

## Book Reviews / Recensions de livres

*Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current Status Quo and Responsibility under International Law.* By Róisín Sarah Burke. Leiden: Brill Nijhoff, 2014. 384 pages.

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Within the last twenty-five years, international humanitarian law (IHL) has taken major steps to address the enduring problem of sexual violence during armed conflict by categorizing and prosecuting rape as a war crime for the first time.<sup>1</sup> Despite these developments, international law has not adequately responded to a particularly troubling and widespread type of sexual offences committed in ongoing or recently ceased armed conflicts — those committed by United Nations military contingent personnel (UN military personnel). Róisín Sarah Burke addresses this topic in her book *Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current Status Quo and Responsibility under International Law*.

Burke's expertise on this issue is evident from her previously published works on the topic. The book is an adaptation of Burke's doctoral thesis, completed at the Asia Pacific Centre for Military Law at the University of Melbourne in October 2012. Parts of the book draw from her previous academic work, including peer-reviewed journal articles and book chapters. In addition to her doctoral degree, Burke holds an LLB in law and European studies from the University of Limerick and an LLM in international human rights law from the National University of Ireland, Galway, where she is currently a post-doctoral research fellow.

In her book, Burke explores various methods for holding individuals, states, and the United Nations (UN) accountable for sexual exploitation and abuse by UN military personnel. Burke's analysis of the legal and practical

<sup>1</sup> Richard Goldstone, "Prosecuting Rape as a War Crime" (2002) 34 Case W Res J Int'l L 277 at 283.

complexities of international accountability for sexual exploitation and abuse by UN military personnel is not only insightful but also timely. The UN secretary general released a report to the UN General Assembly on 13 February 2015 entitled *Special Measures for Protection from Sexual Exploitation and Abuse*.<sup>2</sup> The report documents reported instances of sexual exploitation and abuse by UN personnel in 2014 and suggests measures to combat these offences.

The sheer number of treaties, judicial decisions, and scholarly publications that Burke cites demonstrates the book is well researched. Yet Burke's book serves as an accessible guide to a reader who may not thoroughly understand the international legal principles at play. Burke's writing style is clear and effective, making the book an overall good read. However, Burke's use of abbreviations and acronyms is not always effective. In total, the book uses 104 different abbreviations and acronyms. Given the extensive number of organizations, treaties, and UN missions she cites, some acronyms are useful. But some references to lesser known organizations, documents, and concepts may have been more helpful to the reader in a less abbreviated form. For example, Burke refers to the "Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law" as "SGB 1999" throughout the book. An abbreviated phrase, such as "Secretary-General's Bulletin, 1999" would have been more intuitive. While the author does provide a Table of Abbreviations and Acronyms, the reader may find it distracting to repeatedly have to refer to the table to confirm an acronym's meaning.

More significantly, Burke's abbreviation of "sexual exploitation and abuse" as "SEA" detracts from her fundamental position that "[sexual exploitation and abuse] undermines the promotion of the Rule of Law, respect for human dignity and the values of the international community as a whole."<sup>3</sup> Abbreviating the concept to "SEA" in a 384-page book somewhat sterilizes the issue and fails to remind the reader of its seriousness. To compare, the secretary-general's 2015 report does not abbreviate "sexual exploitation and abuse." This may have been a better choice for Burke.

Burke has nonetheless organized the book well, as each chapter builds on the previous one. Thus, her analysis is divided into six complementary chapters. In her introduction, Burke convincingly presents sexual exploitation and abuse by UN military personnel as a compelling problem. She explains that sexual exploitation and abuse can take many

<sup>2</sup> Report of the Secretary General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc A/69/779 (2015) [Secretary-General's 2015 Report].

<sup>3</sup> Róisín Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current Status Quo and Responsibility under International Law* (Leiden: Brill Nijhoff, 2014) at 9.

forms, such as sexual violence, forced prostitution, and abuse of minors. Further, the occurrence of the phenomenon has been documented in a majority of UN military operations since the 1990s. This trend is troubling because “[a]n integral part of the UN’s mandate is the protection of human rights.”<sup>4</sup> Burke acknowledges that UN civilian personnel also commit sexual exploitation and abuse, but she focuses her study on UN military personnel exclusively as this category represents the largest number of accused perpetrators. This is consistent with the findings of the secretary general’s 2015 report.<sup>5</sup>

In Chapter 1, Burke reviews the UN’s current strategy for implementing its “zero-tolerance policy” for sexual exploitation and abuse, including codes of conduct and victim assistance programs. Her primary critique of these measures is that they create no legally binding obligations. She notes that, in 2007, the UN prohibited sexual exploitation and abuse by UN military personnel in its revised model memorandum of understanding (MOU), which it enters into with troop-contributing states. The revised MOU includes such measures as enhanced investigation procedures, command responsibility, and assurances that troop-contributing states will react to sexual exploitation and abuse by their troops. However, Burke argues that the revised MOU could have referred explicitly to troops’ duty to respect IHL, thereby creating more robust legal obligations for troop-contributing states to exercise jurisdiction.

Burke further considers possible legal remedies in Chapter 2, where she discusses how and why UN military personnel are generally immune from host-state jurisdiction. She explains that since the 1960s, UN practice has been to negotiate status of forces agreements that grant UN military personnel immunity from the host state’s jurisdiction. Under this scheme, the troops’ state of nationality maintains exclusive criminal and disciplinary jurisdiction. She claims the primary reason for granting such immunity is “functional necessity” — to encourage troop contribution by states — as many states want to maintain sovereign control over their troops.<sup>6</sup> However, troop-contributing states often fail to exercise their jurisdiction, leading to impunity.

Burke suggests creating a system where troop-contributing states exercise concurrent jurisdiction at the international level, possibly shared with host states. While concurrent jurisdiction may help end impunity, Burke does not fully explain how this would address the functional necessity problem: states may still be wary of sharing jurisdiction and, thus, not contribute troops to UN missions.

<sup>4</sup> *Ibid* at 2.

<sup>5</sup> Secretary-General’s 2015 Report, *supra* note 2 at paras 4–5.

<sup>6</sup> Burke, *supra* note 3 at 64, 83.

In Chapter 3, Burke considers one of the most significant impediments to international accountability: identifying the applicable international legal obligations. She recognizes that neither IHL nor international human rights (IHR) treaties bind the UN, as only states can be parties to such treaties. Therefore, the UN, as such, is only required to follow customary international law. She thus focuses much of her analysis on the international obligations of troop-contributing states themselves. Burke aptly notes the threshold for IHL's application: the existence of an armed conflict. In classic peacekeeping missions, armed conflict has ceased. But she rightly points out that UN troops may engage in "peace enforcement" missions, where they intervene on behalf of a belligerent, making them party to the conflict. However, as Burke indicates, it is often difficult to differentiate between peacekeeping and peace enforcement missions, making it difficult to determine whether IHL applies. Burke does well in acknowledging that IHL may not be a proper basis for imposing international legal responsibility for sexual exploitation and abuse by UN military personnel.

In terms of IHR, the biggest obstacle in relation to enforcement is establishing that a state's human rights obligations apply extraterritorially. Burke's review of international and domestic case law demonstrates that judicial bodies have applied varying tests to determine when a state's human rights obligations apply to their troops' operations abroad. She asserts that "[a] broader interpretation of extraterritorial jurisdiction which focuses not only on state control over victims better reflects the reality that states can and do affect the rights of persons beyond their borders."<sup>7</sup> She claims such a broader interpretation would better reflect the object and purpose of IHR treaties. But, in making this assertion, Burke fails to consider states parties' intentions in consenting to be bound by IHR treaties. As noted by the International Court of Justice in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, state jurisdiction over human rights is primarily territorial.<sup>8</sup> Therefore, states are unlikely to have intended that their IHR treaty obligations would be applicable to their troops' actions when deployed abroad.

The soundest part of Burke's study comes in Chapter 4, where she assesses whether UN military personnel could be tried for sexual exploitation and abuse before the International Criminal Court (ICC). Burke admits that, while the *Rome Statute of the International Criminal Court* has recognized that acts of sexual violence can constitute crimes against humanity (Article 7) and war crimes (Article 8), it is unlikely that sexual exploitation

<sup>7</sup> *Ibid* at 178.

<sup>8</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 109.

and abuse by UN military personnel would meet the elements of either crime.<sup>9</sup> She argues that in any event, the ICC prosecutor would not likely prosecute sexual exploitation and abuse by UN military personnel given the ICC's jurisdictional limits. However, Burke claims that the principle of complementarity, enshrined in the *Rome Statute*, could act as a “catalyst” to encourage troop-contributing states to exercise their criminal and disciplinary jurisdiction.<sup>10</sup> Burke is perhaps a bit too optimistic in asserting this. Many troop-contributing states, including two of the largest (India and Pakistan), are not parties to the *Rome Statute* and, therefore, have no complementarity obligations.<sup>11</sup>

In Chapter 5, Burke explores alternatives for holding UN military personnel directly responsible when their states of nationality fail to exercise jurisdiction. Referring to the proliferation of hybrid tribunals in the early 2000s, Burke suggests that hybrid tribunals involving the troop-contributing state, the host state, and an international component, could effectively hold perpetrators to account while respecting state sovereignty. Though hybrid tribunals may appear a viable response, they may not be realistic. Hybrid tribunals would require the consent and participation of troop-contributing and host states on an ad hoc basis. Therefore, the UN would have to negotiate with states every time a tribunal was to be created. The UN's experience in negotiating an agreement for a hybrid court in Cambodia — which took nearly seven years to establish — indicates that such negotiations can be cumbersome.<sup>12</sup> Burke's other suggestions, namely on-site courts martial by troop-contributing states and transnational legal networks to support domestic prosecutions, are more realistic. Indeed, the secretary general's 2015 report suggests that on-site courts martial could help solve the impunity problem.<sup>13</sup>

In Chapter 6, Burke assesses whether troop-contributing states or the UN should be legally responsible for sexual exploitation and abuse by UN military personnel. She recognizes the difficulty of holding either responsible due to the complex command structure of UN military operations. However, as she states, “[i]n the milieu of [sexual exploitation and abuse]

<sup>9</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, arts 7–8 [*Rome Statute*].

<sup>10</sup> Burke, *supra* note 3 at 225.

<sup>11</sup> See “Troop and Police Contributors,” online: United Nations Peacekeeping <[www.un.org/en/peacekeeping/resources/statistics/contributors.shtml](http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml)>; “The States Parties to the Rome Statute,” online: International Criminal Court <[www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#B](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#B)>.

<sup>12</sup> Sylvia de Bertodano, “Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers” (2006) 4 Int'l Crim Just 285 at 287.

<sup>13</sup> Secretary General's 2015 Report, *supra* note 2 at para 60.

by [UN Military Contingent] personnel, the question is not solely who gave orders but rather who omitted to prevent misconduct and to hold perpetrators to account.”<sup>14</sup> Burke relies on various international court and tribunal decisions and the International Law Commission’s works on the responsibility of states and international organizations to assert that both troop-contributing states and the UN may be legally responsible for failing to prevent and punish sexual exploitation and abuse by UN military personnel.

Burke also argues that IHR enforcement bodies, such as the Human Rights Committee, are the most feasible accountability mechanisms because they make recommendations and publish their findings, effectively “naming and shaming” responsible states.<sup>15</sup> Burke takes for granted the threshold issue she discusses in Chapter 3, which is whether troop-contributing states have extraterritorial human rights obligations during UN missions. This issue is far from settled. Hence, her confidence in IHR enforcement bodies may be misplaced. Burke also suggests establishing an ombudsman who can investigate and publish factual rather than legal findings. This would serve a similar purpose without the need to establish that troop-contributing states owe human rights obligations while participating in UN missions.

In *Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current Status Quo and Responsibility under International Law*, Burke explores possible accountability mechanisms for acts of sexual exploitation and abuse committed by UN military personnel. She assesses alternatives to individual criminal responsibility. She outlines the applicable international legal framework for establishing responsibility and is honest about its practical and legal limitations. As the extent of sexual exploitation and abuse by UN military personnel has only recently come to light, Burke’s work represents one of the first thorough theoretical studies of potential legal responses to this phenomenon. This book will be an important resource for anyone seeking to better understand this troubling international legal problem and for those assessing the adequacy of the international community’s response.

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<sup>14</sup> Burke, *supra* note 3 at 266.

<sup>15</sup> *Ibid* at 307.

<sup>16</sup> The views expressed in this review are those of the reviewer and not necessarily of the City Solicitor’s Office of the City of Toronto.