resolutions. In absence of a clear reference to the UN Charter, an analysis needs to be made based on factors such as the authority and language of the resolution in declaring if the resolution is binding or not.[254] A relevant internal document to sexual exploitation and abuse is the 2003 bulletin. Although hard to categorize, this is binding upon all UN peacekeepers due to its part in the code of conduct and revised MoU.[255]

The final part of the rules of an international organization, as identified in VCLTIO and ARIO, is established practice of the organization. For a practice to be considered as a definitive rule of an international organization it needs to be undoubtedly established in that organization.[256]

5.3.2 External Sources of Law

The external sources of law can be divided into two categories, namely domestic law and international law. International law is in turn separated into international treaty law and customary international law.[257]

Domestic law can be relevant for and binding upon international organizations. This can happen in situations where an organization has a physical connection with a state when it for example has activities or is housed in a state. Furthermore, the legal system of a state can be applicable

[251] Sands and Klein (n 28) 448.
[252] Klabbers (n 27) 308.
[253] Sands and Klein (n 28) 460.
[254] Nguyen (n 27) 152.
[255] Ibid 153.
[256] Sands and Klein (n 28) 461.
[257] Sands and Klein (n 28) 447; Nguyen (n 27) 308.

following actions where the international organization and the state are closely linked, for example situations concerning economic affairs.[258] Since the focus of this paper is on the responsibilities of the UN under international law, the area of domestic law will not be explored in further detail. However, it is worth noting that UN peacekeeping operations are subject to the rules of the host state in which they operate based on the SOFA as well as mission-specific agreements.[259]

5.3.2.1 International Treaty Law

There are three different categories that treaty law can be divided into that are relevant to international organizations. Firstly, there are the treaties that are written specifically for international organizations. It is clear that the organization is bound by this category of treaties. An example is the Convention on the Privileges and Immunities of the United Nations.[260] Secondly, international organizations can enter into binding treaty relationships with states or other international organizations.[261] An example of this kind of arrangement is the VCLTIO. Lastly, there is treaty law that an international organization, in this case the UN, is not part of. Most relevant are for example the treaties of international humanitarian law, as well as those of international human rights law.[262]

The applicability of international humanitarian law, i.e. the laws of armed conflict, has been determined through a Secretary-General bulletin from 1999 stating that UN forces shall respect the rules of international humanitarian law.[263]

There is no similar bulletin binding the UN to international human rights law and since the UN cannot be party to the treaties, the status of this area of

[258] Sands and Klein (n 28) 466.
[259] Model SOFA (n 168) Section IV [6]; Nguyen (n 27) 153.
[260] Convention on the Privileges and Immunities of the United Nations (Adopted 13 February 1946, entered into force 17 September 1946); Nguyen (n 27) 154.
[261] See for example Sands and Klein (n 28) 462.
[262] Nguyen (n 27) 154-155.
[263] Kofi A Annan, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1999/13.

law in relation to the UN is uncertain. Still, it is a topic under debate among legal scholars.[264] One line of argument is that the UN is bound by the human rights norms that constitute customary international law. Another is that the UN is bound by human rights since it is the purpose of the organization to promote these values.[265] A connected argument is that the UN should be subject to human rights law due to their power of effect over individuals in for example military operations.[266] Finally, some mean that since Human Rights treaties bind the UN Member States, they are binding also on the UN. Otherwise it would be possible for the UN Member States to "hide" in the organization and therefore avoid their responsibilities.[267] Consequently, although there is no clear legal basis, there is a perception that international human rights law should be applicable to the UN. However, how that translates into responsibility and accountability is another question. The UN does not have the same kind of enforcement bodies, jurisdiction or possibilities to secure human rights as states do. Although, it is still possible to attribute a responsibility to abide the rules in other ways, such as incorporating the standards in their operations as well as function with the intention to follow the values the organization was created to promote.[268]

5.3.2.2 Customary International Law

Customary international law consists of rules that have developed through the practice of states. The requirements for something to be considered as part of customary international law are the material facts and elements of opinio juris.[269] The material facts are the actual behavior of states and the elements of opinio juris consist of the underlying belief that the behavior taken is consistent with international law.[270] There are several difficulties in

[264] Burke (n 5) 124; Nguyen (n 27) 171.
[265] Frédéric Mégret and Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25:2 Human Rights Quarterly 314, 317-318.
[266] Nguyen (n 27) 155-156.
[267] Mégret and Hoffman (n 265) 318. See also Burke (n 5) 124.
[268] Mégret and Hoffman (n 265) 318-320; Burke (n 5) 126-127.
[269] Shaw (n 25) 54-55.
[270] Ibid 56, 62.

assessing these two factors, making the confirmation of obligations as rules under customary international law difficult.[271]

In the 1980 WHO-Egypt Advisory Opinion, the ICJ stated that international organizations, as subjects of international law, are bound by the "general rules of international law".[272] There is some discussion as to whether the "general rules of international law" are equal to "customary international law" or if the ICJ meant something else.[273] Some hold that the ICJ would have used the wording of customary international law if that was what they were intending. Others raise the argument that customary international law is created by and for states, and that it therefore should not be applied to international organizations without further considerations.[274] Nevertheless, largely based on the statements from the ICJ, the general understanding is that international organizations are bound to respect customary international law.[275]

Beyond customary international law it is certain that international organizations are bound by jus cogens norms, as they apply to all international law subjects.[276] Jus cogens norms, or peremptory norms, are obligations of a higher status that cannot be derogated from. Some norms that have the status of jus cogens are the prohibition of genocide, crimes against humanity, war crimes and torture.[277]

[271] Nguyen (n 27) 157; Shaw (n 25) 54.
[272] ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion of 20 December 1980) ICJ Reports 73, ICGJ 212 [37]; Klabbers (n 27) 325.
[273] See for example Klabbers (n 27) 325-326.
[274] Klabbers (n 27) 325-326.
[275] Sands and Klein (n 28) 463; Nguyen (n 27) 156.
[276] Sands and Klein (n 28) 463; Antônio Augusto Cancado Trindade, 'Some Reflections on Basic Issues Concerning the Responsibility of International Organizations' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 7.
[277] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53; Nguyen (n 27) 157; Shaw (n 25) 92-93.

5.4 Secondary Rules of International Responsibility

5.4.1 Introduction to ARIO

ARIO, the Draft Articles on the Responsibility for International Organizations, enshrines secondary rules that establish responsibility of international organizations for internationally wrongful acts.[278] The definition of an international organization in the framework of ARIO includes the criteria of possessing international legal personality.[279] An internationally wrongful act is in turn defined as an action or omission that is (a) attributable to the organization, and (b) constitutes a breach of one of the organization's obligation under international law.[280] What constitutes an internationally wrongful act is determined by the primary rules, i.e. the sources of law that have been reviewed in the previous section (section 5.3). Important to note is that, for the purposes of ARIO, it is only the primary rules that constitute international law that are relevant.[281] Responsibility stemming from a violation of domestic law is therefore not covered by ARIO.[282]

ARIO is the body of law that is most broadly recognized by the international community regarding responsibility for international organizations.[283] It is also worth mentioning that ARIO has been referenced as a legitimate source of law in the case-law of, for example, the ECtHR.[284] Still, the area of law is not completely settled and parts of ARIO may still only "constitute progressive development of the law".[285] In other words, the exact substance

[278] ARIO (n 15) art 1.1, 3; ARIO with Commentaries (n 15) General Commentary [3].
[279] ARIO (n 15) art 2(a).
[280] Ibid art 4.
[281] Cf ARIO (n 15) art 5.
[282] ARIO (n 15) art 5; ARIO with Commentaries (n 15) art 1 [3].
[283] Klabbers (n 27) 309-310; Nguyen (n 27) 160.
[284] Behrami and Saramati Cases (n 27). See also Klabbers (n 27) 317.
[285] Burke (n 5) 14.

of the law of responsibility of international organizations is still subject to change.[286]

5.4.2 Attributability

There are a number of different ways in which an internationally wrongful act can be deemed attributable to an international organization.

One way is finding the conduct of an organ or agent of the international organization attributable to that organization according to article 6.1 ARIO. The position of the organ or agent is inconsequential, but the conduct needs to have been part of the organ or agent's performance of functions.[287] What these functions consist of is determined by the rules of the international organization.[288] Furthermore, the definitions of "organ" and "agent" are found in article 2(c) and 2(d) ARIO. An "organ" is a person or an entity that is defined as an organ in the internal rules of the organization.[289] An "agent" is defined as a "person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts".[290] The interpretation of "agent" must be flexible and factors such as payment and employment are not decisive.[291]

Even if the organ or agent acts outside the limits of the authority given, that conduct can in accordance with article 8 ARIO be considered an act of the organization. Article 8 ARIO concerns so called ultra vires conduct which entails actions that go beyond the authority or instructions that have been given.[292] Moreover, for the ultra vires acts or omissions to fall under ARIO they need to have been performed in an official capacity as well as within the limits of the organization's overall functions.[293] Therefore, private acts or omissions by organs or agents as individuals are not attributable to the

[286] Nguyen (n 27) 172.
[287] ARIO (n 15) art 6.1.
[288] Ibid art 6.2.
[289] Ibid art 2(c).
[290] Ibid art 2(d).
[291] Reparations Case (n 239) 177; ARIO with Commentaries (n 15) art 2 [23].
[292] ARIO (n 15) art 8; ARIO with Commentaries (n 15) art 8 [1].
[293] ARIO (n 15) art 8.

international organization.[294] Notably, practice has confirmed that attribution is possible already when the conduct is related or linked to the official functions of the organ or agent.[295] Furthermore, if the act is conducted off-duty, but concerns a breach of an obligation of prevention under international law, that act can give rise to responsibility.[296] The ILC emphasizes in the commentary to article 8 the need to protect third parties. Therefore, acts that are invalid according to the rules of the organization can still give rise to responsibility as an action ultra vires.[297]

Another way to find attributability is through article 7. If an organ or agent is placed at the disposal of another international organization, the conduct of the organ or agent can be attributable to the second organization in certain cases. Article 7 ARIO states that the actions of the organ or agent is attributable to the organization under the disposal of which they are placed, if the organization exercises effective control over that specific conduct. The organ or agent can be that of an international organization, or that of a state.[298] The article concerns cases where the organ or agent in some way still acts as an organ or agent of the seconding organization or state.[299] The difficulty of article 7 is to determine which conduct is attributable to the organization or the state, respectively.[300] It is possible for the sending state or organization and receiving organization to conclude an agreement concerning the distribution of responsibility. However, an agreement like this only applies to the interactions between the parties, making it irrelevant regarding third parties.[301]

Lastly, article 9 states that any act can be attributable to an international organization if it acknowledges and adopts the conduct as its own. If the

[294] ARIO with Commentaries (n 15) art 8 [4].
[295] Ibid art 8 [9].
[296] Ibid art 8 [10].
[297] Ibid art 8 [5].
[298] ARIO (n 15) art 7.
[299] ARIO with Commentaries (n 15) art 7 [1]. Note: the term "agent" is not used in relation to states since ARSIWA only uses "organ". An "organ of a state" is however to be understood broadly as those whose acts are attributable to the state according to ARSIWA – see ARIO with Commentaries (n 15) art 7 [2].
[300] ARIO with Commentaries (n 15) art 7 [1], [5].
[301] Ibid art 7 [3].

organization only recognizes part of the conduct, it is only partially attributable to the international organisation.[302]

5.4.3 Breach

The second aspect of an internationally wrongful act is that an attributable action constitutes a breach of an obligation that the international organization has under international law or that an attributable omission breaches an obligation to take positive action.[303] The criterion "breach" is regulated in Chapter III of ARIO and is according to article 10 ARIO existent when an international organization acts in a way that is not compliant with its obligations under international law. The obligation stands "regardless of the origin or character of the obligation concerned".[304] Thus, responsibility can stem from customary international law or treaties, as well as relating and being owed to any subject or group of subjects under international law.[305] The second part of article 10 specifies that international obligations of the organizations that stem from the internal rules of the organization are included.[306] Breaches of internal rules are only covered by ARIO to the extent that they reflect international obligations. The articles in ARIO with accompanying commentary are intentionally vague in expressing the exact legal status of internal organizational rules, due to different views amounting to some controversy in international law.[307] Some scholars and experts regard internal rules of an international organization as international law directly, some think the opposite. Some think it depends on the organization and some that it is contingent on the source and subject to different rules.[308]

The subsequent articles, articles 11-13 ARIO, lay down general principles regarding the timing and character of the breach. Firstly, the organization

[302] ARIO (n 15) art 9; ARIO with Commentaries (n 15) art 9 [1].
[303] ARIO (n 15) art 2; ARIO with Commentaries (n 15) Chapter III [2].
[304] ARIO (n 15) art 10.1.
[305] ARIO with Commentaries (n 15) art 10 [2]-[4].
[306] ARIO (n 15) art 10.2.
[307] ARIO with Commentaries (n 15) art 10 [5], [7].
[308] The different views are summarized in ARIO with Commentaries (n 15) art 10 [5] with references.

must be bound by the relevant obligation at the time of the act for it to constitute a breach.[309] Secondly, the breach occurs at the moment the act is performed, or the entire period it continues if it is an act of continuing character. The same principles apply if an organization breaches an obligation to prevent.[310] Thirdly, a series of actions or omissions can constitute a breach when regarded together. In this case, the breach is continuing over the period of the occurrences that form the series.[311]

5.4.4 Other Important Aspects of ARIO

Chapter V of ARIO concerns circumstances precluding wrongfulness, in other words situations where internationally wrongful acts for different reasons are excused.[312] Article 20, for example, states that an internationally wrongful act is precluded in relation to a state or international organization that has given its consent.[313] An internationally wrongful act can furthermore be justified if it is an act of lawful self-defence (article 21), a lawful countermeasure (article 22), if it has occurred due to force majeure (article 23), if there is no other option due to distress (article 24) or if it is a question of necessity (article 25).

Article 26 deals with the question of peremptory norms and states that no wrongful act can be precluded if the act is not in conformity with obligations stemming from these norms. As mentioned above in section 5.3.2.2, peremptory norms, or jus cogens norms, are obligations of a higher status that cannot be departed from. The ILC Commentary to article 26 identifies a number of obligations as being undoubtedly peremptory norms. These include "the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[314]

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[309] ARIO (n 15) art 11.
[310] Ibid art 12.
[311] Ibid art 13.
[312] Cf ARIO with Commentaries (n 15) Chapter V [1].
[313] ARIO (n 15) art 20.
[314] ARIO with Commentaries (n 15) art 26 [2]. See also n 277.

Article 33 ARIO specifies the scope of part three ARIO concerning the consequences of legal responsibility. The article sets out that an obligation in this part can be owed to either one or more states, one or more organizations or the international community as a whole. Thus, breaches by international organizations that affect individuals are not covered by the rules in part three ARIO.[315] Part three is comprised of rules on the consequences when an organization is found responsible of an internationally wrongful act, in other words, rules of reparation, compensation, cessation and guarantees of non-repetition.[316]

It is worth noting is that international organizations can have joint responsibility with states.[317] It is also possible for a state or an organization to have subsidiary responsibility, meaning that they are responsible and obliged to make reparations insofar as the entity that is primarily responsible has not done so.[318] An example of subsidiary responsibility is when a state holds responsibility of an internationally wrongful act of an organization as a member state of that organization.[319] Furthermore, concurrent individual international responsibility of someone working on behalf on an international organization or state is not excluded, which is specified in article 66 ARIO. Hence, the potential prosecution of peacekeepers is not excluded if the UN is found internationally responsible under ARIO.[320]

[315] ARIO with Commentaries (n 15) art 33 [5].
[316] ARIO (n 15) pt 3.
[317] Ibid art 48.1.
[318] ARIO (n 15) art 48.2; ARIO with Commentaries (n 15) art 48 [2].
[319] ARIO (n 15) art 62, 62.2.
[320] Cf Nguyen (n 27) 161.

5.5 Applying the Law to Situations of Sexual Exploitation and Abuse in UN Peacekeeping Operations

5.5.1 Introduction

This section will apply the relevant law to situations of sexual exploitation and abuse in UN peacekeeping operations with the aim of examining if the UN can be held responsible for these acts. The main legal framework for establishing international responsibility is, as mentioned above, ARIO. First, the issues of attributing conduct of sexual exploitation and abuse committed by peacekeepers to the UN will be studied. Second, a short overview will be made of the element of breach. The findings will be summarized and explored in the first section, section 6.1, of the analysis in Chapter 6.

Before continuing, article 33 ARIO needs to be addressed. Article 33 determines the scope of part three ARIO, covering the consequences of an internationally wrongful act, which excludes acts affecting individuals. Thus, it might not be possible to realize the responsibility of the UN for acts of sexual exploitation and abuse affecting individuals. At least not if the goal is getting remedies for the acts. The ILC Commentary to article 33 even states that "breaches committed by peacekeeping forces and affecting individuals (…) are not covered by the present draft articles".[321] However, ARIO is still relevant to our discussion. The draft articles reflect the development of this area of law and is still subject to developing application. Furthermore, the essence of ARIO, that international organizations should be held responsible, plays an important part in this development.[322] Additionally, the second part of article 33 states that the first part is "without prejudice" to rights of persons or entities other than a state or an international organization if the right is owed directly to them under the international responsibility of the international organization.

[321] ARIO with Commentaries (n 15) art 33 [5].
[322] Nguyen (n 27) 172-173.

Hence, in situations where an obligation is owed to an individual, the applicability of ARIO becomes easier. An example of this kind of situation is certain human rights obligations.[323]

5.5.2 Are the Actions of Sexual Exploitation and Abuse Attributable to the UN?

Examining whether the acts of sexual exploitation and abuse in peacekeeping operations can be attributable to the UN can be done in two steps. First, it needs to be established that the conduct of the persons involved in UN peacekeeping operations can be attributable to the UN. Here it is central to address the different categories of UN personnel commonly serving in peacekeeping operations separately due to their various legal statuses. The main categories are UN staff, experts (civilian police and military observers), and national military contingents.[324] Second, a discussion needs to be had surrounding the nature of the act, in other words to see if acts of sexual exploitation and abuse can be attributable to the UN.

5.5.2.1 Attribution of Peacekeeper Conduct

Attributing the conduct of the groups of UN staff and civilian police and military observers (experts) to the UN is not that controversial. Both groups can be argued to fall under article 6, namely attribution of organs or agents. Peacekeeping missions are subsidiary organs of the UNSC and UN staff employed in peacekeeping operations fall easily into the definition of agent.[325] Since agent is to be interpreted generously, it is possible to make a convincing argument that civilian police as well as military observers can fall under article 6 ARIO.[326]

[323] Burke (n 5) 297.
[324] See section 4.2.1.
[325] UNSC, 'Subsidiary Organs: Overview' https://www.un.org/securitycouncil/content/repertoire/subsidiary-organs-overview accessed 28 April 2019.
[326] Nguyen (n 27) 162.

Attribution for conduct of national military contingents appears more complicated. Although they are part of the peacekeeping mission, making them part of a subsidiary organ of the UN, they still have a connection to the sending state.[327] Another way of describing this is that they are an organ of a state placed at the disposal of the UN, which leads to article 7 ARIO. The ILC Commentary of article 7 ARIO directly connects to this situation:

> *"Article 7 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization. This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent".*[328]

If the acts of the national military contingents are to be considered acts of the UN, it needs to be established that the UN exercises effective control over their conduct.[329] The conclusion is not all-or-nothing, instead an assessment of the specific conduct needs to be done to find if the act is attributable to the sending state or to the UN.[330] The criterion of effective control does not have a precise definition and it has been interpreted in different ways in different judicial systems.[331] In addition to the complexity of the effective control test, the way peacekeeping operations are set up with regards to the distribution of "command and control" differs from case to case and is also commonly complex. Furthermore, there is an inconsistency in terminology in discussions, documents and case law concerning the different degrees of control over peacekeeping operations.[332] A short

[327] Burke (n 5) 265.
[328] ARIO with Commentaries (n 15) art 7 [1].
[329] ARIO (n 15) art 7.
[330] ARIO with Commentaries (n 15) art 7 [1].
[331] Natalia Perova, 'Disentangling "Effective Control" Test for the Purpose of Attribution of the Conduct of UN Peacekeepers to the States and the United Nations' (2017) 86:1 Nordic Journal of International Law 30, 39-40.
[332] See for example Burke (n 5) 260, 265.

account will be given of the turns taken in regard to the effective control test, followed by the conclusions that can be made with regard to responsibility of the UN for peacekeepers' conduct.[333]

The central debate on effective control is on the level of control needed to establish attributability.[334] Different court systems have interpreted the provision of article 7 ARIO, and the corresponding rule for state responsibility in article 8 ARISIWA, in various ways. Apart from effective control, phrases like "overall control", "ultimate authority and control" and "effective overall control" have been used.[335] Furthermore, the meaning of effective control with regard to peacekeeping operations remains unclear. One interpretation that has won recognition is "operational control and command" as a kind of definition for effective control cases related to peacekeepers' actions.[336] Additionally, different factors have been seen as decisive in establishing effective control. One opinion suggests that the actor who has the ability to prevent misconduct is the one who has the relevant level of control. This opinion is commonly connected with the author Dannenbaum.[337] Another opinion, represented by Hirsch, is that the institutional link should be decisive. In other words, that responsibility should fall to the actor that "places the person in a position to perpetrate a wrongful act", for example by not vetting or training a soldier in an adequate way.[338] Moreover, the ILC highlights the retention of disciplinary powers by the sending state as an important factor.[339] Applying these three factors to the case of peacekeepers and sexual exploitation and abuse, it appears that the troop-contributing state will be responsible. States retain the power of disciplining their troops and based on the UNSC resolution 1888 they are also required to take precautionary measures against sexual

[333] For a more comprehensive account of command and control in peacekeeping operations and the development of the effective control test see Burke (n 5) 256-286.
[334] Burke (n 5) 266.
[335] See for example Behrami and Saramati Cases (n 27); Supreme Court of The Netherlands, *Netherlands v Nuhanović* Case No 12/03324 (6 September 2013). See also Burke (n 5) 266. A detailed analysis of the cases does not add any value to the present discussion.
[336] Burke (n 5) 284.
[337] Ibid 283.
[338] Ibid 285.
[339] ARIO with Commentaries (n 15) art 7 [7].

exploitation and abuse such as vetting candidates and giving soldiers adequate training.[340] Thus, Dunnenbaum's factor of prevention and the "retention of powers" emphasized by the ILC, points responsibility to lie mainly with the state. The same goes for Hirsch's theory as states are the ones who are responsible for potentially deploying a soldier with a criminal record or who has not received sufficient training.[341] However, it has been argued that the UN has powers to coordinate and put pressure on the states regarding for example training and effectively investigating instances of sexual exploitation and abuse.[342] An example of the UN exercising this power is the UNSC resolution 1888 requiring states to adequately vet and train their contingents.

In conclusion, which degree of control to use and what precise factors to apply in order to establish attributability is an on-going debate. However, the consensus seems to be that the variable distribution of control between the troop-contributing state and the UN in different operations warrants a case-by-case assessment of where attribution falls.[343]

One more thing needs to be addressed. The term peacekeeper is not only used for the people that are part of the UN mandated peacekeeping operations but also the ones that are authorized by the UN. The case study of Anders Kompass is an example that concerns peacekeepers in a UN-authorized peacekeeping mission, namely the Sangaris force. The difference is that the Sangaris force is not under the command of the UN. One consequence of this is that they are not covered by the same rules of conduct as the personnel under UN command.[344] Another is that they do not fall under the framework of ARIO. Therefore, for the purposes of this thesis, it may be even more difficult to establish attributability to the UN for the conduct of this group than for UN military contingents.

[340] UNSC Res 1888 (30 September 2009) Un Doc S/RES/1888; Burke (n 5) 285.
[341] Burke (n 5) 284-285.
[342] Ibid 286.
[343] Burke (n 5) 266; Nguyen (n 27) 165.
[344] See for example Report of an Independent Review (n 2) [15], [60].

5.5.2.2 Attribution of Sexual Exploitation and Abuse

In finding whether the UN has responsibility for conduct of sexual exploitation and abuse, an important factor to consider is the nature of the conduct. An act of sexual exploitation and abuse committed by a person in a peacekeeping operation cannot generally be considered to be part of the performance of functions of an organ or agent.[345] It is therefore relevant to examine article 8 that deals with acts ultra vires, namely acts taken outside one's authority. The acts can be both within the competence of the organization or not.[346] However, acts of sexual exploitation and abuse are not linked to the official duties of the peacekeepers and are therefore considered off-duty acts or private acts as opposed to ultra vires.[347]

Nevertheless, responsibility has been argued to exist for the omission of the UN and the troop-contributing state to prevent and/or punish such conduct.[348] This line of reasoning is based on the commentary to the corresponding article in ARSIWA, saying that the line between ultra vires acts and off-duty acts "may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it".[349] As demonstrated throughout this thesis the problem of sexual exploitation and abuse is systematic, recurrent and known to states and the UN. It has also been shown that few adequate measures have been made to prevent this conduct. Moreover, it has been established that responsibility of an international organization can arise as a result of both acts and omissions.[350]

[345] Cf ARIO (n 15) art 6.
[346] ARIO with Commentaries (n 15) art 8 [1].
[347] Burke (n 5) 287.
[348] Ibid 288-289.
[349] ARSIWA with Commentaries (n 219) art 7 [8].
[350] Burke (n 5) 288-289.

5.5.2.3 Dual Attribution

Lastly, it is relevant to consider the possibility of joint responsibility through dual attributability from article 48 ARIO. The significance of this provision is that in situations where both the UN and the troop-contributing state are found to have a certain level of control over the troops, both can be held responsible.[351] The ILC Commentary to article 48 suggests a number of articles in ARIO in which they picture joint responsibility being relevant. They do not mention article 7 as one of those provisions. Therefore, scholars have called for a further development of dual attributability by courts.[352]

5.5.3 Can a Breach be Found under International Law?

When determining the breach of international law committed by an international organization the difficulty lies in determining what obligations the organization is bound by. There are many uncertainties still surrounding the international obligations of the UN, which leads to uncertainties in establishing a breach under ARIO.[353] The rules that are the basis for what constitutes a breach are the primary rules, examined above in section 5.3.[354] Following the articles of ARIO concerning breaches, acts in breach of domestic law and perhaps to some extent internal law are excluded from the scope of ARIO.

Although there has been some debate on the applicability of international humanitarian law to peacekeepers, the 1999 bulletin has in large settled the matter and UN forces are bound by the relevant provisions.[355] Therefore, violations of international humanitarian law amount to breaches. Accordingly, a breach can be found if the act of sexual exploitation or abuse

[351] Burke (n 5) 291.
[352] ARIO with Commentaries (n 15) art 48; Burke (n 5) 292.
[353] Sands and Klein (n 28) 524; Klabbers (n 27) 325.
[354] Cf Nguyen (n 27) 170-171.
[355] Burke (n 5) 106.

is prohibited under this body of law. Some relevant examples that can be found in international humanitarian law are provisions against rape, enforced prostitution and assault.[356] Scholars have made the argument that international humanitarian law is an area of law that classifies as lex specialis and therefore is not covered by ARIO according to article 64 ARIO. However, international humanitarian law is not mentioned in the ILC Commentary to article 64 and it is not a generally agreed upon point of view.[357]

Next, acts of sexual exploitation and abuse could constitute breaches under ARIO by way of violating international human rights law. However, since the UN is not party to international human rights treaties, it is not completely clear whether the UN are bound by this area of law. Nevertheless, it is possible to argue that the rules still apply and that the UN has obligations to incorporate standards of human rights as well as work in accordance with their own values and human rights instruments.[358] Translating this to the situation of peacekeeping, it has been posited that the UN has a responsibility to take "adequate administrative measures" to prevent sexual exploitation through policies, training and practices.[359] Furthermore, the Capstone Doctrine states that "peacekeeping operations should be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates" and that all personnel working in peacekeeping operations should operate in accordance with human rights law.[360] The Capstone Doctrine even goes one step further and states that the UN peacekeeping personnel "should respect human rights in their dealings with colleagues and with local people, both in their public and in their private lives. Where they commit abuses, they should be held accountable".[361] In conclusion, there is no legal basis for establishing responsibility of the UN under international human rights law,

[356] Burke (n 5) 115; Nguyen (n 27) 154.
[357] Burke (n 5) 290-291.
[358] See section 5.3.2.1.
[359] Burke (n 5) 127.
[360] Capstone (n 139) 14-15.
[361] Ibid 15.

but it is possible to convincingly argue that they have some kind of obligations.

If the law develops and human rights violations can be seen as direct breaches of the UN, there are several frameworks that sexual exploitation and abuse could fall into. These include the obligation to suppress trafficking of women in the Convention on the Elimination of All Forms of Discrimination Against Women, the rules protecting children in the Convention on the Rights of the Child and its second Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and in some situations the provisions of the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment.[362]

The final category under the external sources of law is customary international law. It is relatively clear that the UN is bound by customary international law, and it is certain that they are bound by jus cogens norms.[363] However, the relevant obligations that are found in this group are already established obligations of the UN through international humanitarian law.[364] Therefore, customary international law is only interesting if it is found that the UN is not bound by international humanitarian law or if norms from international human rights law are established as customary international law.

A few words can also be said regarding the internal sources of law. There is an on-going debate on whether and to what extent internal rules constitute international law. The ILC Commentary to ARIO is vague and, apart from recognizing the debate, does not give any more guidance in the matter.[365] If internal law were to be considered as international obligations, it could be

[362] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 6; Convention on the Rights of the Child (Adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; Optional Protocol to Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227; Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment (Adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85. See also Nguyen (n 27) 155.
[363] See section 5.3.2.2.
[364] Nguyen (n 27) 157.
[365] See section 5.4.3.

argued that by not doing more to prevent or address the acts of sexual exploitation and abuse committed by UN peacekeepers, the UN violates their own zero-tolerance policy established in the 2003 bulletin on protection against sexual exploitation and abuse.[366]

As a final note, article 13 ARIO can be interesting to consider. This article opens the possibility to see the actions or omissions of the UN in relation to acts of sexual exploitation and abuse as a series that in combination violates a potential obligation and therefore constitutes a breach under ARIO.[367]

[366] See section 4.3.2.
[367] Article 13 ARIO was introduced in section 5.4.4.

6 Analysis

6.1 Sub-question 1

What kind of responsibility does the UN have in relation to acts of sexual exploitation and abuse committed by peacekeepers in UN peacekeeping operations?

When applying the law to the situations of sexual exploitation and abuse in UN peacekeeping operations, the general finding is that it is not without difficulties that responsibility can be established for the UN. To find responsibility within the framework of ARIO, it is necessary to show attributability for the relevant acts as well as a breach of international law. As discussed in section 5.5.2.1, it is not controversial that the UN is attributable for the acts of UN staff and experts on mission as they are organs and agents of the UN under article 6 ARIO. The question of military contingents sent by states is, however, more complicated. This group is additionally perhaps the most important to establish responsibility for since the perpetrators most often are represented by this group. The relevant provision is article 7 ARIO, since these troops are seconded by states that still retain some powers over the soldiers. The definitive factor for determining if a specific act is attributable to the UN or to the state, is "effective control". The prerequisite of effective control has, as a provision in both ARIO and ARSWIA, over the years been the subject of different interpretations where, among other things, the needed level of control has been discussed. The different opinions raised in section 5.5.2.1 – Dannenbaum, Hirsch and the ILC – all point to the state more often having effective control. However, that does not mean that responsibility for the UN is ruled out. Both the state and the UN can have responsibility due to the concept of dual responsibility enshrined in article 48 ARIO. Additionally, attributability is determined from case by case, act-by-act, and the UN does for example have some powers related to training and

investigation of sexual exploitation and abuse. Thus, the UN could be attributable for these acts committed by military contingents in certain situations. The bottom line is that attributability can only be determined on a case-by-case basis due to the variations of peacekeeping operations, agreements between states and the UN etc. Moreover, the group of peacekeepers not under the command of the UN is even more difficult to establish responsibility for since they cannot be included under the rules of ARIO as UN organs or seconded organs. As an additional note on attributability, article 9 ARIO enables the UN to adopt any conduct as its own. It is possible to argue that they should do this considering the gravity of these acts and their connection to the UN.

Next, the possibility of establishing responsibility over acts of sexual exploitation and abuse was further examined in section 5.5.2.2. Since these acts are private acts, committed off-duty, they are not directly covered under article 8 ARIO. Nevertheless, the ILC Commentary to the corresponding framework for states, ARSIWA, has opened for acts that are systematic or recurrent, and that the state should have known of and tried to prevent, to be considered as acts under the corresponding article to article 8 ARIO. Since sexual exploitation and abuse has been a recurrent problem, known since the 1990s, it is possible to argue that it is covered by ARIO. On the same note, if a recurrence of omissions of the UN to prevent and/or address these acts is found, article 13 ARIO can be used in arguing that this is a breach considered as a series. For this to be possible, however, a positive obligation to prevent and/or address needs to be found.

After attributability, it is still needed to determine a breach of international law in order to establish responsibility under ARIO. A breach is found where acts of sexual exploitation and abuse amount to a violation of an international law framework that the UN is bound by. Relevant frameworks are for example international humanitarian law, international human rights law and customary international law. The UN is bound by international humanitarian law through the UN Secretary-General bulletin from 1999 and this framework includes provisions against for example rape and enforced

prostitution. Sexual exploitation and abuse can also fall under different international human rights frameworks, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. Whether the UN is bound by international human rights treaties is, however, a question that remains uncertain and scholars disagree in this regard. Furthermore, it is generally agreed upon that international organizations such as the UN are bound by customary international law. The relevant content of customary international law overlaps with the rules of international humanitarian law to a great extent, but this category may be relevant beyond that if, for example, certain parts of human rights law become customary international law. It is, moreover, possible to argue that internal law in some situations can constitute international law. This is an ongoing-debate and the ILC have deliberately not taken a stance in the matter yet. If it is found that internal rules are international obligations, responsibility could arise after a breach of, for example, the 2003 UN Secretary-General bulletin that prohibits sexual exploitation and abuse and obliges UN staff to create an environment that prevents sexual exploitation and abuse.

Lastly, there are two additional obstacles in establishing responsibility in these cases. The first one is the lack of clarity on whether dual attribution applies to article 7 ARIO – the article that applies to UN military contingents. . Scholars have called for further development of the concept of dual attribution. The next relevant obstacle is article 33 ARIO, which states that obligations owed to individuals are not covered by the framework. The law of responsibility of international organizations is an area of law that is still developing and ARIO is an aspect of that development. ARIO reflects a belief that the responsibility of international organizations is important and due to the attention the problem of sexual exploitation and abuse in UN peacekeeping operations has gotten, and is getting, an expanded scope of responsibility for the UN is a further necessary part of this development.

In conclusion, it is possible to establish that the UN has responsibility for the acts of sexual exploitation and abuse committed by UN peacekeepers –

although with some reservations, an unsecure legal bases and a need for further development of the law. It is important to note though that the development of the UN's approach and attitudes towards the discussed issue indicates a development towards the UN recognizing more and more responsibility. The 2003 Secretary-General bulletin that prohibits sexual exploitation and abuse, for instance, has gone from only applying to UN staff to also binding experts and military contingents. The measures of the UN have furthermore gone from mostly disregarding the allegations, to affirming a zero-tolerance policy, to continuously strengthening and evaluating their efforts. Although there is a long way to go, the development nevertheless points in the direction of the UN taking more responsibility.

6.2 Sub-question 2

The next question regards the connection between the responsibility of the UN and UN whistleblower protection. The question was formulated as follows:

What role does UN whistleblower protection have in that responsibility?

The assessment of what role UN whistleblower protection has in the responsibility of the UN with regard to sexual exploitation and abuse in UN peacekeeping operations is done in three steps. First, it is discussed in what way whistleblower protection affects the likelihood that people report violations and injustices. Second, the act of reporting and whistleblowing is examined as a possible factor in sexual exploitation and abuse being properly addressed and prevented. Third, the effects found are assessed in relation to the responsibility of the UN. The case study, the findings from Chapter 3 on UN whistleblower protection, and other relevant aspects will be used in support of the discussion.

After what happened to Kompass, he expressed concern that the attitude and actions of the UN against him and other whistleblowers risk deterring people from speaking out against injustices. The statistics from the global

staff survey support this statement. Almost half of those who had witnessed misconduct in the timeframe studied had not reported it in fear of retaliation and because of lack of confidence in the system. As Kompass stated, "[t]he benefit to the individual of not behaving ethically is perceived as greater than the cost of taking an ethical stance". This is, moreover, something acknowledged in research on whistleblowers. If a person believes the risks of reporting to be bigger than the gains, that person will probably not do so. Important factors are the individual risks, such as losing their job, the organizational policies and culture, as well as the laws and values of society. The factors favoring not speaking up are more significant for employees of the UN. As international workers they risk being more vulnerable to, for example, visa-concerns and the culture of the UN is characterized by a sense of unity and favorability for discretion. Accordingly, it is shown that whistleblower protection, including the general culture and attitude towards whistleblowers, affects whether people report and speak out against injustices.

The next step is to examine the connection between reporting and the acts of sexual exploitation and abuse. The case study clearly showed the significant effects that someone speaking out can have. Before Kompass took action, the Sangaris notes were sent from person to person with no one taking responsibility. It was only after Kompass handed over the report to France that action was taken to investigate and address the allegations. It furthermore required international media attention for the UN (UNICEF) to actively offer support to the victims in CAR. This shows that reporting can have a direct effect on the UN addressing such acts. A connection can also be made to the prevention of sexual exploitation and abuse. When people report misconduct, especially when it is spread in media, pressure is put on the UN to address the allegations. The increasing attention from the public and from different organizations and academics puts additional pressure on the UN to take action to prevent the problem.

In conclusion, there is a chain of influence starting with the treatment and protection of whistleblowers enabling and empowering more people to

speak out, to the effect of people speaking out on the response to allegations as well as on the future culture and the likelihood that violations keep happening. Whistleblower protection is by this line of reasoning part of the UN's responsibility to both address and prevent violations.

6.3 Sub-question 3

Does the current UN whistleblower protection reach the level that is needed for it to fulfill that role?

A general description of the current whistleblower protection in the UN was laid out in Chapter 3. This was not a comprehensive examination or study of the substance or sufficiency of the existing measures so no final conclusions can be drawn. Instead, the facts and experiences expressed throughout this thesis will provide some interesting points for the purposes of the discussion on whistleblowing with regard to sexual exploitation and abuse in UN peacekeeping operations.

The main measures taken in the UN for the protection of whistleblowers are the creation of the Ethics Office, where people who have experienced retaliation for reporting misconduct can bring their complaints, and the two UN Secretary-General bulletins named "Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations" from 2005 and 2017 respectively. As for the effects of these measures, the common theme appears to be that they are valuable parts of the protection development, but that they have not reached the needed level of protection in practice. The Ethics Office has proven to be inefficient and it has not reached the level of protection as envisaged. Furthermore, the developments introduced in the 2017 bulletin have been questioned in terms of their independence and unnecessary complexity.

When looking at the individual perception of the protection available to them, the picture is similar. Kompass has expressed concern that the mechanics are too weak and pointed to the lack of independence of the internal review-system from the UN leadership. Additionally, the JIU

review and the global staff survey give some insight. The review questioned that there were so many different policies in the different UN organizations. The survey furthermore showed that there was a lack of awareness of the policies that existed, that about 13 % of people questioned had experienced retaliation and that less than half of those who had faced retaliation had reported it. Moreover, a key number in the survey was that only 44 % of those who had witnessed misconduct in the timeframe given had reported it. This shows that something is deterring people from reporting. The general conclusion that can be drawn from these short facts and experiences is that the measures of whistleblower protection could be better.

In the answer to sub-question 2, it is concluded that the culture of the organization is included in the whistleblower protection with regard to what effects it has on people feeling that they can speak out. The three factors introduced in section 3.1 that makes being a whistleblower in the UN different from other organizations connect to this. The UN has built a strong sense of unity that intensifies the traitorous idea of the whistleblower. Moreover, they rely on careful considerations when dealing with sensitive questions and vulnerable groups as well as have a tradition of discretion. Overall, the culture of the UN is not the ideal environment for whistleblowers. One reason behind people not reporting misconduct, as showed in the Global Staff Survey, was their lack of confidence in the system to take action. Hence, the parts of the culture where bureaucracy and protocols take precedent over action and protecting people are also included in the conclusion that the culture needs to change to improve the whistleblower protection.

6.4 Main Research Question

The main research question is:

What is the role of UN whistleblower protection in the larger framework of responsibilities of the UN under international law, specifically regarding instances of sexual exploitation and abuse in UN peacekeeping operations,

and should the current whistleblower protection be changed to strengthen the capacity of the UN to uphold those responsibilities?

As explained above, the effects of UN whistleblower protection can be a significant factor in the probability that acts of sexual exploitation and abuse continue to happen. Although the responsibility of the UN for the acts of sexual exploitation and abuse committed by peacekeepers in UN peacekeeping operations is not a completely settled area of law, it has been determined in this study that the UN has some kind of responsibility to address and prevent these acts. Therefore, it is the conclusion of this thesis that the UN has a responsibility to have a strong whistleblower protection in place. Nevertheless, the content of ARIO, its status in international law and the application of law to the problem discussed, are all areas of law that are in need of further research and development.

The second conclusion of this thesis is that the protection as it stands should be changed and strengthened in order for the UN to fulfill this aspect of their responsibility. Although not part of the research question as such, some thoughts will be given on the changes needed. It is not possible to make any specific comments since the level of detail of the different UN organizations' policies has not been studied here. Instead, some general comments will be made based on observations that can be made throughout this thesis. Firstly, the policies of whistleblowing need to be updated and more coherent, as recommended in the JIU review. Attention is also required on the independence of the different policies and measures. Secondly, a changed perspective, where sexual exploitation and abuse are seen as human rights violations, is proposed based on the corresponding recommendation of the Independent Review Panel. A shift like this could contribute to an overall changed perception, where the acts that previously risked being diminished to disciplinary issues are treated as serious human rights violations. Thirdly, the UN needs to work on improving the culture within the organization. The system needs to be less rigid and in cases when allegations arise in peacekeeping operations, the focus needs to be more on addressing the problem and less on protecting the image of the organization.

Fourthly, efforts to remove the need for whistleblowing could be part of the solution. Kompass did not intend to “blow the whistle” when he received the Sangaris notes. If the culture and systems for reporting changed, the necessity for whistleblowing would diminish. Additionally, the energy that has been put on trying to deny allegations and “deal with” whistleblowers could be spent addressing the, in my opinion, more serious problem of people being subjected to violations by UN peacekeepers.

Finally, that the UN, an organization working for peace, justice and human rights, keeps being connected to acts of sexual exploitation and abuse, is incomprehensible. One of the important purposes of peacekeeping operations is the protection of individuals. The exploitation and abuse committed by peacekeepers has been shown detrimental to the individuals, the society and for the legitimacy and effectiveness of the peacekeeping operations. There are accordingly many reasons why this needs to stop. The focus of this thesis has been the aspect of whistleblowing and based on the findings it is possible that UN whistleblower protection is a piece of the puzzle to end the acts of sexual exploitation and abuse UN peacekeeping operations.

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