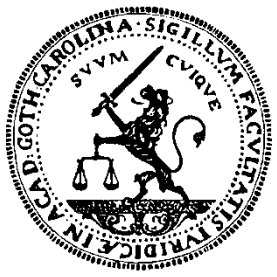

FACULTY OF LAW
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UN Peacekeeping Forces: a Legal Analysis of Individual Accountability for Sexual Exploitation and Abuse

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

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Jane Holl Lute (UN Special Coordinator on Improving the United Nations Response to Sexual Exploitation and Abuse): "Well, it turns out, for the women of the world, [sexual exploitation and abuse] is an ever-present danger. There is nowhere women are safe. There is no family, no church, no school, no organisation, no workplace."

Interviewer: "Miss Lute, shouldn't the UN, under UN responsibility, [be] the place? If there was one place in the world?"

Lute: "There is no one place."[1]

[1] Fault Lines, "Haiti by Force", video feature in Al Jazeera, narrated by Femi Oke, 22nd March 2017, available at: https://www.aljazeera.com/programmes/faultlines/2017/03/haiti-force-170321091555170.html [accessed 10th May 2020], timestamp: 18:35-18:58.

Contents

Summary

United Nations peacekeeping operations have, for the better part of two decades, been plagued by allegations of sexual exploitation and abuse of local civilian populations. Several reports indicate not only that peacekeepers exploit and abuse the very people they were sent to protect, but also that these crimes routinely go unpunished. This thesis examines and evaluates the different methods of holding United Nations military peacekeepers accused of sexual crimes to account, with focus being put on criminal accountability. Firstly, the internal framework of peacekeeping missions is studied, and its implications for achieving accountability are assessed. Secondly, three different avenues of accountability outside the United Nations, namely the jurisdiction of the troop contributing country, the host state and the International Criminal Court, are explored and analysed. The conclusion reached is that each examined pathway of accountability has its advantages, but none of them provide a satisfactory solution. Because of this, a number of measures to enhance and strengthen the individual criminal accountability of peacekeepers are suggested. These suggestions build upon the strengths and weaknesses discovered throughout the thesis.

Sammanfattning

Förenta Nationernas fredsbevarande operationer har under nästan två decennier besvärats av anklagelser om sexuellt utnyttjande av och sexuella övergrepp på civilbefolkningar. Flera rapporter visar inte bara att organisationens fredsbevarande styrkor begår dessa brott mot just de människor de fått i uppdrag att beskydda, utan också att de undgår ansvar och straff. Denna uppsats undersöker och utvärderar olika alternativ för att hålla de Förenta Nationernas militära fredsbevarande styrkor anklagade för sexualbrott ansvariga. Fokus läggs på det straffrättsliga ansvaret. För det första studeras det interna regelverket för fredsbevarande operationer samt dess konsekvenser för det straffrättsliga ansvaret. För det andra utreds tre externa alternativ för ansvarshållande, nämligen det truppbidragande landets jurisdiktion, värdstatens jurisdiktion och Internationella Brottmålsdomstolens jurisdiktion. Slutsatsen som nås är att alla undersökta alternativ har fördelar, men ingen av dem utgör en tillfredsställande lösning. På grund av detta föreslås ett antal åtgärder för att förbättra och stärka det individuella straffrättsliga ansvaret för fredsbevarande styrkor. Förslagen bygger på de fördelar och nackdelar som upptäcks under studiens gång.

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To my supervisor, Professor Daria Davitti, thank you for your valuable advice and feedback and for being so patient with me.

To all of my family, thank you for your encouragement and support. To my big sisters, Sunniva and Karolina, thank you for being my pillars of strength and for brightening my thesis-writing days.

Finally, I would like to thank Gertrud. I hope you knew how much of an inspiration you were to me.

Lund, 26th May 2020

Alva Rosqvist

Abbreviations

DPKO	Department of Peacekeeping Operations
DPO	Department of Peace Operations
DRC	Democratic Republic of the Congo
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Report of Judgments, Advisory Opinions and Orders
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
K.B.	King's Bench
MONUC	United Nations Organisation Mission in the Democratic Republic of Congo

MoU	Memorandum of Understanding
NGOs	Non-governmental Organisations
OIOS	Office of Internal Oversight Services
ONUC	United Nations Operation in the Congo
SEA	Sexual Exploitation and Abuse
SOFA	Status of Forces Agreement
TCC	Troop Contributing Country
UN	United Nations
UNAMID	The African Union - United Nations Hybrid Operation in Darfur
UNEF	United Nations Emergency Force
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UNTSO	United Nations Truce Supervision Organisation

1 Introduction

1.1 Background

One of the core purposes and tasks of the United Nations (hereafter UN) is to maintain international peace and security.[2] In pursuit of this purpose, the organisation has employed many peacekeeping operations.[3] Although peacekeeping missions are not explicitly referred to in the UN Charter, they are arguably one of the most visible activities of the organisation. The UN Peacekeeping Forces even received the Nobel Peace Prize in 1988 for, *inter alia*, having "contributed to reducing tensions where an armistice has been negotiated but a peace treaty has yet to be established" and representing "the manifest will of the community of nations to achieve peace through negotiations".[4]

UN peacekeeping operations usually consist of military, police and civilian personnel who are sent to unstable conflict areas to contribute to the maintenance and/or re-establishment of the peace. The specific mandates and purposes of these missions vary somewhat, but they very often include human rights monitoring and the protection of civilians.[5] With that purpose in mind, it is unsettling that in the last few decades, UN peacekeeping missions have come under fire for sexual exploitation and abuse (henceforth SEA) of the civilian population. Despite peacekeepers occupying positions of power and trust in some of the most vulnerable communities in the world, there have been several accusations of SEA of the local civilian population, particularly girls and women.[6] Allegations of SEA are existent in several

[2] United Nations, *Charter of the United Nations*, 24th Oct 1945, 1 UNTS XVI, available at: https://www.un.org/en/sections/un-charter/un-charter-full-text/ [accessed 18th Feb 2020], art 1, para 1, [henceforth "UN Charter"].
[3] United Nations Peacekeeping, "What Is Peacekeeping", United Nations, available at: https://peacekeeping.un.org/en/what-is-peacekeeping [accessed 19th Feb 2020].
[4] Nobelprize.org, "The Nobel Peace Prize 1988", Nobel Media AB 2020, available at: https://www.nobelprize.org/prizes/peace/1988/press-release/ [accessed 19th Feb 2020].
[5] See for example UNSC Res 1925, S/RES/1925 (2010), 28th May 2010.
[6] See for example The Editorial Board, "The U.N.'s Tainted Legacy in Haiti", The New York Times, 23rd Dec 2019, available at: https://www.nytimes.com/2019/12/23/opinion/un-peacekeepers-haiti.html [accessed 21st Feb 2020]; "UN Peacekeepers 'barter goods for

UN-mandated peacekeeping missions, for example the operations in Haiti, Liberia, the Central African Republic, Mali, South Sudan, Western Sahara and the Democratic Republic of the Congo (DRC).[7]

Further, there are reports that the UN and other relevant actors have been unable to properly investigate, prosecute and punish the crimes allegedly committed. Especially the UN has been heavily criticised for failing to act against the misconduct of its peacekeepers. There seems to be issues with, for example, jurisdiction and immunity which are causing accused peacekeepers to avoid sanctions and enjoy impunity. Not only is this a severe problem for the victims of these crimes since they have little to no access to redress, it also severely taints the image of the UN and, more importantly, maims the public's trust in their peacekeeping missions, which is essential for their effective operation. This raises important questions about the credibility of UN peacekeeping operations and the effects on the perception of international efforts as a whole.

1.2 Purpose, Scope and Research Questions

This thesis has two purposes. The first purpose is to examine and evaluate the different methods of holding individual UN peacekeepers guilty of SEA to legally accountable. To this end, the current framework for addressing SEA will be studied, both within the UN and in other relevant structures. The overarching motive behind this is, firstly, to obtain clarification of the existing processes and strategies, and secondly, to identify their strengths and weaknesses and uncover potential obstacles to and catalysts in holding peacekeepers accountable for their misconduct. This will enable a more meaningful discussion with regards to the thesis' second purpose, namely

sex'", BBC News, 11th June 2015, available at: https://www.bbc.com/news/world-35790697 [accessed 21st Feb 2020].

[7] Conduct in UN Field Missions, "Sexual Exploitation and Abuse: Table of Allegations", United Nations, available at: https://conduct.unmissions.org/table-of-allegations [accessed 20th Feb 2020].

to, wherever possible, make suggestions for methods, changes and/or adjustments to increase the individual responsibility of peacekeepers accused of SEA.

To achieve these purposes, the thesis will revolve around the following research questions:

- How does the UN handle allegations of sexual exploitation and abuse and hold accused military members of their peacekeeping operations to account for said misconduct?
- What possibilities, outside the UN, are there of holding individual military members of peacekeeping operations legally accountable for sexual exploitation and abuse?
- What are the strengths and weaknesses of the methods and options investigated in the two previous research questions?
- What changes can be made or implemented to enhance the legal accountability of UN peacekeepers for sexual exploitation and abuse?

1.3 Delimitations

This thesis will investigate the individual accountability and responsibility of the UN peacekeeper. Therefore, neither the responsibility of the UN as an international organisation, nor the state responsibility of the troop contributing country (henceforth TCC) will be discussed. This is due to the fact that these are separate issues and that time and space constraints of the thesis do not allow for a thorough study of them.

Furthermore, the thesis will only examine peacekeeping missions within the UN organisation. It is acknowledged that allegations of SEA exist not only with regards to personnel in UN operations, but also personnel working for other international organisations and non-governmental organisations (NGOs), as well as members of national contingents operating outside UN

initiatives.[8] Examining them all would, however, be a too extensive scope for this thesis and, therefore, any non-UN activity will be omitted.

Another delimitation of the study is done with regards to the type of personnel in the missions. Traditionally, UN peacekeeping has mostly been military and consisted of observing armistice agreements and ceasefires as well as keeping forces separate post-hostilities. In recent times, however, peacekeeping mandates have grown more complex and the missions often have several different types and layers of personnel, subject to different sets of rules and regulations.[9] Since it is not possible to examine all types of personnel within the space of this thesis, the focus will only be on military contingents. Throughout the thesis, the word 'peacekeeper' therefore refers exclusively to national troops. The main reason for this delimitation is that military personnel are the biggest group, against whom the majority of allegations have been directed. This makes them the most relevant group to study. This conclusion is drawn using data published by the UN. The data shows that out of currently serving peacekeeping personnel (as of 1st February 2020), more than 70 % are troops.[10] The data also shows the following number of allegations[11] between the years 2007 and 2020 (up until 22nd February):

- 309 allegations against civilian personnel,
- 144 allegations against police personnel,
- and 561 allegations against military personnel.[12]

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[8] See for example Charity Commission for England and Wales, *Statement of the Results of an Inquiry – Oxfam*, 11th June 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807945/Statement_of_the_Results_of_an_Inquiry_Oxfam.pdf [accessed 1st April 2020].

[9] *Basic Facts about the United Nations 2014*, Rev. ed., United Nations Department of Public Information, New York, 2014, at p. 58.

[10] United Nations Peacekeeping, "Data", United Nations, available at: https://peacekeeping.un.org/en/data [accessed 1st Feb 2020].

[11] 'Allegation' here means uncorroborated information pointing to the possible occurrence of misconduct. They are counted by reports received, meaning they may implicate one or more alleged perpetrators, and may involve one or more victims.

[12] Conduct in UN Field Missions, "Sexual Exploitation and Abuse: Allegations", United Nations, available at: https://conduct.unmissions.org/sea-overview [accessed 25th May 2020].

Finally, a delimitation is done in relation to the type of accountability. The focus of this thesis is on criminal accountability. This includes the full criminal process from allegation, to arrest, to investigation, to prosecution and sentencing. Disciplinary and administrative sanctions are not the focal point and will therefore be mentioned only if relevant to the main purpose of assessing and increasing the criminal accountability of peacekeepers. Civil accountability is altogether omitted.

1.4 Methodology, Material and Values

It is generally accepted that research in international law requires a different approach than research in domestic law. This is because of the unique decentralised and consensual nature of international law. As opposed to most domestic legal systems, the international legal system does not have a single legislature, executive or judicial, and does not contain a clear hierarchy of sources.[13] The sources mostly relied upon in international law are the ones listed in the Statute of the International Court of Justice (hereafter ICJ), namely international conventions, international customary law and general principles of law recognised by civilised nations. Judicial decisions and the teachings of the most highly qualified publicists of the various nations are also listed as a subsidiary means for the determination of the rules of law.[14]

The mentioned sources will be used mainly with regards to the thesis' second research question, that is the study of methods of holding peacekeepers accountable outside the UN system. This will be done using a legal dogmatic method, which aims at finding the solution to a legal problem by applying the relevant rules to it.[15] For example, to determine the

[13] McConville, Mike & Hong Chui, Wing (Eds.), *Research Methods for Law*, Edinburgh University Press, Edinburgh, 2007, at p. 182.
[14] United Nations, *Statute of the International Court of Justice*, 18th April 1946, annexed to the UN Charter, available at: https://www.icj-cij.org/en/statute [accessed 20th Feb 2020], art 38.1.
[15] See Korling, Fredric & Zamboni, Mauro (Eds.), *Juridisk Metodlära*, 1st ed., Studentlitteratur, Lund, 2013, at p. 21.

jurisdiction of the host state and the TCC, things like treaties, customary law and general principles of international law will be studied. Scholarly literature and articles from academic journals will also be used to confirm the existing rules in the mentioned sources and increase knowledge of their application.

To be able to answer the thesis' first research question about internal UN strategies, a similar dogmatic method will be used. The material will, however, be official UN documents, such as decisions, reports, resolutions, bulletins and manuals, as well as information provided by the organisation online. This material will be used as evidence of the internal rules and processes of the organisation. Where necessary to fully understand the rules and processes, subsidiary sources in the form of academic articles, legal literature and reports from NGOs and international organisations will be used.

With regards to third and fourth research questions, namely identifying the strengths and weaknesses of the methods investigated and proposing changes to fill the gaps in the current system, an analytical method will be used. This will be done building upon the findings from the first two research questions. Through analysis of the different rules and methods, strengths and weaknesses will be discovered in pursuit of answering the thesis' third research question. In doing this, official reports as well as literature and articles will be used as an aid to reveal the effects of certain measures and provisions. The strengths and weaknesses will, in turn, be further assessed and valued to reveal potential gaps with regards to the fourth research question.

Throughout the thesis, the analysis will be carried out based on one core value: the rule of law. Consequently, any measure, provision or institution examined will be evaluated with regards to its implications for the rule of law. The UN definition of the term will be used, according to which the rule of law is:

> "a principle of governance in which all persons, institutions and entities […] are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards".[16]

This definition is chosen because it entails a few different principles and aspects. Some of them are more relevant than others in relation to the analysis of avenues of accountability and will therefore be described more closely. Firstly, a main principle is the general idea of accountability in relation to the law. A practical approach is taken to this principle, meaning that investigated entities and measures will be valued based on their practical implications for holding peacekeepers accountable. Because of the nature of the subject, there may not be one applicable law for each investigated method or institution. Instead, there may be one or several sets of governing rules. These will nevertheless be used as 'the law' to which perpetrators of SEA should be held account.

A second aspect entailed in the rule of law is legal certainty. This principle asserts that rules should be public and clear so that people, including peacekeepers, know what is expected of them.[17] Thirdly, human rights standards is an essential aspect. The entities and measures investigated will, therefore, also be valued based on their effects on the accused's right to a fair trial as well as the victim's rights to participate and be heard.

1.5 Outline

After this introductory chapter, the second chapter gives an account of UN peacekeeping history along with an explanation of how missions work, in

[16] Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23rd Aug 2004, para 6.
[17] See Kruger, Thalia, *The Quest for Legal Certainty in International Civil Cases*, Brill | Nijhoff, 2016, at p. 295.

theory and in practice. An overview of the allegations of SEA is also given. In chapter 3, the UN's internal way of addressing the problem, including investigations conducted and strategies and methods used to increase accountability for peacekeepers, is explained and analysed. In the fourth chapter, other external pathways of accountability, namely host state jurisdiction, TCC jurisdiction and international jurisdiction, are explored and assessed. In chapter 5, proposals for possible strategies to be used and potential adjustments to be made to enhance accountability are put forward. The thesis' sixth and final chapter is a concluding chapter which summarises the findings of the study.

2 Peacekeeping Operations

In this chapter, a description of peacekeeping will be given, including a brief retelling of its history within the UN and its legal basis. The process, practice and legal framework of UN peacekeeping will also be explained, along with a presentation of SEA statistics. The overarching motive of this is to clarify the context in which alleged SEA is occurring. This will, in turn, make any discussion on methods of holding accused peacekeepers accountable more meaningful and any suggestions for increasing that accountability more qualified.

2.1 What is Peacekeeping?

Although there is no shortage of scholarly definitions of peacekeeping, defining it is not as straightforward as one at first may suspect. Sir Marrack Goulding, the first Under-Secretary-General for Peacekeeping Operations of the UN, defines it as "a technique which has been developed, mainly by the UN, to help control and resolve armed conflicts".[18] Professor George L Sherry instead defines it as "the reverse of military action: it is the peaceful application of a military presence in the interest of a political process".[19]

The disparity in definitions of peacekeeping gives a clue to the complex nature of the phenomenon. For the purposes of this thesis, however, it suffices to say that peacekeeping is any activity, instigated by the UN, that involves military personnel, with the aim of helping to maintain or restore international peace and security in trouble areas. This does not include operations that only comprise of activities like good offices, fact-finding and supporting elections. The missions investigated will be the official peacekeeping operations that the organisation recognises as such.

[18] Goulding, Marrack (1993), *The Evolution of United Nations Peacekeeping*. International Affairs, Volume 69 Issue 3, pp. 451–464, at p. 452.
[19] Sherry, George L, *The United Nations Reborn: Conflict Control in the Post-Cold War World*, Council on Foreign Relations, New York, 1990, at p. 30.

2.2 Historical Context

Since its inception at the end of World War II, the UN has deployed more than 70 peacekeeping operations in all parts of the world. One of the first missions within the UN structure was established in 1948, when the UN Security Council (henceforth the UNSC) established the UN Truce Supervision Organisation (UNTSO) in the Middle East. UNTSO had the purpose of monitoring the armistice agreement between Israel and its neighbouring countries (Egypt, Jordan, Lebanon and Syria).[20] At the time of writing, more than 70 years later, unarmed military observers are still deployed in that area.[21]

In those early days, UN peacekeeping operations were only lightly armed and were mainly concerned with maintaining and monitoring ceasefires. They consisted of strengths in the low hundreds.[22] Armed peacekeeping started with the first UN Emergency Force (UNEF), which was established in 1956 to defuse the Suez crisis.[23] Today, UNEF is described as the traditional type of peacekeeping, much because it was based on neutrality of the forces, consent of the involved parties and the non-use of force.[24] These three principles are known as the basic principles of peacekeeping.[25]

The first large-scale mission was the UN Operation in the Congo (ONUC).[26] This mission was authorised in 1960 as a response to what later came to be called the Congo crisis. More specifically, it was a response to the Congolese government's request for military assistance from the UN to protect its territory when Belgium sent troops into the country without

[20] United Nations Peacekeeping, "Our History", United Nations, available at: https://peacekeeping.un.org/en/our-history [accessed 18th Feb 2020].
[21] United Nations Peacekeeping, "UNTSO FACT SHEET", United Nations, available at: https://peacekeeping.un.org/en/mission/untso [accessed 18th Feb 2020].
[22] United Nations Peacekeeping, "Our History", United Nations.
[23] McCoubrey, Hilaire & White, Nigel D., *The Blue Helmets: Legal Regulation of United Nations Military Operations*, Dartmouth, Aldershot, 1996, at p. 3.
[24] Koops, Joachim Alexander, Tardy, Thierry, MacQueen, Norrie & Williams, Paul D. (Eds.), *The Oxford Handbook of United Nations Peacekeeping Operations*, 4th ed., Oxford University Press, Oxford, 2015, at p. 44.
[25] United Nations Peacekeeping, "What Is Peacekeeping", United Nations.
[26] United Nations Peacekeeping, "Our History", United Nations.

consent. This happened in the days following Belgium's grant of independence to the Congo, which caused disorder to break out.[27] ONUC had a strength of almost 20 000 military personnel and claimed the lives of 250 UN personnel, including Secretary-General at the time Dag Hammarskjöld.[28]

During the rest of the 1960s and 70s, there were a number of missions, but Cold War tensions in the UNSC often caused impediment. Since the five permanent members of the Council (France, China, the United Kingdom, Russian Federation and the United States of America) were granted the power of veto in the UN Charter, unanimity between them is required for the UNSC to be able to authorise missions.[29] Due to the rivalry between the United States of America and the Soviet Union during this time, such unanimity was rarely reached.[30] This constrained the Council's ability to adopt resolutions. This period did, however, illustrate the secondary role of the UN General Assembly (henceforth UNGA) with regards to authorising peacekeeping missions. For example, the UN Security Force in West New Guinea was established by the UNGA in 1962, and not by the UNSC.[31]

The decline of the Cold War led to a steady increase in peacekeeping operations in the 1990s. This was not only because the UNSC was now able and willing to authorise more operations, but also because there was a growing demand for them. In the five-year period between 1989 and 1994, the number of missions authorised by the UNSC doubled compared to the number for the previous 40 years. Moreover, the scope of the operations expanded in different ways. Previously, missions had mostly been deployed to troubled areas where an armistice agreement had been concluded, but

[27] Koops, Tardy, MacQueen & Williams, *The Oxford Handbook of United Nations Peacekeeping Operations*, at p. 160-161.
[28] United Nations Peacekeeping, "Our History", United Nations.
[29] UN Charter, art 27.
[30] United Nations Peacekeeping, "Our History", United Nations; Barnett, Michael N. & Finnemore, Martha, *Rules for the World: International Organizations in Global Politics*, Cornell University Press, Ithaca, N.Y., 2004, at pp. 125-127.
[31] De Coning, Cedric & Peter, Mateja (Eds.), *United Nations Peace Operations in a Changing Global Order*, Palgrave Macmillan, Cham, Switzerland, 2019, at p. 30.

now operations started to take place in much more unstable areas where a ceasefire was not yet in place. Mandates for the missions also started growing more and more complex with new types of tasks being added.[32] In Secretary-General Boutros Boutros-Ghali's *An Agenda for Peace*, a clear step towards mandates including objectives like disarmament, destruction of weapons, refugee repatriation, election monitoring and economic recovery was taken. Efforts for the protection of human rights and the strengthening of governmental institutions were also mentioned as part of this new approach.[33] These changes were implemented by expanding existing operations as well as adding new ones and required coordination between many different UN departments.[34] To oversee everything, a Department of Peacekeeping Operations (hereafter DPKO) was created in 1992.[35]

This new form of UN peacekeeping was, however, relatively short-lived. The failures particularly in Somalia, Rwanda and Bosnia led the UN to acknowledge its mistakes and propose a less ambitious approach to the organisation's role in international peacekeeping.[36] In practice, the number of missions remained relatively high, but the mandates for new missions were noticeably narrower, returning to a more traditional model of peacekeeping. This decline paved the way for other international and regional organisations, for example the European Union and the African Union, to enter the peacekeeping scene.[37]

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[32] Barnett & Finnemore, *Rules for the World: International Organizations in Global Politics*, at pp. 129-130.
[33] Boutros-Ghali, Boutros, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping : Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992*, United Nations, New York, 1992, particularly at p. 55.
[34] Barnett & Finnemore, *Rules for the World: International Organizations in global politics*, at p. 130.
[35] Koops, Tardy, MacQueen & Williams, *The Oxford Handbook of United Nations Peacekeeping Operations*, at p. 266.
[36] See Boutros-Ghali, Boutros, *An Agenda for Peace: 1995*, 2nd ed., United Nations, New York, 1995.
[37] Koops, Tardy, MacQueen & Williams, *The Oxford Handbook of United Nations Peacekeeping Operations*, at p. 267.

In time, albeit with a few difficulties, controversies and reforms along the way, a new era of multidimensional UN operations dawned again.[38] While still based on the three principles of peacekeeping (consent, impartiality and the non-use of force except in self-defence or defence of the mandate), mandates again started to be broader and more complex and operations started to include military, police and civilian personnel, all performing different types of tasks. During this time, particular emphasis was put on the task of civilian protection. Several mandates were broadened to include the use of force to that end. The UN also started partnering with the other peacekeeping actors that had entered the scene.[39]

These trends live on today: complex, multifaceted peacekeeping mandates with different types and layers of personnel, involving cooperation between several international and regional organisations. For example, the operation in Darfur, known by its acronym UNAMID, is a joint effort by the African Union and the UN.[40]

2.3 Legal Basis

The UN has several organs that deal with the maintenance of international peace and security. The most important ones are the UN General Assembly (UNGA) and the UN Security Council (UNSC). The Secretariat, particularly the Secretary-General, also has a role to play, although mainly with organisational and logistical aspects. Out of these organs, it is the UNSC which has the primary responsibility for international peace and security.[41] Because of this, the authorisations of the majority of the organisation's peacekeeping operations have come from the UNSC. UNGA authorisation, although not unheard of, is a rarity and should in theory only occur when the

[38] Koops, Tardy, MacQueen & Williams, *The Oxford Handbook of United Nations Peacekeeping Operations*, at p. 267; Barnett & Finnemore, *Rules for the World: International Organizations in Global Politics*, at p. 134.
[39] Koops, Tardy, MacQueen & Williams, *The Oxford Handbook of United Nations Peacekeeping Operations*, at pp. 613-616.
[40] UNSC Res 1769, S/RES/1769 (2007), 31st July 2007.
[41] UN Charter, arts 11-12 and 24. See also art 12.

UNSC is unable to act because of the power of veto of the permanent five members.[42]

2.3.1 The UNSC

The measures that are at the disposal of the UNSC when dealing with the maintenance of international peace and security can be found in Chapter VI, VII and VIII of the UN Charter. Chapter VI is titled "Pacific Settlements of Disputes" and it allows the UNSC to make recommendations and conduct investigations. For example, the UNSC can call upon parties to settle a dispute between them by using peaceful means like negotiation or arbitration. The Council can also make recommendations for procedures or appropriate methods of adjustment.[43]

If the UNSC has determined that there is a threat to the peace, a breach of the peace or an act of aggression, the enforcement measures set out in Chapter VII of the Charter are available to it. Enforcement measures envisaged in Chapter VII include actions both involving and not involving the use of armed force. Examples mentioned in the Charter text are interruption of economic relations and action by air, sea or land forces.[44]

Chapter VIII of the Charter is different in that it does not spell out powers of the UNSC in the same way. Instead it provides for the involvement of regional arrangements and agencies in the maintenance of international peace and security, provided such activities are consistent with the purposes and principles of the organisation.[45] This is what happens, for example, when the Council authorises peacekeeping operations led by the African Union.[46]

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[42] Ibid., art 27; UNSC, "Current Members", United Nations, available at: https://www.un.org/securitycouncil/content/current-members [accessed 19th Feb 2020].
[43] UN Charter, arts 33-38.
[44] Ibid. arts 39-51.
[45] Ibid. arts 52-54.
[46] See for example UNSC Res 2297, S/RES/2297 (2016), 7th July 2016.

As perhaps noticed, none of the described UNSC powers provide explicitly for peacekeeping operations. There is in fact no mention of peacekeeping missions at all in Chapter VI, VII, VIII or anywhere else in the UN Charter. This means that they were probably not specifically envisaged by the founders of the organisation. Former Secretary-General Dag Hammarskjöld once referred to them as being 'Chapter VI and a half' measures, meaning they fall somewhere in between Chapter VI and VII.[47]

This lack of specific legal basis has made it more difficult to decide the precise grounds for and mandates of different operations. In practice, it means that a legal basis must be decided for each individual peacekeeping operation using the provisions of the Charter or implicit powers. This can sometimes be difficult since the UNSC very rarely refers to a specific provision as basis for its resolutions. Instead, it will be the wording of the authorising resolution that will be the deciding factor.

The use of peacekeeping operations without explicit basis for them in the UN Charter has been questioned from time to time, but, in reality, the constitutionality of them has not been in doubt since the ICJ delivered its advisory opinions in the *Certain Expenses* and *Namibia* cases.[48] Although there is no consensus on which powers represent the legal basis for peacekeeping operations, it is generally accepted that legal basis lies somewhere in the UNSC's powers to promote peaceful settlements of disputes and to maintain and restore international peace and security.[49] The Council does, after all, have the power to establish such subsidiary organs as it deems necessary for the performance of its functions, and those functions

[47] Boddens Hosang, Hans F. R., Gill, Terry D. & Fleck, Dieter, *Handbook of the International Law of Military Operations*, 2nd ed., Oxford University Press, Oxford, 2015, at p. 138.
[48] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory opinion), [1962] ICJ Rep 151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion), [1971] ICJ Rep 7.
[49] Boddens Hosang, Gill & Fleck, *Handbook of the International Law of Military Operations*, at p. 138; Orakhelashvili, Alexander (2003*), The Legal Basis of the United Nations Peace-Keeping Operations*. Virginia Journal of International Law, Volume 43 Issue 2, pp. 485-524, at p. 487.

include the recommendation of appropriate procedures and methods of dispute settlement and recommendations or decisions in order to maintain or restore international peace and security.[50] It is arguable that this flexibility, although undesirable from a rule of law perspective, actually facilitates the development of peacekeeping. Since the nature of international conflicts change, the international response must also be allowed to change. In that sense, a flexible legal basis for peacekeeping may actually be beneficial.

2.3.2 The UNGA

As mentioned, UNGA authorisation of a peacekeeping mission is not as common as UNSC authorisation. Legal basis for it is, however, generally thought to lie somewhere in the wide powers of the organ to discuss and make recommendations on matters within the scope of the UN Charter. For example, the UNGA may recommend measures for the peaceful adjustment of any situation, regardless of the origin, which it deems likely to impair the general welfare or friendly relations among nations. It may also establish such subsidiary organs as it deems necessary for the performance of its functions. The organ is more restricted than the UNSC since it cannot take any binding decisions. This would, however, rarely be a problem in practice since consent is usually sought from the involved parties. Nevertheless, the UNGA is also restricted in that if the UNSC is exercising any of the functions assigned to in respect of any dispute or situation, the UNGA is prohibited from making any recommendations on the matter.[51]

2.4 Rules and Principles of Peacekeeping

One problem with peacekeeping missions not being specifically envisaged in the UN Charter is that there is no tangible legal framework for them. Instead, peacekeeping operations work on an *ad hoc* basis, meaning that

[50] UN Charter, arts 29 and 36-42.
[51] UN Charter, arts 10-14.

they must be designed and authorised for each and every situation that arises that warrants them. The authorisation comes in the form of a resolution, which also contains the specifics of the operation's mandate and size. This allows for a budget to be drawn up regarding the resources that will be needed for the operation. That budget must be approved by the UNGA before the initial planning stage of the operation can commence.[52]

The missions are officially directed by the Secretary-General, though the actual direction is usually done by an appointed Head of Mission. In most cases there is also a Force Commander who is responsible for the military aspects of the operation.[53] The Head of Mission, along with the Department of Peace Operations (DPO, formerly DPKO) and the Department of Operational Support lead the planning for the political, military, operational and support aspects of the operation. Out of these, it is the DPO which bears the overall responsibility for planning, managing, deploying and supporting all UN peacekeeping operations.[54]

Since the UN has no military force of its own, any military personnel must be provided voluntarily by the Member States.[55] The troops are often contributed in accordance with a Memorandum of Understanding (henceforth MoU), which details and establishes the responsibility and standards for the provision of personnel. The MoU usually follows the model MoU[56] drafted by the UN, but the specific terms can be negotiated.

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[52] *Basic Facts about the United Nations 2014*, United Nations Department of Public Information, at p. 58; United Nations Peacekeeping, "Forming a New Operation", United Nations, available at: https://peacekeeping.un.org/en/forming-new-operation [accessed 2nd March 2020].
[53] Ibid.
[54] United Nations Peacekeeping, "Forming a New Operation", United Nations; Peacekeeping Best Practices Unit, *Handbook on United Nations Multidimensional Peacekeeping Operations*, DPKO (UN), Dec 2003, available at: https://peacekeeping.un.org/sites/default/files/peacekeeping-handbook_un_dec2003_0.pdf [accessed 2nd March 2020], at p. 3.
[55] Peacekeeping Best Practices Unit, *Handbook on United Nations Multidimensional Peacekeeping Operations*, at pp. 5-6;
[56] Report of the Special Committee on Peacekeeping Operations and its Working Group, *Revised Draft Model Memorandum of Understanding*, A/61/19 (Part III), 12th June 2007, available at: https://undocs.org/a/72/288 [accessed 2nd March 2020], [henceforth "model MoU"].

According to the model MoU, TCCs are reimbursed for the personnel as well as the equipment they provide, at predetermined rates.[57] Further, it provides that military troops remain members of their own national establishment and are under the exclusive criminal jurisdiction of their respective TCC. The operational authority and control, however, is transferred to the UN, specifically the Force Commander who reports to the Head of Mission.[58] The troops wear their own country's uniform but add a UN blue beret or helmet and a badge, making them recognisable as UN personnel.[59]

When forces are sent to a particular state, an agreement is, in theory, always concluded between the UN and that state (the host state). In practice, however, agreements are not always concluded or are not concluded until after a certain period.[60] Any agreement entered into is called a Status of Forces Agreement (henceforth SOFA) and will often be based on the model SOFA produced by the Secretary-General in 1990.[61] The model SOFA covers things like facilities, logistics, respect for local laws, privileges and immunities of persons and property, dispute settlement procedures and jurisdictional and military discipline issues. For example, paragraph 46 of the model SOFA states that members of the operation shall be immune from legal process in the host state in respect of all acts performed by them in their official capacity. Paragraph 47 (b) also spells out that military members of national contingents are under the exclusive criminal jurisdiction of their TCC.

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[57] Ibid., art 6.
[58] Ibid., arts 7 *quinquiens* and *sexiens*; Peacekeeping Best Practices Unit, *Handbook on United Nations Multidimensional Peacekeeping Operations*, at pp. 67-68.
[59] *Basic Facts about the United Nations 2014*, United Nations Department of Public Information, at p. 58.
[60] Zwanenburg, Marten, *Accountability of Peace Support Operations*, Martinus Nijhoff, Leiden, 2005, at p. 36.
[61] Report of the Secretary-General, *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects, Model Status-of-Forces Agreement for Peace-Keeping Operations*, A/45/594, 9th Oct 1990, [henceforth "model SOFA"].

Both the model MoU and the model SOFA provide that UN peacekeepers are required to respect local laws and regulations.[62] The model MoU also provides that military personnel must comply with the UN Standards of Conduct.[63] These are incorporated in several different policy documents, one of which is the *Ten Rules: Code of Personal Conduct for Blue Helmets*.[64] This document provides that peacekeepers "should not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or of United Nations staff, especially women and children".[65]

Another document named *We Are United Nations Peacekeepers*, which has been annexed to the revised model MoU, provides that peacekeepers should never "commit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children" or "any act involving sexual exploitation and abuse, sexual activity with children under 18, or exchange of money, employment, goods or services for sex".[66]

2.5 Allegations of SEA

In this subchapter, an overview of SEA allegations and statistics will be presented. This is done because it is necessary to identify the scope of the problem before engaging in meaningful discussion of the different approaches to accountability. Note, however, that this subchapter is meant to provide an overview of the scale of the problem rather than give a complete historical recount of allegations in the UN.

[62] Model MoU, art 7 *ter*; Model SOFA, para 6.
[63] Model MoU, art 7 *ter*.
[64] UN DPKO, *Ten Rules: Code of Personal Conduct for Blue Helmets*, 1999, available at: https://police.un.org/sites/default/files/ten_rules.pdf [accessed 2nd March 2020].
[65] Ibid., rule 4.
[66] *We Are United Nations Peacekeeping Personnel*, annex J to the model MoU.

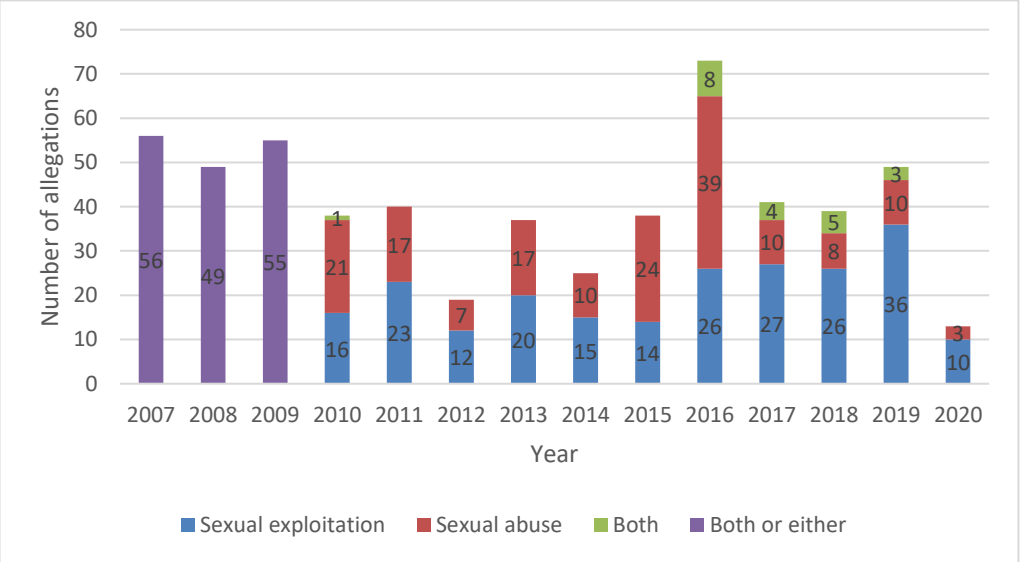
Throughout this thesis, the UN definition of SEA is used. The organisation defines sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another". Sexual abuse, on the other hand, is defined as "actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions".[67] These definitions can include things like rape, sex with minors, trafficking, child pornography and patronising of prostitutes.[68]

The problem of SEA by UN peacekeeping personnel is not new. Reports and allegations of such misconduct started to gain public awareness in the 1990s, especially with regards to operations in the Balkans, Cambodia and Timor-Leste.[69] Some claim this was due to the increase in peacekeeping operations at that time, which brought with it an increase in interaction between peacekeepers and local people.[70] Regardless the reason, scandals started emerging from not only the operations mentioned, but also from missions in Mozambique, Liberia, Sierra Leone, Guinea, Eritrea and others. There were reports of girls as young as eight being forced to have sex with personnel in Liberia in exchange for food.[71] In Eritrea, three Danish peacekeepers were found guilty of having sex with a 13-year-old girl. Young girls in Haiti were subjected to fondling of their breasts and men exposing their penises.[72] During the mission in Cambodia in 1992-93, the

[67] UN Secretary-General's Bulletin, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, ST/SGB/2003/13, 9th Oct 2003, section 1.
[68] Burke, Róisín Sarah, *Sexual Exploitation and Abuse by UN military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, Brill | Nijhoff, Leiden, 2014, at p. 30.
[69] Stern, Jenna, *Reducing Sexual Exploitation and Abuse in UN Peacekeeping: Ten Years After the Zeid Report*, The Henry L Stimson Center, 12th Feb 2015, available at: https://www.stimson.org/wp-content/files/file-attachments/Policy-Brief-Sexual-Abuse-Feb-2015-WEB_0.pdf [accessed 14th May 2020], at p. 5.
[70] Simic, Olivera, *Regulation of Sexual Conduct in UN Peacekeeping Operations*, Springer Berlin, Berlin, 2014, at p. 33.
[71] "Liberia sex-for-aid 'widespread'", BBC News, 8th May 2006, available at: http://news.bbc.co.uk/2/hi/africa/4983440.stm [accessed 2nd March 2020].
[72] Save the Children UK, *No One to Turn To: The Under-Reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers*, 27th May 2008, available at: https://www.refworld.org/docid/483c2a822.html [accessed 14th April 2020], at p. 5.

number of prostitutes reportedly increased four-fold, from 6 000 to 25 000, to meet the demand created by peacekeeping personnel. This includes an increase in the number of child prostitutes. After complaints from Cambodians about peacekeepers' disorderly behaviour, the mission's Special Representative notably replied "boys will be boys".[73]

Despite the initial inaction of the UN, the organisation has subsequently developed methods and strategies in response to the problem. These have, however, as shall be seen, done little to combat the problem. Allegations of SEA have continued to emerge, again and again. The graph below illustrates the number of allegations of SEA committed by military personnel in UN peacekeeping missions in recent years.[74]



The graph shows the total number of reported allegations of sexual exploitation and/or abuse received in UN peacekeeping operations between the years 2007 and 2020, as of 25th May 2020. Only reports implicating military peacekeeping personnel are included.

The data used in this graph is the official data provided by the UN. Before 2010, the UN did not differentiate in its statistics between sexual exploitation and abuse, meaning that the allegations from the first three years in the graph can relate to either of the crimes, or a combination of

[73] Martin, Sarah, *Must Boys Be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions*, Refugees International, Washington D.C., 2005, at pp. 4-5.
[74] Conduct in UN Field Missions, "Sexual Exploitation and Abuse: Allegations", United Nations.

them. Since 2010, however, the statistics does make a distinction between the two behaviours.[75]

It is worth noting that allegations are counted by number of reports received as opposed to incidents. This means that they can implicate one or more alleged perpetrators and involve several victims. Since the actual number of victims and perpetrators is not known, it is hard to get an accurate understanding of the scale of the problem.

It should also be mentioned that the graph shows the number of allegations actually reported. It is impossible to tell how many incidents go unreported, but many fear that this may be a large number since research shows that most victims are reluctant to report.[76] A 2008 report from Save the Children UK found that SEA is chronically underreported. This means that the data shown in the graph may represent little more than the tip of the iceberg. Reluctance of victims to speak out and report can be due to things like fear of retaliation, poor prospects for legal action, fear of losing material assistance and/or cultural stigmas related to sex in general and SEA in particular.[77]

[75] Ibid.
[76] Simm, Gabrielle, *Sex in Peace Operations*, Cambridge University Press, New York, 2013, at p. 47.
[77] Save the Children UK, *No One to Turn To: The Under-Reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers*, at pp. 12-14.

3 Internal Rules and Processes of the UN

The ongoing issue of SEA in UN peacekeeping missions has posed a challenge to the UN in general and the successive Secretaries-General in particular for many years. There have been countless reports, resolutions, initiatives and reviews on the subject, and numerous mechanisms have been designed and implemented in an attempt to battle the problem. This chapter will give an overview of the UN's response to the issue as well as describe and assess the most important mechanisms, focusing on those relating to accountability rather than prevention.

3.1 UN Response

Initially, there was little response to the problem of SEA in peacekeeping missions from the UN. Some claim that there was an internal culture of dismissing SEA as an unavoidable side effect of "military masculinities".[78] The first official report drawn up by the UN did not come until 2002. It consisted of a study that had been carried out by the Save the Children Fund-United Kingdom in cooperation with the UN High Commissioner for Refugees. The report uncovered SEA in the operations in Liberia, Sierra Leone and Guinea.[79] These findings could, however, for the most part, not be substantiated by the following investigation conducted by the UN Office of Internal Oversight Services (henceforth OIOS).[80]

[78] Arnold, Roberta (Ed.), *Law Enforcement Within the Framework of Peace Support Operations*, Martinus Nijhoff, Leiden, 2008, at p. 402.
[79] United Nations High Commissioner for Refugees & Save the Children – UK, *Sexual Violence and Exploitation: The Experience of Refugee Children in Liberia, Guinea and Sierra Leone*, Report of Assessment Mission carried out from 22nd Oct to 30th Nov 2001, Jan 2002, available at: https://www.parliament.uk/documents/commons-committees/international-development/2002-Report-of-sexual-exploitation-and-abuse-Save%20the%20Children.pdf [accessed 1st April 2020].
[80] Arnold, *Law Enforcement Within the Framework of Peace Support Operations*, at p. 402.

Despite this, the situation prompted the UN Secretary-General at the time, Kofi Annan, to issue a Bulletin: the 2003 *Special Measures for Protection from Sexual Exploitation and Abuse*. The Bulletin detailed what is now referred to as the UN's zero-tolerance policy for SEA. It prohibited sex with anyone under the age of 18 as well as the exchange of money, employment, goods, services or other forms of assistance for sexual favours. Consensual sexual relationships between UN staff members and beneficiaries of assistance were not prohibited, but strongly discouraged due to their inherently unequal power dynamics. SEA was recognised as an act of serious misconduct, constituting a ground for administrative measures like summary dismissal. The Bulletin also provided the definitions of SEA as spelled out above in subchapter 2.5.[81] The Bulletin was and is still not directly applicable to military members of peacekeeping missions.[82]

When allegations of large-scale SEA by peacekeepers in the UN Organisation Mission in the Democratic Republic of the Congo (MONUC) surfaced, the issue gained a more global awareness. This led to yet another OIOS investigation.[83] The subsequent report was released in 2005 and revealed not only that SEA was existent in MONUC, but also that there were problems with procedure and accountability. Out of 68 allegations against military personnel, 44 cases were closed since victims and/or witnesses could not be traced or even identified, seven were closed and sent to MONUC administrators and three could not proceed because the alleged perpetrators had been rotated out of the mission area. Out of the remaining cases, only six were fully substantiated. The consequences for the implicated military personnel in those six cases were denouncement to national authorities and repatriation.[84]

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[81] UN Secretary-General's Bulletin, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, sections 1 and 3.
[82] Burke, *Sexual Exploitation and Abuse by UN military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at pp. 31-32.
[83] Arnold, *Law Enforcement Within the Framework of Peace Support Operations*, at pp. 402-403.
[84] UNGA, *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, A59/661, 5th Jan 2005.

The OIOS investigation prompted Secretary-General Kofi Annan to request the Permanent Representative of Jordan, Prince Zeid Ra'asd Zeid al-Hussein, to produce a report on the allegations and recommend methods to prevent SEA and ensure accountability.[85] The report later put forward by Prince Zeid, commonly called the Zeid report, contained an acknowledgement of how widespread SEA was in peacekeeping operations and that efforts to combat the issue had not been successful. A few key problems were addressed and a comprehensive package of recommendations for reform was put forth. Among the recommendations were a propagation and clarification of UN Standards of Conduct, a reform of the investigative process, strengthening of organisational, managerial and command responsibility and instituting individual disciplinary, financial and criminal accountability.[86]

The Zeid report gained a lot of attention and many of its recommendations were implemented or at least discussed further. An important effect of the report was the 2007 revision of the model MoU. As explained above, MoU's are bilateral agreements that regulate the relationship between the UN and a TCC. The latest model version considers some of the difficulties of the past and the recommendations put forth in the Zeid report, especially with regards to Standards of Conduct and investigations, which will be discussed below.

Another response to the Zeid report was the creation, in November 2005, of Conduct and Discipline Teams, which have since been deployed on most peacekeeping missions. Their main role is to receive allegations of misconduct against peacekeepers and report them to the Head of Mission. They also examine allegations and make recommendations on whether an

[85] Arnold, *Law Enforcement Within the Framework of Peace Support Operations*, at p. 331.
[86] UNGA, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, A/59/710, 24th March 2005, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/710 [accessed 3rd March 2020], [henceforth "the Zeid report"].

investigation is needed, monitor disciplinary issues, monitor and provide advice on the application and interpretation of UN Standards of Conduct and provide feedback to victims on the outcome of investigations. Another task of the Teams is to raise awareness among the local population of their rights and of the complaints mechanisms and means. This is one of the efforts put in place to combat the underreporting of SEA.[87] The Teams are overseen by the Conduct and Discipline Unit, which was established at the same time and which sits at the UN headquarters.[88]

The Executive Committees on Humanitarian Affairs and Peace and Security United Nations and Nongovernmental Organisation Task Force on Protection from Sexual Exploitation and Abuse was also established in 2005. Its purpose is to develop tools and policies to prevent acts of SEA and to improve response mechanisms. The work of the Task Force is important for the development of a more coordinated response to acts of SEA by peacekeepers.[89]

Apart from these measures, there have been many UN resolutions on the matter, mainly from the UNSC. Most of them are non-binding and request continued efforts to implement the zero-tolerance policy and urge Member States to ensure full accountability in cases of misconduct involving their nationals.[90] An important one was UNSC resolution 2272, in which the Council endorsed a decision of the UN Secretary-General to repatriate an entire military unit of a contingent when there is credible evidence of widespread or systematic exploitation and abuse by that unit. The resolution also requested that the Secretary-General replace all units of a TCC when that particular TCC has personnel who are the subject of an allegation of SEA and has not taken appropriate steps to investigate the allegation, held the perpetrator accountable or informed the Secretary-General of progress.[91]

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[87] Burke, *Sexual Exploitation and Abuse by UN military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at pp. 37-38.
[88] Ibid., at p. 38.
[89] Ibid., at pp. 36-37.
[90] See for example UNSC Res 2106, S/RES/2106 (2013), 24th June 2013.
[91] UNSC Res 2272, S/RES/2272 (2016), 11th March 2016, paras 1 and 2.

3.2 Standards of Conduct

The revised model MoU includes an obligation for TCCs to ensure that all members of their national contingents comply with the UN Standards of Conduct that prohibit SEA, described above in subchapter 2.4.[92] The definitions of SEA as well as a modified version of the Standards were also made part of the model MoU.[93] This was an important change from an accountability perspective since Standards of Conduct which are not part of the MoU or any other agreement between the UN and the TCC, are not legally binding for military members of that TCC. This is because national military contingents remain in national service while deployed in peacekeeping operations, meaning that the UN cannot issue legally binding rules for them without the consent and cooperation of the TCC. Making the Standards legally binding by including them in the MoU means there are concrete rules to hold peacekeepers accountable for breaching.[94] It also makes it clearer what the Standards of Conduct for troops are, which was one of the recommendations in the Zeid report.[95]

Another important aspect in relation to this is that the model MoU requires TCCs to ensure that their military contingents receive pre-deployment training with regards to the Standards of Conduct. Post-deployment training is instead provided by the UN.[96]

3.3 Investigations

The model MoU provides in Article 7 *quater* that the primary responsibility for investigating misconduct of peacekeepers lies with the TCC. The UN has a secondary responsibility for investigation, which is normally carried out by a mission investigative entity or OIOS. More specifically, the UN

[92] See model MoU, art 7 *bis*.
[93] See model MoU, annex H and J.
[94] Burke, *Sexual Exploitation and Abuse by UN military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at pp. 47-51.
[95] Zeid report, para 26.
[96] Model MoU, art 7 *bis*.

only has the authority to conduct a preliminary fact-finding investigation to preserve evidence if the TCC does not initiate one. A fact-finding inquiry does not include interviewing witnesses or other persons involved.[97] Further, this authority only exists until the TCC commences its own investigation.[98]

When the UN's fact-finding inquiry is finished, a report on it is sent to the concerned TCC. The TCC will then have ten working days to notify the UN that it will start an investigation. If such notification is not made, the TCC is considered unwilling or unable to initiate an investigation. This gives the UN the ability to commence an administrative investigation. The TCC is required to instruct the commander of its national military contingent to cooperate and share documentation and information. This is, however, subject to the TCC's national laws, including its military laws, which might not allow for such disclosure. Nevertheless, when the UN investigation is concluded, or if the TCC commences its own investigation, the UN must provide the TCC with all its findings and gathered material and evidence.[99]

From this Article it becomes clear how the primary responsibility of the TCC works. The TCC can at any time commence an investigation, which then blocks the UN from starting or continuing its inquiry. The main role of the UN is instead the provision of investigative and logistical support to the TCC's investigation.[100] This means that a TCC which does not want its image tainted by the potential findings of an investigation, in theory, can avoid one by notifying the UN that it will conduct its own investigation, but never actually carry one out. In such a case, there is little the UN can do to push the investigation of the TCC other than request reports on progress.[101]

[97] Model MoU, annex H p. 31.
[98] Model MoU, art 7 *quater*.
[99] Model MoU, art 7 *quater*, 7.13-14.
[100] See particularly the model MoU, art 7 *quater*, 7.18 and 7.21.
[101] Model MoU, art 7 *sexiens*, 7.24 *in fine*.

There are, however, a few Articles which aim to reduce the risk of that happening. Article 7 *sexiens* of the model MoU places a requirement on TCCs to forward the case to appropriate national authorities, if the investigation concludes that the suspicions of misconduct are well founded. The same Article provides that the government agrees to notify the Secretary-General of progress on a regular basis, including the outcome of the case. Article 7 *quinquiens* also contains a general assurance from the TCC that it will exercise its exclusive jurisdiction in respect of any crimes or offences committed by their military contingent members while they are deployed on the mission.

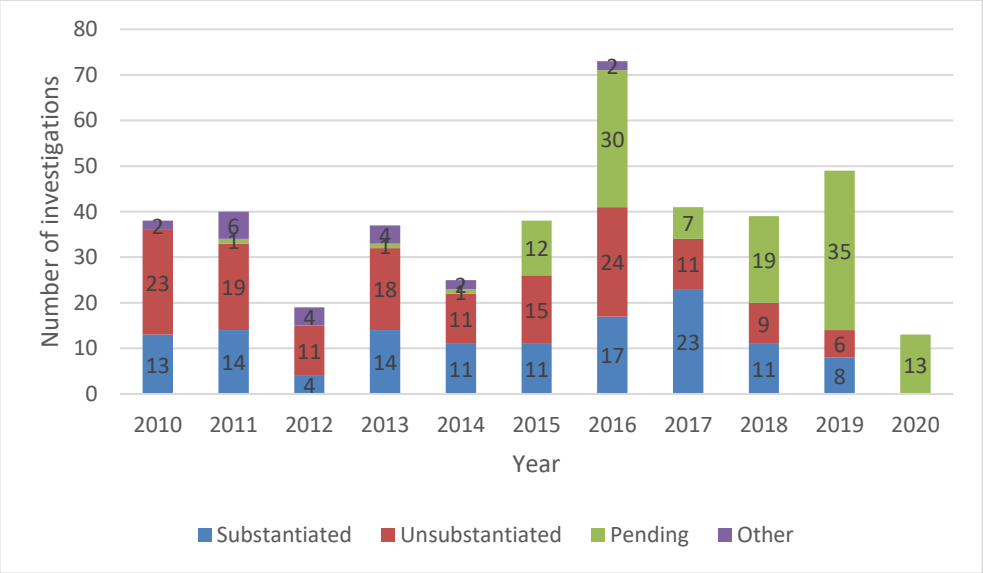
None of the mentioned Articles, however, include any sanction if not fulfilled. This means there is little incentive for TCCs to actually comply with them if they are unwilling to do so. The only recourse available to the UN in case of unwillingness or inability of a TCC to investigate, prosecute or report on the outcome of a case is the dispute settlement mechanism described in Article 13 of the model MoU. This Article provides for negotiation as a first resort, mediation as a second resort and arbitration as a third and final resort. In theory, this is an option that the UN can use to pressure TCCs. In practice, however, arbitration is a costly affair and the UN budget is strained and heavily reliant upon Member State contributions.[102] It is, therefore, not surprising that the arbitration mechanism has never been used by the UN, and likely never will be.

Another, albeit related, point is that if the national authorities of the TCC decide to close a case, there is no requirement in the model MoU for the TCC to notify the UN of the reasons for closing the case.[103] There is only a requirement to notify the Secretary-General of progress on a regular basis, including the outcome of the case. Statistics show that such notifications are rare. Usually, the UN will have to request information on cases and even in relation to such requests, the response rate is low. Responses received may

[102] See UN Charter, art 17.
[103] Such a requirement was indeed suggested by Prince Zeid, see para 79 of the Zeid report.

also only contain an acknowledgement of the case and no information on what further steps are planned.[104] This lack of pressure on TCCs to report to the UN is regrettable from an accountability perspective since it allows TCCs to systematically or arbitrarily close cases and/or decline to prosecute, without needing to explain or justify anything to the UN.

To illustrate the reality of investigations, the graph below shows the total number of investigated allegations of SEA per year, as well as the outcome of the investigations.[105]



The graph shows the number and outcomes of investigations of allegations[106] of SEA in UN peacekeeping missions between the years 2010 and 2020, as of 25th May 2020. Investigations can have been conducted by a mission investigative entity, a TCC, OIOS or jointly by a TCC and OIOS. 'Substantiated' means that the allegation has been proven through investigation. 'Unsubstantiated' means that the allegation has been disproven or that there is insufficient evidence to prove the allegation. 'Pending' means that the investigation is underway. 'Other' means that the information received is not sufficient to warrant an investigation or that the information is not found to be credible enough to warrant an investigation and that the UN will undertake further verification.

The graph shows that the most common investigation outcome, making up more than 35 % of the total outcomes, is that the allegation is considered

[104] Model MoU, art 7 *sexiens*, 7.24; Burke, *Sexual Exploitation and Abuse by UN military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at pp. 54-55.
[105] Conduct in UN Field Missions, "Sexual Exploitation and Abuse: Investigations", United Nations, available at: https://conduct.unmissions.org/sea-investigations [accessed 25th May 2020].
[106] The definition of allegation is the same as in subchapter 2.5.

unsubstantiated. This can mean that investigations are ineffective in acquiring the necessary evidence since 'unsubstantiated' means that there is insufficient evidence to prove an allegation. However, no definite conclusion can be drawn since 'unsubstantiated' can also mean that the allegation has been disproven by evidence. Nonetheless, the graph shows that a large number of investigations are pending. Most of these cases are from the last five years, but there are a few investigations pending from even further back than that. This is clearly not in line with the UN's expressed policy of a six-month timeline for completing investigations.[107]

3.4 Sanctions

When an allegation of SEA by a peacekeeper is substantiated, there is an instance of misconduct. The model MoU provides that SEA is a form of serious misconduct.[108] Since military personnel in peacekeeping missions are under the exclusive jurisdiction of their TCC, disciplinary or criminal sanctions can only be imposed by the TCC. This is set forth very clearly in the model MoU.[109] It is also included in the model SOFA.[110] The UN does not have power to impose any such sanction. This is based on the fundamental international legal principle of state sovereignty. The actions that are available to the UN are administrative in nature: it can summarily dismiss and repatriate the implicated individual and ban them from participation in future peacekeeping missions.[111] The organisation can also make recommendations for action to the TCC.[112]

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[107] Conduct in UN Field Missions, "Addressing Sexual Exploitation and Abuse", United Nations, available at: https://conduct.unmissions.org/addressing [accessed 28th April 2020].
[108] See model MoU, annex H p. 33.
[109] Model MoU, art 7 *quinquiens.*
[110] Model SOFA, para 47.
[111] Conduct in UN Field Missions, "Disciplinary Processes", United Nations, available at: https://conduct.unmissions.org/enforcement-disciplinary [accessed 28th April 2020]; UN Secretary-General's Bulletin, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, section 3.2 (a).
[112] Ferstman, Carla, *Criminalizing Sexual Exploitation and Abuse by Peacekeepers*, United States Institute of Peace, available at: https://www.usip.org/sites/default/files/SR335-Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf [accessed 2nd May 2020], at p. 4.

3.5 Conclusion

The UN has, over the last two decades, taken a large number of initiatives to combat the problem of SEA from different stances. In particular, the revised model MoU includes mechanisms that aim to increase the accountability for peacekeepers' misconduct. It contains a requirement and an assurance that the TCC will exercise its exclusive criminal jurisdiction, a clarification and promulgation of the Standards of Conduct and an improved investigation structure. Further, the UN has established different organs to help prevent and improve response to SEA and issued many reports and resolutions condemning the crimes and calling for action.

Despite this, problems remain in relation to most of the mentioned areas. A considerable problem seems to be how the investigations work, with primary responsibility placed on the TCC and only a secondary, smaller responsibility on the UN. The fact that the UN, in case of a TCC being unwilling or unable to investigate, must wait ten working days before it can commence even just an administrative investigation is a significant issue since it means that time is lost at the beginning stage. This can have severe effects as evidence may no longer be available or may have been tampered with by the time the investigation starts. The memories of witnesses may also have faded.

Another issue is that the requirements and obligations placed on the TCCs in the model MoU are vague. For example, the assurance that the TCC will exercise its exclusive criminal jurisdiction does not specify what steps that includes. It is clear that it does not include prosecution, since the decision on whether to prosecute or not is an act of sovereignty and remains an exclusive matter for the TCC.[113] It is also clear that the assurance is directed at the UN, since it is part of the model agreement between the UN and

[113] Zeid report, para 80.

TCCs. There is no assurance made to host states or victims. Apart from this, there is no specification on what an exercise of criminal jurisdiction is meant to be.

A related issue is that the obligations are not subject to any sanction. This means that accountability for SEA largely will depend on the willingness of TCCs to fulfil their obligations, as the model MoU does not include any kind of consequence for those that do not. Since reports show that TCCs often are unable or unwilling to investigate their personnel for SEA in due time, this is cause for concern.[114] It is especially troubling when considering the above shown numbers of investigations that are still pending. If the investigations of TCCs are being delayed, the prospects for successful prosecution, and thus accountability, become significantly smaller.

It is also important to note that the model MoU is a negotiable instrument, and that the MoU entered into after negotiations might look different. While it is not impossible for a TCC to agree on further reaching obligations than what the model MoU provides, the opposite is more likely. There were, after all, many states which opposed the revised version of the model MoU because it, through incorporation, strengthened the UN Standards of Conduct.[115] Another aspect in relation to this is that delays often occur before and during the negotiations. Therefore, it is often the case that the MoU is not signed before deployment, and not for several months after.[116] Until that happens, TCCs and their military contingents are not bound by any of the rules in the model MoU, meaning that there are very few mechanisms promoting and strengthening accountability.

[114] See Zeid report, para 67 (a).
[115] "U.N. Peacekeepers Need Formal Discipline", United Press International, 31st May 2007, available at: https://www.upi.com/Defense-News/2007/05/31/UN-Peacekeepers-need-formal-discipline/15071180612793/?ur3=1 [accessed 28th April 2020]
[116] UNGA, *Report of the Group of Legal Experts on Making the Standards Contained in the Secretary-General's Bulletin Binding on Contingent Members and Standardizing the Norms of Conduct so that they are Applicable to all Categories of Peacekeeping Personnel*, A/61/645, 18th Dec 2006, para 12.

Altogether, the measures imposed by the UN, especially the amended model MoU, do provide improvements in clarifying Standards of Conduct for troops and rights and obligations of TCCs as well as increasing accountability. The measures, however, do not challenge the exclusive criminal jurisdiction of TCCs and, thus, reflect the limits on what the UN is able to do. The organisation can implement standards, arrange education and training, seek assurances from TCCs and impose administrative sanctions like repatriation. Outside of this, the UN has no power to exercise disciplinary or criminal jurisdiction or issue rules that are legally binding for peacekeepers. Since allegations of SEA year after year remain high and since investigations are not following the UN policy on timeline, it is clear that the measures have been ineffective. Impunity remains the norm, and accountability a rarity.

4 External Pathways of Accountability

In this chapter, a few different options for holding military members of peacekeeping operations to account outside the UN system will be explored and evaluated. The main purpose of this is to identify the practical and theoretical strengths and weaknesses of the different options. Subchapter 4.1 deals with the option of TCC jurisdiction, subchapter 4.2 addresses host state jurisdiction, and subchapter 4.3 considers the International Criminal Court.

4.1 The Troop Contributing Country

As already noted, under the current system, TCCs bear the responsibility for exercising jurisdiction and prosecuting SEA committed by members of their national troops. This is provided for in the model MoU and is also included in the model SOFA.[117]

4.1.1 Do TCCs Exercise Jurisdiction?

For TCCs to be able to exercise jurisdiction, they need to have criminal codes that extend jurisdiction over crimes committed by their nationals while outside the borders of the countries. This would be done on the basis of the nationality principle of international jurisdiction.[118] The vast majority of countries do recognise such extraterritorial jurisdiction, but there are exceptions.[119] It has also been suggested that while many countries do have criminal laws with extraterritorial reach applicable to peacekeepers, they are

[117] Model MoU, art 7 *quinquiens*; Model SOFA, art 47 (b).
[118] Ryngaert, Cedric, *Jurisdiction in International Law*, 2nd ed., Oxford University Press, Oxford, 2015, at p. 104.
[119] Freedman, Rosa, *UNaccountable: A New Approach to Peacekeepers and Sexual Abuse*. European Journal of International Law, Volume 29, Issue 3, pp. 961–985, at p. 973.

far from comprehensive.[120] Because of this, it is regrettable that the model MoU does not require TCCs to provide guarantees that they are able to exercise extraterritorial jurisdiction over crimes committed abroad by their national contingents.

A bigger issue than the inability of TCCs to exercise jurisdiction seems to be their unwillingness to do the same. According to a leaked UN report, at least 134 Sri Lankan personnel were found to have sexually exploited nine children in Haiti during the UN mission there. Out of the 114 of them that were repatriated, none received any criminal sanctions.[121] The Sri Lankan Army, although reluctant to disclose information on the matter, has insinuated that only three of the implicated soldiers have been punished through military procedures.[122] The data made public by the UN also shows that TCCs have a poor record of holding their peacekeepers to account for SEA. In 126 substantiated allegations of SEA by military contingents during the years 2010-2019, only 46 perpetrators received a criminal sanction, namely imprisonment. As noted above, allegations are counted by reports received and can therefore implicate more than one perpetrator. Even if the best-case scenario is assumed, that is that each allegation concerns only one perpetrator, the numbers show that less than 37 % of perpetrators of SEA have received criminal sanctions in the last decade.[123]

The reason for the unwillingness both in imposing criminal sanctions, as just noted, and concluding investigations, as described above, may be because of the practical difficulties of holding trials. Evidence and witnesses

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[120] O'Brien, Melanie, *Criminalising Peacekeepers: Modernising National Approaches to Sexual Exploitation and Abuse*, Palgrave Macmillan, Cham, Switzerland, 2017, at pp. 59-75.
[121] Lee, Sabine & Bartels, Susan (2019), *'They Put a Few Coins in Your Hand to Drop a Baby in You': A Study of Peacekeeper-fathered Children in Haiti*. International Peacekeeping, Volume 27 Issue 2, pp. 177-209, at p. 181.
[122] REDRESS & The Child Rights International Network, *Litigating Peacekeeper Child Sexual Abuse*, Jan 2020, available at: https://redress.org/wp-content/uploads/2020/01/LitigatingPeacekeeperChildSexualAbuseReport.pdf [accessed 7th May 2020], at p. 35.
[123] Conduct in UN Field Missions, "Sexual Exploitation and Abuse: Actions", United Nations, available at: https://conduct.unmissions.org/sea-actions [accessed 25th May 2020].

are usually located in the host state, meaning that TCCs will need to make efforts to overcome the practical difficulties attached to this. Another reason for the unwillingness of TCCs to exercise jurisdiction may be fear of it undermining the national support for contributing troops to the UN. Since troop contribution is an important source of national income for many TCCs, it does not stretch the imagination to think that they want to uphold national support for it.[124] As the Zeid report noted, the unwillingness can also be for reluctance to publicly admit to acts of wrongdoing.[125] By not addressing and admitting to misconduct by national troops, states may feel that they avoid international criticism and backlash.

4.1.2 Should TCCs Have Exclusive Jurisdiction?

In theory, TCCs are well placed to adjudicate their own national troops since most of them extend jurisdiction over crimes committed abroad. In practice, however, the unwillingness of TCCs to exercise their exclusive criminal jurisdiction is a serious problem. In order for accountability to be increased, TCCs need to be pressured to comply with their obligations. Since the TCCs are in a contractual relationship with the UN, and not the host state, it falls primarily upon the UN to exert this pressure. The provisions described in chapter 3, such as the TCC notifying the UN on progress and giving assurances that jurisdiction will be exercised, are, on the whole, vague and unenforceable. It is clear that without stronger checks and balances, TCC's exclusive jurisdiction is an impediment to accountability.

Even where TCCs are willing to investigate and prosecute, the process has other disadvantages. As already explained, holding the trial in the TCC means that it will often take place far away from the crime scene. This will

[124] Weller, Marc (Ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford, 2015, at p. 396; Avezov, Xenia (2014), *Why Contribute? Understanding Asian Motivations for Troop Contribution to Peace Operations*. Journal of International Peacekeeping, Volume 18 Issue 3-4, pp. 256-280, at p. 260.
[125] Zeid report, para 67 (a).

likely lead to difficulties in conducting investigations. Witnesses and evidence will often need to be transferred, which incurs extra costs and delays. It has also been noted that evidence gathered abroad is not always permissible according to the domestic procedural laws of TCCs.[126] For example, evidence collected by a UN investigation in a host state might be inadmissible in a national court of a TCC, which significantly reduces the prospects for successful prosecution.

Further, holding the trials in the TCC means that the affected community will not be able to take part. A well-known legal principle is "that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[127] While this quote originates from an English case and is mainly used when considering the impartiality of judges, it is equally important when discussing the concept of public administration of justice. This concept is also part of international standards since the International Covenant on Civil and Political Rights (ICCPR) contains a right to a "fair and *public* trial" [emphasis added].[128] If the trial is held far away from the concerned society, it becomes, in a way, invisible; the members of the affected society are not able to see justice being done. Victims are also less able to participate and have their rights to attend and be heard met. This runs the risk of undermining the credibility of the mission itself. Additionally, it risks perpetuating local perceptions of impunity, which can make future victims less likely to report.[129]

Another disadvantage with TCCs having exclusive jurisdiction is that not all military troops are governed by the same sets of rules. Peacekeepers in a certain mission may be subject to different Standards of Conduct if the MoUs with all the TCCs are not identical. When the MoUs are identical,

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[126] UNGA, *Criminal Accountability of United Nations Officials and Experts on Mission*, A/66/174, 25th July 2011, para 35.
[127] *R. v Sussex Justices Ex p. McCarthy*, [1924] 1 K.B. 256, at p. 259.
[128] United Nations, *International Covenant on Civil and Political Rights*, 19th Dec 1966, 999 UNTS 171, available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx [accessed 4th May 2020], art 14 (1).
[129] See subchapter 2.5 *in fine*.

different national troops will still be subject to different domestic military and criminal codes. This means that peacekeepers from different nationalities may commit the same crime yet receive different sanctions. Further, since not all TCCs are able to exercise extraterritorial jurisdiction, there may be situations where a number of peacekeepers are guilty of the same crime and only some of them can be punished. This causes legal uncertainty.

All these disadvantages seem to point to the conclusion that allowing TCCs exclusive jurisdiction is not the best option. It is, however, unlikely that TCCs would be willing to give their jurisdiction up. An option that would rid the system of the disadvantages of holding the trial in the TCC, while allowing TCCs to retain jurisdiction is holding on-site courts martial. This would mean that trials would be conducted in the host state by the TCC's own military. Courts martial were endorsed by Prince Zeid in his report since it would mean easier access to witnesses and evidence, and since the community would see justice being done.[130] The latter would, however, perhaps require amendments to the legislation of some TCCs regarding public courts martial. Practice has shown that trials *in situ* are supported by local populations. In the DRC, for example, there was widespread civilian dissatisfaction when implicated peacekeepers were repatriated to their TCCs rather than court martialled.[131]

However, there are a few concerns with this option. Firstly, it does not solve the problem that peacekeepers of different nationalities are subject to different sets of rules, thereby weakening the legal certainty. Secondly, it could mean that trials are conducted with a lack of expertise in adjudicating SEA.[132] As noted in the Zeid report, it is imperative that cases are handled

[130] Zeid report, para 35.
[131] Bergsmo, Morten & Song, Tianying (Eds.), *Military Self-Interest in Accountability for Core International Crimes*, 2nd ed., Torkel Opsahl Academic EPublisher, Brussels, 2018, at p. 325.
[132] UNGA, *Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, A/71/99, 23rd June 2016, para 259.

by professionals who have specialised experience in investigating sex crimes and who are able to provide advice on the evidentiary requirements and standards of proof needed.[133] Such expertise might not be held by the courts martial. Thirdly, several senior military personnel have noted that independence, both perceived and actual, is not sufficiently guaranteed when national investigators are required to investigate their own troops.[134] This makes courts martial an inadvisable option.

4.2 The Host State

4.2.1 Can Host States Exercise Jurisdiction?

A fundamental starting point in international law is that every state has jurisdiction over the crimes committed on its territory. This is based on the territoriality principle, which is the most basic principle of jurisdiction in international law.[135] In theory, this would mean that host states have jurisdiction over any act of SEA committed on their territories, provided that the act constitutes a crime under domestic law. However, as explained, the SOFA between the host state and the UN will normally provide for the exclusive criminal jurisdiction of the TCC.[136] This means that the host state, in practice, is barred from exercising jurisdiction. In other words, the host state waives its jurisdiction and the troops are given immunity.[137] This immunity cannot, in turn, be waived by the UN, as is the case for other peacekeeping personnel such as UN officials and experts on mission.[138] Instead, it is a matter solely for the TCC.

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[133] Zeid report, para 32.
[134] Office of Internal Oversight Services, *Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations*, Evaluation Report IED-15-001, 15th May 2005, para 25.
[135] Ryngaert, *Jurisdiction in International Law*, at p. 49.
[136] See model SOFA, para 47 (b).
[137] See model SOFA, para 46.
[138] United Nations, *Convention on the Privileges and Immunities of the United Nations*, 13th Feb 1946, 1 UNTS 15, available at: https://treaties.un.org/doc/Treaties/1946/12/19461214%2010-17%20PM/Ch_III_1p.pdf [accessed 2nd May 2020], art V section 20 and art VI section 23.

For various reasons, it is not always possible for the UN to conclude a SOFA before peacekeepers are deployed to the mission area. It might be the case that there is no governing authority to conclude an agreement with, or the mission might be deployed in such an expeditious way that it does not allow time to conclude one.[139] There was no SOFA, for example, for the UN mission in Somalia, and it took 20 years before one was concluded for the operation in Lebanon.[140]

There is disagreement in the international law community regarding the status of peacekeepers in the absence of a SOFA and in the interim before a SOFA is concluded. The Convention on Privileges and Immunities of the UN does not apply to national military contingents, nor does the immunity provision in the Article 104 of the UN Charter.[141] For some peacekeeping missions, there have been UNSC resolutions stating that the model SOFA, including its rules on jurisdiction and immunity, is applicable as a provisional document until a specific agreement is concluded.[142] While this solves the issue regarding those particular missions, it does not mean that the same applies for every other peacekeeping mission. The UNGA has endorsed a recommendation that such a practice should apply generally, but, again, this is not binding for all peacekeeping operations.[143] The UNGA is in fact unable to adopt binding resolutions.[144]

Using different doctrines of legal immunity, some scholars argue that the exclusive jurisdiction of the TCC and the ensuing bar on host state

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[139] Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at p. 67.
[140] Murphy, Ray (2003), *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?*. Criminal Law Forum, Volume 14, pp. 153-194, at p. 159.
[141] Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at p. 68; United Nations, *Convention on the Privileges and Immunities of the United Nations*; Worster, William Thomas (2008), *Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement*. Military Law and the Law of Review, Volume 47 Issue 2, pp. 277-376, at pp. 322-332.
[142] See Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at p. 95.
[143] See UNGA Res 52/12 B, A/RES/52/12 B, 9th Jan 1998, para 7.
[144] See subchapter 2.3.2.

jurisdiction has become state practice and is therefore a customary rule of international law. This does not, however, seem to be a broadly accepted position.[145] The study will therefore assume that there is no such customary rule. Bearing that in mind, there seems to be no other legally binding rule suggesting that TCCs have exclusive criminal jurisdiction over their national military contingents in the absence of a SOFA. Host state jurisdiction is therefore a viable option for ensuring accountability that warrants further exploration and assessment. It is also an option worth examining as a hypothesis since host state jurisdiction could be negotiated as a primary, concurrent or subsidiary option to TCC jurisdiction.

4.2.2 Should Host States Exercise Jurisdiction?

There are a few clear advantages to the host state being able to investigate and prosecute an accused peacekeeper. Firstly, since a big problem in the regime of allowing TCCs exclusive jurisdiction is the unwillingness of several of them to fulfil their obligations, allowing the host state jurisdiction instead seems a convenient solution. Host states do, after all, have an interest in protecting and safeguarding the rights of their nationals and would probably be more inclined than TCCs to investigate and prosecute instances of SEA.

Secondly, conducting the investigation and holding the trial in the host state is beneficial for practical reasons since that is where potential evidence and witnesses are more accessible. If evidence and witnesses do not need to be transferred, both time and money can be saved. Thirdly, holding the trial in the host state means that the proximity to the victim and the affected community is maintained. They can, in other words, see justice being done and perhaps find closure. This may, in turn, mean that the credibility and the local support for the mission is upheld.

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[145] Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at pp. 67 and 95-99; See also Worster, *Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement*, at p. 309.

Fourthly, host state jurisdiction means that only one set of rules is applicable, as opposed to the several sets of rules of the different TCCs. This means that all military troops would be subject to the same criminal code, namely that of the host state, thus promoting legal certainty.

These advantages of host state jurisdiction are, however, met by an obvious disadvantage: the lack of guarantees for a fair trial. Peacekeeping missions are deployed to conflict or post-conflict areas which are, at the very least, unstable. Since conflict inevitably weakens many of the social, political and legal structures designed to protect and promote the rights of the population, it is unlikely that the host state would be able to guarantee that due process rules are met. The rule of law may in fact be entirely absent, or the legal system may be altogether dysfunctional. This means it is often not possible for the host state to conduct an investigation, let alone hold a fair criminal trial. Since it is paramount that any criminal trial held not only protects the rights of the victim, but also fulfils the right to a fair trial of the accused, allowing host states jurisdiction is not desirable. Granting host states jurisdiction will, in other words, not solve the problem of impunity and increase accountability since alleged perpetrators are likely to either not be tried at all or be tried unfairly.

In the past, it has been suggested that, because of the advantages of holding the trial in the host state, the UN should help with capacity-building initiatives to strengthen the criminal justice system of the host state.[146] If that was possible, host state jurisdiction could be laudable at least as a concurrent or subsidiary option to TCC jurisdiction. However, strengthening the host state's criminal justice system, including its investigatory, prosecutorial, adjudicatory and custodial institutions, to a satisfactory capacity would likely be a long-term process. The carrying out of such initiatives in mission areas in time for the deployment of peacekeepers

[146] UNGA, *Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations*, A/60/980, 16th Aug 2006, at para 27 and 30; The Zeid report, para 89. Although these paragraphs concern UN staff and experts on mission, it is used here by analogy.

seems unrealistic. Further, it would require significant resources and funding, which are already in short supply.

4.3 The International Criminal Court

Until now, only the jurisdiction and power of the involved parties to a peacekeeping mission, namely the UN, the host state and the TCC, has been discussed. It was held by the ICJ in the *Arrest Warrant* case that immunity from host state jurisdiction does not bar prosecution outside the host state.[147] On that note, focus will in the following shift from the involved parties to other possibilities. An option that deserves attention is the permanent International Criminal Court (henceforth ICC), which was established in 2002 through the Rome Statute of the International Criminal Court (hereafter Rome Statute).[148] At the time of its creation, the ICC was seen by many as a symbol for the end of impunity for the most serious international crimes. There was a sense of pride in the international community for succeeding in creating a permanent international criminal court with jurisdiction to try individuals.[149] In reality, however, the mandate of the court is defined very narrowly in almost all regards, making it very difficult to bring a case before it. This subchapter will explore the possibility and suitability as well as the main impediments to peacekeepers' SEA offences being prosecuted by the ICC.

4.3.1 Jurisdiction

There are only three ways in which a case can reach the ICC:

1. a referral by a State Party to the Rome Statute (hereafter State Party),

[147] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of The Congo v. Belgium)* (Merits), [2002] ICJ Rep 3. This case concerned diplomatic immunity but is used here by analogy on peacekeeper immunity.
[148] United Nations, *Rome Statute of the International Criminal Court*, 17th July 1998, 2187 UNTS 90, available at: https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx [accessed 28th April 2020], [henceforth "Rome Statute"].
[149] Welch, Claude E. & Watkins, Ashley F. (2011), *Extending Enforcement: The Coalition for the International Criminal Court*. Human Rights Quarterly, Volume 33 Issue 4, pp. 927-1031, at pp. 927 and 990.

2. a referral by the UNSC, or
3. the initiation of an investigation by the ICC Prosecutor (hereafter Prosecutor).[150]

Further, the jurisdiction of the Court is limited to crimes either committed on the territory of a State Party (the territoriality principle), or by a person who is a national of a State Party (the nationality principle).[151] This means that either the host state or the TCC, or both, must be a State Party for the ICC to have jurisdiction. If, for example, troops contributed by India would sexually abuse members of the local population in a mission in Somalia, the ICC would not have jurisdiction since neither of those states are parties to the Rome Statute. This is a significant limitation since there are many states, particularly in Asia and Africa, who have not signed or ratified the Rome Statute.[152] This issue can, however, be overcome if the situation involves UN Member States and is referred to the Court by the UNSC acting under Chapter VII of the UN Charter. The reason for this is that such a resolution is legally binding for UN Member States, making it irrelevant whether the concerned states are parties to the Rome Statute or not.[153]

Another important factor is that the ICC operates on the principle of complementarity. This means that the Court cannot investigate or prosecute a case unless a state, which has jurisdiction over the case, is unwilling or unable to do so. Essentially, if a State Party has jurisdiction over a case and adequately investigates or prosecutes it, or decides not to prosecute on substantial grounds, the case is inadmissible before the ICC. Further, an alleged offender cannot be brought before the ICC if the case has already been heard in a domestic court.[154]

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[150] Rome Statute, art 13.
[151] Rome Statute, art 12.
[152] "The States Parties to the Rome Statute", International Criminal Court, available at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [accessed 7th May 2020].
[153] Shaw, Malcolm Nathan, *International Law*, 8th ed., Cambridge University Press, Cambridge, 2017, at p. 299.
[154] Rome Statute, arts 1 and 17; Preamble to the Rome Statute, para 10.

The complementarity provision is likely to limit the number of cases admissible before the ICC. As shown above, however, it is often the case that TCCs are unwilling or unable to investigate and prosecute SEA committed by their nationals. Since it is the State Party which bears the burden of proof to show that the case is inadmissible, that is to show that a genuine investigation or prosecution is taking or has taken place, this provision could in fact serve to exert pressure on TCCs which are also parties to the Rome Statute.[155] If these TCCs wish to avoid criminal jurisdiction being exercised over their nationals by the ICC, they must show that they are able and willing to investigate and prosecute. This means that the ICC exists as a secondary option to put pressure on TCCs to comply with their obligations, and to provide redress to victims that have not received it. This pressure, however, only pertains to TCCs who are States Parties and to the crimes under the subject-matter jurisdiction of the Court.

4.3.2 Crimes

The ICC has jurisdiction over only four international crimes: genocide, crimes against humanity, war crimes and aggression. These are considered the most serious crimes of concern to the international community as a whole and are known as the core crimes of international law.[156] The UN definitions of SEA are not included in the Rome Statute, but many acts covered by them can be found in the definitions of the *actus rei*[157] of the mentioned core crimes. The UNSC has also noted that rape and other forms of sexual violence can constitute a war crime, a crime against humanity or a constitutive act with respect to genocide.[158] This subchapter will therefore examine whether it is possible for SEA to be prosecuted under the core

[155] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Decision), Case No. ICC-01/09-01/11, 30th Aug 2011, para 62; *The Prosecutor v. Simone Gbagbo* (Decision), Case No. ICC-02/11-01/12 OA, 27th May 2015, para 128.
[156] Rome Statute, art 5; Bellilli, Roberto (Ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review*, Ashgate, Farnham, 2010, at pp. 369-370.
[157] The *actus reus* is the act or omission that makes up the physical element of a crime. The mental element is called the *mens rea*.
[158] UNSC Res 1820, S/RES/1820 (2008), 19th June 2008, para 4.

crimes. Aggression is not included in this subchapter since it is not relevant for the study of sex crimes by individuals.

4.3.2.1 Genocide

Genocide is defined as any of the acts listed in Article 6 of the Rome Statute, if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.[159] Rape and other forms of sexual violence has been considered by the International Criminal Tribunal for Rwanda (ICTR) as an *actus reus* of genocide, more specifically as an act causing serious bodily or mental harm.[160] While it is hard to determine exactly which acts fit under this category, it is clear that at least some of the acts covered by the UN definition of SEA are included, particularly those relating to sexual abuse.

However, the specific intent (*mens rea*) that is required is a high threshold: the sexual violence must be committed with intent to destroy a group, in whole or in part. It is highly unlikely that individual peacekeepers involved in SEA fulfil this element. While SEA by peacekeepers is widespread and causes serious harm, the argument that it is committed with intent to destroy the local population or a group within that population is unconvincing.

4.3.2.2 Crimes Against Humanity

The definition of crimes against humanity includes a long list of acts.[161] Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity is specifically mentioned.[162] This would seem to overlap with several of the acts covered by the UN definition of sexual abuse. There is, however, yet

[159] Rome Statute, art 6.
[160] See for example *Prosecutor v. Musema* (Judgement), Case No. ICTR 96-13-T, 27th Jan 2000, para 933; Rome Statute, art 6 (b) compared with UNSC, *Statute of the International Criminal Tribunal for Rwanda*, annexed to UNSC Res 955, S/RES/955 (1994), 8th Nov 1994, art 2.2 (b).
[161] Rome Statute, art 7 (1).
[162] Rome Statute, art 7 (1)(g).

again a specific *mens rea* required: the act must be committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack. The attack itself must involve multiple commissions of the list of covered acts, pursuant to or in furtherance of a State or organisational policy to commit the attack, though the policy need not be official.[163]

It is highly unlikely that a peacekeeping mission would have an expressed policy to carry out an attack against a civilian population. Nonetheless, reports and statistics show that SEA in peacekeeping missions is widespread and part of a broader pattern. It is not limited to singular and isolated events. Following this line of reasoning, it could perhaps be argued that the existing pattern of SEA be considered an unofficial policy of peacekeeping missions to commit an attack on the civilian population.

However, the *Elements of Crimes*, provided for by Article 9 of the Rome Statute, states that active promotion or encouragement of the attack from the organisation behind the policy is required.[164] In the view of this author, the argument that the UN has actively promoted or encouraged a policy to attack a civilian population is unconvincing, especially considering its zero-tolerance policy and the myriad of reports and resolutions over the years condemning and banning SEA. *Elements of Crimes* is, however, not binding on the ICC judges. The document is merely an interpretative aid.[165] In theory, it could therefore be possible to bring peacekeepers accused of SEA before the ICC and prosecute them for crimes against humanity. The likelihood of such prosecutions being successful is, however, low.

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[163] Rome Statute, arts 7 (1) and 7 (2)(a).
[164] *Elements of Crimes*, International Criminal Court, ISBN No. 92-9227-232-2, 2011, available at: https://www.icc-cpi.int/resourcelibrary/official-journal/elements-of-crimes.aspx [accessed 8th May 2020], art 7 para 3.
[165] Dörmann, Knut, Doswald-Beck, Louise & Kolb, Robert, *Elements of War Crimes under the Rome Statute of the International Criminal Court. Sources and Commentary*, Cambridge University Press, Cambridge, 2003, at p. 8; Art 9 of the Rome Statute, which provides that *Elements of Crimes* shall assist the Court in the interpretation and application art 6-8 *bis*, seems to *lex specialis* in relation to art 21, which states that the Court shall apply the Statute and *Elements of Crimes*.

4.3.2.3 War Crimes

Out of the crimes that are under the jurisdiction of the ICC, the Article covering war crimes has the longest list constituent acts. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence are explicitly mentioned, both when committed in an international armed conflict and a non-international armed conflict.[166] As noted above, this seems to overlap with many acts covered by the UN definition of sexual abuse.

The advantage with war crimes is that there is no special *mens rea* required. Nor is it a precondition that war crimes be widespread or systematic. They do, however, need to be committed in the context of an armed conflict. Whether forces of peacekeeping missions can be considered parties to armed conflicts has been discussed at length in the international law community.[167] Ultimately, the answer to that question lies in the specific circumstances of each peacekeeping operation. Since mission mandates and contexts vary greatly, it is impossible to make a general conclusion regarding peacekeepers' status in relation to armed conflicts. It is, nonetheless, a possibility that UN peacekeepers could commit sexual abuse in the context of an armed conflict, even though most peacekeeping missions would probably not qualify as such. SEA committed in those that do would consequently be prosecutable before the ICC, provided that all other jurisdictional requirements are met.

[166] Rome Statute, arts 8 (2)(b)(xxii) and 8 (2)(e)(vi).
[167] See for example Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at pp. 104-113; Hegelsom, Gert Jan F. (1993), *Law of Armed Conflict and UN Peace-Keeping and Peace-Enforcing Operations*. Hague Yearbook of International Law, Volume 6, pp. 45-58; Lilly, Damian (2016), *The United Nations as a Party to Armed Conflict: The Intervention Brigade of MONUSCO in the Democratic Republic of Congo (DRC)*. Journal of International Peacekeeping, Volume 20 Issue 3, pp. 313-341; Koops, Tardy, MacQueen & Williams, *The Oxford Handbook of United Nations Peacekeeping Operations*, at pp. 52-53.

4.3.3 Discussion

As shown, it is possible for the ICC to have jurisdiction over the more serious instances of sexual misconduct by military members of peacekeeping missions. The possibility is, however, heavily limited by many provisions. For the ICC to be able to increase accountability for SEA committed by peacekeepers more than just marginally, amendments would have to be made to the Rome Statute. One option to mitigate the obstacles relating to subject-matter jurisdiction is adding a new crime to Article 5.[168] This would admittedly encompass very difficult political negotiations and it is unlikely that agreement on the matter would be achievable in the foreseeable future. Despite this, the discussion will continue on the assumption that SEA by peacekeepers is under the subject-matter jurisdiction of the ICC. The reason for this is to better be able to focus on the other concerns relating to the use of ICC as an avenue of accountability.

The main advantage to the ICC having jurisdiction is that it is a recognised institution with an existing judicial framework and infrastructure. There is, in other words, already a functioning system in place that ensures judicial independence and conducts investigations and trials that follow internationally agreed standards. Further, its prosecutors and judges have experience in dealing with serious crimes relating to rape and other sexual violence. This means that there is potential to solve some of the current issues regarding the investigations since the personnel will be better able to understand the nature of the crimes.

Additionally, allowing the ICC jurisdiction over SEA committed by peacekeepers means that there is only one set of applicable rules. Instead of needing to follow both UN and TCC rules, investigations and trials would have to adhere only to the rules of the Court. This would lead to improved legal certainty.

[168] The procedures for amendment are explained in arts 121 and 123 of the Rome Statute.

Another advantage with the ICC exercising jurisdiction is that it is a separate judicial institution. This means that it might be perceived as more impartial than the host state and the TCC. This is because the host state and the TCC, at least to some degree, may be seen as representing the victim and the perpetrator, respectively.

The main disadvantages to the ICC having jurisdiction seem to revolve around the inefficiencies arising from the unwillingness of many states to accept the jurisdiction of the Court.[169] Many cases that relate to nationals of and territory belonging to states which are not States Parties are difficult to bring before the Court. Although UNSC referral is a way around this, it is not very likely that the UNSC would refer individual personnel from its own peacekeeping missions to the ICC due to the potential ramifications on future troop contributions and peacekeeping efforts. It could, however, happen that the UNSC refers a situation in a certain country where there is a mission to the Court. That would leave open the possibility of the Prosecutor pursuing cases in that area.[170]

Another disadvantage relating to the unwillingness of states is that the ICC does not try individuals in their absence. It is dependent upon voluntary appearances or states surrendering accused persons to it for trial. Article 98 (2) of the Rome Statute provides that the ICC cannot request the surrender of those suspected of crimes under the jurisdiction of the Court if there is a bilateral agreement which one of the parties would violate by such surrender, unless the other party agrees. In other words, if an agreement between a sending state and a host state provides that the sending state must consent before the host state can surrender nationals of the former to the ICC, the Court must secure such consent before it requests a surrender. This

[169] For information on States Parties and non-States Parties, see "The States Parties to the Rome Statute", International Criminal Court; For information on troop contributors, see Department of Peace Operations, *Contributors to UN Peacekeeping Operations by Country and Post Police, UN Military Experts on Mission, Staff Officers and Troops*, United Nations, available at: https://peacekeeping.un.org/sites/default/files/01_summaryofcontributions_21.pdf [accessed 8th May 2020].
[170] Rome Statute, arts 13 (c) and 15.

provision has been used extensively by the United States of America, thus blocking many American nationals, including officials and military personnel, from being surrendered to the ICC. These agreements have received much attention and criticism, and the validity of them remains unclear.[171] The effects of Article 98 (2) are therefore not fully known. Nevertheless, the fact that agreements made pursuant to the Article exist and potentially prevent the surrender of peacekeepers is a limiting factor to be kept in mind.

Furthermore, many scholars have argued that bringing individual peacekeepers before the ICC for SEA is unsuitable since it violates Article 17 (1)(d) of the Rome Statute. This provision states that a case is inadmissible if it is not of sufficient gravity to justify further action by the Court. It has, on that note, been suggested that instances of SEA are not grave international crimes. Instead, they are ordinary crimes committed within an international arena.[172] Although this argument carries some weight, it is, on the other hand, also arguable that SEA by peacekeepers is particularly grave since it violates the relationship of trust between the peacekeepers and the local civilian population. It also jeopardises and undermines UN peace efforts as well as the core values upon which the UN, and indeed international law, is based.

While this argument might reach the threshold described in Article 17 (1)(d), it must be seen in the broader context in which the ICC works. The Prosecutor receives hundreds of communications every year.[173] This high workload in combination with the Court's restricted resources and budget means that not all cases under its jurisdiction will be investigated. Discretion in the selection of cases is given to the Prosecutor. The general approach favoured by the Prosecutor is to put focus on representative rather

[171] Shaw, *International Law*, at p. 302.
[172] See for example Freedman, *UNaccountable: A New Approach to Peacekeepers and Sexual Abuse*, at p. 977.
[173] Burke, *Sexual Exploitation and Abuse by UN military Contingents: Moving Beyond the Current "Status Quo" and Responsibility under International Law*, at p. 210.

than comprehensive cases.[174] It is unlikely that individual peacekeeper cases will be considered as representative of the gravest international crimes. Out of the factors considered in gravity assessments, the Prosecutor has stated that the number of victims is a key consideration. Indeed, a potential case was dismissed with reference to the gravity threshold because it had a total number of victims of less than 20. In the reasoning for this, the Prosecutor conveyed that other situations under consideration had victim numbers in the hundreds or even thousands.[175] None of the statistics made available by the UN shows the number of victims connected to each perpetrator of SEA. It is, however, unlikely that victim numbers for individual perpetrators would rise to comparable heights.

Finally, holding the trial before the ICC has several of the same disadvantages as holding it before domestic courts in the TCC. Firstly, the trial will take place far away from the crime scene, meaning that victims and evidence will need to be transferred. Secondly, justice will not be seen to be done. The affected communities and victims may never even hear about the cases. This can, however, be mitigated by the Prosecutor taking steps to ensure that victims are able to participate. An outreach programme could also be arranged either by the ICC itself or by the UN so that the concerned communities receive information on the outcome of cases.

4.3.4 Assessment

Although the ICC seems a desirable option for increasing accountability for SEA by peacekeepers, an examination of all the conditions for jurisdiction and admissibility as well as the disadvantages of holding the trial before the Court, leads to the conclusion that the ICC is not a suitable option. Although these crimes are widespread and abhorrent, they do not easily fit into any of

[174] Schiff, Benjamin N., *Building the International Criminal Court, Cambridge University Press*, Cambridge, 2008, at p. 118.
[175] O'Brien, Melanie (2012), *Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold*. Journal of International Criminal Justice, Volume 10 Issue 3, pp. 525-546, at p. 535.

the definitions of the core crimes. Even assuming that the ICC has subject-matter jurisdiction, there are many impediments that leave the margin of admissible and plausible cases too narrow.

Despite the ICC not being a suitable option for increasing criminal accountability directly, it is possible to use its procedures to achieve the same effect in a more indirect way. More specifically, the Prosecutor could look into situations where alleged SEA has been committed by peacekeepers and start to notify states that have jurisdiction of the Court's intention to prosecute.[176] Since States Parties bear the burden of proof to show that a genuine investigation or prosecution is taking or has taken place, this would put pressure on states to comply with their obligations. As discussed above, the model MoU requires TCCs to report to the UN on progress in cases against troops, yet such reports are rare. The threat of an investigation by the ICC might be a stronger incentive for TCCs to act. It should, however, be noted that the effects of this are limited to the crimes under the subject-matter jurisdiction of the Court as well as TCCs who are States Parties.

4.4 Conclusion

This chapter has shown that while there are advantages to all examined pathways of accountability, none of them provide a comprehensive and satisfactory solution to the lack of accountability for SEA at the hands of peacekeepers. The host state is normally unable to act because of the exclusive jurisdiction of the TCC, and when it is able to act, it cannot always guarantee a fair trial. The TCC on the other hand is normally able to act, except when there are problems with extraterritorial jurisdiction. However, reports show that not all TCCs are willing to investigate and prosecute their national troops. Even when TCCs are willing, there are several disadvantages, namely that the trial takes place far away from the

[176] See Rome State, art 18 (1).

crime scene, the local community does not see justice being done and different peacekeepers are subject to different sets of criminal rules. While the ICC could perhaps be capable of hearing a small number of cases regarding SEA by peacekeepers, it is, by and large, an unlikely and implausible solution.

5 Recommendations

It is clear from the previous chapters that the current framework for holding peacekeepers accused of SEA to account is inadequate. This chapter aims to use the advantages and disadvantages discovered throughout the thesis to propose options and adjustments to increase the accountability of peacekeepers. Although some of these measures have been alluded to previously, they will be mentioned here again to provide a comprehensive overview.

5.1 A New Model MoU

The main reason for the current lack of accountability for SEA committed by military peacekeepers is the unwillingness or inability of TCCs to investigate and prosecute their troops. This could, in theory, be solved by allowing another institution or entity to exercise jurisdiction, which will be explored below. In practice, however, TCCs are reluctant to give their excusive criminal jurisdiction up. Because of this, adjustments should initially be made to exert more pressure on TCCs to fulfil their obligations. Since TCCs are generally only in a contractual relationship with the UN, it is the latter which is in the best position to exert this pressure. One measure the UN could adopt in pursuit of this is to amend the model MoU to include stricter provisions. The UN could also make all troop contribution dependent upon acceptance of the new model MoU. This would increase legal certainty by preventing situations where troops are deployed without an MoU, and thus without applicable binding Standards of Conduct. This subchapter will explore and propose the provisions that could be added to this new model MoU.

It is acknowledged that this solution poses the risk of UN Member States being less likely to contribute troops. Stronger requirements also run the risk of states circumventing them by placing their troops at the disposal of other

international organisations or contributing them through bi- or multilateral arrangements. This, however, should not lead to the acceptance of the current system. Efforts must still be taken to fill the accountability gap even though this might result in a smaller number of troops contributed.

5.1.1 Provisions Relating to the Investigation

Investigations are the first step to ensuring accountability. If an investigation is not conducted or is conducted poorly, the subsequent prosecution will almost certainly be unsuccessful. Since investigations are currently being inordinately delayed and since few lead to successful prosecution, it is clear that the framework for investigations needs to be improved. One option that would put pressure on TCCs is granting the UN investigative powers to conduct complete investigations, as opposed to the current preliminary fact-finding and administrative investigations. The UN could have a primary or concurrent responsibility that is instantly triggered by an allegation regardless of the TCC's actions. If such a provision would prove difficult to put in place, the UN could, at the very least, have a secondary responsibility for complete investigations that would be triggered immediately when a TCC does not start one. Upon completion of its investigation, the UN should be required to send all material and evidence collected to the TCC for prosecution.

To be effective, these provisions would need to be combined with a requirement for TCCs to regularly and frequently report on the steps it has taken in the investigations and the reasons for them. This would prevent TCCs from initiating investigations without having intention to conclude them for the sake of blocking UN investigations. The UN should have discretion to determine whether the steps taken by the TCCs are adequate or not. Further, a timeline for completing investigations should be added to make sure that they are not unduly delayed by either party. This would lead to investigations being initiated and concluded in a timelier manner, thus

minimising the risk of witnesses' memories fading and evidence disappearing or being tampered with.

Furthermore, due to the complexities that the prosecution of SEA by peacekeepers entails, there are many issues that need to be taken into account already at the investigation stage. Because of this, a provision should be included to ensure that investigations are conducted by personnel with relevant and specialised expertise. Firstly, the investigation needs to include personnel with knowledge and experience of conducting investigations relating to crimes of a sexual nature. Such investigators will likely have received training in working with witnesses and victims of sexual trauma and can therefore ensure that collection of evidence and questioning is conducted in an appropriate manner. Secondly, personnel with sufficient knowledge of the local language need to be involved to overcome language barriers, and to ensure that victims and witnesses are fully heard and understood.

Thirdly, the investigation needs to include personnel with knowledge of the domestic criminal, military and procedural laws of the concerned TCC. Such personnel are required since evidence needs to be collected in a way that is compliant with national admissibility requirements. A provision should also, on this note, be included in the new model MoU to require TCCs to amend any national legislation that does not allow for extraterritorial prosecution of peacekeepers or the use of evidence from foreign sources. TCCs should also be required to demonstrate that their legislation in this regard is satisfactory.

Fourthly, since there is a small possibility for cases to come before the ICC, it would be desirable to include personnel with knowledge of the jurisdictional rules and admissibility requirements in the Rome Statute. This could increase the pressure felt by TCCs to conduct genuine investigations. On the same note, a provision could be added stating that the UN will refer any case that appears to meet the jurisdictional requirements of the Rome

Statute to the ICC. Admittedly, it might not be possible to make use of this provision particularly often. Nevertheless, the provision would add to the pressure on TCCs to genuinely investigate and prosecute cases.

5.1.2 Provisions Relating to Sanctions

One of the main things that allows TCCs to escape their obligations under the model MoU is that it does not include any sanctions. The document should therefore be amended to include consequences for any requirement not fulfilled, for example neglecting to report on the steps taken in investigations. The sanctions that could be inserted into the new model MoU are, however, limited. They include disqualification from participation in future peacekeeping missions and withholding reimbursement, in whole or in part. Repatriation is a sanction directed at individual peacekeepers and not at TCCs. It is therefore not likely to compel TCCs to start complying with their obligations. Repatriation of entire units when there is widespread SEA might have more of an inciting effect, but it does not specifically put pressure on TCCs to bring accused peacekeepers before domestic courts. The main palpable advantage is instead that perpetrators are immediately removed from the host state community.

Because of the limited number of effective sanctions, it is, unfortunately, difficult to see that a new model MoU including the proposed provisions would significantly increase accountability for SEA. This should, nevertheless, not deter the UN from making the changes as, with respect to accountability, something is better than nothing.

5.2 A New International Tribunal

Due to the above described difficulties, the option of creating a new international tribunal to address SEA by peacekeepers warrants consideration. Admittedly, it is not very likely that enough states, particularly TCCs, would agree to the jurisdiction of such an institution.

Since no other examined avenue of accountability has proved satisfactory, the option will nevertheless be explored. This will provide insight on its strengths and weaknesses, which may be useful in case agreement among states is achievable in the future.

5.2.1 Rationale

It has been noted above that the ICC has many jurisdictional and admissibility requirements that heavily restrict the number of cases that comes before it. A new tribunal given jurisdiction specifically over SEA committed by peacekeepers would remove the disadvantages described in relation to the ICC yet maintain the advantages of being an independent and impartial international institution. Further, personnel from the ICC could be involved to provide the institution with experience on processes relating to SEA as well as the workings and practical issues of an international judicial institution.

Some argue that an international tribunal is an unsuitable option since international law should only deal with the most serious crimes of concern to the international community, and individual crimes by peacekeepers are not part of that category.[177] In the view of this author, however, this argument understates the gravity and extent of the issue. SEA in UN peacekeeping missions is, as has been shown, widespread. It is committed in an international arena involving several subjects under international law, namely the UN and at least two states. Further, SEA by peacekeepers usually entails a breach of duty of care since mission mandates very often include the protection of civilians. The fact that SEA is committed against those who were supposed to be protected, by those who were supposed to protect, makes it impossible to view SEA by peacekeepers as an ordinary crime. In combination with the attention the current lack of accountability

[177] See for example Freedman, *UNaccountable: A New Approach to Peacekeepers and Sexual Abuse*, at p. 977.

has received from the international community and the UN, an international tribunal should thus be considered a suitable option.

5.2.2 Practicalities

A new international tribunal would be set up in one of two ways: by treaty, as the ICC was, or by a resolution from the UNSC acting under Chapter VII of the UN Charter. In the latter case, agreement in the UNSC, including the unanimity of the permanent five members, would be necessary.[178] This has been achieved before in relation to ICTR and the International Tribunal for the Former Yugoslavia (ICTY). Those tribunals were, however, set up *ad hoc* for specific situations and granted jurisdiction to address past instances of criminality in a defined area, during a limited time span.[179] A tribunal set up by the UNSC to address peacekeeper misconduct would be different in that its jurisdiction would, at least preferably, cover crimes committed in the territory of all UN Member States and both past and future crimes. Achieving agreement in the UNSC on this would be difficult to say the least.

If the new international tribunal were instead to be set up by treaty, it would still require the agreement and acceptance of a multitude of states, particularly TCCs. It would not, however, require agreement from the permanent five members of the UNSC. Further, ratification of the treaty could be made a precondition for accepting troops. This would mean that only states that have an interest in ensuring accountability would be allowed to contribute troops. It would also mean that all troops contributed to peacekeeping missions are subject to the same rules and the same judicial institution, thus increasing the legal certainty.

Whichever way the tribunal is set up, a defined jurisdictional base must be decided upon. Personal and territorial jurisdiction would need to be limited

[178] UN Charter, art 27.
[179] UNSC Res 955, S/RES/955 (1994), 8th Nov 1994; UNSC Res 827, S/RES/827 (1993), 25th May 1993.

to nationals and territory of the States Parties or of UN Member States, depending on how the tribunal is established. With respect to the subject-matter jurisdiction, a simple solution would be using the UN definitions of SEA. Since these are already part of the model MoU, they are most likely agreed upon by the majority of TCCs.

Further, since TCCs would likely not waive their criminal jurisdiction altogether, the jurisdiction of the tribunal would need to be subsidiary. With regards to this, the tribunal could draw on the complementary principle in the Rome Statute. This would mean that TCCs, with regards to SEA committed by their troops, would need to show that a genuine investigation or prosecution is taking or has taken place domestically, to block the tribunal from exercising jurisdiction. If the tribunal finds that such investigation or prosecution has not taken place or is ingenuine, it would be able to exercise its subsidiary jurisdiction.

5.3 Combined Procedure

One option would be to combine this new tribunal with the above recommended provisions in a new model MoU. The overall procedure, from allegation to judgement, would in that case follow the procedure described below.

After an allegation of SEA by a peacekeeper is reported, either the TCC or the UN would conduct an investigation in accordance with the provisions in the new model MoU. In case the TCC conducts the investigation, it would upon completion make a decision on whether or not to prosecute. If it is instead the UN which conducts the investigation, the organisation would upon conclusion be required to send a report on the findings along with all material and evidence gathered to the TCC. The latter would then make a decision with regards to prosecution.

Regardless of whether the TCC finds the allegation substantiated and decides to prosecute, or unsubstantiated and decides to close the case, both the new model MoU and the statute of the new tribunal would require the TCC to send a report on its decision to the tribunal. A provision would also be inserted into the statute of the tribunal to allow it to request reports from TCCs. The tribunal would, in turn, examine the report. If the tribunal concludes that a genuine investigation and prosecution has taken place, or that the decision to not prosecute is substantiated, the decision of the TCC would be upheld. If, however, the tribunal finds that the TCC has not conducted a genuine investigation or prosecution, the subsidiary jurisdiction would be triggered.

Since it is difficult to enforce the proposed timeline for completing investigations in the new model MoU, the subsidiary jurisdiction of the tribunal could also be triggered in cases where the timeline is not observed. This would, however, require monitoring of cases from as early as the allegation stage. An appropriate solution would be placing the responsibility for such monitoring on the UN. A provision could to that end be inserted into the new model MoU to require the UN to monitor cases to ensure that they follow the timeline. If the timeline is not observed, the UN could have the power to refer the case to the tribunal, which can thereafter request a report from the TCC.

With regards to peacekeepers convicted by the new tribunal, a framework would also need to be negotiated regarding the sanctions. Ideally, prison sentences would be servable in the TCC. A requirement could in that case be added that the conditions of imprisonment be governed by the laws of the TCC, and that these laws must be consistent with widely accepted international standards regarding the treatment of prisoners.

5.3.1 Disadvantages

This solution is, admittedly, flawed. By addressing the flaws, however, it might be possible to mitigate their effects. Therefore, this subchapter will present the main disadvantages of the proposed combined system and suggest measures that can be taken to limit their effects.

Firstly, a new tribunal would have the problem of justice not being seen to be done. Unless the tribunal happens to be located in the host state of a mission, local populations and victims may not be aware of the tribunal or may not see perpetrators of SEA be put on trial and criminally sanctioned. This can be remedied by allocating enough resources to ensure that victims and witnesses are able to be transported to the seat of the tribunal. Further, an effective outreach programme could be established that informs affected communities on the progress and outcome of cases. The UN could also run information campaigns about the new tribunal to increase local awareness. Individuals could, on this note, be allowed to provide information to the tribunal, which, in turn, can request reports from TCCs.

Secondly, due to the subsidiary nature of the proposed tribunal, several phases need to pass before it can exercise jurisdiction. When a case comes before the tribunal, the concerned TCC will by necessity have been found not to have genuinely investigated or prosecuted a case. This will likely take time. In practice, several months or even years could pass before a case is properly investigated. A fixed timeline for completing investigations in the new model MoU might limit the amount of time that can pass, but it is unlikely to solve the problem altogether. This issue is, however, a concern in the current system as well. There are, as shown above, several investigations pending from as far back as five years, and a few from even further back than that. The proposed system contains provisions to prevent such delays, or at least make them less likely. These provisions are the incorporated timeline for completing investigations and the trigger of the subsidiary jurisdiction of the tribunal when that timeline is not respected.

Thirdly, as already mentioned, it is unlikely that states in the foreseeable future will agree to the creation of a new international tribunal. Although some states might agree, the likelihood of obtaining consent from all TCCs, let alone all UN Member States, is low. The establishment of a new international tribunal is therefore a long-term project that will require work. This does not, however, mean that efforts to promote and make states more willing to accept subsidiary jurisdiction should stop. The UN and other influential actors should take on the task of promoting the idea of a new international tribunal since this might lead to it being a feasible option in the future. In the meantime, the UN should start implementing the provisions described above in a new model MoU, as these are a step in the right direction.

Lastly, a new tribunal would require extensive resources and financing. This seems to be an inescapable disadvantage. Nonetheless, it is likely that any strategy to effectively increase the accountability of peacekeepers would require vast resources. This does not mean that such strategies should not be promoted. Steps to ensure accountability must be taken despite being resource-heavy. This is absolutely necessary for the UN to maintain its legitimacy.

5.4 Concluding Remarks

The proposals put forward in this subchapter consist of both short-term and long-term efforts. Measures that can be taken in the short-term to pressure TCCs to exercise jurisdiction include incorporating precise requirements to report on steps and decisions taken regarding cases, including the reasons for them, into the model MoU. Wherever possible, sanctions for any unfulfilled obligations relating to the exercise of jurisdictions can be included. Establishing subsidiary jurisdiction of a separate judicial institution in case the TCC does not exercise jurisdiction can also pressure TCCs, particularly if used in combination with the proposed amendments to the model MoU. This is, however, likely a more long-term solution.

6 Conclusion

Allegations of SEA in UN peacekeeping missions have plagued the UN for many years. Despite the myriad of efforts made by the organisation to combat the issue, SEA remains widespread. This thesis has revealed that the existing framework for ensuring accountability for SEA is, in several regards, inadequate.

Under the current system, the TCC retains exclusive criminal jurisdiction over its military contingents. Because of this, the TCC bears the primary responsibility for investigations. The UN has only a secondary responsibility to conduct administrative investigations and must, in addition, wait ten working days before it can act. This is a significant flaw since TCCs have been shown to be unwilling or unable to investigate many cases in a timely manner.

The exclusive jurisdiction of the TCC further prevents the UN from doing anything other than summarily dismissing and repatriating perpetrators of SEA. All criminal and disciplinary matters are left entirely to the TCC. While the model MoU contains assurances from the TCC that it will exercise its exclusive jurisdiction, this is not enforceable. In fact, a significant flaw in the model MoU is that none of the requirements and obligations placed on the TCC are combined with sanctions. This makes the obligation of the TCC to exercise its exclusive jurisdiction, at best, a moral obligation. The result of this, is the current state of impunity and lack of criminal accountability for peacekeepers.

The existing alternative avenues of accountability examined in the study, namely the host state and the ICC, do not provide satisfactory solutions. The host state is usually barred from exercising jurisdiction. When it is not, host state jurisdiction is nonetheless inappropriate since peacekeeping missions usually take place in unstable conflict areas. The domestic courts of the host

state may simply not always be able to guarantee that accused peacekeepers will receive fair trials. The ICC, on the other hand, seems to be a desirable option at first glance since it has a formal and functioning structure for investigation and prosecution. However, the Court has jurisdiction only in very limited types of cases and is, therefore, not a feasible option. With regards to the cases where the ICC has jurisdiction, though, its procedures can, to a certain extent, be used to exert pressure on TCCs.

Due to the lack of a comprehensive and adequate avenue for accountability, it is clear that further measures are required. The UN has a key role to play with regards to these measures. The organisation must start negotiating new provisions to be inserted into the model MoU that put pressure on TCCs to comply with their obligations. Provisions like requiring TCCs to report in full on progress of cases and combining obligations with sanctions are important initial steps. However, for the long-term, efforts must also be made to challenge the exclusive jurisdiction of TCCs. The option favoured by this study is the creation of a new international tribunal with subsidiary jurisdiction over SEA committed by peacekeepers. This solution would give TCCs the possibility to fulfil their responsibility to investigate and prosecute their national military contingents. In other words, the primary jurisdiction of TCCs would be retained. The international tribunal would, however, have the power to examine the steps taken and decisions made by TCCs in specific cases. If the investigation and/or prosecution of the TCC is found to be ingenuine, the tribunal would be able to exercise its subsidiary jurisdiction and thus ensure accountability.

Admittedly, stronger measures like these are difficult to implement. They also run the risk of states being less likely to contribute troops. While it is important to keep these disadvantages in mind, and perhaps take measures against them, they should not discourage the UN from taking steps to increase criminal accountability for peacekeepers. The fight against impunity must go on even if it proves a lengthy one.

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