

**PROSECUTION OF SANDF SOLDIERS BY SOUTH AFRICAN MILITARY
COURTS FOR VIOLATIONS OF UN SEXUAL ABUSE AND EXPLOITATION
DURING PEACEKEEPING OPERATIONS**

by

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Submitted in fulfilment of the requirements for the degree

LLM MULTI-DISCIPLINARY HUMAN RIGHTS

In the Faculty of Law,
University of Pretoria

Date

01 OCTOBER 2019

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SUMMARY

Allegations of Sexual Exploitation and Abuse (SEA) have been plaguing the United Nation (UN) missions around the world. In 2004 a series of sexual abuse scandals in the UN peacekeeping mission in the Democratic Republic of the Congo (DRC) made international headlines. The UN forbids its peacekeepers and other personnel from engaging in sex with the local communities it operates in. Despite the efforts of the South African government to fulfill the country's international commitment to ensure the eradication of SEA matters in the DRC, there are still some challenges hindering the government's efforts. Currently South Africa does not have specific legislation pertaining to SEA. The South African Government has pointed out that ill-disciplined soldiers will not be tolerated and that the current Military Disciplinary Code will be replaced with a new Military Disciplinary Bill, with one of the aims being the criminalisation of SEA. Different legislation is currently used to prosecute soldiers with the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 being one of the most important legislations. The military prosecution system can prosecute members not only in South Africa but also outside the RSA, in peace time as well during war. This paper discusses how UN SEA offences are prosecuted during peacekeeping missions by SANDF military courts. It examines whether the current legislation is effective or whether new legislation should be enacted with harsher penalties to deter soldiers from committing SEA.

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List of Abbreviations

Court of Military Appeals	CMA
Court of a Senior Military Judge	CSMJ
Court of a Military Judge	CMJ
Commanding Officer's Disciplinary hearing	OCDH
Democratic Republic of the Congo	DRC
International Criminal Court	ICC
United Nations	UN
Military Discipline Supplementary Measures Act 16 of 1999	MDSMA
Memorandum of understanding	MOU
Military Discipline Code	MDC
National Director of Public Prosecutions	NDPP
Sexual Exploitation and Abuse	SEA
South African National Defence Force	SANDF
United Nations Organization Stabilization Mission in the Democratic Republic of the Congo	MONUSCO
UN Forces Intervention Brigade	FIB
Universal Declaration of Human Rights	UDHR

CHAPTER 1: INTRODUCTION

1.1 Research Question

The focus of this paper is on the current South African legislation used to prosecute Sexual Exploitation and Abuse (SEA) committed by South African soldiers in United Nations (UN) peacekeeping missions by South African Military Courts. The paper examines whether the current law is effective or should new legislation be created criminalising SEA with harsh penalties to deter soldiers from committing SEA. The paper briefly discusses international law and sexual violence in armed conflict, but it will not be the focus of the paper.

1.2 SA Mission in the DRC

South Africa is one of 125 countries that contribute to United Nation (UN) peacekeeping missions. The South African National Defence Force (SANDF) contribution is currently limited to the Democratic Republic of the Congo (DRC). The country withdrew its soldiers for the UN mission in Sudan in April 2016.¹ The SANDF forms part of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), as well as the UN Forces Intervention Brigade (FIB) in the country, with more than 1 156 soldiers involved (203 of them female).²

Allegations of SEA have been plaguing UN missions around the world. In 2004 a series of sexual abuse scandals made headlines in the UN mission (then called MONUC) in the DRC.³ Since 2015 there has been 28 alleged SEA cases reported against South African soldiers in the DRC.⁴

¹ Sudan government forced South African withdrawal from UNAMID 'DefenceWeb' 13 May 2016 http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=43473:sudan-government-forced-south-african-withdrawal-from-unamid&catid=111:sa-defence (accessed 05 June 2018)

² More than a thousand South African soldiers deployed with MONUSCO 'Defenceweb' 29 January 2018 http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=50507:more-than-a-thousand-south-african-soldiers-deployed-with-monusco&catid=56:diplomacy-a-peace&Itemid=111 (accessed 05 June 2018)

³ S Martin "Must boys be boys? Ending sexual exploitation & abuse in UN peacekeeping missions" *Refugees International* 2005 1-30

⁴ <https://conduct.unmissions.org/sea-subjects> (accessed 05 June 2018)

On 25 April 2018 the South African Cabinet held a meeting at Tuynhuys Cape Town during which the response of the SANDF to SEA allegations against SANDF soldiers in the DRC was discussed. The Cabinet pointed out that ill-discipline in the SANDF will not be tolerated and that the current Military Disciplinary Code will be replaced with a new Military Disciplinary Bill, with one of the aims being the criminalisation of SEA. The view is that perpetrators of SEA should be given harsher punishments in order to serve as deterrence for would be offenders.⁵ SEA violates the human dignity of the victims, and South Africa needs to eradicate SEA. Ideally no SEA cases should be reported against South African soldiers.

In March 2019 the South African Ambassador to the UN declared that South Africa supports a zero-tolerance policy against SEA and that necessary support structures should be formed to support victims of SEA, and it must be ensure mechanisms are in place to enable victims to report SEA matters.⁶

The Secretary-General of the UN António Guterres has the following to say regarding SEA: “Let us declare in one voice: We will not tolerate anyone committing or condoning sexual exploitation and abuse. We will not let anyone cover up these crimes with the UN flag.”⁷

The White Paper titled “South Africa in International Peace Missions” is the policy framework that guides South Africa and its participation in peacekeeping missions.⁸ South Africa is allowed to provide civilians, armed forces and police officers to assist in peacekeeping missions.⁹ The White Paper does not specifically address SEA in UN missions. The White Paper on National Defence for the Republic of South Africa is similarly silent on such policy issues.¹⁰

⁵ Statement on the Cabinet Meeting held at Tuynhuys Cape Town on 25 April 2018 <https://www.gov.za/speeches/statement-cabinet-meeting-25-april-2018-26-apr-2018-0000> (accessed 05 June 2018)

⁶ Statement by Ambassador Jerry Matjila, Permanent Representative of South Africa to the United Nations, during the UN Security Council Meeting on the United Nations Stabilisation Mission in the Democratic Republic of Congo, New York, 18 March 2019

⁷ <https://www.un.org/preventing-sexual-exploitation-and-abuse/> (accessed 05 June 2018)

⁸ <https://pmg.org.za/committee-meeting/16893/> (accessed 28 June 2018)

⁹ White Paper on South Africa in International Peace Missions 1999

¹⁰ White Paper on National Defence for the Republic of South Africa 1996

Section 200(1) of the South African Constitution provides that the SANDF must be managed as a disciplined force.¹¹ The most important legislation giving the SANDF the jurisdiction to ensure that the SANDF comply with UN requirement to combat SEA is the Defence Act 44 of 1957 (the 1957 Defence Act), Defence Act 42 of 2002 (the Defence Act), Military Discipline Code (or First Schedule to the Defence Act 44 of 1957 (MDC)), and the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA).¹²

South African Military Courts have jurisdiction to prosecute MDC offences as well as criminal offences. In *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd and Others* 2002 (1) SA 1 (CC), the jurisdiction of the military courts was challenged in the Constitutional Court.¹³ It was found that the military justice system is seen as much more than just prosecution of crimes. It is seen as a system that allows for the maintenance of discipline in the SANDF. The military prosecution system can prosecute members not only in South Africa, but also outside the RSA, in peace time as well as in time of war. Soldiers have unique lives and a culture of their own, and their justice system have its own rules, offences and punishment. This ensures that the SANDF is effective and ready to protect South Africa and to serve under international obligations such as UN missions.¹⁴

Currently South Africa does not have a specific offence for SEA, and other legislation is used to prosecute SEA offences in South African Military Courts. These offences differ depending on the circumstances of each case.¹⁵

1.3 Sexual Violence during Armed Conflict under International Law

Rape and sexual violence has been part of armed conflicts both as a weapon of war, and a tragic consequence for centuries. It has been utilised to destroy cultures and

¹¹ The Constitution of the Republic of South Africa, 1996 (The Constitution)

¹² The different South African legislation pertaining to Military Law will be discussed in detail in chapter 4

¹³ Jurisdiction of military courts will be explained in detail in chapter 4

¹⁴ *Minister of Defence v Potsane; Legal Soldier (Pty) Ltd and Others* 2002 (1) SA 1 (CC)

¹⁵ This will be discussed in Chapter 4

family structures. The victims must bear the humiliation and the shame during and after the armed conflict.¹⁶

Sexual violence and rape is regarded as a war crime under customary international law. However, the 1899 and 1907 Hague Conventions did not provide for protection against sexual violence in armed conflict. It was argued that Article 46 of the 1907 Hague Convention provides for protection against sexual violence in that it states that the “family honour” must be respected. However, this view has been rejected by some scholars.¹⁷ The 1907 Hague Convention does however provide in its preamble that if no protection for a specific violation of a human right is provided for in the Hague Convention it will be provided for under customary international law.¹⁸

The Geneva Conventions and its Additional Protocols make a distinction between international and non-international armed conflict.¹⁹ International armed conflict involves two or more states in conflict with each other²⁰ and non-international armed conflict is restricted to the territory of a single state involving governmental forces and non-governmental groups (subject to art 2 of Additional Protocol II). It includes armed groups fighting each other.²¹ However, the sexual assault women and children endure during international and non-international armed conflict situations do not differ. Women and children suffer equal human rights violations in both circumstances.

¹⁶ C Lindsey Women Facing War ICRC Study on the Impact of Armed Conflict on Women 1998 14-15

¹⁷ N Dyani ‘Protocol on the Rights of Women in Africa: Protection of women from sexual violence during armed conflict’ (2006) 6 African Human Rights Law Journal 166-187

¹⁸ 1907 Hague Convention

¹⁹ The Conventions (Geneva Conventions) signed at Geneva on 12 August 1949, consist of the following: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War; Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Protocols consist of the following: Protocol [I] Protection of Victims of International Armed Conflicts; Protocol [II] Protection of Victims of Non-International Armed Conflicts as in Dyani (n 17 above)

²⁰ How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008

²¹ n 20 above

Armed conflicts are not restricted to a certain area or groups, and involve the whole population. The civilian population is also affected by the conflict.²²

Conflict changes the traditional roles of women as most of them become the head of households and the sole providers for families having to provide for children and the elderly. This can lead to poverty.²³ Women already endure discrimination during peacetime, and this gets worse during armed conflict: as such they are much more vulnerable. Women and children experience displacement, loss of homes and property, poverty, family separations and an increase in sexual assaults and violence.²⁴ Over the years non-international armed conflict played a major role in the history of the DRC. Interpretations of the Geneva Conventions and its Additional Protocols have provided for protection and prosecution for sexual violence in international and non-international armed conflict situations.²⁵

Under the Rome Statute of the International Criminal Court sexual violence can be defined as crimes against humanity and war crimes. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of similar magnitude that is part of a widespread systematic attack directed against civilian populations is a crime against humanity.²⁶ It must include numerous attacks and it must be to advance a specific State or organisational policy.²⁷ The Rome Statute also provides that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence constitute war crimes in international and non-international conflicts.²⁸

Furthermore, the International Criminal Tribunal for Rwanda found in the case of *The Prosecutor v Jean-Paul Akayesu ICTR-96-4-T* that genocide is different from other

²² n 16 above 15

²³ 'The Impact of Armed Conflict on Women' *Centre for Women Economic and Social Commission for Western Asia* United Nations Beirut-Lebanon 2007

²⁴ S McKay 'The Effects of Armed Conflict on Girls and Women' (1998) 4:4 *Peace and Conflict* 381-392

²⁵ n 17 above 166-187

²⁶ Article 7(g) of the Rome Statute of the International Criminal Court

²⁷ Article 7((2) of the Rome Statute of the International Criminal Court

²⁸ Article 8(2)(b)(xxii) and Article 8(2)(e)(vi) of the Rome Statute of the International Criminal Court

crimes as there needs to be a specific intent to “destroy, in whole or in part a national, ethnical, racial or religious group.”²⁹

The Tribunal found that “measures intended to prevent births within the group”³⁰ should be interpreted to include sexual mutilation, the practice of sterilization, forced birth control, separation of sexes and the prohibition of marriages. It further stated that in patriarchal societies where a child’s identity is determined by the father, measures intended to prevent births within a intended group include rape to deliberately impregnate women to give birth to a child that do not belong to his mothers group.³¹ It was found that rape do not only have physical consequences but mental consequences as well. Rape can have a traumatic effect in that women refuse to procreate after being raped.³² This case is important as rape can now even constitute genocide if the intent to destroy a group can be proven.

The principle of complementarity governs the International Criminal Court’s (ICC) jurisdiction. Member States have the responsibility and the right to prosecute international crimes first. The ICC may only exercise jurisdiction where the Member States national legal system fail to do so.³³ In South Africa the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 was enacted to provide a legal framework for the implementation of the Rome Statute of the International Criminal Court in South Africa.³⁴ This Act enables South Africa to prosecute cases brought against an accused person who have committed a crime (as defined in the ICC Statute) in the Republic and outside the borders of the

²⁹ Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide and Article 6 of the Rome Statute defines genocide as: “Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

³⁰ Article 2(d) of the Convention on the Prevention and Punishment of the Crime of Genocide

³¹ The *Prosecutor v Jean-Paul Akayesu ICTR-96-4-T* para 507

³² n 31 above para 508

³³ <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> (accessed 26 May 2019)

³⁴ The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

Republic.³⁵ In addition, during UN peacekeeping missions countries are responsible to prosecute perpetrators of SEA themselves.³⁶

1.4 UN Regulatory Framework for Peacekeeping Missions

During World War II many atrocities were committed by the warring countries and the international community did not have a means to curb these crimes. This highlighted the belief that every person is entitled to certain human rights just by being human and that human rights should be protected. After the war Governments committed themselves to establishing the UN, with the primary goal of ensuring international peace and the prevention of conflict. On 10 December 1948 the Universal Declaration of Human Rights (UDHR) was adopted by the UN.³⁷ The UDHR was a landmark document and has become a standard of principles for human rights.³⁸

The UN Charter is the foundational document of the UN, and it was signed on 26 June 1945. One of its main aims is to maintain international peace and security. Peacekeeping is not clearly provided for in the UN Charter. However, the interpretation of the UN Charter has evolved to include peacekeeping missions.³⁹ This can be found in chapters 6, 7 and 8 of the UN Charter. Chapter 6 deals with “Pacific Settlement of Disputes”, and peace operations are linked to this chapter.⁴⁰ Chapter 7 includes measure related to: “Action with Respect to the Peace, Breaches of the Peace and Acts of Aggression.” This chapter is used for UN peace operations in volatile post-conflict countries where the Government is not able to maintain security and public order.⁴¹ Chapter 8 is for “Regional Arrangements”, and it allows

³⁵ n 34 above

³⁶ Revised Draft model memorandum of understanding between the United Nations and (participating State) contributing resources to (the United Nations Peacekeeping Operation) dated 03 October 2006

³⁷ <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm> (accessed 17 May 2019)

³⁸ <http://research.un.org/en/undhr/introduction> (accessed 17 May 2019)

³⁹ “United Nations Peacekeeping Operations Principles and Guidelines” Department of Peacekeeping Operations Department of Field Support United Nations January 2010

⁴⁰ <https://peacekeeping.un.org/en/mandates-and-legal-basis-peacekeeping> (accessed 16 February 2019)

⁴¹ n 38 above

for regional groups to maintain peace and security in line with the principles of the UN Charter.⁴²

The UN has several main bodies that serve different purposes. The UN Security Council is responsible to ensure international conflicts are resolved peacefully and to prevent the outbreak of war.

It has to ensure the atrocities of World War II are never repeated.⁴³ The functions and powers of the Security Council include the maintenance of peace and security that can include military action.⁴⁴

Article 39 of the United Nations Charter states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”⁴⁵

The UN Security Council includes five permanent members: the United States, Great Britain, France, Russia and China (the five main Allied powers during World War II). Ten non-permanent seats rotate between different countries every two years,⁴⁶ and the following countries’ term ends in 2019: Côte d’Ivoire, Equatorial Guinea, Kuwait, Poland and Peru. Belgium, Dominican Republic, Germany, Indonesia and South Africa’s terms end in 2020.⁴⁷ Resolutions are used as formal expressions of the opinion or the will of the UN Security Council.⁴⁸ UN Security Council resolutions are binding on member states and are enforced by UN peacekeepers, which are security forces contributed by member states.⁴⁹

UN Peacekeepers are sent into post-conflict zones to provide protection to the local communities. Studies have shown that UN peacekeeping deployments prevent the

⁴² n 40 above

⁴³ <https://www.khanacademy.org/humanities/us-history/rise-to-world-power/us-wwii/a/the-united-nations> (accessed 17 May 2019)

⁴⁴ <https://www.un.org/securitycouncil/content/functions-and-powers> (accessed 17 May 2019)

⁴⁵ Article 39 United Nations Charter

⁴⁶ n 43 above

⁴⁷ <https://www.un.org/securitycouncil/content/current-members> (accessed 17 May 2019)

⁴⁸ <https://www.un.org/securitycouncil/content/resolutions-0> (accessed 17 May 2019)

⁴⁹ n 43 above

escalation of conflict and are linked to a reduction in civilian casualties.⁵⁰ These communities are vulnerable and women and children often trade their bodies to the UN peacekeepers for material assets in order to survive.

The UN forbids its peacekeepers and other personnel from engaging in sex with the local communities it operates in.⁵¹

There was a distinctive need to be able to differentiate UN peacekeeping soldiers from other soldiers. UN observer vehicles are painted white and soldiers' part of UN missions dress in their national uniforms with added UN arm bands and shoulder patches, with blue berets or helmets. The blue beret and helmets were created by Secretary-General Dag Hammarskjöld in 1956, during the first UN peacekeeping mission. This decision was based on tactical reasons, as it allowed for UN soldiers to be identified by snipers.⁵² UN vehicles and soldiers are instantly recognisable due to this, and today UN soldiers are commonly referred to as Blue Helmets.

Peacekeeping mission mandates received from the UN Security Council differ for each mission. It will depend on the nature of the conflict and the specific challenges each country experience.⁵³

The United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) was the first UN peacekeeping mission in the DRC. Security Council resolution 1925 adopted on 28 May 2010 established the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). Its mandate included the protection of civilians, humanitarian personnel and human rights defenders that might be under imminent threat of physical violence, and to support the Government of the DRC in stabilisation and peace consolidation process. Numerous Security Council resolutions were passed after 2010 to extend MONUSCO's mandate in the country. In March 2014 the security situation in the country deteriorated to such a extent that the Security

⁵⁰ B Beber, MJ Gilligan, J Guardado and S Karim "Peacekeeping, Compliance with International Norms, and Transactional Sex in Monrovia, (2017) *Liberia*" *International Organisation* 71 1-30

⁵¹ n 3 above 1-30

⁵² <http://ask.un.org/faq/209615> (accessed 17 May 2019)

⁵³ n 40 above

Council passed resolution 2147 to extend the mandate of the mission to include an Intervention Brigade that allowed for a more forceful intervention in the country to protect civilians and to ensure peace and security in the country.

When the Security Council passed resolution 2147 it created the first ever offensive combat group intended to carry out targeted operations to “neutralise and disarm” rebel groupings in the DRC.⁵⁴ The Intervention Brigade consists of three infantry battalions, one artillery battery and one Special Forces and Reconnaissance Company.⁵⁵

The Intervention Brigade is mandated⁵⁶ to use all necessary means to “neutralise” rebel groupings, including deadly force. With this Brigade the UN moved towards a more traditional war-fighting mission rather than a peacekeeping one.⁵⁷ It is argued that the UN now became a party to the armed conflict and as such lost the protection afforded to them under international law, and may be attacked.⁵⁸ On 27 March 2018 the Security Council adopted resolution 2409 that extended the mandate of the Intervention Brigade.⁵⁹

The UN does not expect countries to change their legislation or to adopt new legislation in order to ensure SEA is criminalised. Countries are expected to issue the UN standard of conduct to all its members and to ensure members receive orders to comply with them. This can be done in the form of formation or unit orders. Through these orders the soldiers are required to comply with the UN standard of conduct and may then be prosecuted under the countries’ relevant disciplinary codes for violations.⁶⁰

⁵⁴ <https://www.un.org/press/en/2013/sc10964.doc.htm> (accessed 26 May 2019)

⁵⁵ United Nations Resolution 2147 adopted by the Security Council at its 7150th meeting, on 28 March 2014 provides the mandate for the FIB

⁵⁶ n 55 above

⁵⁷ S Sheeran, S Case “The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo” *International Peace Institute* November 2014 1-19

⁵⁸ n 56 above 1-19

⁵⁹ <https://monusco.unmissions.org/en/resolutions-security-council>
<https://monusco.unmissions.org/en/mandate> (accessed 16 February 2019)

⁶⁰ n 36 above

1.5. Outline of Chapters

As stated above the focus of this paper is the current South African legislation used to prosecute SEA committed by South African soldiers in UN peacekeeping missions by South African Military Courts. Chapter one briefly discuss the problem within the UN environment and sexual violence during armed conflict under international law.

Chapter two focus on the definitions used by the UN to define SEA, the different definitions are broken down in smaller elements, this chapter links up with chapter three. Chapter three explains SEA definitions according to South African law and how this definitions links up with the UN definitions discussed in Chapter two of this paper.

Chapter four encompasses the bulk of the paper, the focus is on the South African Military court system within the SANDF. Legislation providing jurisdiction to prosecute cases outside the borders of the Republic is discussed. The chapter provides clarity on the court system with in the SANDF explaining factors such as jurisdiction and sentencing practices of each court. The chapter concludes with a study of offences existing for SEA matters and if they are effective.

Chapter five provides a brief look at the social issues surrounding SEA however, this will not be the focus of the paper. The chapter conclude with recommendations on how SEA matters should be dealt with in the SANDF.

CHAPTER TWO: WHAT IS SEA

2.1 Elements of SEA

The term SEA comprises various components and cannot be defined in one simplified concept. Section 3 of the Bulletin on Special Measures for the Protection from Sexual Exploitation and Sexual Abuse⁶¹ states that SEA are not acceptable and is prohibited.

The UN must ensure the protection of the most vulnerable and if a person is guilty of SEA disciplinary measures will be taken. Any sexual activity with a person under the age of 18 is prohibited; neither consent nor mistake in age is regarded as a defence in law. Any form of transactional sex is prohibited.⁶² Section 3(d) explains the reason for this as the relationship between a UN member and the local population is inherently unequal and as such vulnerable members of the population can never give consent without an element of influence and misuse of power.⁶³

Rule 4 of the Ten Rules of Personal Conduct for the Blue Helmets states the following: "Do not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children."⁶⁴ Every SANDF member deployed on a UN mission has to abide by these rules as it forms part of the UN standards of conduct.

In March 2016 the UN Security Council issued Resolution 2272(2016) highlighting that SEA is still a problem in UN missions and that it undermines the credibility of the UN and its work. It emphasised that the UN have a zero tolerance policy for SEA.⁶⁵ All sexual activities with a child is considered to be sexual abuse and is not only

⁶¹ The Secretary-General's Bulletin Special measures for protection from sexual exploitation and sexual abuse ST/SGB/2003/13 dated 9 October 2003

⁶² n 51 above

⁶³ n 51 above section 3

⁶⁴ The Ten Rules Code of Personal Conduct for Blue Helmets http://www.un.org/en/peacekeeping/documents/ten_in.pdf (accessed 05 June 2018)

⁶⁵ United Nations Security Council Resolution 2272 (2016) Adopted by the Security Council at its 7643rd meeting, on 11 March 2016 S/RES/2272 (2016)

limited to rape and sexual assault. Sexual exploitation must be interpreted broadly as to include transactional sex and solicitation of sex.⁶⁶

2.2 UN Definitions of SEA

SEA has two distinctive parts and can be separated into sexual exploitation and sexual abuse, both with different definitions. Sexual exploitation is defined as “Any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purpose, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.”⁶⁷ Sexual exploitation can include a number of actions including but not limited to transactional sex, solicitation of sex (prostitution) and exploitative relationships.⁶⁸

Sexual abuse is defined by the UN as follows: “The actual or threatening physical intrusion of a sexual nature whether by force or under unequal or coercive conditions.”⁶⁹ Sexual activity is defined as “Physical contact of a sexual nature.”⁷⁰ This includes all sexual activity with a minor, rape and sexual assault.⁷¹

In October 2016 a task team prepared a glossary of terminology to improve member states’ response and understanding of SEA, but it is a non-binding document. It merely provides clarity on what is regarded as SEA by the UN.⁷² The following are some UN definitions in the glossary:

Rape: “Penetration - even if slightly - of any body part of a person who does not consent with a sexual organ and/or the invasion of the genital or anal opening of a person with any object or body part.”⁷³

⁶⁶ United Nations Glossary on Sexual Exploitation and Abuse: Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations Prepared by the Task Team on the SEA Glossary for the Special Coordinator on improving the United Nations response to sexual exploitation and abuse 5 October 2016

⁶⁷ n 50 above

⁶⁸ n 54 above

⁶⁹ n 50 above

⁷⁰ n 54 above

⁷¹ n 54 above

⁷² n 54 above

⁷³ n 54 above

Sexual assault: “Sexual activity with another person who does not consent. A violation of bodily integrity and sexual autonomy.”⁷⁴ It includes force or violence, but it does not include any form of penetration.⁷⁵

Sex with a minor: “Sexual penetration of a person younger than 18. Sexual penetration of the vagina, anus, or mouth by the penis or other body part, and also includes the penetration of the vagina or anus by an object.”⁷⁶ Any sexual activity with a child younger than 18 is prohibited, regardless of whether consent was given or not. Mistake in age is not a defence.⁷⁷

Transactional sex or the solicitation of sex: “The exchange of money, employment, good or services for sex, including sexual favours other forms of humiliating, degrading or exploitative behaviour. This includes any exchange of assistance that’s due to the beneficiaries of assistance.”⁷⁸ This definition makes it clear that consent can never truly be given in a transactional sexual relationship, even if the relationship is to the benefit of the victim.

An exploitative relationship: “A relationship that constitutes sexual exploitation, i.e 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.”⁷⁹

2.3 Conclusion

The term SEA comprises various components and cannot be defined in one simplified concept. It is important to understand the different definitions of SEA as defined by the UN. It will assist in understanding if SEA is an offence under South African Legislation. Chapter three discuss the link between the UN definitions for

⁷⁴ n 54 above

⁷⁵ n 54 above

⁷⁶ n 54 above

⁷⁷ Force Commander’s Directive-on Preventing Sexual Exploitation and Abuse (SEA) by MONUSCO FORCE (309/MONUSCO/FC dated 29 April 2016

⁷⁸ n 54 above

⁷⁹ n 54 above

SEA and the definitions existing in South African Legislation. This is important to determine if SEA can be prosecuted under South African Legislation.

CHAPTER 3: SOUTH AFRICAN DOMESTIC LAW AND SEA

South African law does not have a specific definition for SEA in any of its legislation, and it was stated in CMA case *25/2017 S v Capt M.P. Malatjie* that SEA is not a crime in South Africa.⁸⁰ As stated before it is troop-contributing countries' own responsibility to hold members accountable for SEA infractions.⁸¹

To fully understand SEA and which South African legislation could be applicable the definitions must be broken down in different smaller elements according to South African law and not the UN definitions. This will assist in identifying the relevant applicable legislation (or lack thereof). Depending on the nature of the UN SEA offence (for example an exploitative relationship), it is not viewed as an offence in South Africa. However it can be an offence under the MDC depending on the elements. SEA can be broken down into serious offences under South African law and offences where the victim gave consent to the relationship.

3.1 Serious Offences

a. Rape

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act) in South Africa defines rape as "Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B."⁸² Sexual penetration is defined as:

"Includes any act which causes penetration to any extent whatsoever by

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

⁸⁰ CMA case *25/2017 S v Capt M.P. Malatjie* para 10

⁸¹ n 54 above paragraph 6

⁸² Section 3 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

(c) the genital organs of an animal, into or beyond the mouth of another person.”⁸³

It is clear that South Africa have a much broader definition of rape⁸⁴ than the UN and the Sexual Offences Act definition will be used in the South African Military Courts.

b. Sexual Assault

The Sexual Offences Act defines sexual assault as “(1) A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault. (2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault.”⁸⁵ The Act goes further and includes acts such as compelled sexual assault and compelled self-sexual assault. Sexual violation/violates is an important part of the definition of sexual assault and must be understood to fully understand the definition of sexual assault in South Africa. The definition is as follows:

“Any act which causes-(a) direct or indirect contact between the-

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;

(ii) mouth of one person and-

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could-

(aaa) be used in an act of sexual penetration;

(bbb) cause sexual arousal or stimulation; or

(ccc) be sexually aroused or stimulated thereby; or

⁸³ n 79 above section 1

⁸⁴ The jurisdiction of the South African military courts over rape will be discussed in chapter 4.

⁸⁵ n 79 above section 5

- (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration.⁸⁶

c. Sexual Activity or Sex with a Minor

The Sexual Offences Act dedicates a whole chapter to sexual offences against children. It is broad and extensive and includes statutory rape, sexual exploitation and sexual grooming of children, exposure and using children for pornography and causing children to witness sexual offences or sexual acts.⁸⁷ Rape, sexual assault and sexual activities or sex with a minor are very serious offences and these offences form part of SEA, and in South Africa they are offences under the Sexual Offences Act.

3.2 Offences with Consent from the Victim

The following offences under SEA include an element of consent from the victim. In a UN mission consent can never truly be given by the victim. UN peacekeepers are in a position of authority over the victim and it is the view that consent is always coerced. UN personnel involved in peacekeeping operations earn much more than the local victims that are being exploited.⁸⁸ It must also be taken into account that most of the victims, women and children but even men, are often forced into transactional sexual relationships as they have no other means of income.⁸⁹

⁸⁶ n 79 above section 1

⁸⁷ n 79 above chapter 3

⁸⁸ A Lalbahadur "Peacekeepers And Sexual Abuse: A Persistent Stain On The United Nations' Image" (2017) *Peacekeeping Forces* 1-11

⁸⁹ n 85 above 1-11

a. Transactional Sex/ Solicitation of Sex (Prostitution)

In South Africa the solicitation of sex is illegal even if the person is older than 18. Section 11 of the Sexual Offences Act states: “Engaging sexual services of persons 18 years or older: A person ('A') who unlawfully and intentionally engages the services of a person 18 years or older ('B'), for financial or other reward, favour or compensation to B or to a third person ('C')- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or (b) by committing a sexual act with B, is guilty of the offence of engaging the sexual services of a person 18 years or older.”⁹⁰

Current available data cannot describe a person who buys sex in terms of race, age, socio-economic status or marital status. The only defining feature of a person who engages in the buying of sex is the position of power they have over the person from whom the sex is bought.⁹¹ This is an extremely important factor of SEA.

The South African Law Reform Commission could not obtain any confirmation of actual figures for arrest or prosecution in South Africa for people that have been prosecuted in terms of Sec 11 of the Sexual Offences Act as no official records exist.⁹²

Prostitution or commercial sex is a sexual exchange that involves a cash payment that is usually pre-determined (it can be seen as a contract). This is normally a sex worker, male or female (including underage children), that provides sex on a more professional basis. The relationship is not so simple if the relationship is not a professional one and based on more than a cash transaction.⁹³

⁹⁰ n 79 above section 11

⁹¹ South African Law Reform Commission Report Project 107 'Sexual Offences Adult Prostitution' (June 2015) ISBN: 978-0-621-42727-1 South African Law Reform Commission First Published 2017

⁹² n 88 above

⁹³ S Lellerc-Madlala “Transactional Sex and the Pursuit of Modernity” 29:2(2008) *Social Dynamics* 213-233

Prostitution and transactional sexual relationships are of a very personal nature and due to this interaction between the different parties a change in the law would not in itself change the behaviour of the buyer.⁹⁴

b. Exploitative Relationships/Transactional Relationships

SEA also includes transactional relationships that are not prostitution. This type of relationship is becoming common among sexually active, unmarried females. It includes sex in a long or short term relationship in exchange for money, food, clothes, jewellery or even cosmetics. The gifts become a symbol of the woman's worth and the how much her respective partner is interested in her. The women in such relationships feel offended if they do not receive something for being in a relationship and for providing sex to her partner.⁹⁵

This type of relationship is seen as consensual. Originally the practice of receiving money and gifts for sex and a relationship was thought to be due to poverty. However, recent research have shown that this is not the case. It was found that it can be due to economic survival and to increase the woman and her family's long term chances. However, it is also used to increase a person's status among his or her peers.⁹⁶ Research has found that sex in exchange for material gain is a common practice and that women who engage in such transactional relationships do not identify themselves as prostitutes or sex workers.⁹⁷

For a large group of women, exchanging a relationship and sex for financial or other rewards is an important part of their perception towards sex and has little to do with being poor. Young women exploit the men to provide them with expensive gifts. It is

⁹⁴ n 88 above

⁹⁵ A M Moore, A E Biddlecom & E M Zulu "Prevalence and meanings of exchange of money or gifts for sex in unmarried adolescent sexual relationships in sub-Saharan Africa" (2007) *African journal of reproductive health* 11(3) 44–61

⁹⁶ n 92 above 44–61

⁹⁷ K Dunkle, R Jewkes, H Brown, G Gray, J McIntyre, & S Harlow "Transactional sex among women in Soweto, South Africa: Prevalence, risk factors and association with HIV infection" (2004) *Social Science & Medicine* (1982) 59(8), 1581-92

important to establish the different meanings of sexual behaviour in different socio-economic and cultural societies.⁹⁸

South Africa does not have a specific crime for such relationships. However, soldiers are still prohibited to have any sexual relationship with the local population. This is communicated to them through training and members can be charged under the MDC for disciplinary-related offences.⁹⁹

3.3 Conclusion

South African law does not have a specific definition for SEA in any of its legislation, and there is a view that SEA is not a crime in South Africa. However the different definitions highlight the fact that SEA cannot be seen as one concept. It must be broken down into its different elements to truly understand the impact and consequences towards its victims.

It highlights the fact that victims can in some of these instances give consent, and it cannot be seen in the same light as those offences that is committed without consent. As it is troop-contribution countries own responsibility to hold members accountable for SEA infractions it is important to examine the link between the definitions discussed in this chapter with the SANDF court system.

⁹⁸ n 90 above

⁹⁹ This will be discussed in detail in chapter 4

CHAPTER FOUR: SOUTH AFRICAN MILITARY COURTS

4.1 Legislation Establishing Military Courts

All military courts are creatures of statute and have no jurisdiction beyond that conferred by the following Acts:

a. The Constitution

The security services of the country is established under section 199 of the Constitution, and consist of a single defence force, single police service and any intelligence services established under the Constitution. The defence force is the only military force in the Republic and must be structured and regulated by national legislation.¹⁰⁰

Section 198 of the Constitution prescribes that the national security must be governed by the following principles:

- “a. National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
- b. The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.
- c. National security must be pursued in compliance with the law, including international law.
- d. National security is subject to the authority of Parliament and the national executive.”¹⁰¹

Section 201(2) of the Constitution states that only the President may authorise the employment of the defence force under the following circumstances:

- “a. in co-operation with the police service;
- b. in defence of the Republic; or

¹⁰⁰ n 11 above section 199

¹⁰¹ n 11 above section 198

c. in fulfilment of an international obligation.”¹⁰²

Even though the Constitution does specifically refer to military courts, section 200(1) provides: “The defence force must be structured and managed as a disciplined military force”¹⁰³ In the *Potsane* case it was argued that it is unconstitutional for the military to have its own prosecution authority and that section 179 of the Constitution invest the National Director of Public Prosecutions (the NDPP) with exclusive powers to prosecute in the Republic of South Africa. It was argued that prosecutions in the military should be conducted by or under the authority of the NDPP.¹⁰⁴

In this regard Constitutional Court Judge Kriegler stated that the two authorities have very different tasks as the military justice system is concerned with the maintenance of discipline, and the NDPP is concerned with the combating and prosecution of crime. It was emphasised that soldiers have a unique culture with its own rules and offences. Justice Kriegler: “Military discipline is not about punishing crime or maintaining and promoting law, order and tranquility in society. Military discipline, as chapter 11 of the Constitution emphasises, is about having an effective armed force capable and ready to protect the territorial integrity of the country and the freedom of its people.”¹⁰⁵ It was found that the military prosecution system, separate from the NDPP, was not unconstitutional.¹⁰⁶ This Constitutional Court case highlights the fact that the main objective of military courts is discipline, and not combating of crime.

b. The Defence Act 44 of 1957 and the MDC

Most of the Defence Act 44 of 1957 (the 1957 Defence Act) was repealed and replaced by the Defence Act 42 of 2000 (the Defence Act). Only the following sections of the 1957 Defence Act were not repealed: sections 104, 105, 106, 108, 109, 111 and 112.¹⁰⁷

¹⁰² n 11 above section 201(2)

¹⁰³ n 11 above Section 200(1)

¹⁰⁴ n 14 above

¹⁰⁵ n 14 above

¹⁰⁶ n 14 above

¹⁰⁷ The 1957 Defence Act

Section 104 of the 1957 Defence Act establishes the Military Discipline Code (or First Schedule to the Defence Act 44 of 1957 (MDC)). The MDC provides for unique offences that members only subject to the 1957 Defence Act and the MDC can be charged with.¹⁰⁸ Section 104(5) states that the 1957 Defence Act and the MDC will apply to the following people:

- All Members of the Permanent Force.
- Members of the Citizen Force, commandos and Reserve, while they are rendering service to the Republic or if they are busy with training.
- Persons serving a prison sentence imposed by them under the MDC.
- Members of the auxiliary services.¹⁰⁹

The 1957 Defence Act does not mention civilian members deployed with the SANDF. However, this was later remedied with the Defence Act 42 of 2002 and the Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA).¹¹⁰ If legislation does not specifically confer military status over a specific type of person, military courts will not have jurisdiction over such a person.

c. The Defence Act 42 of 2002

In order to give effect to Section 199 of the Constitution the Defence Act was promulgated to establish and structure a single military defence force. The Defence Act replaced most of the 1957 Defence Act. Section 2 of the Defence Act states that the defence force must perform its functions and duties in accordance with the Constitution and international law.¹¹¹

The Act applies to all members of the permanent and reserve force and all employees, whether they are employed inside or outside the Republic. The Act also applies to any person who, with the consent of the commanding officer,

¹⁰⁸ The 1957 Defence Act section 108
The 1957 Defence Act section 104(5)

¹¹⁰ Section 3(b) of the Defence Act 42 of 2002: “(b) any persons who, with the consent of the commanding officer concerned, are with or accompanying the Defence Force whilst outside the borders of the Republic.” and Section 3 of the MDSMA

¹¹¹ The 1957 Defence Act section 2

accompanies the defence force while working outside the borders of the Republic.¹¹² Section 104 provides for offences and penalties under this Act.

Section 18(1) of the Act states that in addition to the employment of the defence force by the President as contemplated in section 201(2) of the Constitution, the President or the Minister may authorize the employment of the defence force for services inside the Republic or international waters in order to:

- “a. preserve life, health or property in emergency or humanitarian relief operations;
- b. ensure the provision of essential services;
- c. support any department of state, including support for purposes of socio-economic upliftment; and
- d. effect national border control.”¹¹³

d. The Military Discipline Supplementary Measures Act 16 of 1999

The Military Discipline Supplementary Measures Act 16 of 1999 (MDSMA) is important as it provides for the administration of justice within the military: it creates the military court system, as well as review and appeal processes.¹¹⁴ The MDSMA provides for the establishment of the following Military Courts:¹¹⁵

Court of Military Appeals (CMA):

In cases where treason, murder, rape or culpable homicide was committed outside the borders of the Republic, or where contraventions of section 4 or 5¹¹⁶ of the MDC are involved, the court will consist of 5 members. These members must be three judges of the High Court of South Africa, one legal officer from the permanent force with 10 years experience in the field of law and one permanent force member with

¹¹² Section 2 of the Defence Act

¹¹³ Section 18(1) of the Defence Act

¹¹⁴ Section 2 MDSMA

¹¹⁵ Section 6 MDSMA

¹¹⁶ Section 4 of the MDC relates to offences endangering safety of forces, and Section 5 is offences by a person in command of troops, vessels or aircraft.

experience exercising command and control in the SANDF and in the conducting of military operations.¹¹⁷

In all other matters the court will have three members: one High Court Judge of South Africa or a magistrate with 10 years experience, one legal officer from the permanent force with 10 years experience in the field of law and one permanent force member with experience exercising command and control in the SANDF and in the conducting of military operations.¹¹⁸ The CMA can sit at any place within or outside the borders of the Republic.¹¹⁹

The CMA has the following Powers:

- It can uphold the findings and the sentence.
- Refuse to uphold the finding and set the sentence aside.
- Change the finding to that of a competent alternative.
- Vary the sentence.
- Correct any error in any finding, sentence or court order.
- Refer any finding or sentence not clearly or correctly recorder back to a military court to be corrected.¹²⁰

Court of a Senior Military Judge (CSMJ):

A CSMJ consist of an officer with the rank of a colonel or higher with five years experience in the field of law. The court may try any person subject to the MDC and any offence other than murder, treason, rape or culpable homicide committed within the Republic.¹²¹

A CSMJ will have jurisdiction over an accused if he or she commits murder, treason, rape or culpable homicide outside the borders of the Republic. In such cases the CSMJ will have three senior military judges presiding.¹²² The court can impose any sentence referred to in section 12 of the MDSMA.

¹¹⁷ Section 7(a) of the MDSMA

¹¹⁸ Section 7(b) of the MDSMA

¹¹⁹ Section 7(4) MDSMA

¹²⁰ Section 8 MDSMA

¹²¹ Section 9(1) of the MDSMA

¹²² Section 9(3) of the MDSMA

Court of a Military Judge (CMJ):

A CMJ consist of an officer with the rank of a major and higher with three years or more experience in the field of law.¹²³ A CMJ can try any person that is below the rank of a major and any offence except murder, treason, rape, culpable homicide and sections 4 and 5 of the MDC.¹²⁴ The court can sentence an offender to any punishment referred to in section 12, subject to a maximum sentence of imprisonment for a period of two years.¹²⁵

Commanding Officer's Disciplinary hearing (OCDH):

A commanding officer with a rank of a major and higher may conduct a disciplinary hearing of any person of the rank of a staff sergeant and lower who elected to plead guilty to a disciplinary offence¹²⁶. A sentence of a fine is limited to R 600.00.¹²⁷

In *S v Tsotsi* the court found that military courts do not form part of the ordinary court structure as military courts have its own purpose and structures. It was stated that superior courts have a superior jurisdiction over them similar to the jurisdiction over Magistrates' Courts.¹²⁸ In *Mbambo v Minister of Defence* it was stated that military courts are inferior courts with a similar status as magistrate courts.¹²⁹ In *Tsoaeli v Minister of Defence; Kholomba v Minister of Defence* it was stated that a Act of Parliament may establish or recognise courts of a status similar to a High Court, but none of the Acts establishing military courts do that, nor does any other Act of Parliament. Therefore it was held that for the purpose of the Supreme Court Act, the Court of Military Appeals is an inferior court and its decisions are subject to review by the High Court.¹³⁰

¹²³ Section 10(1) of the MDSMA

¹²⁴ Section 10(2) of the MDSMA

¹²⁵ Section 10(2) of the MDSMA

¹²⁶ "military disciplinary offence: means any offence in terms of the Code and any offence deemed in law to be an offence in terms of the Code, for which the maximum punishment prescribed in the Code does not exceed imprisonment for a period of one year" Definitions MDSMA

¹²⁷ Section 11 of the MDSMA

¹²⁸ *S v Tsotsi* 2004 (2) SACR 273 (E) para 12 & 14

¹²⁹ *Mbambo v Minister of Defence* 2006 JOL 17627 (T)

¹³⁰ *Tsoaeli v Minister of Defence; Kholomba v Minister of Defence* [2006] JOL 17034 (T) at 6-7;

4.2 Jurisdiction

The concept of “jurisdiction” refers to the power and competence of a court to hear and determine issues between parties.¹³¹ Military courts must always ensure that the respective court has jurisdiction over a person to hear the matter. In Magistrate court’s jurisdiction is based on the following three aspects: the type of claim; the value of the claim and the area of jurisdiction.¹³² In military courts it is important to establish the status of the accused and his rank.

Jurisdiction and subjectivity in the military is conferred over specific persons under the different Acts. Jurisdiction over different people depends on the circumstances. The following people are subject to the different Acts and therefore military courts have jurisdiction over them.

- All members of the permanent force;
- Member of the reserve force while rendering service, on duty or undergoing training;
- Persons in detention or imprisoned by a military court;
- Members of the auxiliary services;
- Students at military training institutions;
- A person that is not usually subject to the MDC for example a civilian member that is with the consent of the commanding officer performing duties for the SANDF while outside the borders of the Republic.¹³³

If a person is suspected of having committed a crime under Section 37¹³⁴ of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, the matter must be dealt with in accordance with that Act.¹³⁵

¹³¹ *Graaff-Reinet Municipality v Van Ryneveld’s Pass Irrigation Board* 1950 (2) SA 420 (A)

¹³² Jurisdiction Notes For Clerks Of The Civil Courts Compiled By Cheryl Loots, Civil Section, Judicial Training, Justice College May 2004

¹³³ Section 3 of the Defence Act 42 of 2002; Section 104(5) of the Defence Act 44 of 1957; Section 3 of the MDSMA

¹³⁴ Section 37 of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, refers to “Offences against the administration of justice in terms of Statute” and such offences can only be prosecuted with the permission of National Director or at the request of the Court.

¹³⁵ Section 3 of the MDSMA

a. Territorial Jurisdiction

Section 57 of the MDC provides for the territorial jurisdiction of military courts and states: “Any person charged with an offence in respect of which a military court has jurisdiction, may be tried and punished for such offence at any place by such a court having jurisdiction in respect of such person at the time of the commencement of the trial.”¹³⁶

Military courts are not limited to a specific geographic area. Military courts can be held anywhere irrespective of where the offence was committed (for example an offence can be committed in the DRC but the Military Court can take place in or outside the Republic). Section 5 of the MDSMA provides that whenever the MDSMA is enforced outside the Republic, any finding and sentence shall be as valid and effective as if it was made in the Republic, and it shall also be carried into effect as if it had been made in the Republic.¹³⁷

CMA case *202/2001 S v L/Cpl M.S. Modiba* dealt with extraterritorial jurisdiction. In this case a member of the South African National Defence Force was found guilty of contravening Section 39(1) (l) of the Arms and Ammunition Act, No 75 of 1969 read with Section 56 MDC. In that the accused unlawfully and intentionally discharged his R 4 assault rifle in such a manner that it endangered the lives of other people. The offence was committed in Maseru, Lesotho. The CMA took judicial notice of the fact that Maseru is situated beyond the borders of the Republic of South Africa.¹³⁸

The charge sheet in this case specifically referred to Section 56 MDC, it states the following: “Civil offence may be tried under code: A person subject to this Code may be tried by a military court having jurisdiction for any civil offence (other than treason, murder, rape or culpable homicide committed by him within the Republic), and may in respect of such offence be sentenced to any penalty within the jurisdiction of the court convicting him.”¹³⁹

¹³⁶ Sec 57 MDC

¹³⁷ Section 5 MDSMA

¹³⁸ CMA *202/2001 S v L/Cpl M.S. Modiba* para 04-06

¹³⁹ Sec 56 MDC

This section provides military courts the jurisdiction to try any civil offences except treason, murder, rape or culpable homicide committed within the Republic. Cases of such a nature must be dealt with in terms of section 27 of the National Prosecuting Authority Act 32 of 1998 and the trial will take place in a civilian court.¹⁴⁰ Section 56 MDC does not give clarity on rape committed outside the borders of the Republic, as SEA cases can include a charge of rape. It is therefore important to establish if military courts have jurisdiction over rape outside the Republic.

Section 9 of the MDSMA provide for the jurisdiction of CSMJ and Sec 9(3) of the MDSMA: “(3) In any case where the charge or one of the charges brought or to be brought against an accused is murder, treason, rape or culpable homicide committed beyond the borders of the Republic, the powers conferred by this section shall be exercised by three senior military judges sitting together under the presidency of the senior of those judges.”¹⁴¹ This section makes it clear that a CSMJ have jurisdiction to try a case of rape outside the Republic if the court consist of three senior military judges.

Section 58 MDC¹⁴² deals with prescription of offences in the military and it states that military courts only have jurisdiction for three years after the commission of an offence, except for treason, murder, rape or culpable homicide committed outside the Republic. Such offences do not prescribe and military courts will have jurisdiction no matter the time that has elapsed.¹⁴³

CMA case 202/2001 *S v L/Cpl M.S. Modiba* specifically quoted the following court case: “In *Bishop and others v Conrath and another, 1947(3) SA 800*, on page 803 Malan, J. said:

It should be observed that in the interpretation of a statute a presumption arises that a statute will not have extraterritorial application or strike acts

¹⁴⁰ Section 3 of the MDSMA

¹⁴¹ Sec 9(3) MDSMA

¹⁴² Sec 58 MDC must be read with Sec 29(9) MDSMA that states the following “When a person is brought before a military court, that person’s first appearance shall interrupt and absolutely bar the further passing of time in respect of the periods prescribed in sections 58 and 59 (1) (b) and any rule of the Code.” This is important as offences do not prescribe if the accused appeared in front of any military court and a Sec 29MDSMA certificate has been filled in irrespective of the offence within a 6 month period after being charged.

¹⁴³ Sec 58 MDC

committed beyond the limits of jurisdiction of the legislature unless such an intention appears clearly from the enactment.”¹⁴⁴

The court stated that the Arms and Ammunition Act, No 75 of 1969 does not contain a provision that specifically gives the Act an extraterritorial application and therefore the accused could not have been found guilty of this specific offence.¹⁴⁵ The question is then if military courts only have jurisdiction over Acts and statutes that have extraterritorial application.

The court then specifically referred to Section 47 MDC:

“Civil offences committed outside the Republic: Any person who beyond the borders of the Republic commits or omits to do any act in circumstances under which he would, if he had committed or omitted to do that act in the Republic, have been guilty of a civil offence, shall be guilty of an offence under this Code and liable on conviction to any penalty which could under section twelve of the Military Discipline Supplementary Measures Act, 1999, be imposed by a military court in respect of such offence: Provided that no such penalty of such a nature that it could, if the offence in question had been committed within the Republic, have been imposed by any competent civil court, shall exceed the maximum penalty that could be imposed in respect of such offence by that civil court.”¹⁴⁶

The court stated that the accused should not have been charged with contravention of Section 39(1) (l) of the Arms and Ammunition Act, No 75 of 1969 but with the contravention of Section 47 MDC instead.¹⁴⁷ Military courts have extraterritorial jurisdiction over any offence that would have been an offence inside the Republic under Sec 47 MDC. Military courts can try any person under the Sexual Offences Act, and this will include most of the offences covered under the definition of SEA.

¹⁴⁴ *Bishop and others v Conrath and another*, 1947(3) SA 800 page 803 as quoted in CMA 202/2001 S v L/Cpl M.S. Modiba para 05

¹⁴⁵ n 135 above

¹⁴⁶ Sec 47 MDC

¹⁴⁷ n 135 above

It is important that the charge sheet is drafted correctly and it will be drafted as follows:

“Contravention of section 47 MDC: Civil offence committed outside the Republic: On or about the 1st day of January 1999 and at or near Sake, Democratic Republic of the Congo, the said accused committed an act in circumstances under which he would, if he had committed that act in the Republic, have been guilty of a civil offence, to wit the contravention of Section 11(b) of the Criminal Law (Sexual Offences and Related Matters Amendment Act) Act 32 of 2007, in that the accused unlawfully and intentionally engaged the services of a person 18 years and older to wit person X by committing a sexual act of sexual penetration for financial reward and/or other rewards and/or compensation to the said person X.¹⁴⁸

Section 5 of the MDSMA states as follows: “Extra-territorial application: Whenever this Act is enforced outside the Republic, any finding, sentence, penalty, fine or order made, pronounced or imposed in terms of its provisions shall be as valid and effectual, and shall be carried into effect, as if it had been made, pronounced or imposed in the Republic.”¹⁴⁹ This is important, as the Act provides for military courts to have jurisdiction outside the Republic and for the sentences to be enforced inside the Republic.

b. Concurrent Jurisdiction

The military courts and civilian courts have concurrent jurisdiction over military members. Section 105 of the 1957 Defence Act states that ordinary courts in South Africa will have jurisdiction to try any person for an offence under the MDC if the offence and person falls under the jurisdiction of such a court,¹⁵⁰ and section 54 of the MDC states that nothing in the MDC will affect the jurisdiction of civil courts to try a person subject to the MDC for any offence within its jurisdiction.¹⁵¹ These two

¹⁴⁸ This is only a example of a possible charge sheet of Sec 11(b) of the Sexual Offences Act

¹⁴⁹ Section 5 MDSMA

¹⁵⁰ Section 105 The 1957 Defence Act

¹⁵¹ Section 54 MDC

sections make it clear that civilian courts do not lose jurisdiction over military members.

Section 61 of the Sexual Offences Act states the following:

“Extra-territorial jurisdiction: (1) Even if the act alleged to constitute a sexual offence or other offence under this Act occurred outside the Republic, a court of the Republic, whether or not the act constitutes an offence at the place of its commission, has, subject to subsections (4) and (5), jurisdiction in respect of that offence if the person to be charged-

- (a) is a citizen of the Republic;
- (b) is ordinarily resident in the Republic;
- (c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;
- (d) is a company, incorporated or registered as such under any law, in the Republic; or
- (e) any body of persons, corporate or unincorporated, in the Republic.”¹⁵²

This section gives extra-territorial jurisdiction to courts for offences committed under the Sexual Offences Act outside the borders of the Republic. Military courts do not need to use section 47 MDC to charge members, but can use the Sexual Offences Act directly. This also gives civilian courts jurisdiction over military members who commit offense under Sexual Offences Act outside the Republic.

Section 106 of the 1957 Defence Act provides that a person can only be tried once for an offence. There is no rule that provides which court (military or civil) will have priority over the prosecution of military members. Factors such as the type and seriousness of the offence, as well as sentencing, will influence the decision.

Section 112 stipulates where a member sentenced to imprisonment or detention will undergo the sentence. The military do not have its own prisons and members are sent to the same prisons as members sentenced by ordinary courts.¹⁵³

¹⁵² n 79 above section 61

4.3 Sentencing

Section 12 of the MDSMA provides that military courts can impose the following sentences:

- Imprisonment.
- Officers can be cashiered or dismissed with or without ignominy from the SANDF.
- Any other rank than an officer can be discharged with or without ignominy from the SANDF.
- Officers and other ranks can be demoted to a lower rank or receive a reduction in seniority.
- A fine not exceeding R 6000.00.
- If the person is not an officer detention for a period not exceeding two years.
- In the case of a private, field punishment not exceeding three months or confinement to barracks for a period not exceeding 21 days.
- Any other rank than an officer extra non-consecutive duty for a period not exceeding 21 days.
- A reprimand.¹⁵⁴

Civilian courts follow the three pillars of sentencing set out in *S v Zinn*: the sentence must reflect the seriousness of the crime, take into consideration the mitigating and aggravating factors that affect the blameworthiness of the offender and also consider the interest of society to protect society and also to serve as deterrence to other future would be offenders.¹⁵⁵ Military courts follow the same triad when considering sentencing. The court will consider the nature of the offence, the effect on the military community and its discipline and the status of the offender such as his rank in the military, and his duties and responsibilities.¹⁵⁶ Sentencing in the military is confronted by several problems similar to the rest of South African courts. Some of the problems include a wide discretion on sentencing, which results in a lack of

¹⁵³ Section 112 The 1957 Defence Act

¹⁵⁴ Section 12 MDSMA

¹⁵⁵ *S v Zinn* 1969 (2) SA 537 (A)

¹⁵⁶ M Nel 'Sentencing Practice in Military Courts' Doctor of Laws University of Pretoria January 2012

uniformity in sentencing practices. There is no consistency in sentencing in the military.¹⁵⁷

In CMA case 20/2017 *S v Rfn S. Gumbi* the accused pleaded guilty to contravening section 45(a) MDC in that the accused admitted that he had solicited a local DRC prostitute for sex, and he was sentenced to a discharge from the SANDF by the original Senior Military court. Due to the nature of the sentence the case went on review to the CMA. The CMA found that the sentence of discharge from the SANDF was not in line with the nature of the offence and changed it to six months imprisonment and discharge with ignominy from the SANDF, both wholly suspended for three years on condition the accused is not convicted of contravention of section 45(a) MDC within the period of suspension. The Court stressed the following: "Taking into account that sexual relationships with local women by soldiers is a matter of concern in that it can cause major administrative and social problems, and effect military discipline the trial judge in my view overemphasised the nature and the extend of the offence and did not give sufficient weight to the fact that the relationship between the accused and the women concerned was consensual."¹⁵⁸

In CMA case 25/2017 *S v Capt M.P. Malatjie* the accused pleaded guilty to contravening section 45(a) MDC in that he admitted that he had a sexual relationship with a local DRC woman. The accused was sentenced to dismissal from the SANDF, but due to the nature of the sentence the case went on automatic review to the CMA. The CMA stressed the fact that the trial judge made an error in that he considered a social problem as a serious crime and that the judge did not remain objective during sentencing. It was also stressed that the victim was not a victim as she was a willing partner in the sexual relationship. The sentence was changed to six month imprisonment and cashiering, both wholly suspended for 3 years on condition that the accused is not convicted of contravening section 45(a) MDC committed within the period of suspension.

¹⁵⁷ J Naser "Reformation of Sentencing in South Africa" (2001) 14(2) *Acta Criminologica* 84-89

¹⁵⁸ CMA case 20/2017 *S v Rfn S. Gumbi*

The CMA made an additional order that has never been done by a military court in that the accused was order to pay an amount of R 60 000.00 for interim maintenance for the child that was born out of the relationship.¹⁵⁹

4.4 Appeal and Review

Accused convicted and sentenced by a military court has the right of automatic review of proceedings of the trial to ensure that the proceedings, findings, sentence or order made is valid, regular, fair and appropriate.¹⁶⁰

Section 25 MDSMA provides that all convictions in the military courts must be reviewed. If the review counsel is of the view that the sentence should not be upheld the review counsel must make representations to the Director Military Judicial Reviews, who can then exercise the same powers as conferred on a Court of Military Appeals by the MDSMA, or refer the case to the Court of Military Appeals.¹⁶¹

A case will serve before a Court of Military Appeals if the accused was sentenced to imprisonment, a suspended sentence of imprisonment, cashiering, discharge with ignominy, dismissal or discharge from the SANDF.¹⁶² This is an automatic process and an accused need not apply for a review of the case. The accused can also apply for the review of the case by the Court of Military Appeals.¹⁶³ The MDSMA states that a accused must be informed of his or her rights after the trail, one of which is the option of approaching the High Court for relief after the trial at his or her own cost,¹⁶⁴ in *Mbambo v Minister of Defence* the court stated that the High Court have the power to review the proceedings of a Court of Military Appeals as it is a inferior court and it must be done in accordance with the Supreme Court Act.¹⁶⁵

¹⁵⁹ CMA case 25/2017 S v Capt M.P. Malatjie

¹⁶⁰ Sec 25 MDSMA

¹⁶¹ Sec 34(3) MDSMA

¹⁶² Sec 34(2) MDSMA

¹⁶³ Sec 34(5) MDSMA

¹⁶⁴ Sec 33(7)(c) MDSMA

¹⁶⁵ n 126 above

4.5 Possible Existing SEA Offences under South African Law

The conduct and discipline of troop-contributing countries to UN missions is governed by a memorandum of understanding (MOU). The MOU is an agreement between the UN and a Member State to establish the administrative, logistical and financial terms for the mission. It also provides for the standards of conduct the personnel must abide by and the consequences if personnel do not.¹⁶⁶

Member States agree that military personnel will remain subject to the exclusive jurisdiction of the country. However, they must comply with the UN standards of conduct and all other documents adopted by the UN that regulate their conduct. Member States have the primary responsibility to investigate alleged acts of misconduct committed by their personnel. If a Member State does not do so the UN can do its own investigation.¹⁶⁷

Criminal accountability rest with the Member State. Any misconduct that is a crime will be investigated and can be prosecuted by the Member State. Military members remain under the exclusive jurisdiction of their countries.¹⁶⁸

The UN Force Commanders Directive on Preventing Sexual Exploitation and Abuse (SEA) by MUNUSCO Forces dated 29th April 2016 makes it clear that UN personnel are under no circumstances allowed to fraternise with the local population of the DRC, including instances where the relationship seems to be consensual. UN personnel are prohibited from procuring any sexual services either directly or by using a third party.¹⁶⁹ In CMA cases 20/2017 S v Rfn S. Gumbi and CMA case 25/2017 S v Capt M.P. Malatjie¹⁷⁰ the CMA judge stated that although these actions are prohibited by the UN and various UN resolutions, it was not criminalised and did not constitute a new offence in South Africa. The court emphasised that although

¹⁶⁶ <https://peacekeeping.un.org/en/deployment-and-reimbursement> (access 26 May 2019)

¹⁶⁷ UN Policy: Accountability for Conduct and Discipline in Field Missions dated 01 August 2015

¹⁶⁸ n 164 above

¹⁶⁹ UN Force Commanders Directive on Preventing Sexual Exploitation and Abuse (SEA) by MUNUSCO Force dated 29th April 2016 309/MONUSCO/FC

¹⁷⁰ CMA case 20/2017 S v Rfn S. Gumbi and CMA case 25/2017 S v Capt M.P. Malatjie

socialising with the local people in the DRC may have serious administrative and social implications for the SANDF it is still not a crime.¹⁷¹

Even though SEA itself is not criminalised in the traditional sense it does not mean that soldiers who commit SEA cannot be prosecuted. The military authorities currently use existing legislation that conforms to the factual basis of those offences to prosecute SANDF members for SEA.

Offences that can be used include the following: sections 19(5), 45(a), 46 and 47 MDC. In two recent cases the Court of Military Appeals (CMA), *CMA case 20/2017 (S v Rfn S. Gumbi)* and *CMA case 25/2017 (S v Capt M.P. Malatjie)*, soldiers were found guilty of contravening section 45(a) MDC after having relationships with local women in the DRC.¹⁷² In more serious cases members can be charged with contravening the Sexual Offences Act. This Act can be used to charge a soldier for various offences: section 11 of the Sexual Offences Act criminalises the act of paying for sex or for any other reward. This section makes transactional sex a criminal offence under South African law.¹⁷³

Chapter 3 (sections 15-22) of the Act provides for sexual offences against children.¹⁷⁴ This will be discussed in detail below.

a. Section 47 MDC

Section 47 MDC states the following: “Any person who beyond the borders of the Republic commits or omits to do any act in circumstances under which he would, if he had committed or omitted to do that act in the Republic, have been guilty of a civil offence, shall be guilty of an offence under this Code and liable on conviction to any penalty which could under section twelve of the Military Discipline Supplementary Measures Act, 1999, be imposed by a military court in respect of such offence: Provided that no such penalty of such a nature that it could, if the offence in question

¹⁷¹ n 156 above

¹⁷² n 167 above

¹⁷³ n 79 above Section 11

¹⁷⁴ n 79 above section 3

had been committed within the Republic, have been imposed by any competent civil court, shall exceed the maximum penalty that could be imposed in respect of such offence by that civil court.”¹⁷⁵

As discussed above this section provides for the jurisdiction of military courts to try any civil offence outside the Republic. Any action that is an offence under the Sexual Offences Act will be dealt with under section 47 MDC. Military courts have jurisdiction to try any offences such as rape, sexual assault or any sexual offence against a minor.¹⁷⁶

b. Section 19(5) MDC

Section 19(5) MDC provides: “Any person who neglects to obey any unit, formation or force order of which it is his duty to have knowledge, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding six months.”¹⁷⁷

The military dictionary defines unit standing orders as follows: “Published rules and regulations and detaching regulating unit personnel”¹⁷⁸ A base is the area from which operations are directed or supported from. An order is defined as “communication, written, oral or by signal, which conveys instructions from a superior to a subordinate.”¹⁷⁹

Unit orders are used to communicate important day-to-day administrative and disciplinary orders to unit members. It is also referred to as base standing orders. Every military base will have one.

An example of a unit order will be Unit Order Part 001: Order 001/17: RSA Base Standing Order dated 01 June 2017 that was applicable to the members deployed in Sake DRC in 2007/2018. The order stated: “The aim of this Standing Order is to give

¹⁷⁵ Sec 47 MDC

¹⁷⁶ n 79 above

¹⁷⁷ Sec 19(5) MDC

¹⁷⁸ South African Defence Force Military Dictionary 1984

¹⁷⁹ South African Defence Force Military Dictionary 1984

orders for the conducting day-to-day activities of the RSA deployment Bases in DRC.”¹⁸⁰

Paragraphs 9 and 10 of the order specifically state that noncompliance with this order constitutes an offence under the MDC and that it is the duty of all members within the mission area to have knowledge of the base standing order as negligence is sufficient to get a conviction under the MDC.

The base standing order specifically prohibits the following actions:

“Paragraph 58: No RSA Contingent member is allowed to have sexual relations with the local populations.

Paragraph 62: Local women and men must be treated with respect and courtesy. Any member who commits such offences wrt Sexual Exploitation and Abuse will be repatriated immediately and will be charged in accordance with the MDC and any other applicable laws.

Paragraph 64: No RSA Batt member must engage in any act of prostitution with the local population or any kind of prostitution with anyone during the tour of duty.”

This base standing order specifically prohibits any sexual relationship with the local population, and consent is not a defence. In CMA case *21/ 2014 S v Sgt G.J. Mbokane* the court stated that in order for a person to be convicted of section 19(5) MDC the court must be satisfied that the following was proven: the order existed, it was duly promulgated and it was still in force at the time of the commission of the offence. The order applied to the accused and that he had a duty to have knowledge of it.¹⁸¹

In CMA case *60/2008 S v S.M. Mathebula* the court upheld a sentence of discharge from the SANDF for a member that was found guilty of contravening section 19(5) MDC in that he had a sexual relationship with a member of the local population. In this case base standing order revised Mavivi and Madiba Base Standing Order dated 12 June 2007 stated in paragraph 62: “Local women will be treated with respect and

¹⁸⁰ Unit Order Part 1: Order 001/17: RSA Base Standing Order para 4

¹⁸¹ CMA case *21/2014 S v Sgt G.J. Mbokane* para 120

courtesy. Any SANDF member who makes himself guilty of the offence of rape, sexual misconduct or gross sexual harassment will be repatriated immediately, and will be charge in accordance with the MDC and UN act wrt SEA”¹⁸²

The complainant in this case testified that she had a sexual relationship with the accused on two occasions: he did not rape her but promised to marry her. The court found that he indeed contravened the base standing order. Aggravating was the fact that the accused disobeyed orders outside the Republic, he did not use a condom and he used food to entice the complainant to have sex with him. The court stated the following: “The SA National Defence Force cannot afford ill discipline sexual behaviour or its soldiers beyond the borders of the Republic.”¹⁸³ It is clear from the above that section 19(5) MDC can be used to prosecute members for SEA offences if the base standing order prohibits such actions.

c. Section 45(a) MDC

Section 45(a) MDC provides: “Any person who at any time behaves in a riotous or an unseemly manner shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding six months.”¹⁸⁴

In CMA case *54/2004 S v L/Cpl Tebogo* it was found that the fault element can be either intention or negligence.¹⁸⁵ In SEA matters it will have to be proven that the accused acted in an unseemly manner. The MDC do not have a specific definition for “unseemly manner”. The Merriam Webster online dictionary define unseemly as follows: “not according with established standards of good form or taste.”¹⁸⁶

In CMA case *20/2017 S v Rfn R.S. Gumbi* the accused pleaded guilty in contravening section 45(a) MDC in that he admitted that he had a sexual relationship with a local DRC woman. The charge sheet reads as follows: “In that between the months of July

¹⁸² Revised Mavivi and Madiba Base Standing Order dated 12 June 2007 as quoted in CMA case *60/2008 S v S.M. Mathebula* para 04

¹⁸³ CMA case *60/2008 S v S.M. Mathebula* para 12

¹⁸⁴ Sec 45(a) MDC

¹⁸⁵ CMA case *54/2004 S v L/Cpl Tebogo* para 14

¹⁸⁶ <https://www.merriam-webster.com/dictionary/unseemly#other-words> (accessed 26 May 2019)

2015 and May 2016 and at or near Lubero, DRC the said accused unlawfully and intentionally or negligently behaved in an unseemly manner in that the accused despite the fact that it is common knowledge that the United Nations (UN) prohibits sexual relationships with the local population engaged a member to be deemed a member of the local population to wit (Person X) to have sexual relationships with her in exchange for money and/or favours and/or compensation, which act caused the matter to be reported to the UN as a Sexual Abuse and Exploitation Case, which in turn reflected negatively on the SANDF and the RSA as a whole.¹⁸⁷ (the author removed the name of the complainant in the matter to protect her identity)

The accused was originally sentenced to discharge from the SANDF. The CMA took into consideration that the complainant was a sex worker and that the sex was consensual. The sentence was changed to six months imprisonment and discharge with ignominy from the SANDF, suspended for 3 years on condition the accused is not found guilty of contravening Sec 45(a) MDC in that time.¹⁸⁸

Members of the SANDF can be charged for contravening section 45(a) MDC for SEA related offences if it is found that their conduct was unseemly. The term acted in an “unseemly manner” is very broad and it can also include consensual sexual relationships.

d. Section 46 MDC

Section 46 MDC states: “Any person who by act or omission causes actual or potential prejudice to good order and military discipline, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding one year.”¹⁸⁹

In CMA case *62/2005 S v Capt S.J. Phaladi* the court made it clear that in order for a charge of section 46 MDC to succeed the prosecution will have to prove beyond reasonable doubt that the conduct of the accused resulted in the good (military)

¹⁸⁷ n 155 above

¹⁸⁸ N 155 above

¹⁸⁹ Section 46 MDC

order and military discipline suffered.¹⁹⁰ If it can be proven that the good order and military discipline suffered because of a SEA related matter the accused can be charged for contravention of section 46 MDC.

SEA and its related matters can be dealt with under the MDC depending on the circumstances of each individual case.

4.6 General Principles of Criminal Law

Section 35 of the Constitution set out the rights of an arrested, detained and accused person.¹⁹¹ It is important for military courts to adhere to these principles to ensure that accused person is afforded a fair trial.

Section 84 of the MDC states that the rules of evidence applied by the civilian courts of the Republic will also be followed by the military courts. The section further provides that no person shall be required to answer a question or be forced to produce a document or any other piece of evidence which he would not have to produce in similar proceedings before a civil court.¹⁹² Military courts may take judicial notice of matters within their general service knowledge and the general principles of the national law of the Republic with regard to criminal liability shall be followed.¹⁹³ The quantum of evidence required for conviction in a military court is beyond reasonable doubt.¹⁹⁴

If there is any matter that is not provided for in the military legislation then the military courts will look at other legislation that will best provide justice (for example the provisions of the Criminal Procedure Act 51 of 1977).¹⁹⁵ Section 4 of the MDSMA provides that if there is a conflict between the MDSMA and any other act that the provisions of the MDSMA will prevail, except if it is in conflict with the Constitution.¹⁹⁶

¹⁹⁰ CMA case 62/2005 *S v Capt S.J. Phaladi* para 08

¹⁹¹ n 11 above section 35

¹⁹² Section 84 MDC

¹⁹³ Rule 19 and 20 Rules of Procedure or Schedule to the MDSMA (The Rules)

¹⁹⁴ Rule 51 The Rules

¹⁹⁵ Rule 124 The Rules

¹⁹⁶ Section 4 MDSMA

Section 35(f) and (g) of the Constitution provides for the right of an accused to choose his own and be represented by a legal practitioner, and that if he does not have the financial means to do so that one will be provided to him by the state if it will result in substantial injustice.¹⁹⁷ This right of the accused is protected and provided for in section 23 of the MDSMA which states that every person who falls under the jurisdiction of military courts has the right to choose his own legal representation at own cost or that a military defence counsel at state expense will be provided to him.¹⁹⁸ Section 38 of the MDSMA states: "Every privilege which in law attaches to communications between any practising advocate or attorney and such practitioner's client, shall apply to communications between any member of the military legal services law staff and such person's individual or departmental client."¹⁹⁹ The day-to-day working language in the SANDF is English and it is expected of all soldiers to be competent in this language. However, during trial proceedings an accused is given the right to have the proceedings interpreted in to his preferred language.²⁰⁰ This shows that the rights of the accused are protected at all times during the military court process.

All MDC offence has to adhere to the principle of legality. The principle is based on the consideration that law should be as clear as possible in order for people to know what a crime is.²⁰¹ A person cannot be found guilty of a crime unless at the moment it took place his conduct was already recognised as a crime.²⁰² Section 39(2) of the Constitution of South Africa states that when a court interprets any legislation or develops the common law it must promote the spirit and objects of the Bill of Rights.²⁰³ The common law must be adapted so that it grows in harmony with the objectives found in the Constitution.²⁰⁴ Section 173 of the Constitution prohibits lower

¹⁹⁷ Section 35(f) and (g) of the Constitution of South Africa

¹⁹⁸ Section 23 MDSMA

¹⁹⁹ Section 38 MDSMA

²⁰⁰ Section 39 MDSMA

²⁰¹ CR Snyman 'Criminal Law' LexisNexis Butterworths 2006 4th ed 39

²⁰² Article 11 of the Universal Declaration of Human Rights 1948 gives the following definition of the principle: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed".

²⁰³ n 11 above section 39 (2)

²⁰⁴ I Currie, J De Waal *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005) 67

courts from developing the common law as they do not have an inherent power to do so, and since military courts are lower courts they will not have the power to do so.²⁰⁵

In *Carmichele v The Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 (4) SA 938 (CC) the Constitutional Court emphasised that the constitutional obligation to develop the common law is not discretionary, but is rather a “general obligation” to consider whether the common law is deficient and, if so, to develop it to promote the objectives of the Bill of Rights.²⁰⁶ In *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC), the court reminded judges when developing the common law to “be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary”.²⁰⁷ In the *Masiya* case the judge had to decide if the common law were to be developed in retrospect or only to future cases. The Judge states that a development that is necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act.²⁰⁸

In *S v Mshumpa and Another* 2008 (1) SACR 126 (E) the Judge highlighted the fact that the definition of a crime or the extension of its application to new circumstances was frowned upon in even in our pre-constitutional common law because of the fact that it offended against the principle of legality.²⁰⁹ The Judge referred to the judgement in *Masiya* (referred to above) and stated that it clarified the extent to which the Constitution allows the High Courts to develop criminal law. Referring to paragraph 30 to 33 of *Masiya* the Judge stated that a development of the common law of crimes must be done incrementally and cautiously, in accordance with the dictates of the Constitution. The development should not have retrospective effect as this would offend the principle of legality. However; it is competent to operate in the

²⁰⁵ JJ Joubert (editor) *Criminal Procedure Handbook* 10th ed (Juta Cape Town 2011) 386

²⁰⁶ *Carmichele v The Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 (4) SA 938 (CC) para 33

²⁰⁷ *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) para 33

²⁰⁸ n 204 above para 47-58

²⁰⁹ *S v Mshumpa and Another* 2008 (1) SACR 126 (E) para 54

future only.²¹⁰ In *S v Mshumpa* the court took the judgment of *Masiya* into consideration and it is clear from the above two cases that the High Court is allowed to develop common law in accordance with the Constitution, but it will only be operational for the future and not be applied retrospectively.

4.7 Conclusion

Section 200(1) of the South African Constitution provides that the SANDF must be managed as a disciplined force. The most important legislation giving the SANDF the jurisdiction to ensure that the SANDF comply with UN requirement to combat SEA is the 1957 Defence Act, the new Defence Act, the MDC, and the MDSMA. South African Military Courts have jurisdiction to prosecute MDC offences as well as criminal offences.

Currently South Africa does not have a specific offence for SEA and other legislation is used to prosecute SEA offences in South African military courts. These offences differ, depending on the circumstances of each case. Offences that can be used include the following: sections 19(5), 45(a), 46 and 47 MDC.

In more serious cases members can be charged with contravening the Sexual Offences Act. The SANDF have the jurisdiction and offences to prosecute different SEA offences. These offences can either be criminal or disciplinary in nature.

General principles of criminal law must be adhered to and the SANDF cannot create offences and punishment as it see fit. The next chapter discuss the social issues linked to SEA and if new legislation should be enacted to prosecute SEA matters.

²¹⁰ *Carmichele v The Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 (4) SA 938 (CC) para 59

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Social Aspects

The focus of this paper is on the prosecution of SEA by South African military courts. However, it is important to briefly look at the social aspects of SEA, even though it falls outside the scope of this study. There have been arguments²¹¹ that the zero tolerance approach by the UN is not correct as it takes away income from sex workers in the DRC. Sex is used for survival due to the poverty in the country. The UN must concentrate on the underlying human rights and social issues in the country.²¹² Sex workers get stereotyped all over the world. However, with limited economic opportunities some women and men have little other choice but to become sex workers. It is a viewpoint that it is the laws that criminalise sex work that allows for abuse to occur against the people that work in the sex trade.²¹³ The definition of SEA by the UN includes any sexual interactions between UN personnel and the local population, even including consensual relationships.²¹⁴ A relationship between a UN peacekeeper and a member of the local population can never be consensual due to the unequal power dynamic.

This view has been criticised by O Simic²¹⁵ as it sees all sex between UN personnel and locals as harmful, even if it is a consensual transactional relationship. This point does not take the economic climate of the country into consideration, and does not take into consideration that prostitution is the only why some women can get an income.²¹⁶

²¹¹ This is discussed in detailed in: D Otto Making sense of zero tolerance policies in peacekeeping sexual economies Draft chapter for V Munro and C F Stychin (eds), *Sexuality and the Law: Feminist Engagements*, London: GlassHouse Press, 2007

²¹² D Otto Making sense of zero tolerance policies in peacekeeping sexual economies Draft chapter for V Munro and C F Stychin (eds), *Sexuality and the Law: Feminist Engagements*, London: GlassHouse Press, 2007

²¹³ CA Mgbako (2016) *To Live Freely in this World: Sex Worker Activism in Africa*

²¹⁴ As discussed in detail in chapters 2 and 3

²¹⁵ O Simic 'Rethinking 'sexual exploitation' in UN peacekeeping operations' (2009) 32 *Women's Studies International Forum* 288–295

²¹⁶ O Simic 'Rethinking 'sexual exploitation' in UN peacekeeping operations' (2009) 32 *Women's Studies International Forum* 288–295

In 2003 a study found that the even though there has been a increase in the awareness of the vulnerable position the local population in the DRC found themselves in, there were no decisive actions taken by the UN or troop contributing countries to combat SEA. No significant difference has been made on the long term socio-economic situation in the country.²¹⁷

The opposite view is that the buyer in the chain of sexual transactions must be punished instead of the seller, and that the women are being sexually exploited and must be protected as they are the victims in the process: "We cannot shrug our shoulders and say men are like this, or prostitution has always been in existence, or boys will be boys, or customers are victims too. We cannot tell women and girls in prostitution that they must continue to do what they do because prostitution is inevitable. Rather, our responsibility is to make men change their behaviour by all means available — educational, cultural, and through legislation that penalises men for the crime of sexual exploitation."²¹⁸

Male power is seen as domination, and the assumption is made that when a man pays for sex he actually buys power and dominance over an objectified female body. This has serious psychological consequences for the women, equivalent to rape. Radical feminists see men that buy sex in the same light as a man who commits rape.²¹⁹ SEA is seen as an abuse of power and it breaks the trust between the community, families and individuals affected.²²⁰

In South Africa legislation already exists that criminalise the solicitation of sex.²²¹ The South African Law Reform Commission (the Commission) looked into the current legislation regarding prostitution. The Commission considered whether South African law should be reformed to identify alternative policies and legislation to regulate,

²¹⁷ P Higate Chapter 1 Peacekeeping and Gender Relations in the Democratic Republic of the Congo Gender and Peacekeeping November 2003

²¹⁸ J Raymond 'Guide to the New UN Trafficking Protocol' *North Amherst* (2001) MA: CATW

²¹⁹ J O Davidson "'Sleeping with the enemy'? Some Problems with Feminist Abolitionist Calls to Penalise those who Buy Commercial Sex" (2003) *Social Policy and Society*, vol. 2, no. 1, 55-63

²²⁰ UN Force Commanders Directive on Preventing Sexual Exploitation and Abuse (SEA) by MONUSCO Force dated 29th April 2016 309/MONUSCO/FC

²²¹ n 79 above section 11

prevent or deter prostitution.²²² The solicitation of sex is only one component of SEA, and South Africa has adequate legislation to deal with rape, sexual assault and any sexual activity with a minor.

Research done by J.O. Davidson has shown that societies attach different meanings to the use of prostitutes and the use of commercial sexual services. Certain societies see it as a rite of passage and it is deemed normal masculine behaviour.²²³

However, in contrast other societies discourage men from using the services of prostitutes and paying for commercial sexual services.²²⁴ If changes are made or needed to current legislation, it will have to consider social aspects.²²⁵

It is important for the SANDF to consider Standing Operating Procedures (SOP's), policies and legislation that can deal with the men and women who abuse their power to get sexual services from the local DRC population, even if it seems like a consensual relationship. Exploitation is inherent to prostitution, and is caused by various external factors which include inequality and poverty.²²⁶

SEA do not only include cases where members must be prosecuted for committing SEA. Cases are also reported of pregnancies that lead to paternity and child support claims against the SANDF soldiers.²²⁷ The South African military courts are a criminal court system and as such paternity claims cannot be addressed through Military Courts: it must be done through private international law.

5.2 Need for SEA Specific Legislation in South Africa

The Cabinet approved the submission of the new Military Discipline Bill of 2019 to Parliament. This new Bill will repeal the MDSMA and provide for effective

²²² n 88 above

²²³ J O Davidson "Sleeping with the enemy'? Some Problems with Feminist Abolitionist Calls to Penalise those who Buy Commercial Sex" (2003) *Social Policy and Society*, vol. 2, no. 1, 55-63

²²⁴ n 219 above 55-63

²²⁵ n 219 above 55

²²⁶ n 88 above

²²⁷ Cases about Paternity claims against South African Soldiers are reported by the Local DRC ladies to the Conduct and Discipline Team of the UN. It is South Africa's responsibility to investigate each of the reported cases. <https://monusco.unmissions.org/en/conduct-and-discipline> (accessed 23 Nov 19)

administration of military justice and the maintenance of discipline in the SANDF.²²⁸ It will align the SANDF with the UN disciplinary principles.²²⁹ No information, however, has been provided on how the new Bill will achieve this.

It has been proposed that South Africa creates a specific offence for SEA. It will have to be established if this will influence the MDC only or the Sexual Offences Act as well. Our current criminal law system does not allow for compensation to be paid to the victims, but a new law can include a restorative justice system to address sexual offences. New legislation can address the needs of the victim in consideration of the rights of the offender balanced with the need of the community that wants some protection given to victims, and the offenders punished.²³⁰

It is important that if an offence is created that the harm done to the victims be addressed. Gender issues can be found across all spheres of life regardless of the social, political or economic position of the victim. It must be remembered that perpetrators of SEA are not only men, but can be women as well.²³¹

The proposed legislation will only be effective if it can accomplish its purpose of combating SEA. It is important that the proposed legislation is not only enacted to satisfy the UN, but that it has a measurable effect on the ground. In order for the proposed new legislation to be effective it will have to be communicated to the soldiers, and it must be acceptable to not only the military community but also the people of the DRC (or any other region). The new law must be enforceable and applied consistently.²³²

The system of punishing people for crimes committed only have a limited success. There is a view that a different approach is needed. Restorative justice aims to

²²⁸ Publication of Explanatory Summary of the Military Discipline Bill, 2019 Government Notices No. 42346 Government Gazette, 28 March 2019

²²⁹ <https://www.defenceweb.co.za/middle-east/middle-east-middle-east/cabinet-approves-new-military-discipline-bill/> (accessed 26 May 2019)

²³⁰ N Joyce-Wojtas M Keenan "Is restorative justice for sexual crime compatible with various criminal justice systems?" (2016) 19:1 *Contemporary Justice Review* 43-68

²³¹ CON Moser FC Clark (2001) *Victims, perpetrators or actors? : gender, armed conflict and political violence*

²³² <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/09/2015-FBLEP-Characteristics-of-an-Effective-Law.pdf> (accessed 05 June 2018)

involve all the parties to the despite, including the community or family members that might be affected by the crime. This shifts the focus from punishing the offender to repairing the harm done against the victim and the community.²³³

Restorative justice can restore the dignity of SEA victims. It must respond to the harm done by the offender, the needs of the victim and the obligations of the offender.²³⁴ There is no need to enact legislation for a restorative justice process: it can be used at the reporting stage, pre-trial or sentencing stage.²³⁵ This process can give the victim and the community a voice against SEA.

South Africa provides training to its soldiers and ensures they are aware of SEA. Training received informs the soldiers about SEA and that no sexual relationship with the local population will be tolerated, and if they do not adhere to this they will be prosecuted under the MDC and repatriated back to South Africa.²³⁶ In addition the country has a Peace Mission Training Centre that provides training to soldiers and to ensure soldiers understand the unique environment they will be operating in peacekeeping missions.²³⁷

5.3 Conclusion and Recommendations

South Africa's Cabinet has affirmed that South Africa will not to tolerate ill-disciplined soldiers and that SEA needs to be combated. Ideally South Africa needs to eradicate SEA allegations and no SEA cases should be reported against South African soldiers.

Sexual violence during armed conflict differs from SEA and is regulated by international humanitarian law, human rights law and international criminal law.

²³³ Restorative Justice the Road to Healing Department of Justice and Constitutional Development Republic of South Africa

²³⁴ n 226 above

²³⁵ n 226 above

²³⁶ <https://pmg.org.za/committee-meeting/25896/> (accessed 28 June 2018)

²³⁷ http://www.dod.mil.za/news/2014/03/mission_training.htm (accessed 28 June 2018)

During UN peacekeeping missions countries are responsible to prosecute perpetrators of SEA themselves. The UN does not expect countries to change their legislation or to adopt new legislation in order to ensure SEA is criminalised. Countries are expected to issue the UN standard of conduct to all its members and to ensure members receive orders to comply with them. This can be done in the form of formation or unit orders. Through these orders the soldiers are required to comply with the UN standard of conduct and then to be prosecuted under the countries' relevant disciplinary codes for violations.

Currently South Africa does not have a specific offence for SEA and other legislation is used to prosecute SEA offences in South African military courts. These offences differ, depending on the circumstances of each case. Offences that can be used include the following: sections 19(5), 45(a), 46 and 47 MDC. In more serious cases members can be charged with contravening the Sexual Offences Act.

This Act can be used to charge a soldier for various offences: section 11 of the Sexual Offences Act criminalises the act of paying for sex or for any other reward. This section makes transactional sex a criminal offence under South African law. Chapter 3 (Sections 15-22) of the Act provides for sexual offences against children.

Even though SEA itself is not criminalised in the traditional sense it does not mean that soldiers who commit SEA cannot be prosecuted. The military currently uses existing legislation that conforms to the factual basis of those offences to prosecute SANDF members for SEA.

If new legislation is adopted it will not only have an effect on the MDC, but also the Sexual Offences Act. The proposed legislation will only be effective if it can accomplish its purpose of combating SEA. It is important that the proposed legislation is not only enacted to satisfy the UN, but that it has a measurable effect on the ground.

A restorative justice process can restore the dignity of SEA victims. It must respond to the harm done by the offender, the needs of the victim and the obligations of the

offender. There is no need to enact legislation for a restorative justice process: it can be used at the reporting stage, pre-trial or sentencing stage. This process can give the victim and the community a voice against SEA

It is recommended that existing legislation be used to combat SEA, and that there is no need to change the MDC or the Sexual Offence Act. It is important that the relevant military prosecution personnel are made aware of the existing legislation in order for the optimum use of the legislation.

The system of punishing soldiers for SEA has had a limited success and it is recommended that a restorative justice approach needs to be followed. It is not necessary to change the law for such an approach. SANDF members need to receive training how to effectively implement a restorative justice approach. It is important that the victims and the community be given a voice to address the harm done. This cannot be done with a traditional retributive justice system.

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