

**PROTECTION OF CHILDREN'S RIGHTS IN PEACEKEEPING MISSIONS:
ANALYSIS OF SEXUAL EXPLOITATION AND SEXUAL ABUSE**

**Submitted in partial fulfilment of the requirements for the degree LLM
(Human Rights and Democratisation in Africa)**

By

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DECLARATION

I, **Estelle Inès Nkounkou-Ngongo**, declare that the work presented in this dissertation is original. It has never been presented at any other university or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed:.....

Date:.....

This dissertation has been submitted for examination with my approval as University supervisor

Dr. Henry Odimbo Ojambo

Signed:.....

Date.....

DEDICATION

When you about to lose hope never forget that god is there for you and nothing is impossible to him

Thank you to god for all his blessing

To Marie Ndebolo

Without your determination I would have never achieve this, thank you Mom for your Love and support'

To Auguste Nkounkou

Dad, find an occasion to be proud of me

To my sisters and brothers, may this be an example for you and I hope you will achieve more, thank for supporting me

To my stepmother and stepfather, to have you is a blessing thank you for all that you have done for me.

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LIST OF ABBREVIATIONS

BOI	Board of Inquiry
CAT	Convention against Torture and others Cruel inhuman and Degrading Treatment or Punishment
CPA	Child Protection Adviser
CEDAW	Convention on the Elimination of all Forms of discriminations against Women
CRC	Convention of the Rights of the child
DKPO	Department of Peacekeeping Mission
DRC	Democratic Republic of Congo
ECOMOG	Economic Community of West African States cease-fire Monitoring Group.
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MONUC	United Nations Mission in Democratic Republic of Congo
MINUCART	United Mission in the Central African Republic and Chad
MRM	Monitoring and Reporting Mechanism for children in situation of Armed Conflict
NATO	North Atlantic Treaty Organization
OIOS	Office of Internal Oversight Services
OASEA	Office for Addressing Sexual Exploitation and Abuse
SEA	Sexual Exploitation and Sexual Abuse
SGTM	Standard generic Training Modules
SOFA	Status of Forces Agreement
UN	United Nations
SOMA	Status of Mission Agreement
TCCs	Troop Contributing Countries
UNAMID	African Union/United Nations Hybrid Operation in Darfur
UNBIBH	United Nations Mission in Bosnia and Herzegovina
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNOMOZ	United Nations Operations in Mozambique

UNTSO

United Nations Truce Supervision Organisation

CHAPTER 1

INTRODUCTION

1.1 Background to the Study

Peacekeeping is a key element in maintenance and restoration of international peace. During the last years, peacekeeping missions had valuably contributed to the preservation of international peace and security. It also played an important role in improving the lives of millions of people besieged by armed conflicts. However, these last years, peacekeeping was more evoked in relation with recurrent allegations of sexual exploitation than for its successes in peacekeeping. Acts of Sexual exploitation and sexual abuse (SEA) of children by peacekeepers were particularly targeted¹ because children constitute the large majority of the victims. Children during post-conflict periods are mainly abandoned or orphans;² this situation increases their vulnerability to SEA. Most of them have to struggle to survive, as they become heads of their families.³

¹ 'UN to probe allegation of child sex abuse in Sudan' *USA Today*, 1 February 2007. <http://www.usatoday.com/News/world/2007.01-02-un-sudan_x.htm> (accessed 13 February 2007). See also 'UN: Peacekeepers need formal discipline', Published on 30 May 2007 at <http://www.upi.com/InternationalIntelligence/Briefing/2007/05/30/un_peacekeepersneedformaldiscipline/1507> (accessed 2 June 2007).

² Payment ranged from two eggs to \$5 per encounter, OIOS said. Some of the victims were Abandoned orphans and they were often illiterate. 'Peacekeepers' sexual abuse of local girls continuing in DR of Congo, UN finds' *UN News Service*, 7 January 2005 quoted in 'Refugee Sexual Abuse', IO WATCH article <<http://www.iowatch.org/archive/ruleoflaw/refugeesexualabuses.shtml>> (accessed 20 August 2007).

³ Without adequate food, shelter, clean water, and medical attention, and the absence of protection of parents, governments, or humanitarian organizations, children are at a greater risk for sexual abuse, abduction, exploitation, and military recruitment. Save the Children, Health, Child Survival, <http://www.savethechildren.org/health/child_survival/index.asp> (last visited Feb. 29, 2005), see Impact of Armed Conflict on Children, Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157, U.N. GAOR, 51st Sess., Provisional Agenda Item 108 PP 1-8, U.N. Doc. A/51/306 PP 67-68.

Lacking sufficient mental capacity to appreciate the significance of choices and their consequences,⁴ children make mistakes as illustrate by the following:

If I go and see the soldiers at night and sleep with them, then they sometimes give me food, maybe a banana or a cake. I have to do it with them because there is nobody to care, nobody else to protect Joseph except me. He is all I have and I must look after him.⁵

Protection of children rights in situations of armed conflict is a sensitive issue and cannot be the sole duty of the UN. Nevertheless, as principal representative of the international community, it has the primary duty to secure their protection, particularly in peacekeeping missions it initiates. The UN's strategy to fight SEA within its operations is based essentially on preventive measures. Absence of deterrent sanctions fuels widespread SEA, despite efforts to eradicate it. Sentences given in peacekeeping missions depend on the status of peacekeepers and are mostly administrative measures.⁶ UN's capacity to prosecute its personnel is limited accordingly to the dispositions of its rules and guidelines.⁷ Thus, it depends on compliance of states that provide troops to investigate and punish alleged violators.⁸

⁴ 'Children's Rights' in Stanford Encyclopedia of philosophy, first publication on 16 October 2002 , Substantive revision on 13 October 2006 <http://plato.stanford.edu/entries/rights-children/> > (accessed 25 October 2007).

⁵ 13-year-old internally displaced girl in Bunia, Democratic Republic of the Congo (Holt 2004) quoted Spencer 'Making Peace; Preventive and Responding to Sexual Exploitation by United Nations Peacekeepers' <<http://www.princeton.edu/~jpia/pdf2005/Chapter%208%20Spencer.pdf>> (accessed 12 September 2007).

⁶ The UN has no authority to punish offenders; all it can do is try to ensure that the Code of Conduct is enforced, and that means repatriating when they offend. Proper investigations should be held and a file prepared so the accused can contest the allegations, and if it is shown that there is a prima facie case it should go back to the peacekeepers' country for further investigation and a trial, or some form of disciplinary proceeding should take place. The other option would be for the member state to waive the immunity and do it there. J. Stuart 'Dark Side of Peacekeeping', *The Independent*, London, 10 July 2003, quoted in M. O'Brien in 'Overcoming the boys-will-be -boy's syndrome: Is prosecution of peacekeepers in the International Criminal Court for trafficking, sexual slavery and related crimes against women a possibility?' Master Thesis (2004), *International Human Rights Law* <[http://www.jur.lu.se/Internet/english/essay/Masterth.nsf/0/74_642C18466271E0C1256F63002CB543/\\$File/xsmall.pdf?OpenElement](http://www.jur.lu.se/Internet/english/essay/Masterth.nsf/0/74_642C18466271E0C1256F63002CB543/$File/xsmall.pdf?OpenElement)> (accessed 24 September 2007).

⁷ According to their different status, jurisdiction to which peacekeepers could be subject varies. For instance Status of Forces Agreements provide for jurisdictional immunity of personnel on mission, recognizing the sending state's primacy in the exercise of jurisdiction. See S. Zappala. 'Are some

Troops Contributing Countries (TCCs) are often reluctant to prosecute their soldiers. As noted by Murray, there is an obvious lack of political will to hold them accountable.⁹ Consequently, despite the existence of accountability mechanisms in the UN, the idea that people who work for the UN, particularly peacekeepers, enjoy immunity for condemnable acts is recurrent.¹⁰

Though accountability presumes punishment, it is first the establishment of someone's responsibility that is crucial. Whether establishment of that responsibility could or could not lead to prosecution depends on the gravity of the act committed. Nevertheless, an accountability mechanism beyond establishing responsibility aims to provide remedies to victims. Criticisms against the UN's accountability mechanism reside in the fact that the findings of those mechanisms are not used adequately to address the problem and provide victims with appropriate remedies. Furthermore, when sanctions are applied, they do not often equal the harm perpetrated.

Children lack capacity to secure efficient laws to protect their rights; they totally rely on adults for protection. States are primarily responsible for ensuring their protection. Nonetheless, the absence of a functional legal framework in the host country usually

peacekeepers better than others? UN Security Council resolution 1497 (2003) and the ICC' (2003) *Journal of International Criminal Justice* 673.

⁸ n 7 above.

⁹ J Murray 'The Failure to establish accountability for the participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina' (2002) *34 Columbia Human Rights Review*, 510.

¹⁰ indeed, as reported in the Zeid Report, there is a widespread perception that peacekeeping personnel, whether military or civilian, who commit acts of sexual exploitation and abuse rarely if ever face disciplinary charges for such acts and, at most, suffer administrative consequences. Nor are they held to account financially for the harm that they cause to their victims. There is a similar perception that peacekeeping personnel who commit acts of sexual exploitation and abuse that constitute crimes under generally accepted standards (e.g., rape or sexual relations with young children) are not normally subjected to criminal prosecution, whether by court martial or by trial before a national criminal court, which would have been the inevitable result if they had committed such acts in their home countries. Such perceptions are not without foundation, see 'Comprehensive Review of the whole question of peacekeeping operations in all aspects' A/59/710 of 24 March 2005 (hereinafter Zeid Report) Part V para 66 <<http://www.peacekeepingbestpractices.unlb.org/pbpu/library/A-59-710%20English.pdf>> (accessed 20 February 2007).

prevents it from providing its citizens with real protection against acts such as SEA. It falls therefore to the UN to ensure respect and protection of the rights of such citizens. The creation of two new peacekeeping missions in Darfur, Central Republic and Chad during this year,¹¹ reinforce the indisputable role of peacekeeping in maintaining international peace. However, the above mentioned countries are well known as being areas with a large number of unaccompanied children in extreme situations of vulnerability.

1.2. Statement of the problem

Peacekeeping mission presuppose maintain of peace and safeguarding for people especially children. However, peacekeepers are becoming the fox in the box kitchen for the large numbers of abandoned or orphaned children there are suppose to protect. The presence of peacekeepers, often expose the children to the threat of SEA. Recent allegations of SEA perpetrated against children in Darfur,¹² raise questions about the UN's capacity to adequately protect children from SEA in peacekeeping mission areas.

1.3. Research question

Considering that the UN strategy to address SEA is mainly based on preventive measures, the research aims to answer the following questions:

- Are the UN preventive measures against SEA sufficient to protect children?
- What are the possibilities to improve the UN strategy on SEA to address concretely that issue?

1.4. Objectives of the Study

The objectives of this study are:

- To analyse the legal framework of peacekeeping operations to determine its strengths and weakness in addressing the issue of SEA.

¹¹ UNAMID (July 2007) and MINURCAT (September 2007)< <http://www.un.org/Depts/dpko/list/list.pdf>> (accessed 25 October 2007).

¹² 'UN to probe allegation of child sex abuse in Sudan' *USA Today*, 1February 2007 <http://www.usatoday.com/Com/news/world/2007.01-02-un-sudan_xhtm> (accessed 13 February 2007). See also 'UN: Peacekeepers need formal discipline', Published on 30 May 2007 at <http://www.upi.com/InternationalIntelligence/Briefing/2007/05/30/un_peacekeepersneedformaldiscipline/1507> (accessed 2 June 2007).

- To determine whether the UN's present accountability mechanism can adequately support protection of children's rights in peacekeeping operations.
- To explore the question of prosecution as a way to enhance the accountability mechanism in peacekeeping missions, particularly for TCC.

1.4. Literature Survey

There is extensive literature on the debate of SEA in peacekeeping missions. Although most of the issues that will be discussed in this paper have been subjects of studies, they did not focus on prosecution of peacekeepers, particularly TCC, as a primary means of ensuring children's protection.

Katayanagi,¹³ Kupper,¹⁴ and Cohn¹⁵ have written on the role of peacekeeping missions and their implication in protection of children's rights, especially children in armed conflicts. Murray¹⁶ and Eba¹⁷ focus on accountability for peacekeepers. Scholars like Miller¹⁸ and Shotton¹⁹ examined the investigation system in peacekeeping missions. Murray criticises the weaknesses of the UN concerning the incidence of human rights violations in peacekeeping missions. She points out the problem of prosecuting UN peacekeepers, the difficulty of convicting them for human rights violations and the reluctance of states to subject their troops to prosecution.²⁰ Cohn supports the same

¹³ M Katayanagi 'Human Right Function of United Nations Peacekeeping Operations' (2002). *International Studies in Human Rights*.260-268.

¹⁴ J Kuper 'Military training and Children in Armed Conflict Law, Policy and Practice' (2005) 25

¹⁵ I Cohn 'The protection of children rights in peacemaking and peacekeeping process' (1999) 12 *Harvard Human Rights Journal* <http://www.aw.harvard.edu/students/orgs/hrj/iss12/cohn.shtml> (accessed 1 March 2007).

¹⁶ N 9 above .

¹⁷ Dissertation submitted in partial fulfillment of the requirements for the degree LL.M in Human Rights and Democratisation in Africa (Centre for Human Rights, University of Pretoria, 2004).

¹⁸ A J.Miller 'Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations' (2006) 39 *Cornell International Law Journal* 71 .

¹⁹ A.Shotton 'A Strategy to address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel' (2006) 39 *Cornell International Law Journal* 97.

²⁰ (...) The fact that no member of UNMIBH has ever been criminally prosecuted for trafficking-related indicates that there is an obvious lack of political will to hold them accountable see Murray n 9 above 510.

point.²¹ They both called for an international response to rights abuses and the obligation of the UN to take decisive action on the problem. They propose a review of the rule of immunity in the UN system²² and standardisation of investigation and discipline mechanisms of peacekeepers.²³

Miller and Shotton analyse conduct of investigation over peacekeeping and its challenges. They recognise the necessity of reviewing peacekeeping rules in order to make peacekeepers accountable. Miller calls for prosecution, especially the need for the UN to ensure that its staff and experts on missions, such as UN police officers and military observers, are not exempted from criminal prosecution for atrocities committed in countries with no functioning judicial system.

The present study examines whether the UN's efforts to address SEA satisfy criticisms of scholars.

1.5 Research methodology

This study is mainly a non-empirical analysis of the UN approach on SEA in its activities with a focus on peacekeeping missions. The main sources of the study will include library/desk research. Most of the materials will be accessed through the Internet, especially UN databases, Westlaw website and the UN special agencies' websites.

The study will be supported essentially by the results of the UN application of the recommendations made in the 'Comprehensive Review of the whole question of peacekeeping operations in all aspects,'²⁴ done by Prince Zeid Ra'ad Zeid al-Husseini, UN ambassador from Jordan and Koffi Annan's special adviser (UN former Secretary-General) after the DRC scandal.²⁵ Comments and critics of scholars concerning the UN approach of SEA will be also used.

²¹ According to the Machel study, the story of abuse by UNOMOZ peacekeepers ended when the Soldiers implicated were sent home. 'We do not know what measures, if any, were taken domestically by the Italian government. See Cohn 15 above 153.

²² Various States and international organisations have taken steps to enact legislation enabling them to assume extra-territorial jurisdiction over certain crimes including trafficking. (...) others provide for universal jurisdiction for trafficking crimes perpetrated by any person anywhere in the world see Murray n 9 and 20 above 511.

²³ n 10 above.

²⁴ n 10 and 23 above.

²⁵ J Loconte 'The U.N. Sex Scandal', From the January 3 / January 10, 2005 issue: Exploitation,

1.6. Limitation of the study

The study limits itself on the second side particularly on the protection of children rights between the ages of 0 to 14, who are usually considered to be under the legal age of sexual consent. Acts of SEA perpetrated by peacekeepers from national contingents constitute a major part of the analysis.

1.7. Definition of concepts

1.7.1. Who are peacekeepers?

Peacekeeping is a way to help countries torn by conflict create conditions for sustainable peace.²⁶ Peacekeepers represent the UN in the country where they are present to help it recover from the trauma of a conflict. Soldiers, civilian police, officers and other civilian personnel usually constitute peacekeepers or 'blue helmets' (referring to their blue helmets). Three power centres²⁷ govern UN peacekeeping. They are the Special Representative of the Secretary-General, who acts as the official leader of the mission, the Force Commander, who is responsible for military forces deployed and the Chief Administration officer who oversees supplies and logistics.²⁸ The fundamental role of peacekeepers is to sustain and build peace in a country after a conflict and to promote and respect human rights values as embodied in the UN's rules.²⁹

1.7.2. Sexual exploitation and sexual abuse

In the context of UN peacekeeping, sexual exploitation is '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 is defined as 'actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.'³⁰

Abuse and other humanitarian efforts 01/03/2005, Volume 010, <<http://www.Weeklystandard.com/Content/Public/Articles/000/000/005/081zxeiz.asp>> (accessed 27 February 2007.)

²⁶ 'Peacekeeping' <<http://en.wikipedia.org/wiki/Peacekeeping>> (accessed 24 August 2007).

²⁷ See Miller n 18 above 106-107.

²⁸ See Miller n 18 and 27 above 84.

²⁹ 'We are United Nations Peacekeepers' <http://www.un.org/Depts/dpko/Training/tespublications/booksPeacekeeping_training/pocket_cards/un_in.pdf> (accessed 28 August 2007).

³⁰ United Nations Secretariat, Secretary-general's Bulletin, Special Measures for Protection from Sexual Exploitation and Sexual Abuse <<http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=405ac6614>> (accessed 24 March 2007).

1.7.4. Protection of children's rights

The CRC is the principal instrument that guarantees protection of children's rights. It is the most signed human rights instrument in the world. The CRC is supported by other regional instruments such as the ACWRC. The European and American Human Rights Conventions also have provisions that secure children's protection. The terms sexual exploitation and sexual abuse is undefined in majority of international human rights instruments that deal with children's rights. Nevertheless, article 34 obliges states parties to adopt comprehensive measures against sexual exploitation and abuse of children.³¹ In peacekeeping mission, acts of sexual exploitation and sexual abuse against children amount to a grave crime because of to the unequal relationship between children and peacekeepers. Because of the vulnerability of children, peacekeepers can easily take advantage of them.³²

1.8 Summary of Chapters

The study is divided into four chapters. Chapter one provides the context in which the study is set, the focus and objectives of the study, its limitation and other preliminary issues including hypothesis and literature review.

Chapter two seeks to explain the nature of the regime that governs UN peacekeeping missions, the limitations of its scope and the causes of those limitations.

Chapter three covers the largest part of the main debate in this study and discusses the challenges of peacekeeping investigation and its limitation. It discusses the importance and urgency of the implementation of necessary measures to deal specifically with children's protection from SEA in peacekeeping missions. Furthermore, it explores methods to improve the UN's accountability mechanisms such as prosecution.

³¹ V. Muntarhorn 'A commentary on the United Nations Convention on the Rights of the Child Article 34 sexual exploitation and sexual abuse of Children' (2007) 1.

³² Majority of the victims like young girls, between twelve and eighteen years of age were engaged in 'survival sex' to obtain food perhaps a tablespoon of peanut butter, or a small amount of money. S. Notar 'Legal Implications of Abuses by UN Peacekeepers a case study o sexual abuse by UN Peacekeepers in the D.R. Congo' <http://ipoaonline.org/en/journal/journal_2007_0102.pdf> (accessed 20 August 2007).

Ultimately, the fourth and final chapter sums up the findings of the previous chapter and provides some recommendations.

CHAPTER: 2. ANALYSIS OF THE LEGAL FRAMEWORK OF PEACEKEEPING MISSIONS

2.1 INTRODUCTION

Peacekeeping is a way to help countries torn by conflict create conditions for sustainable peace, with the consent of the conflicting parties.³³ Demurenko and Nikitin³⁴ define it as a common term for various types of activity carried out to resolve conflict, prevent conflict escalation, halt or prevent military actions and uphold law and order in a conflict zone. It also permits humanitarian action, restoring social and political institutions whose functioning has been disrupted by the conflict, and restoring basic conditions for daily living. Peacekeeping missions have been one of the most important contributions of the United Nations (UN) to the preservation of peace in the world.

Peacekeeping is a UN invention³⁵ that was created initially to resolve conflict in the Middle East with the creation of the United Nations Truce Supervision Organisation (UNTSO).³⁶ This mission was followed by the creation of the United Nations Military

³³ 'What is Peacekeeping?' <<http://www.un.org/Depts/dpko/field/pkeep.htm>> (accessed 16 August 2007) see also A. E. Eckert 'United Nations peacekeeping in collapsed states'(1996) 5 *Journal of International Law and Practice*, the traditional requirement of consent respects the host state's sovereignty. Such respect for state sovereignty is expressed practically through the principle of non-intervention of prohibited under the UN Charter art 2(7) 297.

³⁴ Colonel A. Demurenko and Professor A Nikitin 'Basic Terminology and Concepts in International Peacekeeping Operations: An Analytical Review' translated by R.R. Love *Foreign Military Studies Office, Fort Leavenworth, KS* <<http://fms.leavenworth.army.mil/documents/pkterms.htm>> (accessed 16 August 2007).

³⁵ Boutros Boutros-Ghali, 'Empowering the United Nations' (1992/93).5 *Foreign Affairs* 71, quoted in 'Peacekeeping is an U.N. Invention,' McNair Paper Number 58, Searching for Partners: Regional Organizations and Peace Operations, Chapter 1, June 1998 <<http://www.ndu.edu/inss/mcnair/mcnair58/sproch1.html>> (accessed 27 August 2007).

³⁶ The UNTSO was the first peacekeeping operation established by the UN, the UNTSO military remain in the Middle East to monitor ceasefires, supervises armistice agreements, prevent isolated incidents from escalating and assist other UN peacekeeping operations in the region. <http://www.un.org/Depts/dpko/missions/untso/> (accessed 27 August 2007).

Observer Group in India and Pakistan (UNMOGIP)³⁷ in 1948. In 1992, Boutros Boutros-Ghali³⁸ decided to create the Department of Peacekeeping Operations (DPKO). The role of the DPKO is to assist Member States and the Secretary-General in their efforts to maintain international peace and security. The Department plans, prepares, manages and directs UN peacekeeping operations, for the fulfilment of their mandates under the overall authority of the Security Council and General Assembly, and under the command vested in the Secretary-General.

The DPKO also provides political and executive direction to UN peacekeeping operations, and maintains contact with the Security Council, troops and financial contributors, and parties to the conflict in the implementation of Security Council mandates. It works to integrate the efforts of the UN, governmental and non-governmental entities in peacekeeping operations by providing guidance and support on military, police, mine action, and logistical and administrative issues to other UN political and peace building missions.³⁹

Three principal levels constitute the legal framework of peacekeeping. At the outset, the UN Charter laid down the foundation of peacekeeping missions, notably in chapter VI and VII. The second legal framework is rules and guidelines that govern its functioning and lastly national laws and treaties ratified by each contributing country to peacekeeping missions. The existence of these three legal frameworks impacts heavily on the success of peacekeeping missions due to the difficulty of harmonisation.⁴⁰ This chapter examines the different levels of the legal framework. It further analyses the issue of consent, which is fundamental in peacekeeping missions. Ultimately it considers different fora that have jurisdiction over peacekeeping matters.

³⁷ Set up in 1949, the UNMOGIP was deployed in January of that year to supervise the ceasefire agreed between India and Pakistan in the State of Jammu and Kashmir. Since renewed hostilities in 1971, UNMOGIP monitors the ceasefire called for by the United Nations Security Council. <http://www.un.org/Depts/dpko/missions/unmogip/9> accessed (accessed 27 August 2007).

³⁸ United Nations Secretary-General (1992-1997).

³⁹ DPKO Mission Statement <http://www.un.org/Depts/dpko/dpko/info/page3.htm> (accessed 27 August 2007).

⁴⁰ This is particularly true in matter of investigation. Troop contributing countries frequently complain that evidence gathered by mission boards of inquiry and in prior preliminary investigations is either not sufficient under their national law for use in subsequent judicial or court martial proceedings or has not been gathered in a manner required by their law. Para 28 Zeid Report 14 n 10 above.

2.2. United Nations Charter (UN Charter)

Peacekeeping cements the international community's commitment to the protection and perseverance of international peace and security. This is one of the United Nations' purposes as stated in article 1 (1) of the UN Charter:⁴¹To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace

Furthermore, chapters VI and VII of the UN Charter set down complementary mechanisms for maintaining international peace. Article 33 of chapter VI particularly encourages parties to any dispute to seek solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and any other peaceful means of their choice.⁴² Chapter VII is the cornerstone of peacekeeping missions as it deals with peace enforcement. Article 42 empowers the Security Council to take any action by air, sea, or land forces as may be necessary to maintain or restore international peace. Article 43 (1) requests the participation of member states through contribution to the maintenance of international peace and security by making available for the Security Council in accordance with a special agreement, armed forces, technical assistance and facilities. Contributions of member states shall be subject to an agreement that governs the numbers and types of forces, their degree of readiness and general location.⁴³ For that purpose paragraph (3) of article 43 states:

The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and

⁴¹ United Nations Charter 26 June 1945 'Human Rights Education Projects' (CD-ROM) University of Peace 2004.

⁴² The Charter itself does not mention peacekeeping operations, but they could be subsumed under one or more of the provisions of Chapter 6 of UN Charter (as part of mediation, negotiation, or preventive diplomacy); or under Chapter 7 enforcement measures in the mode of peace enforcement. T. M. Ocran 'How blessed were the UN peacekeepers in former Yugoslavia? The involvement of UNPROFOR and other UN bodies in humanitarian activities and human rights issues in Croatia 1992-1996' (2000) *18 Wisconsin International Journal* 195.

⁴³ Art 43(2) Chapter VII, UN Charter n 41 above

members or between the Security Council and group of members and shall be subject to ratification by signatory states in accordance with their respective constitutional processes.

The above articles give directions on military matters and the conduct to follow to sustain and peace enforcement.⁴⁴ As Ecker points out, although the precise definition of peacekeeping is debatable, considerable consensus has evolved around the core functions and characteristics of peacekeeping.⁴⁵ Peacekeeping represents the ultimate way to facilitate the resolution of a conflict after exhaustion of all other means provided in article 33. Traditional peacekeeping operations help 'to stop or contain hostilities and thus help create conditions in which peace-making⁴⁶ can prosper; or to supervise the implementation of an interim or final settlement which has been negotiated by the peace-makers.'⁴⁷

2.3. Resolution of the Security Council

If the conditions described above are fulfilled, the Security Council decides to create a peacekeeping mission. Peacekeeping missions are created by a Security Council Resolution that defines the mission, provides for its mandate and the description of the mission's tasks. The Security Council Resolution can establish a new mission or just change the mandate or strength of an existing mission.⁴⁸ The Resolution plays an important role as it is the first document that legitimates a peacekeeping mission. International peacekeeping or peace enforcement missions without prior Resolution from the Security Council is viewed as illegitimate.⁴⁹ There is a notable difference between an intervention allowed by the UN and intervention without the UN's prior accord.⁵⁰

⁴⁴ n 41 and above articles 44 to 51.

⁴⁵ G.A. Res. 1001 (ES-I), U.N. GAOR First Emergency Special Sess., Supp. No. 1, at 3, U.N. Doc A/3354, quoted in Eckert n 33 above 278.

⁴⁶ Peacemaking addresses conflicts in progress, attempting to bring them to a halt, using the tools of diplomacy and mediation. 'UN Brahimi Report: Doctrine, strategy and decision making for peace operations' In *'Compendium of key documents relating to peace and security in Africa'* (2006) M.Juma, R.V. Garcia & B. Kesselman (eds) 426.

⁴⁷ n 43 above.

⁴⁸ 'Who decides to dispatch a UN peacekeeping operation and who is in charge on the ground?' <<http://www.un.org/Depts/dpko/dpko/faq/q8.htm>> (accessed 15 August 2007).

⁴⁹ The legitimacy of NATO's bombing Campaign in Kosovo has been the subject of a large number of debate.

2.4. Rules and guidelines

Rules and guidelines of peacekeeping missions are mostly administrative measures. However, they play a central role in peacekeeping operations. The principal rule of peacekeeping mission is the Secretary-General's bulletin entitled 'status of basic rights and duties of United Nations staff members,'⁵¹ which includes the 'standards of conduct for the international Civil Service Commission' is the. It shall be followed by all categories of peacekeepers. Furthermore, the 'Ten rules: on the code of Personal conduct for blue helmet'⁵² (the Ten rules) and 'we are United Nations peacekeepers'⁵³ as indicated by their title deal with peacekeepers individual conduct. The Secretary-General's bulletin 'on Special measures for protection from sexual exploitation and sexual abuse',⁵⁴ complete the rules and guidelines of UN peacekeeping missions. In addition, several rules and guidelines regulate peacekeepers conduct with respect to their different status.

NATO did not have the backing of the United Nations Security Council to use force in Yugoslavia. 'Kosovo War' from Wikipedia, the free encyclopaedia < http://en.wikipedia.org/wiki/Kosovo_War > (accessed 6 October 2007). For Shinoda in orthodox view of war, as a military conflict between sovereign states, an intervention is justified if there is a UN resolution and there exists an internationally recognised threat to the peace, which makes a military attempt to restore peace legitimate see H. Shinoda 'The politics of legitimacy in international relations: the case of NATO's intervention in Kosovo' (2000) *Institute for Peace Science, Hiroshima University*. <<http://ics.leeds.ac.uk/papers/pmt/exhibits/779/shinoda.pdf>> (accessed 6 October 2007).

⁵⁰ n 46 above.

⁵¹ Available at <http://www.onuci.org/archives/feature_stories/abus%20sexuel/6.pdf> (accessed 27 February 2007).

⁵² Available at <<http://ocha.unog.ch/ProCapOnline/docs/library/UN%20Blue%20Helmets%20Codes%20of%20Conduct.pdf>> (accessed 27 August 2007).

⁵³ Available at <<http://www.un.org/Depts/dpko/training/tespublications/books/peacekeepingtraining/pocketcar//unin.pdf>> (accessed 28 August 2007).

⁵⁴ Available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/550/40/PDF/N0355040.pdf?OpenElement>> (accessed 3 March 2007) several documents and reports complete the bulletin, notably the Zeid Report followed by others specifically reports on SEA by the Secretary-General. Report of the Secretary-General on special measures for protection from sexual exploitation and sexual abuse (2005). Report of the Secretary-General on special measures for protection from sexual exploitation and sexual abuse (2006). 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 (2006).

2.4.1 Rules and guidelines with regard to categories of peacekeepers

The basic standards of conduct and integrity to be respected by diverse categories of peacekeeping personnel are all derived from principles established in Article 101, paragraph 3 of the UN Charter, which require the highest standards of integrity of UN officials.⁵⁵ Noticeable differences exist in their application with respect to their personal status. However, a minimum standard is expected from all categories of peacekeepers.

2.4.1.1. United Nations Staff (UN Staff)

UN staffs are requested to respect rules and guidelines of peacekeeping without exception. They have the status of officials under the Convention on the Privileges and immunities of the United Nations (the General Convention).⁵⁶ Section 18 of the General Convention provides that officials are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. However, UN staffs are bound by provisions set out in the rules and guidelines notably in the Secretary-General's bulletin on Special measures on SEA. In case of misconducts, they are subject to the disciplinary mechanisms established by the staff Regulations and Rules.⁵⁷

2.4.1.2. United Nations Civilian police and Military observers (Civil police and Military)

Like UN staff, they enjoy immunities of the General Convention and are considered as experts on missions. They are expected to respect provisions set down in the different rules and guidelines. They follow the same code of conduct as UN staff in addition to the Ten rules and principles provided in 'We are UN peacekeepers'. Civil Police and Military are subject to the same disciplinary mechanism as UN staff.

⁵⁵ Art 101 (3) particularly emphasis that requirement: 'The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible' n 41 above. <[http://www.unogch/80256EDD006B8954/\(httpAssets\)/C8297DB1DE8566F2C1256F2600348A73/\\$file/Convention%20P%20&%20I%20\(1946%20-%20E.pdf](http://www.unogch/80256EDD006B8954/(httpAssets)/C8297DB1DE8566F2C1256F2600348A73/$file/Convention%20P%20&%20I%20(1946%20-%20E.pdf)> (accessed 12 August 2007).

⁵⁷ 'Rules Of Procedure and Guidelines of the Joint Disciplinary Committee at Headquarters' <<http://www.un.org/org/staff/panelofcounsel/pocimages/jdcrules.pdf>> (accessed 5 August 2007) see also paras A27-A35 Zeid Report, *Annex 'United Nations peacekeeping personnel: status and rules of conduct and discipline* 38 n 10 above.

2.4.1.3 Troops Contributing Countries (TCCs)

TCC have a particular status; they benefit from the immunities set out in the Status of Forces Agreement (SOFA)⁵⁸ and are subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences committed in the host States.⁵⁹ However, they should follow the principles of the 'Ten rules of personal conduct of peacekeepers' and 'we are UN peacekeepers'. Concerning the rules of discipline, they should be subjected to the procedures instituted by their national contingents.

2.4.1.4 United Nations Volunteers (UNV) and Individuals Contractors

UNV and individual contractors have the same status as UN Staff, but are subject to the UN volunteers programme's rules of conduct. Accordingly, they are immediately dismissed in cases of violation of the rules of conduct. Disputes involving UNV are subject to arbitration.⁶⁰ Individual contractors also have UN staff status and follow the rules of conduct set out in their contract. In cases of misconduct, their contract ceases instantly. Like the UNV, their disputes are subject to arbitration.⁶¹

2.5. Legal regime and treaties

This regime is mostly governed by national laws and treaties ratified by state parties participating in peacekeeping missions. As stated above, TCC are subject to their national laws and all the treaties ratified *inter alia* by their home countries.

2.5.1. National laws

Domestic laws play a predominant role in peacekeeping missions, notably in matters of jurisdiction. Agreement concluded between states participating in peacekeeping missions and the UN gives the sending country primary jurisdiction over its nationals.⁶²

⁵⁹ As n 5 above.

⁶⁰ Paras A36-A39 Zeid Report ,Annex 'United Nations peacekeeping personnel: status and rules of conduct and discipline' 40-41 see n 10 and 57 above.

⁶¹ Paras A40-A42 of the Zeid Report, Annex 'United Nations peacekeeping personnel: status and Rules of conduct and discipline' 41 see n 10 and 60 above.

⁶² The territorial state recognizes that foreign personnel acting on its territory are under the *primary* jurisdiction of the sending state. Very often, Status of Forces Agreements provide for jurisdictional immunity of personnel on mission, recognizing the sending state's primacy in the exercise of jurisdiction see n 7 above 673.

National laws are important in matters of investigation over a contingent member.⁶³ However, the power of national laws does not stop at jurisdiction. It sometimes extends to the functioning of the peacekeeping mission itself.⁶⁴

2.5.2. Treaties ratified

The 20 principal Troops Contributing Countries⁶⁵ and 20 major contributing countries in terms of budget⁶⁶ have ratified several international treaties. These treaties represent a legal basis for peacekeeping missions in that it binds states with regard to the treaties to which they are parties. The Geneva Conventions and its Protocols are the most widely ratified. However, major international human rights instruments are ratified by large majority of participating countries. Treaties like the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against women (CEDAW) and Protocol, the Convention Against Torture and Others Cruel, inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child, ratified by almost all the UN members states⁶⁷ and its protocol on the sale of children, child prostitution and child pornography provide for protection of children rights against SEA. Whilst engaging in peacekeeping operations, participating

⁶³. The Zeid Report recommended that the TCC send an expert in military law to be a member of the investigation Unit to ensure that evidence are collected in a way that satisfies the requirement of the TCC's applicable law see n 10 above see also Miller n 18 above 84.

⁶⁴ Although the UN nominally commands peacekeeping missions unless a country is specifically tasked to lead the operation in practice each contingent has considerable leeway to act at its own discretion and remains under the authority of its own government. Nationals' contingents regularly communicate directly with their home state adhere to their own rules of engagements and choose whether or not they will obey the Force commander A J.Bellamy, P.Williams & S.Griffin 'Understanding Peacekeeping' (2004) 51.

⁶⁵ Pakistan, Bangladesh, India, Nepal, Jordan, Ghana, Uruguay, Italy, Nigeria, France, Senegal, Ethiopia, China, Morocco, Benin, Brazil, South Africa, Spain, Kenya, Indonesia. 'United Nations Peacekeeping Fact Sheet' <<http://www.un.org/Depts/dpko/fact sheet. PDF>> (accessed 10 August 2007).

⁶⁶ USA, Japan, Germany, UK, France, Italy, China, Canada, Spain, Netherlands, Australia, Russian Federation, Switzerland, Belgium, Sweden, Austria, Norway, Denmark, Greece, as n 65 above.

⁶⁷ Except Somalia, Tanzania and the USA, all the UN members states are parties to the CRC, see ratifications and reservations on the Convention on the Rights of the Child New York, 20 November 1989< <http://www.ohchr.org/english/bodies/ratification/11.htm> > last update 13 July 2007 (accessed on 20 October 2007).

countries promise to respect provisions set out in these treaties in the territory of the receiving countries as well they would in their own territory.

Though, the argument of the extension beyond the territories of state parties to such treaties is evident in the jurisprudence of several treaty monitoring or supervisory bodies.⁶⁸ There is also a counter argument that tends to limit effects of the obligations generated by treaties signed by a given country within the boundaries of its territory.⁶⁹ However, the rising concern about the respect of human rights weak considerably the later, in consequence states are required to meet their obligation without limitation to their sole territory.

2.5.3. The issue of sovereignty

The notion of sovereignty is entrenched in article 2(1) of the UN Charter. It represents the legal identity of the state in international law.⁷⁰ The importance of sovereignty is universally recognised as fundamental to the existence of a state. A sovereign state is

⁶⁸ the United Nations Commission on Human Rights strongly condemned the Israeli occupation of the territories as being a flagrant violation of *human rights* (...) “[t]he measure of constructing the wall within the occupied Palestinian territory and related measures taken by the Government of Israel” includes, inter alia, “[i]nfringements on the freedom of movement contrary to the International Covenant on Civil and Political Rights.” See, Dr B. A. Feinstein ‘the applicability of the regime of human rights in times of armed conflict and particularly to occupied territories: the case of Israel’s security barrier’ (2005) 4 *Northwestern University Journal of International Human Rights* 1, Israel infringes its obligation under the Covenant in the Palestinian territory. The same argument is used by the ICJ in its advisory opinion about that issue. See M.J. Dennis ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 *American Journal of International Law* 141.

⁶⁹ From its analysis of the ICJ Advisory opinion on the Construction of a wall in the Occupied Palestinian Territory, Dennis concludes that the obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to situations of international armed conflict and military occupation offers a dubious route toward increased state compliance with international norms. A judicial requirement of broader application of the peacetime protections provided under these instruments during periods of armed conflict and military occupation is likely to produce confusion rather than clarity and increase the gap between legal theory and state compliance. See M.J. Dennis as n 66 above 141.

⁷⁰ ‘The Responsibility to Protect’ (2001) *ICISS Report* <<http://www.idrc.ca>> (accessed 14 March 2007).

empowered in international law to exercise exclusive and total jurisdiction within its territorial borders. This implies the primary responsibility for the protection of its people.⁷¹

The problem of consent in the creation of a peacekeeping mission, particularly in cases of internal conflict is a huge issue. Although, there are noticeable developments, the debate is still present. Sovereignty represents the primary recognition of territory as a state, consent therefore is entrenched in the respect of the sovereignty.⁷² In addition, since the creation of the first U.N. peacekeeping force, the consent of the parties to the conflict (or at least of the host state) has been considered an important prerequisite for the establishment and definition of peacekeeping operations.⁷³

This brings back the debate about the redefinition of the principle of sovereignty. It centres on whether the principle of sovereignty should be applied '*stricto sensu*', in matters of humanitarian intervention or peace enforcement, or as defended by the international human rights law, '*lato sensu*'. According to that position, the treatment of citizens is not only the exclusive concern of a particular state, but also the concern of the whole community,⁷⁴ which is responsible for the rights of every individual.⁷⁵ Accordingly, the binding effects of international treaties give to state parties' citizens, rights that have been agreed on a global level.⁷⁶ Thus, in some cases, other countries can even monitor and enforce human rights treaties against a state for the treatment of the offending

⁷¹ State sovereignty implies responsibility, and the primary responsibility for the protection, of its peoples lies with the state itself, as n 70 above.

⁷² Sovereignty is more than just a functional principle of international relations. For many states and peoples it is also recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny. In recognition of this, the principle that all states are equally sovereign under international law was established as a cornerstone of the UN Charter (Article 2.1) as n 41 above.

⁷³ See Spencer n 5 above.

⁷⁴ Human rights and humanitarian law are duties owed *erga omnes*, to the entire world. J.I. Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 *American Journal of International Law* quoted in Shinoda see n 49 above, Shinoda argument is that no derogation from *jus cogens* is permitted in a treaty, *jus cogens* is a body of norms which even the will of sovereign states cannot violate, see also 'The Issue of Sovereignty' 'International Law and Organisations' <<http://www.globalisation101.org/index.php?file=issue&pass1=subs&id=236>> (accessed 27 September 2007).

⁷⁵ As n 74 above.

⁷⁶ See Secretary-General Bulletin as 30 above.

state's own citizens.⁷⁷ To illustrate, supporters of the NATO intervention in Kosovo⁷⁸ that was widely criticised for its lack of Security Council permission justified it as a situation of humanitarian emergency.⁷⁹ However obvious threats to peace and security, or humanitarian disaster could be, the consent of states is still required⁸⁰ prior to any peacekeeping mission. This is particularly important in internal conflicts.⁸¹

2.6. Jurisdiction

The jurisdictional competence is determined by the status of peacekeepers and the nature of the crimes committed. UN staff, Civilian Police, Military Observers, UN volunteers, and Individual Contractors could be subjected to the jurisdiction of the receiving country when the action is not related to their official duty.⁸² Indeed, the

⁷⁷ See n 74 above.

⁷⁸ Politicians from NATO states used terms such as 'humanitarian bombing' and 'humanitarian war' to describe the intervention, see 'Kosovo war' n 49 above.

⁷⁹ O, Schachter states that on the absence of prior approval, a State or Group of States using force to put end to atrocities when the necessity is evident and the humanitarian intention is clear is likely to have its action pardoned. 'Interpretation and Change in the Law of Humanitarian intervention', quoted in T.M.Franck, 'Humanitarian *Intervention, Ethical, Legal and Political Dilemmas.*' (2003), J.L Holzgrefe & R.O.Keohane (eds) 215 .In addition, the Independent International Commission on Kosovo founded that: 'The NATO campaign was illegal, yet legitimate. Such a conclusion is related to the controversial idea that a '*right*' (emphasis added) of humanitarian intervention is not consistent with the UN Charter if conceived as a legal text, but that it may, depending on context, nevertheless, reflect the spirit of Charter as it relates to the overall protection of people against gross abuse' . 'Kosovo report' (2000) 186, quoted in J. Dugard 'International Law: A South African Perspective' (2005) 516.

⁸⁰ The conventional approach to peacekeeping requires the consent of the parties not only for the operation's establishment but also, in broad terms, for the way in which it will carry out its mandate see Spencer n 5 above.

⁸¹ In case of Darfur, although obvious were existence of gross human rights violations and well established threat to peace, particularly for neighbours countries, negotiations between the Security Council and the Sudan government for the envoy of a UN peacekeeping mission tool time, because of the refusal of Sudan to accept the deployment of an UN peacekeeping mission.

⁸² The SG determine whether the acts in question were performed in the course of official duties, and then take the decision to waive or not the immunity para A6 Zeid report 33 see n 10 above, in case where the host state has a functional judicial system that could handle the trial the matter is defer to its jurisdiction. For instance, the UN made an inquiry in East Timor into alleged sexual misconduct by Jordanian peacekeepers, the Transitional Administrator waived the immunity of a Civilian Police officer, probably Jordanian, who subsequently faced a rape charge, and was to be tried in Dili District Court. In ETAN (Reuters), 'UN peacekeepers in East Timor face possible sex

Secretary-General can waive their immunities and make them face justice if evidence is established that the alleged acts do not fall under those performed in their official functions.⁸³ In cases of TCCs as stated above, they remain under the jurisdiction of their home countries.⁸⁴ However according to some scholars, home countries jurisdiction is only primary jurisdiction. Zappalà argues that if the sending state decides not to exercise its jurisdiction, the territorial state courts may step in.⁸⁵ Thus, exclusive jurisdiction by the sending state may only exist over acts or omissions that are considered unlawful by that state but lawful by the receiving state.⁸⁶ Moreover, as Rwasiki observed that functional immunity and the 'standard of operational necessity' might conflict with democratic principles⁸⁷ because it runs counter to emerging rights to democratic governance, which require certain levels of accountability by governments to their people.⁸⁸

The International Criminal Court (ICC) has been viewed by some scholars⁸⁹ as the ideal forum for prosecution of peacekeepers. Nevertheless, the ICC's scope is considerably narrow. Indeed, ICC has jurisdiction over only serious crimes like genocide, crimes against humanity, war crimes and aggression.⁹⁰ Under the Rome Statute, sexual exploitation and sexual abuse is not a crime on its own; it is merely a component of the crime against humanity or war crimes.⁹¹ To constitute a crime against humanity or war crimes, some requirements contained in article 7 and 8 of the Statute must be fulfilled. The first requirement is that the act complained of must be part of a widespread or

charges,' 3 August 2001 <www.etan.org/et2001c/august/01-4/03unpeac.htm>, quoted in M.O'Brien n 6 above.

⁸³ The Secretary-General will first make a determination as to whether the acts in question were performed in the course of official duties. If the acts were not performed in the course of official duties, the Secretary-General will inform the local authorities that no functional immunity exists ,s 86 Zeid Report 28-29 n 10 above.

⁸⁴ See Rules of Procedures n 57 above.

⁸⁵ As n 57 and 84 above.

⁸⁶ As n 57 and 85 above.

⁸⁷ F. Rawsiki 'To waive or not to waive: immunity and accountability in U.N. peacekeeping operations' (2003) 18 Connecticut Journal of International Law, Westlaw article 124.

⁸⁸ T.Franck 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal international Law* 46 quoted in Rawsiki n 87 above 53.

⁸⁹ See O' Brien 6 and 82 above.

⁹⁰ Art 5(1) of the Rome Statute of the International Criminal Court of 1998, see University of Peace CD-Rom n 41above.

⁹¹ Art 7(2) and article 8(b) (xxiii) of the Rome Statute as 90 above.

systematic attack;⁹² secondly, the attack must be directed against a civilian population, and ultimately a specific form of intention must exist. In case of peacekeepers, acts of SEA are often isolated and not part of a massive attack. In addition, SEA does not concern only civilians; some cases concerned peacekeepers (especially women) which have been victims of sexual harassment.

For the ICC to have jurisdiction over SEA when committed by peacekeepers, a redefinition of the elements constitutive of crimes under the Statute would be necessary or the SEA should meet the Statute's requirements. Moreover, the ICC has jurisdiction only over nationals of state parties to the Statute.

However, the Security Council could indict a national from a non party state before the ICC as it was the case in Darfur. In 2005 through Resolution 1593,⁹³ the Security Council referred the case of Sudan to the ICC following the findings of the International Commission of inquiry on violations of international humanitarian law and human rights law in Darfur.⁹⁴ As noted by Wenqi,⁹⁵

Treaties are binding in principle only on states parties and do not create rights or obligations for non-party states. In the light of international law, that take account the authority of the UN Security Council under the UN Charter, the possible referral by the Security Council to the Court and the provisions of article 1 common to the Geneva Conventions of 1949, co-operation with the ICC is no longer voluntary in nature, but instead obligatory in the sense of customary international law.

In others words though a state is not party to the ICC Statute, it has the obligation to cooperate with the ICC in certain cases. For instance, article 87 of the Rome Statute empowers the ICC to ask any non-states party to provide judicial assistance on the basis of an 'ad hoc arrangement.'⁹⁶

⁹² Art 7(2); define attack as a course of conduct involving the multiple commissions of acts referred to in art 7(1) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack see Dugard n 79 above 185.

⁹³ Press Release SC/8351 'security Council refers situation in Darfur, Sudan, To prosecutor of International Criminal Court < <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>> (accessed 27 October 2007).

⁹⁴ Report S/2005/60 as 93 above.

⁹⁵ See Z. Wenqi 'On co-operation by states not party to the International Criminal Court' (2006) 88 International Review of the Red Cross Humanitarian debate: Law, policy, Action, International Criminal tribunals 861, 108.

⁹⁶ As n 95 above 109.

However, referral by the Security Council in peacekeeping matter is still on dispute, a case in point is the controversial resolution 1422 (2002) that requested the ICC to refrain from initiating investigation or proceeding related to peacekeepers from non-states parties to the Statute for a 12 months period.⁹⁷ The possibility for the Security Council to adopt resolution in referral to the Court is counterbalanced by the power it has to suspend such referral for a year pursuant provisions of article 16 of the Rome Statute.

2.7. Conclusion

It is clear that the legal framework of peacekeeping missions as it currently stands cannot allow a real strengthening of the UN's accountability mechanism. The interactions between different categories of the instruments that constitute its legal framework represent an obstacle itself. In addition, the immunity enjoyed by peacekeepers is confined to the exercise of jurisdiction over them particularly concerning peacekeepers from national contingents subject to the sole jurisdiction of their home countries. A new approach like the establishment of a unique set of rules binding for all actors is needed. It will on one hand simplify investigations of SEA, and on the other, their enforceability. It will also considerably improve the accountability mechanism. The adoption of a new treaties or the review of the peacekeeping legal framework, might be take a while, thus adequate solutions need to be find within the existing means.

⁹⁷ See C .Stahn 'The ambiguities of Security Council Resolution 1422(2002)' (2002) *14 European Journal of International Law* 85.

CHAPTER 3: GO BEYOND THE LIMITS: SECURE PROSECUTION AS WAY TO ENHANCE ACCOUNTABILITY IN UN SYSTEM

3.1. INTRODUCTION

What are the limits of accountability mechanisms in UN peacekeeping missions and how prosecution can help to improve accountability is the focus of this chapter.

3.2. What are the aims of prosecution?

The principal aim of prosecution is to ensure the enforcement of laws. When laws are violated and crimes committed, prosecution, must ensure that due process is followed and justice obtained.⁹⁸ The two primary functions of the prosecution mechanism consist of maintaining the rule of law and ensuring a fair trial. Those two principles are set out respectively in the UN Guidelines (the Guidelines) on the Role of Prosecutors and article 14 of the International Covenant on civil and Political Rights (ICCPR).⁹⁹ There are two forms of prosecution, national prosecution, by national jurisdiction and the international prosecution carried out by international tribunals like the ICC.

Since the first public recognition of the problem of SEA within peacekeeping missions, noticeable efforts to address the issue have been made. Several measures that deal with SEA in peacekeeping missions and accountability mechanisms have been created for that purpose. This chapter analyses the effectiveness of those measures, particularly for the protection of children. Particularly, the possibilities for the UN to prosecute peacekeepers with the current available means constitute the first part of this chapter.

⁹⁸ See, 'Chapter Four: the role of the prosecution in human rights implementation. Overview of the prosecution mechanism throughout Asia' Asia Human rights Commission- Publications 3 March 2006 <http://www.ahrchk.net/pub/mainfile.php/rol_hr_asia/219/> (accessed 25 October 2007).

⁹⁹ See, 'Lesson 2: the role and characteristics of the prosecution as envisaged in international law'. Human Rights Correspondence School a project of the Asia Human Rights Commission. <<http://www.hrschool.org/doc/mainfile.php/lesson42/165/>> (accessed 25 October 2007).

The second part explores ways to concretise prosecution of peacekeepers as a means for the enhancement of the UN accountability mechanism.

3.3. United Nations Peacekeeping investigation system

The investigation of crimes and collecting of evidence is crucial to the prosecution of perpetrators, without which there can be no justice.¹⁰⁰The DPKO's investigative mechanisms are administrative in nature and designated to handle 'ordinary' violations, such as traffic accidents and disorderly behaviour.¹⁰¹ The preliminary investigation is conducted by the Board of Inquiry (BOI), which is constituted mainly by senior staff members. The BOI's mission is to establish the facts of a case, determine its causes, establish responsibility, and make recommendations for appropriate administrative action, including repatriation.¹⁰² The BOI is not a judicial body; it is merely a management tool to assist the head of mission in discharging his or her responsibilities. It also assists the TCC concerned in its disciplinary proceedings.¹⁰³ Despite all measures taken by the UN, allegations of SEA in peacekeeping still occur.¹⁰⁴ Armed conflicts are widespread nowadays and increase extremely the vulnerability of children and make them easier victims of SEA.¹⁰⁵ What impairs on the full realisation of measures taken by the UN to eradicate the scourge of SEA in its peacekeeping missions? To date, did the measures adopted yield results? What can be done to improve this situation and thus provide a better protection to children in situation of armed conflict?

3.4. Challenges of Peacekeeping investigation

Handling a claim in the context of an international peacekeeping operation causes major difficulties, not only to the victim but to lawyers as well.¹⁰⁶ Because of differences in regimes that govern peacekeepers, few if any, community members know how to report an act of sexual exploitation. Reporting procedures in the UN are complicated and often

¹⁰⁰ See n 65 above.

¹⁰¹ Miller n 18 above 84.

¹⁰² Directives for Disciplinary matters Involving Civilian Police and Military observers <http://www.onuci.org/archives/feature_stories/abus%20sexuel/unpol.pdf> (accessed 12 September 2007).

¹⁰³ as above.

¹⁰⁴ n 2 and 5 above.

¹⁰⁵ n 8 and 9 above.

¹⁰⁶ K. Smalenbach 'Third party liability of International Organisation: study on claim settlement in the course of military operations and international administration' (2004) in Langholtz. H.Kondock & B.Wells. A, (eds) 'International Peacekeeping' 10 *The Yearbook International*. 33.

unclear to those living in post-conflict areas.¹⁰⁷ In addition, the fear of repression prevents many women and children from reporting acts of sexual exploitation by peacekeepers.¹⁰⁸

Furthermore, as stated previously, UN investigation is principally administrative and the findings of the BOI cannot be used to prosecute certain categories of peacekeepers (members of nationals' contingents). In the current legal system, it is the peacekeepers' municipal authority, which is responsible for prosecuting offending peacekeepers, particularly military contingents.¹⁰⁹ This system emanates from a set of trilateral agreements between the UN, States contributing peacekeeping troops, and the state on whose territory the mission is located.¹¹⁰ In addition, the Standard Generic Training Modules (SGTM), developed by the UN and its partners, which compiles guidelines for training peacekeepers, does not address the issue of SEA.¹¹¹ It only provides basic universal training requirements to peacekeepers and hardly mentions sexual exploitation except in the context of larger issues, such as human rights and the UN code of conduct. Exploitation is discussed as a personal 'integrity' issue and not as a rights violation.¹¹²

In 2004, following SEA allegations in the DRC, it became obvious that the DPKO's current measures and disciplinary procedures against SEA were inadequate to prevent

¹⁰⁷ A survey of local and international women's groups, UN agencies, and UNMIL staff in Liberia found that none knew how to report an incident of sexual exploitation by a peacekeeper (Refugees International 2004). S.W. Spencer n 1 above.

¹⁰⁸ V. L. Kent 'Peacekeepers as perpetrators of abuse examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations.' <http://www.iss.co.za/dynamic/administration/file_manager/file_links/EKENT.PDF?link_id=3&slink_id=3667&link_type=12&slink_type=23&tmpl_id=3>(accessed 24 September 2007)

¹⁰⁹ Para 77 Zeid Report, n 10 above see also N.Dahrenfordf. 'Sexual Exploitation and Abuse: Lessons learned study addressing sexual exploitation and abuse in MONUC' March 2006 <http://www.Womenwarpeace.org/drc/docs/OASEA_MONUC.pdf (accessed 24 August 2007) n 4 above.

¹¹⁰ B. Bedont 'The Renewed popularity of the Rule of Law: Implication Women, Impunity and Peace-keeping' (2005) in D.E Mazaruna, J. Raven-Roberts. & L. Parpart. (eds) *'Gender, Conflict, and Peacekeeping'* Google Book Review 84 <<http://books.google.com/books?id=Eftxv8FkdyMC&pg=PA90&dq=prosecuting+peacekeepers&sig=SpZt9VT3JVd4RnCety2LV1uR49U#PPA83,M1>>(accessed 14 September 2007).

¹¹¹ Department of Peacekeeping Operations 2003 Standardised Generic Training Modules. New York United Nations quoted in Spencer n 5 above.

¹¹² n 5 above.

and respond effectively to such misconducts.¹¹³ In addition, indicted peacekeepers are dismissed and repatriated, and this often occurs even before the end of the investigation. This situation disrupts collection of evidence and contributes to a lack of accountability and timeliness in pursuing complaints against peacekeepers.¹¹⁴

To sum up, main impediments to the process of SEA eradication are, firstly the investigation system itself, and secondly the complexity of its legal framework that limits considerably the UN's power in investigation and the efficacy of its accountability mechanisms.

3.4.1. Limits of the UN peacekeeping investigation system

Peacekeeping personnel (the BOI) that usually conduct investigations in peacekeeping missions are typically not experts in criminal investigation.¹¹⁵ Troop contributing countries frequently complain that evidence gathered by mission boards of inquiry and in prior preliminary investigations is either not sufficient under their national law for use in subsequent judicial or court martial proceedings, or has not been gathered in a manner required by their law.¹¹⁶ Thus, if investigations are unprofessional,¹¹⁷ there is little or no accountability.¹¹⁸ In addition, investigations of allegations of sexual misconduct are always very difficult, under any circumstances, in any country, because of the nature of the problem which often results in the reluctance often results in the reluctance of victims and witnesses to provide testimony.¹¹⁹

Furthermore, investigation in peacekeeping needs to be more professional and conducted by specialists in forensics and other related fields.¹²⁰ Investigation and

¹¹³ A. Shotton n 19 above 100.

¹¹⁴ N 30 above .

¹¹⁵ n 60 above, see also paras 31-34 Zeid Report n 10 above.

¹¹⁶ Para 28 Zeid Report n 10 above , see also 'update report no.3 sexual exploitation and abuse by UN peacekeeping personnel' of February 2006 <<http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.149245/k.E83E/updatereportno3BRsexualexploitationandabusebyUNpeacekeepingpersonnelBR20february2006.htm>> (accessed 9 October 2007).

¹¹⁷ The Board of Inquiry composed by peacekeepers is not appropriate, considering that those peacekeepers are not professionals' investigators; see also, Miller n 18 above 84.

¹¹⁸ See Dahrendorf n 109 above.

¹¹⁹ As 119 above.

¹²⁰ Peacekeeping personnel that use to conduct investigation in peacekeeping mission are typically

collection of evidence should be held in cooperation with the TCC in order to respect the requirements of the TCC on this matter.¹²¹ The failure to do so could impair on the eventual prosecution of the alleged offender.¹²²

3.4.2. Limits due to the complexity of the legal framework

Peacekeeping missions are ruled by a hybrid legal system composed of binding (national laws, resolutions) and non-binding (rules and guidelines) instruments. Ironically it is the non-binding instruments that contain the most important provisions, notably in matters of code of conduct and discipline among peacekeepers. Usually, a civilian component, a military and a civilian police component, compose a peacekeeping mission. These components are governed by different rules and disciplinary procedures because they each have a distinct legal status.¹²³

In the United Nations Office of Internal Oversight Services (OIOS) Manual of Investigation Practices and Policies, the OIOS's investigation jurisdiction over military contingent is not considered.¹²⁴ The DPKO Disciplinary Directives for Disciplinary Matters applicable to Civilian Police Officers, Military Observers, and Military Members of National Contingents (Disciplinary Directives) have not been repealed or formally amended. These two documents are therefore both still applicable but are inconsistent with each other.¹²⁵ As there has been no clear statement (legal opinion with cited authority) justifying the limitation of national jurisdiction, coupled with the fact that the

not experts in criminal investigation. Miller n 31 above 84 sees also paras 31-34 Zeid Report n 10 above.

¹²¹ Troop contributing countries frequently complain that evidence gathered by mission boards of inquiry and in prior preliminary investigations is either not sufficient under their national law for use in subsequent judicial or court martial proceedings or has not been gathered in a manner required by their law. See para 28 Zeid Report n 10 above.

¹²² For instance, allegations made against MONUC troops in 2005, 'including reports of child pornography, organised sex shows and the rape of babies, [were] later dropped because of a lack of evidence and support from the military contingent commanders. UN foundation and National Journal Group Inc. 2004. 'abuse by UN Troops in D.R.C may go unpunished,' quoted in Spencer n 5 above.

¹²³ Para 14 Zeid Report n 10 above.

¹²⁴ Dahrendorf n 109 above .

¹²⁵ as n 124 above.

Disciplinary Directives appear to be still in force, investigative jurisdiction and applicable procedures are unclear.¹²⁶

The BOI's investigation is principally based on provisions set out in the Secretary-General's Bulletin on 'special Measures for Protection from Sexual Exploitation and Sexual Abuse'.¹²⁷ The bulletin is only legally binding on UN staff and leave categories of peacekeepers such as TCCs out of those obligations.¹²⁸ On that issue the UN depends on the will of Contributor Countries to prosecute them.¹²⁹

3.4.3 Limitations due to the nature of the texts that rule the mission

Guidelines and rules differ on the obligations they generate. While Guidelines provide a general model that may or may not be followed depending on the circumstances, rules set out norms that must be followed.¹³⁰ However guidelines like the code of conduct concerning prohibition on acts of sexual exploitation must generate binding obligations as rules¹³¹. For instance, the Secretary-General's bulletin entitled 'status basic rights and duties of United Nations staff members',¹³² which includes the text of 'standards of conduct for the international Civil Service Commission' though designated primarily for

¹²⁶ n 124 and 109 above.

¹²⁷ Secretary General's Bulletin on Special measures for protection from sexual exploitation and sexual abuse ST/SCB/2003/13, of 9 October 2003, http://www.peacewomen.org/un/pkwatch/discipline/Sgrepor_tsexexpApr2004.pdf (accessed 27 February 2007).

¹²⁸ Although the UN can send misbehaving peacekeepers home, troop-contributing countries are currently responsible for the conduct of their troops and other uniformed personnel, and UN rules can be made binding only with their agreement. In 'Is the U.S. blocking discipline standards for UN peacekeepers?' <<http://www.un-truth.com/?p=427> (accessed 17 June 2007).

¹²⁹ While the model SOFA provides that the Secretary General will 'obtain assurances' from contributing governments that they will exercise jurisdiction with respect to crimes that may be committed by members of their contingents serving in the PSO, this provision has rarely been adhered to by Member States (paragraph 48 of the Model SOFA), in 'Gender justice And accountability in peace support Operations Closing the gaps A policy briefing paper' by international alert http://www.internationalalert.org/pdfs/gender_justice_accountability_peace_operations.pdf (accessed 9 October 2007) 25, see also Zeid Report para 80 n 10 above.

¹³⁰ Para 20 Zeid Report n 10 above 12.

¹³¹ Peacekeeping personnel that use to conduct investigation in peacekeeping mission are typically not experts in criminal investigation see Miller n 18 above 84 see also paras 31-34 Zeid Report n 10 above.

¹³² Available at <http://www.onuci.org/archives/feature_stories/abus%20sexuel/6.pdf> (accessed 20 February 2007).

the UN staff, nevertheless constitutes the principal rules of peacekeeping, and thus it should be followed by almost all the categories of peacekeepers.

Contrasting, ‘the Ten rules: on the code of Personal conduct for blue helmet’¹³³, (the Ten rules), ‘we are United Nations peacekeepers’¹³⁴ and the Secretary-General’s bulletin on ‘Special measures for protection from sexual exploitation and sexual abuse’,¹³⁵ (The Bulletin) are considered as mere guidelines, which are at the discretion of the parties to the peacekeeping mission. The Bulletin does not, of its own force, apply to all three categories.¹³⁶ As Miller notes, it is very unusual that something as important as basic rules of conduct, to which military members of a contingent must comply, are buried in a lengthy text called ‘guidelines’ which implies that the contents are not binding.¹³⁷ The same concern is in the Zeid Report that recommends that prohibitions against sexual exploitation and abuse for all categories of peacekeeping personnel should be those set out in the 2003 Secretary-General’s bulletin.¹³⁸ However, without binding force, one can question the utility of those rules in the repression of SEA even though they are applicable to all peacekeepers categories.

The huge difference in the criminal laws of member states as reported in the Report of the Legal Experts on recommendations to ensure the accountability and prosecution of the UN staff ¹³⁹(the Legal Experts) is an issue that needs to be addressed adequately. There are no internationally accepted definitions for each crime.¹⁴⁰ To illustrate, there are

¹³³ Available at <<http://ocha.unog.ch/ProCapOnline/docs/library/UN%20Blue%20Helmets%20Codes%20of%20Conduct.pdf>> (accessed 27 August 2007).

¹³⁴ Available at <http://www.un.org/Depts/dpko/training/tes_publications/books/peacekeeping_training/pocket_cards/un_in.pdf> (accessed 28 August 2007).

¹³⁵ n 30 above.

¹³⁶ Para 14 Zeid Report n 10 above.

¹³⁷ Miller n 28 above 82.

¹³⁸ Para 23 Zeid Report n 10 above.

¹³⁹ ‘Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations.’ Report of the Group of Legal experts on recommendations to ensure that United Nations Staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized in accordance with due process, A/6/980 of 16 August 2006 <<http://www.peacewomen.org/resources/Peacekeeping/SEA/A60980.pdf>> (accessed 9 October 2007).

¹⁴⁰ For Murray, peacekeeping personnel who engage in such activities are violating the principles of

national differences in the definition of rape and other violent sexual crimes and the age by which a child is able to consent to a sexual act.¹⁴¹

Finally, absence of jurisdiction of the host state over peacekeepers (particularly TCCs) also needs to be addressed. The possibility of enabling the host state to exercise its jurisdiction over perpetrators in cases where there is a functional juridical system is still controversial.¹⁴² TCCs are reluctant to abandon their jurisdiction over their nationals.¹⁴³ However, the few reports of outcomes of the eventual prosecution conducted by them, highly justify this concern.

3.4.4. Limited sanctions

Sanctions in cases of misconduct are generally of disciplinary and administrative nature. Investigations conducted in cases of SEA allegations are mainly administrative and are followed only by disciplinary sanctions. The heads of missions have power to impose one or more of the following penalties: removal from a position of command; redeployment to another position/area after retraining, if necessary; removal of benefits and concessions provided to United Nations personnel, suspension of leave/compensatory time off, full or partial recovery from mission subsistence allowance, (in cases of financial loss to the United Nations), recommendation to repatriate, and written censure or reprimand, including a possible recommendation for non-eligibility for any future assignment with the United Nations.¹⁴⁴ However, compared to the gravity of

the very laws they are mandated to promote and protect. In most cases they would be violating the domestic laws of the countries in which they are serving, see n 9 above 525. In addition many leaders over the world see no problem with having a sexual affair with young girls. See also H.Cooper, 'In War-torn Africa, young girls are very are very, very old,' International herald tribune, 4 January 2005 quoted in 'Refugee Sexual Abuses', see n 3 above.

¹⁴¹ Para 19 n 139 above.

¹⁴² The Secretary-General can only order the repatriation of any military member of a contingent who has been founded culpable of serious misconduct in a mission investigation as an administrative measure para 19 Zeid Report n 10 above.

¹⁴³ See Dahrendorf n 109 above.

¹⁴⁴ The Directives enable the head of mission to impose one or more of the following penalties: removal from a position of command; redeployment to another position/area after retraining, if necessary; removal of benefits and concessions provided to United Nations personnel; suspension of leave/compensatory time off; full or partial recovery from mission subsistence allowance, in cases of financial loss to the United Nations; recommendation to repatriate; and written censure or

crimes committed, these 'light' sentences are unlikely to stop the phenomenon of SEAS.¹⁴⁵

3.5. How should the accountability mechanisms be enhanced?

The responsibility to protect civilians, particularly children, for members of peacekeeping mission should go beyond merely sending troops to a given country. TCCs should act *bona fide*, as if they are protecting their own citizens. They should avoid any misconduct that could jeopardise the success of UN missions.

In 2006, the Secretary – General's Report on special measures for protection against sexual exploitation concluded that a high number of TCCs were involved in SEA¹⁴⁶ particularly in sex with minors.¹⁴⁷ In the recent Report released on June 2007, the number of allegations had significantly decreased. However, the number of allegations against peacekeepers particularly TCCs is still high.¹⁴⁸ Beyond stressing improvement of

reprimand, including a possible recommendation for non-eligibility for any future assignment with the United Nations para 23 Zeid report n 3 above 38.

¹⁴⁵ Harrington submits that, as soldiers in the national army of their home country prior to their peacekeeping assignment, there is a very strong likelihood that peacekeepers are familiar with the crimes and punishments used in their military courts (...). Is dangerous in that a peacekeeper from a home country with a nascent military and military law, or one who knows that sentences for sexual abuses are relatively light, or one who knows that there is a precedent of not prosecuting errant peacekeepers, will take comfort in that knowledge and feel less inhibited in his abuses, safe in the knowledge that he will not face serious charges at home. R. A. Harrington 'Victims of peace: current abuse allegations against U.N. peacekeepers and the role of law in preventing them in the future' (2005) 12 *ISLA Journal of International Comparative Law* 139.

¹⁴⁶ According to the Secretary-general report on Special measures on sexual exploitation and abuse of 2006, 340 allegations of SEA from 373 reported in 2005 for all UN entities, were from the DPKO. 340 cases, involved 271 uniformed personnel and 123 civilian personnel. Among the 271 allegations against military personnel, 42 concerned sex with minors and 2 allegations on food exchanges for sex, this represent the high rate within all the UN entities.

¹⁴⁷ In the 2006 Report on sexual exploitation and sexual abuse by the Secretary-General, 42 cases among the 271 involved military personnel concerned sex with minors, and were perpetrated principally by TCCs.

¹⁴⁸ In 2006 there was 371 cases reported for all UN entities, 14 concerns entities others than the DPKO. TCCs were involved in 3cases of sex with minors out of 5, 19 cases exploitative sexual relationship out of 24,36 cases of sex with prostitute out of 43, 5 cases of others misconduct out of 7 and in the only sexual assault case and the 2 rape 'cases. In Special measures for protection

reporting mechanisms, it raised the issue of how effective the measures that protect children in peacekeeping mission are.¹⁴⁹The assumption that immunity means impunity is not entirely incorrect, especially, without an enforceable code of conduct.¹⁵⁰

The Security Council Resolution 1612 (2005) underlines the fact that protection of children rights in armed conflicts should be regarded as an important aspect of any comprehensive strategy to resolve conflicts.¹⁵¹ Furthermore, it stressed the primary responsibility of the UN for the maintenance of international peace and security and its commitment to address the widespread impact of armed conflicts on children.¹⁵² Armed conflicts put children in insecure situations at greater risk of sexual exploitation, abuse, abduction and other scourges of war.

The Security Council in an attempt to address the issue adopted the Resolution 1261(1999) that introduced Child Protection Adviser (CPA) in peacekeeping missions to monitor child rights violations and other issues.¹⁵³ However, though the considerable improvement of children's protection, notably on the report of SEA against children, the adoption of strong measures is still needed. Preventive measures had proven their efficacy, nonetheless limited is that efficacy. Sanctions are not deterrent enough to stop TCCs from engaging in SEA. The UN can investigate, but perpetrators can only be tried

from sexual exploitation and sexual abuse Report of the secretary-general A/61/957 <<http://daccessdds.un.org/doc/UNDOC/GEN/N07/386/61/PDF/N0738661.pdf?OpenElement>>(accessed 10 October 2007).

¹⁴⁹ The total number of allegations of sexual exploitation and abuse reported remained relatively constant, with 371 allegations reported in 2006, compared with 373 reported in 2005, as above.

¹⁵⁰ Madeline Rees, the U.N.'s top human rights official in Bosnia, 'Without an enforceable code of conduct, immunity often means impunity. We should look at ways of waiving that immunity.' in 'UN. Wire, Wants Action Against Personnel Involved with sex Trade.' (Feb.10 2003) http://www.unfoundation.org/unwire/util/display_stories.asp?objid=31956 quoted in S.A Levin "Sexual exploitation of refugee children by UN peacekeepers' (2003) 19 *New York Law School Journal of Human Rights* 842.

¹⁵¹ Resolution 1612 (2005).

¹⁵² See Miller n 18 above 82.

¹⁵³ See Dr. F .Olonisakin. 'Lessons Learned Study: Child Protection: The Impact of Child Protection Advisers in UN Peacekeeping Operations Peacekeeping Best Practices Section' May 2007 <http://pbpu.unlb.org/pbps/Library/LL_CPA_PBPS_May07_Final.pdf> (accessed 27 August 2007).

by their own country; the message that the UN in the future will not accept them in a peacekeeping mission can hardly be considered a sanction.¹⁵⁴

This is intolerable because whereas sexual exploitation of children and other related crimes are heavily condemned in almost all national criminal laws,¹⁵⁵ peacekeeping missions are considered as 'free land' for sexual misconduct, principally against children.¹⁵⁶ The strong involvement of states in prevention of children's sexual exploitation, outside peacekeeping area was in relation to the mobilisation following Interpol's appeal in searching for pedophiles via the internet.¹⁵⁷ This is contrary to their reluctance to be bound for similar acts by their nationals in peacekeeping missions.¹⁵⁸ As the Under-Secretary General for Peacekeeping Operations stated:

¹⁵⁴ C. de Cooker 'Ethics and accountability in the international civil service' (date) in 'international, Investigation and due process in international organizations' Book review 47 see also Harrington n 145 above.

¹⁵⁵ See Legislation of Interpol member states on sexual offences against children, <<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/Default.asp>> (accessed 17 October 2007).

¹⁵⁶ The UN is bound by a Status of Forces/Mission Agreement (Memorandum of Understanding) between the UN and countries contributing personnel to the peacekeeping operation. This agreement assumes that the troop contributing country (TCC) will meet its responsibility to exercise criminal jurisdiction over national personnel in return for immunity from local prosecution. However, experience has demonstrated that, because this is a tacit understanding, few countries often meet this requirement. Moreover, peacekeepers seem aware of the UN's limited jurisdiction over them: *the Office for Internal Oversight Services (OIOS) report from the DRC notes: ...despite knowledge that the investigation was on-going, sexual activities between the military and the local population apparently continued...it was clear that the investigation did not act as a deterrent, perhaps because they had not been made aware of the severe penalties for engaging in such conduct, nor had any seen any evidence of negative impact on individual peacekeepers for such behaviour. Without strong reinforcement of the legal requirements and prompt sanctions for violations, they may well continue this behaviour.* (emphasis added) (Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organisation Mission in the Democratic Republic of the Congo (A/59/661), 5 January 2005, www.un.org (18 April 2005), quoted in, V. L. Kent n 108 above.

¹⁵⁷ 'Interpol seeks public's help to identify man photographed sexually abusing children' Interpol media release 8 October 2007 <http://www.interpol.int/public/icpo/pressreleases/pr2007_45.asp> (accessed 17 October 2007).

¹⁵⁸ Efforts of the US to avoid the ICC jurisdiction over its peacekeepers see Murphy, S.D 'Efforts to obtain immunity from the ICC for US peacekeepers' (2002) 96 American Journal of International Law 725.

Sometimes countries want to have their cake and eat it'. 'That is, you can't at the same time want the UN to have perfect discipline and everything, and then resist any UN encroachment or interference with their own national disciplinary procedures. It makes things very difficult.¹⁵⁹

Pursuant to its duty to protect people, particularly children, against any kind of scourge as stated in its Charter preamble,¹⁶⁰ '[t]he United Nations will lose its moral force if it fails to respond when those within the United Nations' system violate human rights.'¹⁶¹

Impunity for crimes committed by peacekeepers is an affront to the rule of law.¹⁶² Article 34 of the Convention of the Rights of the Child (CRC) requires all states parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse. Article 3 of the CRC' Protocol on the sale of children, child prostitution and child pornography provide that practices such are sexual exploitation of the child be fully covered under states parties criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organised basis.¹⁶³ State parties shall take measures, where appropriate, to establish the liability of legal persons for offences as established in paragraph 1 of the article.¹⁶⁴ In addition article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) call for the adoption of special measures of protection and assistance that should be taken on behalf of all children and young persons.

Children depend on adults to ensure their protection; it is the responsibility of the UN representing the international community to take all measures to provide them with

¹⁵⁹ statement by the Under-Secretary General for Peacekeeping Operations, Jean-Marie Guéhenno, Is the U.S. blocking discipline standards for UN peacekeepers? <http://www.un-truth.com/?p=427> (accessed 3 June 2007).

¹⁶⁰ 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...' as n 41 above. In the Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, U.N. ESCOR, Comm'n on Hum. Rts. 56th Sess., P 1, U.N. Doc. E/CN.4/2000/68 (2000) [hereinafter Coomaraswamy Report] quoted in Murray n 9 above 488.

¹⁶² See Murray n 9 above.

¹⁶³ Art 3(1) of the CRC.

¹⁶⁴ See part 2.52 chapter 2 of the present dissertation.

safety and protection. The UN ought to make sure that members of peacekeeping operations sent on missions have a strong adherence to human rights and do not have a history of sexual abuse or questionable pasts.¹⁶⁵

3.5.1. Prosecution as means to enhance accountability mechanisms

The suspension of the ICC's jurisdiction by Resolution 1422 (2002) over peacekeepers operating in Bosnia¹⁶⁶ shows how sensitive the issue of prosecution is in peacekeeping missions particularly for TCCs. The fact that decision to prosecute them or not is at their country's discretion weakens considerably, UN efforts to stop SEA in peacekeeping missions. Moreover, domestic sanctions tend to be disproportionately light both in relation to crimes involved and in light of the inherently unequal relationship between peacekeepers and the civilian population,¹⁶⁷ notably children. To illustrate, one Belgian peacekeeper benefited from the suspension of half of his one year jail sentence for mistreating Somali Children.¹⁶⁸ A Canadian Appeals Court heard the appeals of five army personnel charged in a three-hour beating, torture and killing of a sixteen-year-old Somali youth, while carrying out peacekeeping duties with UNOSOM in March 1993. Sentences ranged from severe reprimands to rank reductions.¹⁶⁹ More recently, a French peacekeeper who served in MONUC was sentenced to a mere 3 months jail term for having sex with children. Conversely, in French national criminal law, the sentence for the offence he committed is at least 5 years and even 10 years in cases of grave circumstances.¹⁷⁰

¹⁶⁵ L. Porteus 'U.N. not at peace with its 'Blue helmets',' *Fox News*, 24 March 2005. IO.WATCH article n 140 above.

¹⁶⁶ The SC Resolution 1422 (2002) requests the ICC to defer potential prosecutions of peacekeepers from non-state parties to the Statute for a 12-month period. See C .Stahn 'The ambiguities of Security Council Resolution 1422(2002)' (2002) 14 *European journal of international Law*. Westlaw article <<http://0-international.westlaw.com.innopac.up.ac.za/>> (accessed 17 October 2007).

¹⁶⁷ See Cohn 15 above.

¹⁶⁸ Belgian Soldier Goes to Jail over Somalia Crimes, Reuters (wire news service, from Brussels), 7 May 1998 quoted in Cohin n 15 above.

¹⁶⁹ Elvin Kyle Brown v. The Queen [1995] C.M.A.C. 372 quoted in Cohin n 15 and 168 above.

¹⁷⁰ Art 227-25(3) Code Penal <<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaFrance.pdf>> (accessed 17 October 2007).

Another limit to prosecution is insufficiency of evidence collected by the OIOS. Consequently, in many cases, charges are simply dropped. Among the reasons, there is the fact that TCC contingents are particularly mobile and could not be in the area while the OISOS investigation is being conducted. Language barriers and the fear of persecution also weaken investigations. To ensure that prosecution will not be mixed up

3.5.2. Use of the finding of the Monitoring and Reporting Mechanism for children in situation on armed conflict as a basis of prosecution.

by these impediments, the OISOS, while conducting its investigations, needs to work closely with reporting mechanisms such as the Monitoring and Reporting Mechanism for children in situation of armed conflict (MRM).

Created by Resolution 1612 (2005) of the Security Council, the MRM led to the prosecution of Thomas Lubanga Dyilo¹⁷¹ before the ICC for recruitment of child soldiers in DRC. Though the ICC's jurisdiction is limited in this case, as explained before, the findings of the MRM can be basis of prosecution under the host state's jurisdiction or in the home country of the perpetrator. The MRM highlights six grave violations of children in situations of armed conflicts but also in post-conflict situations. Those six violations are criminalised under article 8 of the Rome Statute and are principally: killing or maiming of children, recruitment or use of children as soldiers, rape and other grave sexual abuse of children, abduction of children, attacks against schools or hospitals and denial of humanitarian access for children.¹⁷² SEA from peacekeepers can fit into grave sexual abuse of children and denial of humanitarian access for children. The latest is justified by the practice of exchange of food for sex. This supposes that without having sex with a peacekeeper a child will not access the aid she needs. This is more obvious in cases of SEA perpetrated by humanitarian workers.¹⁷³ However, it is still valuable in

¹⁷¹ The DRC is one of the first countries where the MRM have been launched. In 2006 Thomas Lubanga Dyilo had been charged with the crimes under article 8 of the Rome Statute and extradited in The Hague to face a trial before the ICC. <http://www.monuc.org/news.aspx?NewsID=13033> (accessed 13 February 2007).

¹⁷² In the Secretary-General' fifth report on children and armed conflict (A/59/695-S/2005/72)

¹⁷³ The aid workers and peacekeeping forces allegedly abused their positions of relative power to use ". . . the very humanitarian aid and services intended to benefit the refugee population as a tool of exploitation." UNHCR and Save the Children-UK, Note for Implementing and Operational Partners (2002), < <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+kwwBmeEfp-swwwwwnwwwwwwhFqo7E2RN02ltFqopwGBDnG5AFq/opendoc.pdf>.> (This is an official UNHCR/SC-UK summary and not the full findings of the report). See Levin n 149 above 725.

cases of peacekeepers who sometimes act as humanitarian workers by providing humanitarian aid.

The use of the findings of the MRM has the advantage of completeness, because information collected by the mechanism does not need a formal investigation. OIOS deals with cases where the alleged perpetrators leave the country before it concludes its investigation, or move to another part of the country. The MRM could be supply to those impediments because it involves a wide scope of actors and thus facilitate the collect of evidence. However, uses of the MRM's findings need to be supported by other means as an available jurisdiction to use them.

3.5.3. How to secure prosecution within UN peacekeeping mission?

It is obvious that prevention of SEAs should be aided by prosecution to send a strong deterrent message. UN member states made a joint commitment to give every child a better future.¹⁷⁴ They recognised their 'obligation to take action to promote and protect the rights of each child - every human being below the age of 18 years including adolescents.'¹⁷⁵ Thus, a rethinking of justice and respect for human rights is needed between all actors engaged in peacekeeping operations for the international community to meet its engagement *vis a vis* children.

The Group of Legal experts advocate for the review of the functioning of peacekeeping operations, notably the accountability system and the issue of jurisdiction over peacekeepers.¹⁷⁶ It recommends:

that priority be given by the United Nations to facilitating the exercise of jurisdiction by the host State. The United Nations should not readily assume that the host State is unable to exercise jurisdiction merely because a peacekeeping operation is carried out in a post-conflict area.¹⁷⁷

¹⁷⁴ 'A World fit for Children' <<http://www.un.org/children/conflict/keydocuments/english/aworldfitforchil10.html> (accessed 20 February 2007).

¹⁷⁵ See Dahrendorf 109 above.

¹⁷⁶ See Report of the Group of Legal experts n 39 above in the summary of the Report.

¹⁷⁷ As n 171 above.

To realise this, changes should be made to the 1990 Secretary-General's Model for the Status of Mission Agreements (SOMA). The SOMA gives exclusive jurisdiction to the sending country over its military members.¹⁷⁸ Regarding the consequences such a decision will bring,¹⁷⁹ some scholars have proposed that peacekeepers could remain immune to certain legal proceedings, but would be protected in a similar manner to military observers and civilian police, subject to 'local and civil criminal jurisdiction for acts committed by them in the host country that do not form part of their official function.'¹⁸⁰ In other words, jurisdiction of host states will be exercised over the TCC. However, this will be easier said than done.

Emergent state powers such as China, which could balance other state powers (like the USA),¹⁸¹ have themselves a doubtful position regarding human rights issues. Taking into account the stance of some states concerning the vote of sanctions against Sudan about the issue of Darfur,¹⁸² a vote for sanctions against peacekeepers is unlikely. If the vote of sanctions in order to prevent the death of many people failed to be a motivating reason,¹⁸³ one should ask if the vote of sanctions against peacekeepers would succeed.

¹⁷⁸ United Nations General Assembly 1990, para 47 (b) quoted in Spencer, n 5 above.

¹⁷⁹ States might be reluctant to send their troops in the UN peacekeeping missions.

¹⁸⁰ J. Khaleeli 'Addressing the Sexual Misconduct of Peacekeepers,'(2004) *Refugees International*, quoted in Spencer n 5 and 180 above.

¹⁸¹ The U.S. convinced the U.N. Security Council in 2003 to exempt U.S. service members from the Jurisdiction of the ICC through Article 16 of the Rome Statute. F. L. Kirgis 'U.S. Drops Plan to Exempt G.I.s from U.N. Court,' (2004) *American Society for International Law, ASIL Insight*, quoted in Notar. as 39 above, see also 'International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' <<http://web.amnesty.org/library/index/engior40006.2003>> (accessed 20 September 2007).

¹⁸² The dissension over the five permanent members of the Security Council weakened the authority of some resolutions, like the Resolution 1591 that voted sanctions against Sudan. China, Russia, Pakistan, and Algeria abstained for diverse reasons. Nevertheless, China and Russia reasons were obvious. The first voted against because of its oil interest in Sudan and the second for fear of setting a precedent considering its presence in Chechnya. R. Cohen 'The International response' 26 May 2005 <http://www.brookings.edu/fp/projects/idp/20050526_rcohen_fmrdarfur.htm> 9 (accessed 17 March 2007).

¹⁸³ In January 2007, China had voted against a proposal of a Resolution from the USA that condemned violations of human rights. For China, human rights violations have no relation with peace and security sole domain of the Security Council competence. I. Alavarez '*Le Conseil de sécurité saisi, alors que la répression sévit en Birmanie*' <http://fr.news.yahoo.com/afp/20070926/twl-birmanie-manifestations-onu-diplo-mat-5fb7533_1.html> (accessed 26 September 2007).

Nonetheless, the growing international concern for respect of human rights gives hope that this could eventually happen. Before this occurs however, something needs to be done in the interim. Some TCCs pay real attention to this issue and try to remedy it.¹⁸⁴ Nevertheless, sentences are not in some cases really appropriate.¹⁸⁵

3.6. Conclusion

Research and reports conducted on investigations into peacekeeping missions have demonstrated that prevention should be complemented by sanctions to send a strong message, but also to confirm the UN's commitment to respect for human rights particularly protection of children's rights. Preventive measures play an important role, but are not enough to address adequately the issue of SEA.

Prosecution seems to be the more deterrent way to stop SEA for now. Although others ways should be continued to be explored, punitive measures should be applied systematically against perpetrators, especially when a child is a victim. However, the current UN investigation as it operating in peacekeeping mission, necessitate some improvement to support valuable the prosecution process.

¹⁸⁴ The Group understands that certain troop contributing countries have in fact taken action under their military and/or criminal justice systems against persons who have engaged in sexual exploitation and abuse. This includes the dismissal from the military, custodial sentences and loss of rank. Such actions have been taken even though the 2003 bulletin has yet to be included. In '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' (2006) A/61/645.

¹⁸⁵ In July 2005, DPKO informed the Office for Addressing Sexual Exploitation and Abuse (OASEA) that it had been advised by a Permanent Mission of a Troop Contributing Country regarding action taken against six of its contingent members involved in sexual exploitation and abuse while serving in MONUC. All six members had been sentenced to two and a half months' imprisonment, and five of these members had also been demoted to the next lower rank. No further information was provided regarding the specific acts of misconduct reportedly committed by the contingent members. Whilst this was viewed as an important step by the OASEA and MONUC, on closer examination, it transpired that none of the six members who were convicted were the subject of OASEA investigations see Dahrendorf as 109 above.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1. CONCLUSION

The disparity between the growing world concern over children's protection from every form of sexual exploitation and the overcautious attitude in peacekeeping missions has different impacts on the results. The proliferations of laws that sanction SEAs in several countries underlie the scarcity of remedies in the field of peacekeeping missions. International commitment to the protection of children's rights should go beyond a mere declaration. If the Zero-tolerance policy to SEAs has to succeed, measures to stop effectively SEA in peacekeeping missions, need to be adopted. This paper's submission is the enforcement of accountability mechanisms through prosecution. Prosecution is the most deterrent form of punishment and studies have demonstrated that absence of deterrent measures weaken the UN's objectives to realise fully the Zero tolerance policy.

Moreover, as peacekeeping is evolving, its functioning should follow the evolution and adapt to new challenges it faces. Though peacekeeping is a UN invention, nowadays, its legitimacy is well established and cannot face serious challenge. The reluctance of TCC to be bound and the limited means of the UN to put pressure on them due to fear of losing their contribution should not stop the UN from finding the best solutions to fight against the weed that invades its garden. Indeed, as it is difficult for a mother to accept the bad behaviour of her child, it took the UN time to publicly recognise SEAs by peacekeepers. However, as a mother disciplines her child to make her a better person, the UN must take appropriate measures to make its 'baby' a good adult.

Presence of SEAs in peacekeeping missions as well as in the UN organisation itself questions the respect of values that led to its creation. If states really believe in the utility of the organisation and the values that it represents, they should commit themselves to find solutions to end these misconducts. Faced with reluctance of member states to fulfil their commitments, the UN should recall the essence of its existence, i.e. respect of human rights.

The study has demonstrated the causes of the UN's limited power, notably in matters of accountability for SEA. Accountability Mechanisms available within the UN system alone

cannot ensure a real justice. Sanctions from the UN concerning misconducts such as SEA are not enough deterrent to stop its increase. The protection of children rights in situations of armed conflicts is of great concern for the UN and several Resolutions support that cause. Nevertheless, the prevalence of armed conflicts around the world and the numerous allegations of SEAs in peacekeeping missions need an urgent solution. Children are at risk and something needs to be done in order to provide them with the best protection.

Prosecution appears the best way to stop SEAs in peacekeeping missions, as well as in all UN entities. Peacekeeping has become a vital component of the UN through the important role it plays in maintaining international peace. The study's objectives were to highlight the weakness of the accountability mechanisms of UN peacekeeping missions and the means to improve them. The conclusion is that though measures to address SEA are helpful; to some extent more still needs to be done.

Having failed to create a peaceful world for children (presence of multiple conflicts), the international community should ensure them with the best protection, they deserve as a vulnerable group. To concretise fully the application of prosecution as a deterrent sanction, considerable changes need to be made in peacekeeping functioning. This should be concentrated on issues of jurisdiction over peacekeepers principally members of nationals' contingents and the waiver of immunities. The UN will probably lose more than it will win, but its integrity and its image as the guarantor of a peaceful and secure world deserves some sacrifice.

4.2. RECOMMENDATIONS

Several submissions to improve peacekeeping missions, notably in matters of accountability of its personnel have been proposed. The proposition for the adoption of a treaty that will regularise peacekeeping with binding effect on peacekeepers is the most recurrent. Other propositions are notably those from the Group of Legal experts, principally the exercise of the host country's jurisdiction over peacekeepers. However, with respect to the inevitable impracticable difficulties of the application of these

propositions, some have proposed the establishment of a UN army. They found this proposition on need to avoid threats from states to stop providing troops to the UN.¹⁸⁶

Considering the place and importance of peacekeeping nowadays, it is obvious that without peacekeeping, world peace will be in real danger. All means and measures taken to date show that its time to move ahead in the concretisation of the international community's commitment to peace and security. Children are our future and deserve to live in a peaceful world. For that purpose, the UN should adopt the recommendations of the Group of Legal expert in order to improve considerably its accountability mechanisms.

Furthermore, the possibility of creating a UN army, following the model of the Africa Stand by Force of the African Union should be considered. Ultimately, in cases where these propositions cannot apply, the UN should make compulsory the report concerning prosecutions conducted in the home country of peacekeepers. In addition, the possibility of establishing standard sentences for SEAs, particularly those committed against children should be established. Although the perpetrators will be prosecuted in their home country, the sentences applicable should be those determined by the international community in that field. If children cannot benefit from real protection from the international community the following words will become meaningless:

We, the Heads of State and Government and representatives of States participating in the special session of the General Assembly on children, reaffirming our commitment to the purposes and principles enshrined in UN Charter of the United Nations are determined to seize this historic opportunity to change the world for and with children.¹⁸⁷

The above Declaration must not be in vain. The international community should meet its obligation to protect children by taking concrete measures to secure their protection.

Word account: 15 987 (includes footnote)

¹⁸⁶ The time has come to provide the United Nations with a permanent, well-trained, multinational army, under unified command and capable of rapid deployment See L.I. Rothstein 'protecting the new world order: it is time to create a united nations army'(1993) *14 New York Law School Journal of International and Comparative Law* 124.

¹⁸⁷ As 169 above.

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