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International Non-State Humanitarian Actors outside of the International Legal System: Can there be any Legal Consequences for Humanitarian Actors?

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Abstract

Humanitarians are saviours, people employed by organisations that were created to provide neutral and professional help in times of conflict, disaster or other emergencies. We assume that we can trust the humanitarians.[1] This, at least, is the theory of humanitarianism. However, news outlets depict the actions of humanitarians somewhat differently. The accusations levied at humanitarian actors, including Oxfam and the International Committee of the Red Cross (ICRC) within the past three years, include that individuals have committed crimes against those they are meant to be helping, organisations have swept said abhorrent behaviour under the rug, and that the consequences for the individuals concerned are, at worst, being 'let go' or demoted. These scandals have besmirched the reputation of the humanitarian profession. In some instances, the scandals have undermined perceptions of humanitarian actors and, consequently, mired funding for the important work that they do. Although a multitude of actors' act in the same spaces and places, including in armed conflict and disasters, only some are subject to accountability and responsibility on the international stage. Our question is what can and could be done at the international level to address the accusations and, in some cases, unlawful behaviour? This article explores avenues within and outside of the international legal system to ensure responsibility of those embroiled in illegal acts.

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[1] VC Keating and E Thrandardottir, 'NGOs, Trust, and the Accountability Agenda' (2017) 19(1) *The British Journal of Politics and International Relations* 134–51.

1. Introduction

Non-state humanitarian actors, such as the Red Cross Movement, Oxfam and Médecins sans Frontires, wield significant authority in the international humanitarian sphere, but they exist outside of any system of normative control.[2] The examples of non-State humanitarian actors being involved in abuses and legal wrongs have only seemed to increase in recent years. This article focuses on Oxfam and the ICRC as entities that have received media attention, particularly since 2018, for unlawful actions of a small number of staff. Allegations against Oxfam focused on Oxfam staff in Haiti in 2011 paying earthquake survivors for sex.[3] Red Cross staff have been accused of paying for sexual services and of sexual misconduct during field work.[4] The ICRC is particularly interesting as an example of an entity susceptible to *some* regulation but considerable gaps remain, which bodes ill for the regulation of less high-profile organisations.[5] With an increasing number of recent examples of abuses committed by persons acting under the auspices of non-State humanitarian actors, for example Oxfam in Haiti, the gap between action and accountability is becoming increasingly pronounced.[6] The corollary of this is that distrust of humanitarians is also growing.[7] In arguing that this gap is a significant issue that needs to be addressed, we focus on examples of sexual violence and abuse,

[2] International Law Association (Hague Conference 2010) 'Non-State Actors' (2010); International Law Association (Sofia Report 2012), 'Non-State Actors' (2012); International Law Association (Johannesburg Report), 'Non-State Actors' (2016) (hereafter 'ILA Johannesburg Report 2016').

[3] CHS Alliance, Annual Report (2019) <www.chsalliance.org/get-support/resource/chs-alliance-annual-report-2019/>; DfID (Department for International Development), 'Sexual Exploitation, abuse and harassment in the international aid sector: Victim and survivor voices: Main findings from DfID-led listening exercise' (House of Commons Policy Paper UK, 2018); IDC (International Development Committee), 'Sexual Exploitation and Abuse in the Aid Sector' (UK Parliament, 2018); INEQE (Safeguarding Group), 'Oxfam GB: Independent safeguarding review, executive summary, and recommendations' (2018); O'Neil, 'Charity Sex Scandal: "In this community no one gets food without having sex first"' *The Times* London (2018); O'Neil, 'How the Oxfam Sex Scandal Unfolded' *The Times* London (2018).

[4] P Greenfield, 'Red Cross Finds 21 Cases of Sexual Misconduct in the Last Three Years' *The Guardian* London (2018).

[5] IFRC, Code of Conduct for the International Red Cross and Red Crescent Movement and non-governmental organizations (NGOs) in disaster relief (IFRC, Geneva, 1994).

[6] D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2005).

[7] See Edelman Trust Barometer <www.edelman.com/trust-barometer; Centre for Humanitarian Data https://centre.humdata.org/>; J-M Davis, S Henson and L Swiss, 'In INGOs We Trust? How Individual Determinants and the Framing of INGOs Influences Public Trust' (2020) 30(6) *Development in Practice* 809–24; See also Kennedy, ibid; D Kennedy, *Reassessing International Humanitarianism: The Dark Sides* (Princeton University Press 2006); A J Bellamy, 'Humanitarian Responsibilities and Interventionist Claims in International Society' (2003) 29(3) *Review of International Studies* 321–40.

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including transactional sex, but this is not with the argument that they are the only wrongs committed, but rather that they are a prominent example.[8]

Section 2 of this article provides context to the proposition made above that trust in the humanitarian saviour complex is waning as a consequence of exposure of poor, and in some cases unlawful, actions by a minority of staff in international humanitarian organisations, including Oxfam and the ICRC. Section 3 argues that non-State humanitarian actors act, not just within their own sphere, that is outside of the international legal system, but they increasingly engage with obligations that exist within the primary international legal system. Some, including the ICRC, possess international legal personality, with the corresponding capacity for rights and duties at the international level. The secondary rules of responsibility remain, however, a limited concept unable to fully address these actors. In short, we argue that non-State humanitarian actors' spaces are outside of the normative control of international law, but they increasingly act, in a practical sense, within this normative space, creating a significant gap in responsibility. While it would also be advisable for actors to strengthen their internal accountability mechanisms, as one device to address the responsibility gap, we argue that this needs to be done together with a new approach to international responsibility capable of externally addressing these actors.

Section 4 argues that the responsibility gap exists through inherent limitations within the secondary international legal system, that is, the rules on international legal responsibility do not neatly apply to international non-state humanitarian actors.[9] Section 5, the final part, argues for a reconceptualisation of the law of responsibility to better address these increasingly active and influential actors. The current rules, firstly, focus norms around specific types of actors and, secondly, limit this to those considered to possess international legal personality and fall within the international normative framework, namely states and inter-governmental organisations.[10] The roles of non-State humanitarian actors have proven particularly challenging as they may not fulfil the concept of legal personality developed within the boundaries of the state based

8 S Arie, 'Médecins Sans Frontieres is Focus of New Sex Scandal in Charity Sector' (2018) *British Medical Journal* 361:k2788 doi; Examples of other wrongs have been documented in the literature: A Brysk, *Human Rights and Private Wrongs Constructing Global Civil Society* (Routledge 2005); Kennedy (n 6); A De Waal, *Famine Crimes: Politics and the Disaster Relief Industry in Africa* (Indiana University Press 2009); For a definition of 'transactional sex', see K Stoebenau and others, 'More than Just Talk: The Framing of Transactional Sex and its Implications for Vulnerability to HIV in Lesotho, Madagascar and South Africa' (2011) 7 *Global Health* 34; Transactional sex and HIV risk: from analysis to action. Geneva: Joint United Nations Programme on HIV/AIDS and STRIVE; 2018.

9 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001', Yearbook of the International Law Commission 2001, 2001, vol.II, Part Two (Hereafter 'ARS'); ILC, 'Articles on the Responsibility of International Organizations, with Commentaries 2011', Yearbook of the International Law Commission, 2011, vol.II, Part. Two (hereafter ARIO).

10 *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion ICJ Reports, 1949, 174.

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normative framework, which means that they also fall outside of any international legal frameworks for responsibility, including the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) and the Articles on the Responsibility of International Organisations (ARIO).[11] The result of this is the development of a gap between action and responsibility at the global level.

2. The waning humanitarian saviour complex

International non-State humanitarian actors engage with the traditional state focused system of international law but without being encompassed by it. Sovereignty remains the defining feature of the global system, as the normative and institutional frameworks of the international legal system continue to be grounded in the concept of the state.[12] Although there is no generally accepted definition of non-State actor, the International Law Association (ILA) defined non-state actors (NSAs) as 'legally recognized and organized entities that are not comprised of nor governed or controlled by States nor groups of States and that actually perform functions in the international arena that have real or potential effects on international law'.[13] The term 'international non-state humanitarian actor' (INSHA) is intended to encompass those transnational organisations, including international non-governmental organisations (INGOs), whose primary focus is humanitarian.[14] INSHA is an umbrella concept,

[11] Clapham (n 13); M Barnett, *The International Humanitarian Order* (Routledge 2009); A Peters, L Koechlin and G F Zinkernagel, 'Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion' in A Peters and others, *Non-State Actors as Standard Setters* (CUP 2009) 14; See Special Issue, 'Humanitarianism and Responsibility' (2013) *Journal of Human Rights*; M Noortman, A Reinisch and C Ryngaert, *Non-State Actors in International Law* (Hart 2015); See *Reparations for Injuries Case.*

[12] M O'Connell and others, *The International Legal System: Cases and Materials* (Foundation Press 2015).

[13] International Law Association (Johannesburg Conference (2016), 'Non-State Actors: Final Report' (2016) para 19; See also R Hogget, G Underhill and A Biebler (eds), *Non-State Actors and Authority in the Global System* (Routledge 2000); B Arts, M Noortman and B Reinalda (eds), *Non-State Actors in International Relations* (Ashgate 2001); P Alston (ed), *Non-State Actors and Human Rights* (OUP 2005); A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); J d'Aspremont (ed), *Participants in the International Legal System- Multiple Perspectives on Non-State Actors in International Law* (Routledge 2007); M Oliver, 'Exploring Approaches to Accommodating Non-State Actors within Traditional International Law' (2010) 4(1) *Human Rights and international Legal Discourse* 15–31; C Barat, *Status of NGOs in International Humanitarian Law* (Brill Nijhoff 2014); M Noortman, A Reinsch and C Ryngaert (eds), *Non-State Actors in International Law* (Hart 2015).

[14] See G Geeraerts, 'Analyzing Non-State Actors in World Politics' (1995) Vol 1 (4) in International Law Association (Johannesburg Conference 2016), 'Non-State Actors: Final Report' (2016) para 34.

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intended to encompass actors with a neutral, human-focused agenda. It considers those actors to be fundamentally outside of the established international framework; they are focused on the human rather than being fundamentally connected to state sovereignty. These actors are those which are substantially disconnected from the state; they are neither state, nor are they constituted or reliant upon states for their creation or their actions.[15] The ICRC is often held up as a primary example of this. It is a *sui generis* entity with international legal personality existing in a manner entirely distinct from states.[16]

Almost twenty years ago, Noortmann argued that 'the process of globalization and the proliferation of actors on the global scene makes the differentiation between states and other non-State actors obscure and obsolete'.[17] However, even with increased overlap and interaction between different actors on the global scene, it must be recognized that the normative frameworks for responsibility and accountability have remained focused around the state. This is problematic, particularly in times of humanitarian crisis, because states so frequently appear unable or unwilling to respond. It is at this point that states frequently turn or defer to actors operating beyond the bounds of statehood, and therefore largely beyond the bounds of the international legal system, in order to enable a response. This can be seen as a benefit, as it enables action where states fail to act. The difficulty arises, however, that this action is then not encompassed by the international system; it does not alter the normative and regulatory framework of the international legal system to address actors disconnected from the sovereign state. In short, we have a responsibility gap; there remains the 'formal' system of international law that is so stringently focused around the paradigm of state sovereignty,[18] and then there are now also those actors who are active at the global level and engaging in the spaces left by states that are largely outside of international legal regulation, accountability and responsibility frameworks.[19] Most particularly, INSHAs engage without clarity as to their legal obligations, the extent and boundaries of those obligations and, most significantly for this current article, the consequences of any alleged wrongs

[15] ILA Johannesburg Report 2016 para 30.

[16] C Shucksmith, *The International Committee of the Red Cross and its Mandate to Protect and Assist: Law and Practice* (Hart 2017) 175–83.

[17] M Noortmann, 'Globalization, Global Governance and Non-State Actors: Researching beyond the State' (2002) 4 *International Law Forum* 38 in ILA Johannesburg Report 2016, para 11.

[18] *Island of Palmas* (Netherlands, USA) (1928) 2 RIAA 829, 838: 'The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations'.

[19] ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001', Yearbook of the International Law Commission 2001, 2001, vol II, Part Two (Hereafter 'ARS'); ILC, 'Articles on the Responsibility of International Organizations, with Commentaries 2011', Yearbook of the International Law Commission, 2011, vol. II, Part Two (hereafter ARIO).

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committed. In brief, we posit that although a multitude of actors act in the same spaces and places, only some are subject to accountability and responsibility on the international stage. This means that the 'saviours', such as Oxfam, are able to, legally speaking, 'get away with' action that would be illegal for state actors. There is nothing regulating their behaviour beyond publicity and public outcry.[20]

There is growing empirical data on the increasing roles and responsibilities assumed by INSHA as well as research into the unlawful acts perpetrated by NSHA.[21] As of November 2019, over 72 000 organisations were listed by the Union of International Associations.[22] The wrongs perpetrated by these actors have also continued to expand. The significance of the problem of wrongs in humanitarian situations can be considered first of all by the stark numbers recorded by the UN of statistics on sexual exploitation and abuse.[23] It is all the more noteworthy, however, because the UN is recognised as an international legal person encompassed by principles of responsibility and there have been attempts to develop a regulatory framework within the UN.[24] Not only are wrongs continuing to emerge with INSHAs, but this is without the legal recognition and attempt at regulation. Specific examples of unlawful acts perpetrated within Oxfam and the ICRC operations can also be considered. We will return to the significance of international legal personality later, when we contemplate potential responsibility mechanisms for international non-State humanitarian actors.

In February 2018, media reports published allegations of Oxfam staff paying local young Haitian women for sex while in the country working on the humanitarian response to the 2010 earthquake.[25] This was a significant revelation in itself, but the reliance of the aid sector on self-regulation meant that, even

[20] This article focuses upon non-State humanitarian actors, but it is recognised that, in terms of evolving actors on the international stage, a number of other actors could form a focus here, such as those non state actors focused on business, private security, or the extractive industries, non-governmental organisations, charities, philanthropic organisations and benefactors, and other actors that may defy categorisation.

[21] Figure 2.9 Historical Overview of Number of International Organizations by Type 1909-2013 in Yearbook of International Organisations <https://uia.org/ybio/>; See also B Reinalda (ed), *The Ashgate Research Companion to Non-State Actors* (Ashgate 2011).

[22] <https://uia.org/yearbook>, ibid.

[23] United Nations, 'Conduct in UN Field Missions' <https://conduct.unmissions.org/sea-data-introduction>; See also J-K Westendorf and L Searle, 'Sexual Exploitation and Abuse in Peace Operations: Trends, policy responses and future directions' (2017) 93(2) *International Affairs* 365–87.

[24] UN General Assembly, Report of the Secretary General, Special Measures for Protection from Sexual Exploitation and Abuse, A/75/754, 15 February 2021.

[25] The Times, 'Top Oxfam Staff Paid Haiti Survivors for Sex' London (9 February 2018); The Guardian, 'Oxfam: Fresh Claims that Staff used Prostitutes in Chad' London(11 February 2018).

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with Oxfam being made aware of this, little had been done.[26] In fact, it was reported that 'more than 120 workers for Britain's leading charities were accused of sexual abuse in [2017] alone'.[27] Some of the alleged perpetrators had been allowed to resign from Oxfam with no disciplinary action being launched and with only some being dismissed for gross misconduct.[28] While it is possible to report such actions to the UK Charity Commission or the UK government department for international development (DFiD), no such reports were made.[29] Oxfam had failed to handle the events in Haiti and had failed to properly manage the risks.[30] This inaction left open the possibility for alleged perpetrators to find work elsewhere in the aid sector. Through this approach, Oxfam was perceived to be seeking to protect its reputation over and above taking action for wrongs. This is a particular aspect that was criticised by the UK Charity Commission in its inquiry:

> 'No charity is so large, nor is its mission so important that it can afford to put its own reputation ahead of the dignity and wellbeing of those it exists to protect. But the implications of this inquiry are not confined to the failings of a single, big charity, because no charity is too small to bear its own share of responsibility for upholding the wider good name of charity.'[31]

The outraged response to these revelations led not only to further discussion about Oxfam's actions but also claims that this was not a problem limited to Oxfam, but rather an endemic problem within the aid sector, with a culture of 'abuse and impunity', within areas where humanitarian assistance was being provided.[32] Further allegations regarding other NGOs and different scandals continued to be made in the weeks that followed. It began to appear that abuse,

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[26] Haiti Investigation Final Report-Confidential, 'Investigation Report FRN5- Haiti' (2011) <https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/haiti_investigation_report_2011.pdf>.

[27] The Times, 'Oxfam among Charities Reeling as 120 Workers Accused of Sexual Abuse in Last Year Alone' London (11 February 2018).

[28] Haiti Investigation Final Report (n 26).

[29] There was little media coverage of accusations against Oxfam GB, dating back to 2010, or Save the Children executives, dating back to 2012 and 2015, until 2018 with exposés in The Times newspaper and the Mail on Sunday. See G Cooper, '#AIDTOO? The 2018 Humanitarian Scandals in Oxfam GB and Save the Children UK' in H Tumber and S Waisboard (eds), *The Routledge Companion to Media and Scandal* (Routledge 2019) 342–53.

[30] Charity Commission for England and Wales, 'Official Warning of the Charity Commission for England and Wales to OXFAM- 202918' ('the Charity') dated (7 June 2019). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807954/Oxfam_GB_Official_Warning.pdf>.

[31] Charity Commission for England and Wales, 'Inquiry Report: Summary Findings and Conclusions- Oxfam Registered charity number 202918' (11 June 2019).

[32] The Guardian, 'Charities Watchdog Demands Answers from Oxfam over Haiti Scandal' London (10 February 2018).

both in the specific sense of violence or sexual violence, but also in the broader sense of abuse of authority, power and position, was an endemic problem within the humanitarian sector; the examples just kept coming.[33] Twenty-one employees of the ICRC were either dismissed or resigned after paying for sexual services between 2015 and 2018;[34] and in February 2018, Justin Forsyth resigned from his role as United Nations Childrens Fund (UNICEFs) Deputy Executive Director after allegations arose of inappropriate behaviour while he was working for Save the Children.[35] There were continued revelations of a double layered problem of abuse; not only was there abuse but, furthermore, this abuse was being perpetrated by persons there to protect and help. This problem was then further compounded by limited action being taken.

The 2018 revelations were shocking, but they were not the first time such scandals had come to the fore. Humanitarian and peacekeeping actions carried out by the UN had long been plagued by claims of sexual violence and abuse, from the early 1950s right up to more recent claims in 2018.[36] Following reports of abuse by UN peacekeepers arising in the early 2000s, little action was taken at the time, despite public outrage and calls for reform. The UN has now taken steps to address the abuse committed by peacekeepers.[37] It developed internal accountability mechanisms, together with attempts at addressing these issues

[33] International Development Committee, 'Sexual exploitation and abuse in the aid sector inquiry' <https://publications.parliament.uk/pa/cm201719/cmselect/cmintdev/840/84002.htm>; See Safeguarding Summit 2018, 'Putting People First: Tackling Sexual Exploitation, Abuse, and Harassment in the Aid Sector' (London 2018) <www.gov.uk/government/topical-events/safeguarding-summit-2018/about>.

[34] The Guardian, 'Red Cross finds 21 Cases of Sexual Misconduct in Last Three Years' (24 February 2018) <www.theguardian.com/world/2018/feb/24/red-cross-21-staff-members-left-due-to-sexual-misconduct-in-past-three-years>.

[35] The Guardian, 'UNICEF Deputy Quits after Inappropriate Behaviour Claims' (22 February 2018) <www.theguardian.com/society/2018/feb/22/unicef-deputy-justin-forsyth-quits-inappropriate-behaviour-claims>.

[36] UNMISS acts on allegations of sexual exploitation against formed police unit (24 February 2018) <https://peacekeeping.un.org/en/unmiss-acts-allegations-of-sexual-exploitation-against-formed-police-unit>.

[37] UNHCR and Save the Children UK, 'Sexual Violence and Exploitation: The Experience of Refugee Children in Liberia, Guinea, and Sierra Leone' (January 2002); Zeid Report 2005; The Independent, 'Sex and the UN: when peacemakers become predators' (11 January 2005); Kirsti Lattu (Humanitarian Accountability Partnership), 'To complain or not to complain: still the question: Consultations with humanitarian aid beneficiaries on their perceptions of efforts to prevent and respond to sexual exploitation and abuse' (June 2008); Corinna Csáky (Save the Children UK), 'No One to Turn to: The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers' (2008); 'Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping forces in the Central African Republic' (Marie Deschamps, Hassan B Jallow, and Yasmin Sooka), 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers' (17 December 2015); UN Population Fund (UNFPA), 'Voices from Syria 2018; Assessment Findings of the Humanitarian Needs Overview' (November 2017).

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within a normative framework.[38] Even with the ability to address the UN through the international legal system, however, the success of these attempts has been highly limited.[39] There are numerous factors contributing to this, not least the immunity of the UN and the lack of effective UN disciplinary system.[40] Of course, this immunity is limited and does not cover sexual exploitation and abuse except for very senior personnel.[41] There is also the fact that under Status of Forces Agreements (SOFAs) it is the sending State of peacekeepers that have exclusive jurisdiction over their soldiers, which causes complexity in determining where responsibility for the actions of these individuals lies.[42] Overall little has been able to be done in response to wrongs perpetrated.

When considering INSHAs, the problem is even more acute due to the inability to consider the actors within the existing international legal system and responsibility frameworks. It is concerning that there is a similar inability now being seen to appropriately address abuse perpetrated by INSHAs. This is compounded by the fact that such actors, unlike the UN, are not recognised as having duties under international law. As time has gone on, scandals have become more frequent and widespread. The criticisms of an inadequate response to wrongs arises from numerous different points. Not only is there a failure to prosecute and a lack of redress for victims, but even much simpler aspects of accountability are often missing, such as apologies or reporting and

[38] UN Office of Internal Oversight Services (OIOS) <https://oios.un.org/>. See Special Investigation Unit, Military Police, UN Police and ad-hoc panels; UNGA A/RES/57/306 (22 May 2003) Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa; UN Secretariat, 'Secretary-General's Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse' (9 October 2003) SG/SGB/2003/13; Report of the Secretary General's Special Advisor, Prince Zeid Ra'ad Zeid Al-Hussein, on a comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations Peacekeeping Operations [A/59/710] (24 March 2005) (hereafter 'Zeid Report 2005'); UN Department of Political affairs, Department of Peacekeeping Operations, and Department of Field Support, '2015 Policy on Accountability for Conduct and Discipline in Field Missions; Report of the Secretary-General on Special Measures for the Protection from Sexual Exploitation and Sexual Abuse' (1 August 2015) A/70/729; UNGA. 'Resolution on Criminal Accountability of United Nations Officials and Experts on Missions' 6th Committee (Legal)- 69th Session (A/RES/62/63; A/RES/63/119; A/RES/64/110; A/RES/66/93; A/RES/67/88); UNSC Res 2272 (11 March 2016) Addressing Sexual Exploitation and Abuse by Peacekeepers Deployed under Security Council Mandates.

[39] O Simic, *Regulation of Sexual Conduct in UN Peacekeeping Operations* (Springer 2012).

[40] Convention on the Privileges and Immunities of the United Nations, arts I–VI, (13 February 1946), 1 UNTS 15.

[41] Convention on the Privileges and Immunities of the United Nations, See in particular arts IV–V, (13 February 1946), 1 UNTS 15.

[42] UN Model SOFA (1990), UN Doc A/45/594, para 47(b); See also UNGA, Report of the Secretary-General, 'Special Measures for Protection from Sexual Exploitation and Abuse' (15 February 2018) A/72/751.

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acknowledgement of wrongs. One of the aspects of the UK Charity Commission's Report on the allegations against Oxfam focused on the importance placed by the institution on its reputation and how this seemed to have taken precedence over righting, and even preventing, wrongs. The UK Charity Commission Report committed to address future allegations proactively and robustly, more on this report later.[43] As INSHAs continue to grow in power and wrongs continue to emerge, the issue of responsibility becomes all the more significant. The fundamental difficulty arises that INSHAs sit outside of the system of international law and so any ability to hold them to account for these wrongs is limited.

3. International non-State humanitarian actors outside of the normative control of international law

Having outlined the issues surrounding the unlawful actions committed by people working for INSHA, this article now turns to consider the extent to which INSHAs engage with obligations that exist within the primary international legal system, in particular Oxfam and the ICRC. We posit that, although functions have been 'contracted out', this has not found reflection as regards the corresponding issue of responsibilities.

The rules of international law were established 'in order to regulate the relations between ... co-existing independent communities or with a view to the achievement of common aims'.[44] Whether the 'beginning' of international law or the 'law of nations' is taken from Grotius and Westphalia, or a focus is had on the beginning of a more modern international law in the post-World Wars period,[45] state sovereignty is the basis of much of the global system: the formation of the law, the structure of institutions, even those purported to exist in more of a supranational sense, are still highly dependent upon the state.[46] This is because 'international law, being so intertwined with a political project that positions states at centre stage, has found it difficult to adjust its focus on the new realities of globalization'.[47] Berman argues that international law needs

[43] Charity Commission, Inquiry Report: Summary Findings and Conclusions (2019).

[44] *SS Lotus PCIJ* (1927) Series A No 10, 18.

[45] ie H Grotius, *The Rights of War and Peace* 1625 Book I Vol I (Liberty Fund 2005); Peace of Westphalia 1648.

[46] D Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 *Nordic Journal of International Law* 385, 406–08; P G Taylor, *International Cooperation Today: The European and Universal Pattern* (Elek 1971) 28; Reuter, *International Institutions*, Translated by J.M. Chapman from the French *Institutions Internationales* published by Presses Universitaires de France 1955, (George Allen and Unwin 1958) 42–43.

[47] A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 234; see also N Roughan, *Authorities. Conflict, Cooperation, and Transnational Legal Theory* (OUP 2013); D Shelton, 'Normative Hierarchy in

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to be reconceived 'as a global interplay of plural voices, many of which are not associated with the State'.[48]

One of the key voices often absent at the global level is that of the individual. In spite of longstanding concerns to address the individual at the international level, the normative scope of this system remains focused on states and unable to address wrongs perpetrated on individuals. In having such a limited scope, humans are left vulnerable without the full range of security and rights that they could be afforded.[49] As far back as the 1930s, even prior to the UN, Scelle developed his *dedoublement fonctionnel* concept considering that everything began with the individual and built up into communities from there.[50] From that, he argued, we end up with a myriad of interacting legal orders.[51] It was apparent at this point, and in the developments that followed in the post war period, that these theoretical foundations were not going to be those found in the emerging international system, as throughout the twentieth century a myriad of state centric legal frameworks were created by nation states. Even in places where the human was supposed to be the focus, any protection or regulation came through the lens of the state. In 1994, however, the UN took on the concept of human security, which sought to recognize that there could be a human-centric, people focused international legal order.[52] It called for the creation of security beyond national security. In doing this, however, even with this potentially positive development, the system continued to perpetuate its own structures and institutions which, again, grounded themselves in the state. The UN sought to develop various mechanisms in order to develop human security. Largely, these were focused through the lens of national policies; it was down to states that agreed to the concept of human security to then engage with this within their own national structures.[53] In spite of the concept being one to cut across the state and ground the human at the core of development, the very nature of this concept, together with its implementation, depended upon Member States agreement and implementation.

Overall, it is clear that the primary international legal system does not easily accommodate INSHA, which leaves a normative gap. A fundamental reconception of international law is therefore necessary that *should* include INSHA within its remit. Not least because of the significant power and reach of some

International Law' (2006) 100(2) *American Journal of International Law* 291–323; O'Connell and others (n 12).

[48] P Berman, 'A Pluralist Approach to International Law' (2007) 32 *Yale Journal of International Law* 301.

[49] A Cassese, 'Remarks on Scelle's Theory of "Role-Splitting"(*dédoublement fonctionnel*) in International Law' (1990) 1 *European Journal of International Law* 210.

[50] ibid 210.

[51] ibid.

[52] UNDP, 'Human Development Report 1994' (UNDP, OUP 1994).

[53] UNGA Res 66/290, 'Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome' (10 December 2012) A/RES/66/290; UN Report of the Secretary General, 'Follow-up to General Assembly resolution 66/290 on human security' (23 December 2013) A/68/685.

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NSAs, for example the ICRC 'engage[s] in treaty-making processes on the basis of a more formal mandate' and compliance monitoring.[54] In addition, Article 71 UN Charter gives certain entities observer status at the General Assembly, including the ICRC. There are a number of legal obligations relating to the ICRC and Oxfam that could potentially give rise to responsibility. One such being the obligation to facilitate the provision of humanitarian relief during armed conflict, which is enshrined in law.[55] More specifically, '[t]he provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organisation may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief'.[56] Furthermore, consent to such relief must not be arbitrarily withheld.[57] The Geneva Conventions 1949 and Additional Protocols 1977 provide the main rules in international law regarding humanitarian assistance generally, as applicable to all humanitarian actors.[58] Every non-state actor whether humanitarian, economic, military, or other, must go to states to seek permission to act on their territory, whether individually or collectively, that is, States must consent to their presence. For example, States Parties to the Geneva Conventions agree, in principle, to the mandate of the ICRC, should they succumb to non-international or international armed conflict, but that is not to say that the actions of the ICRC will be the same in every state. It is up to states to decide the roles that the ICRC may assume on its territory.[59] To the extent that INSHAs make agreements with states to facilitate their activities, they are forced to buy into the state-based system of international law, but once an agreement establishes their right to be present, their actions are independent, impartial and human focused.[60] There are a range of actors, including the ICRC and Oxfam, taking up the mantle of humanitarian protection and assistance, from the provision of emergency shelter, to the distribution of medicines, to the longer-term capacity building during recovery from conflict and disasters. [61] This happens, as has been discussed throughout this article, outside of the traditional normative international legal system.

54 art 4(g) and 4(1)(c) Statute of the ICRC.

55 Common art 3 GC I-IV; art 27 GC IV; arts 70–71 Additional Protocol I; art 18(2) Additional Protocol II. See also arts 23 and 38 GC IV.

56 GC I-IV; Commentary to art 9 GC I; art 23 GC IV; art 30 GC IV.

57 ICRC 2016 Commentary to art 3 First Geneva Convention paras 832–39; Institut de Droit International 2003 Resolution on Humanitarian Assistance art VIII <https://www.ifrc.org/Docs/idrl/I318EN.pdf>.

58 GC4 art 23; API arts 70–71; APII art 18.

59 ibid; Note that specific headquarters agreements are not published.

60 Proclamation of the Fundamental Principles of the Red Cross (Vienna 1965). They include humanity, impartiality, neutrality, independent, voluntary service, unity and universality.

61 S Silingardi, 'Responses by Private Corporations; in S Breau and K Samuel (eds), *Research Handbook on Disasters and International Law* (Edward Elgar 2016) 225–49; Y Osa, 'The Growing Role of NGOs in Disaster Relief and Humanitarian Assistance

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The ICRC acts in conjunction with States, that is, bridging the divide between the normative international legal system and the humanitarian sphere. It also codesigns its mandate at the International Red Cross and Red Crescent Movement Conference that takes place every four years.[62] In addition, States can make agreements with the International Committee of the Red Cross to allow itself privileges and immunities or other powers and benefits that the UN may normally be privy to.[63] This example exposes the difficulty faced here; there is an increasing amount of interaction between different actors and different systems.

Moreover, given the multitude of actors on the international stage, including international non-state humanitarian actors, the reality is that the global order has changed, in practical terms, from one grounded in state sovereignty to one existing in a pluralist sense.[64] 'Legal pluralism is at the same time both: social norms *and* legal rules; law *and* society, formal *and* informal, rule-oriented *and* spontaneous'.[65] Our legal life is constituted by 'inter-legality', that is 'the intersection of different legal orders'.[66] It is, in fact, inevitable that state legal orders must and do co-exist with other legal frameworks.[67] The increased involvement of Oxfam, MSF, Save the Children, and others, is indicative of a global order increasingly complex and made up of many different types of actor. In spite of this increased activity, the fact remains that the international legal order is not equipped to deal with INSHAs as international legal persons. While they frequently step in where states fail to act, they cannot be contemplated by the international legal system.

The international system continues to be limited in its focus. States remain the key actors recognised as international legal persons, with a recognition that

in East Asia' in R Sukma and J Gannon (eds), *A Growing Force: Civil Society's Role in Asian Regional Security* (Brookings Institution Press 2013) 66–89; UN-OCHA and World Economic Forum, 'Guiding Principles for Public-Private Collaboration for Humanitarian Action' (United Nations, Geneva, Switzerland 2007) <https://interagencystandingcommittee.org/other/documents-public/world-economic-forum-wef-ocha-guiding-principles-public-private-collaboration>.

62 ibid.

63 'Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland' (1993) 293 International Review of the Red Cross 152–60, Arts 1, 3-5; See also ICRC, *Discover the ICRC* (booklet) (Geneva, September 2005).

64 G Geeraerts, 'Analyzing Non-State Actors in World Politics' *Pole Paper Series*, Vol 1 No 4 1995 in ILA Johannesburg Report 2016, 7.

65 G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443; J Klabbers (ed), *Normative Pluralism and International Law: Exploring Global Governance* (CUP 2013).

66 B de souse Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14(3) *Journal of Law and Society* 279, 297–98; See also B Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law and Society* 296, 300.

67 A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 234.

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international organisations have the capacity for this. The State also continues to be the raison d'etre of many international organisations.[68] The nature of such institutions is that they continue to be strongly linked into the concept of the 'primary' international normative framework and have gained a place within this normative framework.[69] This is evidenced, as will be discussed later, by the adoption of Articles on the Responsibility of International Organisations (ARIO) which greatly reflect the previously concluded Articles on the Responsibility of States for Internationally Wrongful Acts (ASR).[70] Our argument is that INSHA have the capacity for legal personality and it is crucial to recognise this and, through this, to begin to determine what rights and duties exist on them at the international level. While it has been argued that domestic law, whether criminal law, tort law or even fiduciary liability, could address individuals committing wrongs, such as those acting through the auspices of INSHAs, this remains far too limited. First and foremost, INSHAs frequently work in failed or weakened States, that is, States in times of crisis, emergency, or during war. These states can lack capacity, domestically, to hold individuals or the international non-State humanitarian entities to account under domestic criminal, or other, law. This means that people sexually abusing citizens or demanding sex for immunization go unpunished.[71] The second consideration is that if INSHAs are acting at the global level as legal persons then they need to be held to account for their actions in the same way as other legal persons, whether states or institutions. An existence as a legal person means the possession of corresponding rights and duties. These duties need to be upheld, not just in terms of the actions of the humanitarians but also for the integrity of the legal system as a whole. This is an issue that will only continue to be exposed as more actors cross-borders and undertake the provision of humanitarian protection

[68] DJ Bedermann, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 *Virginia Journal of International Law* 275; R Collins, 'Modern-Positivism and the Problem of Institutional Autonomy in International Law' in R Collins and N White (eds), *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge 2011) 22; C Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Hart 2007).

[69] PC Jessup, *A Modern Law of Nations* (Macmillan 1948) 17; R Collins, 'Modern-Positivism and the Problem of Institutional Autonomy in International Law' in R Collins and N White (eds), *International Organizations and the Idea of Autonomy. Institutional Independence in the International Legal Order* (Routledge 2011) 22; A Nussbaum, *A Concise History of the Law of Nations* (Revised edn, MacMillan 1954) 232.

[70] ARIO; ARS; See also, C Brölmann, *The Institutional Veil in Public International Law. International Organisations and the Law of Treaties* (Hart 2007).

[71] C Csáky, 'No One to Turn to. The Under-reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers' Save the Children (2008); House of Commons International Development Committee, 'Progress on tackling the Sexual Exploitation and Abuse of Aid Beneficiaries', Seventh Report of the Session 2019-21, HC605, (14 January 2021).

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and assistance.[72] The potential responsibility of such actors is considered in Section 4 of this article.

We argue that there needs to be a recognition of INSHAs having the capacity for international legal personality in the way that this is recognised for international organisations. While legal personality remains a broad and, sometimes, debated concept at the international level, its basic meaning as enabling corresponding rights and duties and an autonomous existence at the international level is crucial here. Quite simply, there are numerous INSHAs that do exist in this manner. What is missing is the recognition and the consequent engagement with the legal system. The result of this is that actors effectively exist with the powers and abilities of legal persons but without the normative capacity to hold them to account; there exists a fundamental responsibility gap.

4. The growing responsibility gap: International Non-State humanitarian actors on the international stage

The concept of holding an actor to account for their actions is fundamental within any legal system. International legal responsibility plays this role and is argued by some as ensuring the very nature of international law.[73] The legal frameworks continue to be grounded in state sovereignty, however, thereby limiting its response beyond this, including to INSHAs. This can be seen with the very origins of the legal principles. International legal responsibility, specifically state responsibility, was one of the first topics for consideration by the International Law Commission (ILC) after its creation as the body responsible for the codification and progressive development of international law.[74] The focus on the state remained in spite of early concerns that this should be broader, even, as a minimum, in response to the actions of international organisations, in particular claims of sexual abuse by UN peacekeepers.[75] Following the conclusion of this project with the ASR in 2001,[76] came the development of

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[72] For reference see EG Ferris, *The Politics of Protection* (Brookings Institution Press 2011).

[73] A Pellet, 'The Definition of Responsibility in International Law' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (OUP 2010) 3.

[74] Yearbook of the International Law Commission 1949, Summary Records and Documents of the First Session including the report of the Commission to the General Assembly, 49–50.

[75] *Report on International Responsibility* by Mr F.V.Garcia-Amador, Special Rapporteur, A/CN.4/96, Extract from the Yearbook of the International Law Commission 1956, vol II; First Report by A.El-Erian, Special Rapporteur, 'Relations Between States and inter-Governmental Organizations, Document A/CN.4/161 and Add.1, contained in ILC Yearbook (1963) Vol.II, A/CN.4/SER.A/1963/ADD.1,159, para 172.

[76] ARS.

the ARIO.[77] The second of these were largely drawn from the first and, as a result of this, the application of these principles suffers from two substantial limitations. The first of these is that its ability to be applied is dependent upon the nature of the actor concerned; principles have been developed in relation to states and international organisations and, consequently there is a need to determine an actor as falling into one of these categories for these principles to be applied.

The second area of weakness lies with the nature of the principles themselves. With the ARIO having been built upon the premise of the ASR, the principles of responsibility are built around the concept of a unitary sovereign state possessing legal personality and bound by traditional and accepted international legal obligations. When engaging with actors outside of the state framework, there is a continued approach to draw back to the state and its primacy at the core of the international legal framework. For example, when considering the actions of private actors, the traditional approach is to see whether such actions can be attributed to a state under Article 8 of the ASR. While there may be occasions when INSHAs act under the instructions or control of a state, thereby engaging state responsibility, this is not always the case and fails to consider the increasing significance of their actions.

A number of problems can then be identified with applying the 'accepted' general principles to the broad category of international non-state humanitarian actors. For responsibility to arise, there needs to be an internationally wrongful act which is constituted by a breach of an international obligation which can be attributed to the responsible actor.[78] Difficulties exist with both facets of this requirement: breach and attribution.

Considering the first of these, namely the identification of a breach of an obligation, the nature of an INSHA as an entity existing in a space outside of the normative system but engaging with it means that their international obligations are often undefined or entirely lacking; they often exist in a legal vacuum. There do exist exceptions to this, with the ICRC for example, and its obligations under International Humanitarian Law (IHL), not just in terms of the Geneva Conventions but also under customary international law.[79] This is an exceptional case, however. The ICRC is a unique type of international actor particularly in terms of its role in IHL.[80] There are limitations even on the extent to which this distinct actor is *bound* by customary principles. The recognition of customary principles of the ICRC was, first of all with the recognition of principles that are contained within the Geneva Conventions and, second of all, with the recognition of a right for the ICRC rather than an obligation.[81] The

[77] ILC, 'Report on the work of its fifty-second session' (2000) A/55/10, Annex 135, 136; ILC, 'Report on the work of its fifty-fourth session' (2002) A/57/10, 231–32.
[78] art 2 ARIO.
[79] *Prosecutor v Simić* et al (Decision on the Prosecution Motion under Rule 73 for a Rule Concerning the Testimony of a Witness) 27 July 1999, paras 73–74.
[80] Shucksmith (n 16).
[81] *Prosecutor v Simić* et al. (n 79), paras 73–74.

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ICRC was not being bound by international principles but rather being given further capacity to act at the international level. With this being limited even with the ICRC, which is perhaps the most developed of actors that can be identified within this class of international non-State humanitarian actors, the ability to identify obligations on this, and other less developed actors remains complex. While actors outside of those primarily recognised at the international level are increasingly active, this has not been combined with the development of a legal framework and system to determine their obligations to act at the global level, nor yet obligations when they choose to act at the global level. Having said this, there are some General Assembly resolutions which indicate the possible emergence of soft law in the field.[82] Even with these examples, however, often the parameters of legal obligations are far from clear. If the obligations of actors are uncertain then questions arise as to whether there have been any breaches of law; if there is no obligation, then there can be no breach of an obligation.

Considering the second of these issues, that of attribution, there remain equal difficulties. Attribution, whether in the ASR or the ARIO, is the principle seeking to link breach to actor and is a determining factor in establishing an internationally wrongful act.[83] There are significant commonalities between the two existing sets of articles. Actions of organs and agents of states[84] and of international organizations[85] will be attributed to the respective state or international organisation. There is also a consideration of entities who are not formally organs and agents but whose actions can be attributed to states or institutions. The remit of states is a broader one, with considerations of the exercise of governmental authority or whose conduct is directed or controlled by the state.[86] Where organs or agents are not those of international organisations but they exercise effective control over that organ or agent then actions will be attributed to them.[87] This concept of control does cause some difficulty, first of all in understanding its specific meaning, and, secondly, in enabling the application of this principle to function in the context of international organisations.

The concept of effective control has been identified as one originally developed in relation to the ASR in terms of conduct directed or controlled by the state.[88] It was one that required a significantly high standard. When the

[82] See UNGA, Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel (2007) A/RES/62/95; UNGA, Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations (2007) A/RES/62/94; International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development (2007) A/RES/62/91.

[83] art 2 ARIO.

[84] art 4 ASR.

[85] art 6 ARIO.

[86] arts 5 and 8 ASR.

[87] art 7 ARIO.

[88] art 8 ASR; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Judgment) [1986] ICJ Rep 14.

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principles within this article were emerging, however, it is noteworthy that one of the complexities was with attempts to address the actions of private actors and seek to determine a connection with states. This was the very core of this article; a provision seeking to establish responsibility for actors not directly connected to the state. The difficulty, however, was the continued prominence that was given to the state. In requiring such a significant level of control by the state, there was a perpetuation of the concept of the state and its sovereignty.

The corresponding principle within the ARIO utilizes the very phrasing of 'effective control' within Article 7 itself. In doing so strong alignment is drawn from the original high level established in relation to states. Seeking a high level of control within the remit of an international organisation is even more complex than when faced with the actions of state. The transparent nature of institutions means that there is often a continued link between organs loaned to institutions and their 'home' state. This is most obviously seen in peacekeeping operations and the continued link of disciplinary and criminal jurisdiction by the sending state. There has been limited discussion seeking to apply this in recent case law.[89] The level of control has continued but there have been attempts to apply this together with a concept of dual attribution.[90] This has caused some difficulty in the ability this high level of control to two different actors. There is a continued state focused approach within the law of responsibility. Attempts to evolve beyond this will be fundamentally restricted despite its crucial nature.

The difficulties with responsibility and INSHAs are numerous. First and foremost, it is difficult to argue that there exist principles able to address these entities. Even if this argument can be made, or it could be argued that principles aligned to those addressing states or organisations could be applied, there are significant difficulties in the application of these to INSHAs; the principles are grounded in a system of international law that does not contemplate these entities. This is where the fundamental problem arises; there are active international actors that simply cannot be addressed by responsibility principles. This creates difficulties for seeking to gain redress for wrongs but could also begin to question the integrity of the international legal system itself. There needs to be a development and reconsideration of responsibility to enable a solution here.

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[89] See, *Netherlands (Ministry of Defence and Ministry of Foreign Affairs) v Nuhanović*, Final appeal judgment, ECLI/NL/HR/2013/BZ9225, ILDC 2061 (NL 2013), 12/03324, 6 September 2013, Supreme Court; *Claimant 1 et al and the mothers of Srebrenica v the State of the Netherlands and the United Nations Case Number* C/09/295247/ HA ZA 07-2973, Judgment of The Hague District Court of (16 July 2014)

[90] *Nuhanovic v Netherlands* (*Ministry of Defense and Ministry of Foreign Affairs*) (10 September 2008), Rechtbank's-Gravenhage, ljn: bf0181/265615 ('*H.N.* District Court Judgment'); *The Netherlands v The Mothers of Srebrenica* (19 July 2019), Supreme Court of the Netherlands, 17/04567.

5. Possibilities for responsibility of NSHA

In advocating for solutions to address the responsibility gap, many options are considered in the literature. There is clearly a need for the development of benchmarks for judging the behaviour of NSHAs and for internal accountability mechanisms.[91] In establishing accepted benchmarks on the behaviour of INSHAs, greater clarity and agreement could be reached when behaviour fell short of these expectations. Furthermore, internal accountability mechanisms are a fundamental part of an overall system of accountability. While there are currently aspects of accountability, the ability of such institutions to adequately develop and uphold internal principles and systems has been subject to numerous critiques. There is clearly a need for some change. Without public awareness of what is going on, the sector has been left to deal with situations in its own way. Authors have argued that situational violence, in this context, was an inevitable outcome of the power disparity in humanitarian activism.[92] The limited public responses seen currently have amounted to apologies, resignations, and, very occasionally, suspensions.[93] This does not amount to redress for victims, nor does it prompt or enable change to prevent further wrongs in the future. As mentioned above, these systems seem to have been more focused on reputational protection than on true concepts of accountability. An overall adequate system of accountability would be one that encompassed both the internal and the external. It is clear that both of these need much development. However, it is the external which forms the focus of this article.

There have also been various discussions on possible areas of international law that could be engaged with to consider consequences for wrongs of these actors. With the actions mentioned above often falling under the remit of criminal behaviour, such as sexual abuse, international criminal law has been one area of consideration. There are inherent limitations to this suggestion, however, as humanitarians are often relied on to provide impartial evidence to the International Criminal Court (ICC). The question arises as to whether it is possible to call actors before courts that they themselves serve. This article

91 Independent Commission on Sexual Misconduct, Accountability and Culture Change, 'Committing to Change, Protecting People: toward a more accountable Oxfam: Final Report' (June 2019) <https://www-cdn.oxfam.org/s3fs-public/oxfam_ic_final_report-en.pdf>.

92 See PZR Al-Hussein, 'A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations: Report to the UN Special Committee on Peacekeeping Operations' (2005) A/59/710; C Csáky, 'No One to Turn to: The Under Reporting of Child Exploitation and Abuse by Aid Workers and Peacekeepers (UK Save the Children, 2008); EM Gillespie, RM Mirabella and AM Eikenberry, '#Metoo/ #Aidtoo and Creating an Intersectional Feminist NPO/NGO Sector' (2019) 10 *Nonprofit Policy Forum*; G Goncharenko, 'In the Spotlight: Rethinking NGO Accountability in the #MeToo era' (2021) *Critical Perspectives on Accounting* <http://doi.org/10.1016/j.cpa.2021.102308>.

93 Chief Executive and Chairman resigned from Save the Children in 2018.

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furthermore considers the legal responsibility of international non-state humanitarian actors as institutions rather than on individual culpability. There have also been discussions as to whether the Business and Human Rights agenda and its concept of due diligence could prove useful. This area addresses the actions of corporations and business through due diligence as a 'standard of care against which fault can be assessed'.[94] The development of the Montreux Document addressing the actions of Private Military and Security Companies is just one example here.[95] The focus of this area, however, continues to be one with the state as the primary actor and contemplating the obligations of states in relation to actions of business rather than addressing the actions of business themselves. While there is potential here, specific analysis of how due diligence could be applied to INSHA will be reserved for a future publication by these authors.[96]

There is frequently discussion of the possibility of utilizing national laws and legal systems. INSHAs do indeed operate within the context of the legal system of the host state and are subject to national laws. The point is that the prima facie applicability of national laws needs to be acknowledged, and it is the issues with national systems, not the existence of a 'legal vacuum', that should provide the context for the discussion about whether there is a need for responsibility under the international system. While some immunity exists for the UN, except for very senior personnel, this only extends to conduct performed in the course of official duties. There is a need for further clarity as different types of organisations and staff are subject to different rules and different immunities, many of the key players make the assumption that no rules apply, and this leads to the Haiti-type scenario wherein NGOs rely exclusively on their own internal mechanisms. Moreover, there are numerous issues with national criminal justice systems, and these warrant discussions: lack of national capacity is one; but another is that there may be instances in which an INGO may have good reason not to want to report conduct that is criminal according to national laws to local authorities.[97]

Finally, there has also been the consideration of a more informal international centralised body to draw together INSHAs and provide a regulatory focal point. This could be viewed in a similar manner to the church or even the media at the national level in the UK. Both of these examples also demonstrate, however,

[94] International Law Association, 'Study Group on Due Diligence in International Law: Second Report' (July 2016). See also J Bonnitcha and R McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899–919.

[95] The Montreaux Document on Pertinent International Legal Obligations and Good Practices for States related to operations of Private Military and Security Companies during Armed Conflict <www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/Montreux-Broschuere_en.pdf>.

[96] In terms of the 'respect, protect and remedy framework', it is argued that NSHA may fit into the 'protect' limb with duties of due diligence.

[97] See recommendations on local criminal justice systems in the Oxfam 2019 Final Report.

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the significant weaknesses within this concept and an overreliance on informal accountability mechanisms.

Overall, while there are numerous possibilities, and indeed requirements, for developing a system of accountability and responsibility capable of fully encompassing INSHAs and all of their expanding actions, they are so numerous as to be too much for one article. The focus of this article remains on external checks and, specifically, the difficulties with the law of responsibility as the general area of law capable of addressing legal wrongs. Not only is it significant for INSHAs for this area to be developed to address them, but for the validity and integrity of the international legal system. Some way of addressing the weaknesses and issues with international responsibility is what now needs to be considered.

A. International legal responsibility of international non-state humanitarian actors

While a law of responsibility to appropriately address the actions of international non-state humanitarian actors is currently highly unlikely, it is quite necessary. The most practical possibility would be to try and address and apply the principles developed in the ARIO. Critically, the definition of an international organisation to which the ARIO would apply is both incredibly broad and limited. It is broad in the sense that the definition is simply an organisation established by treaty and which possesses international legal personality.[98] ARIO limited it in the sense that the development of the principles clearly envisaged an institution akin to the United Nations. The broad nature, however, and the simple requirement of personality could enable a development of personality to address the issue of responsibility. This would need the limitations with legal personality to be addressed, however.

Although the ASR and ARIO exist in a distinct manner from one another, one of the criticisms of the ARIO was the way in which they were so substantially derived from the original ASR.[99] The core principles of both articles are the same. For responsibility to arise, there must be an internationally wrongful

[98] art 2 ARIO; See also Paul Reuter, *International Institutions* (George Allen & Unwin 1958) 195 (trans JM Chapman from the French *Institutions Internationales* (Paris, Presses Universitaires de France, 1955); DJ Bedermann, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 *Virginia Journal of International Law* 275, 371–74; D Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 840, 841–42; N White, *The Law of International Organisations* (Manchester University Press 2005) 1–2; C Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart 2007) 66; I Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 676–79; J Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009) 11–12.

[99] C Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility for International Organizations- An Appraisal of the "Copy-Paste Approach"' (2012) 9 *International Organizations Law Review* 53.

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act, which is constituted by a breach of international law attributable to the wrongful actor. There are a number of aspects here which pose a challenge to the actors which we examine here. The first of these is in terms of the determination of these actors as legal persons capable of acting at the global level. This is fundamental. While personality has long been straightforward with states, as they are sovereign, autonomous, legal entities, the actors outside of the state were kept as 'other'. The advent of the UN initially being recognised as having a large measure of international legal personality saw the expansion of this concept beyond the state.[100] The well-known ICJ statement on this both clarified and complicated matters:

> In the opinion of the Court, the Organization was *intended* to exercise and enjoy, and is *in fact* exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.[101]

The concept of legal personality has long been a complex one, however. With definitions continuing to be subject to debate, the focal point continues to be on the ideas discussed within *Reparations*. The consequence is a continuation of personality as a concept that is linked to the state; international organisations possess personality if it has been conferred by states explicitly, or if states have conferred such powers that must be defined by the possession of legal personality. This has caused difficulties within the concept of personality itself, and when contemplating the status of INSHAs this becomes even more complex. While personality is the necessary starting point in order to determine responsibility, this is another concept that continues to have the state at its core. We posit, however, that this is not necessary, and that *Reparations* had more potential than it fulfilled to determine other questions of international law including legal responsibility.

Reparations was groundbreaking in opening up the possibility of personality beyond the state. The significant part of *Reparations*, however, lies not in its determination of UN personality or its discussion of personality as being derived from the intention of the creators of an institution, namely states. Rather the significance of the judgment lies in its recognition of the fluidity of the international legal system.

[100] A Meijknecht, *Towards International Legal Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia 2001) 26; *Case of the SS Lotus*, 1927 PCIJ (Ser A) No 10, 18; See also *Case Concerning the Payments of Various Serbian Loans Issued in France* (Judgment), 1929 PCIJ Series A No 20 at 41, which principally adhered to the states-only concept of international legal personality.

[101] *Reparations for Injuries Case at* 179 (emphasis added).

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> 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and *their nature depends upon the needs of the community*. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.'[102]

Even at this early point, the Court was recognizing that the international system could not remain stagnant in its concept of legal persons and sought to open up the possibility of a more nuance international legal system. At that point, however, the natural progression was recognition of legal personality of the UN. We argue that *Reparations* could have brought in a new era for the global order with a broader recognition of international legal persons. Had its conception of personality been more nuanced, developed, and more comprehensive, it could have paved the way for a myriad of non-state actors, NGOs, and communities, to be recognised within international institutions as equal to or, at the very least, worthy of consideration and having a voice in the international legal system. This did not happen. This inherently limits the possibility of holding international non-state humanitarian actors, such as Oxfam, to account, when they exist so far beyond the State. This is not to say that it is not possible, as with the ICRC, for example, which is an international legal person.[103] The difficulty with this, however, is that the role of the ICRC is such a distinct one that seeking to draw any lessons from this to assist in developing this area would be complex. There needs to be a broader consideration of personality that develops the rigid concept that has been grounded in the global system.

B. Encompassing international non-State humanitarian actors within ARIO

If we consider, as an example, one of the most developed actors which would fall under our concept of international non-state humanitarian actors, the ICRC, even this actor, with its international legal personality, poses a challenge to even this basic idea of being able to have any principles such as these applied to it. The Red Cross Movement is unique amongst humanitarian organisations, primarily because it is a law maker and guardian of a legal framework that limits State action in times of war. If the international system cannot address the actions of this highly active international actor, it cannot hope to address other

[102] *Reparations for Injuries Case at* 178 (emphasis added).
[103] Shucksmith (n 16).

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international non-state humanitarian actors that exist without the legal mandate and authority of the ICRC. If the international system were able to address the question of responsibility of the ICRC, one would hope that the framework for responsibility could also apply to, or be adapted for, other INSHAs. We must find a way to enable a broader focus on responsibility with regard to INSHAs. At present, the legal status of the ICRC, leaves the ability of the current system to determine its responsibility, at best, uncertain and, at worst, not possible.

We posit that international legal personality is central to the finding of responsibility for INSHA. Without the clear ability to determine when and where personality lies, it becomes difficult to determine where breaches of the law exist. If an actor does not have legal capacity to act at the global level, then there remains a question as to whether it has the capacity to commit a breach of international law. Of course, within international criminal law a person or actor can breach international law, although this is for a limited number of offences.[104] The number of offences could, in theory, be expanded to include situations of widescale sexual abuse, but that would target the perpetrators not the organisations. This question would obviously change nothing for anyone engaged in, and potentially suffering the consequences of, a wrongful action, but the determination of personality is a significant legal requirement to ensure the capacity to view these wrongs as such.

Not only this, but even if it is considered to pass through this boundary, there are even more challenges to be contemplated with the application of the principles themselves, that of attribution. In being derived from principles focused on the sovereign state, the principles focus upon the actions of a single, unitary actor engaged with another single, unitary actor. This can be seen in the construction of an internationally wrongful act as being a breach that is attributed to *an* actor. The focus of the different principles of attribution, whether considering the state or organisation itself, its organs and agents, or any actions of organs or agents loaned to it acting under its effective control. These are common principles. Yet, when applied beyond the actions of traditional bilateral state action, they are substantially limited.

INSHAs in general, and the ICRC specifically, will very rarely be acting alone. Instead, there is far more frequency of collaboration and collective action. With the level of control over action needing to be the high level of effective control for any actors that are not within the boundaries of the responsible actor, this is a high level of control. It is one that would be difficult to determine for many INSHAs that, instead, act in concert together. This type of fixed determination of a single actor simply does not respond to the type of actor being considered here.

Not only are there significant issues with applying these principles with the ICRC, but the category of actors considered here are significantly wide ranging.

[104] art 49 Geneva Convention I; art 50 Geneva Convention II; art 129 Geneva Convention III; art 146 Geneva Convention IV; arts 75(4)(b), 85, 86 Additional Protocol I; and art 6(2)(b) Additional Protocol II; B Bonafe, *The Relationship between State and Individual Responsibility for International Crimes* (Martinus Nijhoff 2009) 281.

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The ICRC is the most aligned with the traditional forms of actors already conceived within the international system and there are a number of substantial difficulties with applying the traditional principles to this actor, including the ICRC principle of confidentiality and questions of where you would take the ICRC in terms of jurisdiction. This is in spite of the fact that it is bound by certain primary norms and staff have breached them. If that is the case with the ICRC, then any broader application would be even more complex and highly unlikely. With significant weaknesses and issues in applying these principles to this range of acts and their distinct nature, there is a need to develop an alternative, parallel system of justice for those who suffer at the hands of INSHAs.

6. Conclusion

The evolution of humanitarians has naturally seen an increase in both the potential, and the actual realization, of wrongs being committed in the course of their actions, as described above. Critically, if state actors sexually abused citizens of another state, there would be legal consequences on the international stage. This is currently not the case for INSHA who are undertaking activities traditionally within the purvey of states. We need to align the law with the deeds and seek consequences for people who act unlawfully. Their affiliation in terms of employer should not determine whether they are punished or whether victims see justice done.

From the Zeid Report identifying abuse by UN peacekeepers to the allegations, resignations and dismissals in 2018,the numerous scandals involving international non-State humanitarian actors have shown an expanse of wrongs, from within the managerial structures of the organisation to the individuals on the ground in a crisis situation. As the engagement of these actors with the international legal system continues to expand, examples of wrongs occurring increase. Whether these wrongs are deliberate or accidental alongside well-intentioned actions, it is crucial that redress for these actions is made possible on the international stage. While there are ways to address wrongful actions, such as internal disciplinary action from the organisations or the ability to take criminal charges against an individual within a host state where the law addresses that conduct. The former remains limited in its ability to effect real consequences and the latter can be problematic in depending upon the legal structures within a host state. Wrongs often occur in the context of humanitarians' action during circumstances of crisis or disaster. In such situations, the structures and systems capable of addressing wrongs can sometimes be limited. To truly address these wrongs, a global approach needs to be taken, as indicated above.

The possibility of legal responsibility remains limited with international non-State humanitarian actors falling outside of the traditional normative framework. We envisage two key options: an expansion of the use of international legal personality to capture a wider range of actors, or a new regulatory system ..

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The first of the options, while perhaps the least likely initial outcome, would be the most preferable in reconceptualising the concept of international legal personality. Personality needs to begin to move beyond a determination of whether it has been conferred by states or not. Rather than this state-focused approach, instead it needs to consider the powers and capabilities of actors in their own right. There needs to be a much more objective approach to the concept of personality. In looking at action rather than the specific types of actors and focusing on the state, not only could distinct actors such as INSHA be considered but so could the interaction between different actors. An attempt to address this interaction, would take a more comprehensive approach to addressing this significant, and growing, responsibility gap. The alternative suggestion would be the development of a new regulatory systemapplicable to these actors. While not a fully enforced system of responsibility, having some system that allows consequences for wrongs is what is most significant. It would also provide structure and awareness of how to deal with wrongs and the most fundamental aspect to address within this problem is that of enabling some form of redress.

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