Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers

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Abstract

United Nations (UN) peacekeeping operations have been increasingly deployed in many crisis contexts. The practice has been established by the UN to ensure peace and protect victims of different types of armed conflict. Unfortunately, during the past ten years, several cases of serious human rights violations committed by peacekeepers against people who should be protected by them have emerged. The UN has gone through a widespread analysis of the issues involved, from the managerial, administrative and legal points of view. The 2005 Zeid Report has provided the basis for further action within the UN system. Since then, several policy and legal measures have been discussed by relevant UN bodies and organs, and some new developments have taken place. This article offers an account and an analysis of the different steps taken within the UN to face difficult cases of misbehaviour, including human rights violations, which may lead to forms of criminal conduct. It takes into consideration the suggestions provided by the Zeid Report and subsequent UN documents. It focuses on legal developments and discusses the main problems in understanding the legal complexity of this phenomenon. The article includes updated documents and proposals that have been discussed and adopted until the most recent reports in 2009.

1. Introduction

International organizations (IOs), in particular the United Nations (UN), now regularly deploy international missions known as peacekeeping operations (PKOs).1 These operations have evolved over time including different and complex activities.2 Armed forces are deployed in different scenarios and different

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types of operations that may use military force. Police and civilian components were further added to established so-called multifunctional missions deployed in post-conflict situations, to deal with peace-building mandates. These missions and their staff operate in very complex situations and in circumstances where the law applicable by and to the staff employed in operations is not always very clear, and an ‘emerging legal regime’ seems to be developing.

A number of acts of misconduct, concerning sex-related abuses and ordinary crimes, committed in the areas of international intervention, have attracted the interest of the international community. They involve military, police and civilian international personnel working for IOs, and for non-governmental organizations (NGOs) delivering humanitarian support. This problem raises very important questions for the credibility of PKOs, particularly with regard to local populations, and the possible negative effects on the work of the international community.

The problems discussed in this article also consider the relationship between international sets of laws including immunities, individual responsibility and possible means to ensure accountability in the case of abuses committed by peacekeepers. The issues are part of a wider UN reflection on the structure and functioning of peacekeeping missions. Since the adoption of the 2000 Brahimi Report, they are part of the reform strategy, called Peace Operations 2010, addressing issues of personnel, doctrine, partnerships, resources and organization of PKOs.

There are problems of criminal prosecution at the international level, taking into account the functional immunities of UN personnel and the possible lack of cooperation by some States in providing support to prosecute their personnel involved in PKOs abroad. The main attention is on abuses affecting the local population concerning forms of violation of International Human Rights Law (IHRPL) and other misconduct. For this reason, issues related to International Humanitarian Law (IHL), as the law regulating the conduct of hostilities shall be mentioned briefly to discuss their relevance in this context.

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3 See ND White and D Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (Manchester UP, Manchester 2005).
4 White and Klaasen (n 3) 1.
8 UN Doc A/60/696 (24 February 2006) para 6.
Apart from denunciation by NGOs and newspapers, there is an emerging literature on this subject that deserves a certain attention, as there are complex issues involved in the legal discussion of the topic. The present article will focus on the work of the UN in dealing with accountability for crimes committed by peacekeepers and staff working under a UN mandate. The basis for this analysis will be the 2005 Report by Prince Zeid, which identified a series of relevant issues and suggested possible solutions. Legal issues will be looked at through the lens of the report taking into consideration also doctrinal, State and UN practice. This will lead to the discussion of several legal problems regarding appropriate responses to the urgent questions concerning the accountability for human rights abuses and serious misconduct by peacekeepers. Furthermore, this article tries to clarify the legal basis and frameworks under which the misconduct of peacekeepers should be constructed under existing law.


2. The Prince Zeid Report and the Nature of Crimes

Violations committed by military and civilian components of PKOs have been addressed only rather recently, while the history of PKOs dates back to the 1950s. They have been publicly denounced by NGOs that operate very closely to UN missions in the field. In 1999, Human Rights Watch criticized forms of sexual exploitation in refugee camps, including several cases of child prostitution involving humanitarian organizations’ workers in Guinea. In 2001, the United Nations High Commission for Refugees (UNHCR) and Save the Children identified cases of violations of women’s rights in refugee camps committed by UN personnel, humanitarian operators and NGO staff in Guinea, Liberia and Sierra Leone. The subsequent report by the UN Secretary-General recognized that forty-three alleged cases of violations of fundamental rights had been verified by the investigation commission established by the UN. All cases included forms of sexual abuse committed in refugee camps, particularly against women. The victims were generally girls aged between 13 and 18 years and perpetrators were members of the civilian and military personnel employed by international agencies.

A second set of violations emerged in 2004 in the context of the UN mission in the Democratic Republic of Congo (MONUC). Out of seventy-two reported cases against civilian and military personnel, only twenty were considered and six cases were confirmed. The violations included sexual abuse and child pornography, but the consequences were very limited for the staff involved. A UN French civil servant was repatriated, the military personnel were denounced to their national authorities and repatriated. The Office of Internal Oversight Ser-

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16 The UN Secretary-General charged of the investigation the UN Office of Internal Oversight Services (OIOS).

17 UNGA (n 15) 17–21.


ervices (OIOS) report did not mention the countries concerned, mainly to avoid their uneasiness.

The same year, Prince Zeid Ra’ad Zeid Al-Hussein was appointed Personal Adviser to the UN Secretary-General to address the problem of sexual abuse perpetrated by UN personnel. Prince Zeid submitted a report entitled ‘A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations’, which considered four major issues:

(i) the current rules on standard of conduct;
(ii) the investigative process;
(iii) the organizational, managerial and command responsibility; and
(iv) the individual disciplinary, financial and criminal accountability.

The suggestions and comments were followed up by a series of measures that will be discussed in the next section.

3. UN Action

The UN documents discussed in this and the following sections do not properly tackle all the existing legal complexities. It is important to maintain a clear distinction between the proposals for reform and existing legal rules.

The 2000 Brahimi Report, which provided an extensive reconsideration of PKOs, did not refer to violations committed by peacekeepers. However, two months later, the Security Council adopted Resolution 1325 on women, peace and security, making a special appeal to UN Member States, to the Secretary-General and ‘to all parties to an armed conflict to respect fully international law applicable to the rights and protection of women and girls, especially as civilians’. The resolution also called ‘upon all parties to armed conflict to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls’. It emphasized

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20 See also UN Doc A/59/19 (2005).
21 ‘Comprehensive Strategy’ (n 10).
22 Brahimi Report (n 7).
23 UNSC Res 1325 (31 October 2000).
'the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls'. It also stressed with particular emphasis ‘the need to exclude these crimes, where feasible from amnesty provisions’.26 The appeal to all parties includes necessarily the UN, so that the same rules and principles should apply to PKOs as well.

Several reports27 contributed to the elaboration of agreed definitions of sexual exploitation and sexual abuse, including a set of recommendations28 and the adoption of six standards of behaviour to be incorporated in UN and NGO codes of conduct.29 In March 2002, the Inter-Agency Standing Committee (IASC)30 established a Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises31 with the objective of improving the protection of women and children.32 After a resolution of the General Assembly (GA), which condemned ‘any exploitation of refugees and internally displaced persons, especially sexual exploitation’, and called ‘for those responsible for such deplorable acts to be brought to justice’,33 the Secretary-General adopted the 2003 Bulletin with special provisions aimed at preventing exploitation and sexual abuse.34 The 2003 SG Bulletin defines its scope of application,35 the def-

26 Ibid para 11.
27 UNGA (n 15).
28 Ibid para 55.
29 See UNHCR, Code of Conduct and Explanatory Notes (1 June 2004); UNHCR ExCom, Conclusion no 98 (Protection from sexual abuse and exploitation) (LIV) (10 October 2003); ExCom Conclusion no 105 (women and girls at risk) (LVII) (6 October 2006) reprinted in (2008) 27 Refugee Survey Q 170–85.
30 The IASC comprises both members (FAO, OCHA, UNDP, UNFPA, UNICEF, UNHCR, WFP, WHO) and standing invitees (ICRC, ICVA, IFRC, InterAction, IOM, SCHR, RSG/IDPs, UNHCHR and the World Bank).
31 Task Forces are subsidiary bodies of the IASC with a limited time-frame and the objective to complete specific tasks.
inition of the expression ‘sexual exploitation’\textsuperscript{36} and the measures that the UN and other organizations that cooperate with it should adopt.

In 2005, the Special Committee on PKOs\textsuperscript{37} adopted a series of recommendations addressing the global strategy for eliminating sexual abuses in PKOs.\textsuperscript{38} The report of the Special Committee explains the possible consequences for the personnel, and highlights the positive effects in the reduction of misconduct regarding sexual abuse committed by peacekeepers. A Group of Legal Experts (GLE)\textsuperscript{39} provided a report entitled ‘Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations’.\textsuperscript{40} In 2006 a second GLE was appointed\textsuperscript{41} to discuss the binding effects of the 2003 SG Bulletin on contingent members, and the applicability of UN norms of conduct to all categories of peacekeeping personnel.\textsuperscript{42} Two main issues were considered: (a) that contingent members are not generally bound by the SG Bulletin on sexual exploitation and abuse until the troop-contributing country has concluded and signed a Memorandum of Understanding (MoU) or other agreement, and (b) UN PKOs may include different categories of personnel (civilian, military and police), which are governed by different rules and disciplinary procedures. This implies the need to adopt more consistent rules for the standards of conduct applicable to peacekeepers, which should include clearer obligations for Troup Contributing Countries (TCCs) regarding the conditions for the exercise of their jurisdiction.

The GLE recommended that UN officers and experts on mission who commit abuses ‘would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized, in accordance with due process’.\textsuperscript{43} It also proposed a Draft Convention on Crim-
inal Responsibility of Experts on Mission for the UN (2006 Draft Convention), which will be discussed later.

Following the recommendation of the Ad hoc Committee on Criminal Accountability of United Nations Officials and Experts on Mission (Ad Hoc Committee), in October 2008, the Sixth Committee of the GA established a Working Group to consider the GLE report, focusing on its legal aspects. At the same time, the GA endorsed the Special Committee on Peacekeeping Operations and its Working Group report on a new Model MoU modifying the existing 1991 Model, with the aim of addressing the issues of criminal responsibility of UN experts on mission, also with the purpose of giving clear legal effect to the 2003 SG Bulletin. After 2006, the GA decided to refer its agenda item entitled ‘Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects’, allocated to the Special Political and Decolonization Committee (Fourth Committee), also to the Sixth Committee (Legal Affairs) for a discussion of the report of the GLE. The GA established an Ad Hoc Committee, which produced two relevant documents. In 2008 the GA adopted resolution 63/119 which reiterated a series of legal measures, including the definition of crimes to be included in national legal systems, and in 2009 considered the GLE report and comments by Member States. Most of the above-mentioned documents will be analysed in the next section of this article.

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44 Ibid annex III.
45 See s 3.B below.
46 UNGA Res 61/29 (4 December 2006) paras 1 and 2.
47 UNGA Res 59/300 (n 38).
51 UN Secretary-General, ‘Model Agreement between the UN and Member States Contributing Personnel and Equipment to UN Peacekeeping Operations’ (23 May 1991) UN Doc A/46/185 3.
52 The item entitled ‘Criminal accountability of United Nations officials and experts on mission’ was included by GA Res 63/119 (11 December 2008).
54 UNGA Dec 60/502 B (8 September 2006).
55 In accordance with UNGA Res 59/300 (n 38).
56 UNGA Res 61/29 (n 46).
A. The Measures Proposed and Adopted

On the basis of the above-mentioned reports and documents, the GA envisaged both short-term and long-term measures. The first type of measure is provided in two resolutions, which should be considered together and include:

(i) extension of the criminal jurisdiction of Member States for crimes committed outside their territory by their nationals, officials and experts from the UN peace missions,
(ii) cooperation among UN Member States and between them and the UN to pursue the perpetrators of relevant crimes,
(iii) judicial assistance in legal proceedings, criminal prosecution and extradition for the aforementioned crimes,
(iv) cooperation, pursuant to the national legislation of Member States, in exchange of information and transmission of evidence gathered by the UN in the territory of the Member States which have begun a procedure of prosecution,
(v) granting, in accordance with national legislation, effective protection against crimes committed by officials abroad, and
(vi) granting of technical assistance to the State which welcomes the peace mission and on whose territory the crime was committed.

The text underlines the need for the UN and its Member States to take urgent, vigorous and effective measures. They include measures that would ensure that offences committed by UN officials and experts in missions do not go unpunished, that their authors are brought to justice in accordance with international law standards, and to ascertain their jurisdiction in the case of serious offences committed by their nationals while acting under UN mandate.

The resolutions suggest developing better cooperation between the UN and Member States, with regard to the exchange of information and evidence in the investigation of such crimes. To evaluate the progress in this matter, the UN Secretary-General is asked to provide a report on the basis of the information sent by Member States, including the number and types of serious allegations, and any measures taken by the UN and the Member States. Among relevant developments to implement UN resolutions, it is important to consider the adoption, by the GA, of a revised Model MoU in 2007; and since 2005 the creation of a Conduct and Discipline Unit at the Department of Peacekeeping Operations.
Operation (DPKO) Headquarters and operating in several missions,64 with the task of receiving and assessing sexual abuse complaints.

**B. The Draft Convention**

Among the long-term measures, a project for a new convention represents a possible development in the international legal framework, and a way to provide better coordination for both States and organizations involved.65 The project is under consideration by the Working Group of the Sixth Committee, which should take into account the views of Member States and the information presented in the 2007 Note of the Secretariat.66 In that Note, the Secretary-General pointed out that a treaty could enable UN Member States to clarify their competence to investigate and deal with cases of UN officials and experts responsible for human rights violations.

Regarding the competence _rationae personae_, the ‘officials of the Organization of the United Nations’ would include also UN volunteers, who are treated as officials under the Status of Forces Agreements (SOFAs).67 The ‘experts on mission’ would include military observers, members of the police, civilians and other people of expert status on mission. However, under the existing proposal, military personnel would be excluded from the jurisdiction of the Draft Convention.68 They would still be under the ‘exclusive’ jurisdictions of the TCC. Regarding the application _ratione materiae_ the Draft Convention would apply to serious offences against persons, including serious sexual abuse, rape and acts of sexual violence, and murder.69 Issues related to the exercise of jurisdiction are also addressed, as they need further clarification for the proper investigation and prosecution of criminal acts. These provisions have been further discussed in subsequent documents, and they will be analysed in the following parts of this article.

**4. Rules Governing Peacekeeping Operations**

The definition of the applicable legal regimes is relevant for the classification and prosecution of certain crimes. However, the UN documents under consideration do not clarify these issues properly. Recent literature also does not

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64 See UN Doc A/61/957 (15 June 2007) para 22.
65 Ibid para 8.
67 See s 4.B below.
68 2006 Draft Convention (n 44) art 2.
69 Ibid art 3.
fully address this issue. It is impossible here to engage in the definition of the
general law applicable to PKOs, but it is relevant to turn the attention to
some legal issues that are directly relevant when dealing with crimes committed
by peacekeepers, to identify the legal basis for their prosecution. The docu-
ments adopted by the UN on the issue of criminal accountability do not clarify
the legal basis for the prosecution as they often provide quite general state-
ments on the legitimacy, accountability and good practices of UN missions.
However, no clear legal backgrounds are provided. This may be associated
with the complex legal regulations of PKOs, and to the unclear position of
States in relation to the obligations of their personnel involved in PKOs.

Furthermore, there is a problem with UN accountability, linked to its inter-
national legal personality. Acts of UN personnel may be attributable to the
organization, with resulting international responsibility for the wrongdoing.
However, this is not necessarily the case, as international responsibility is based
on international wrongful acts, committed by the personnel and imputable to
the organization, and on the ‘effective control’ test, as required by interna-
tional case law. This is an issue related to the type of relationship that
States and the UN establish with regard to the personnel engaged in the
PKO. It depends whether the national contingents and experts are under the
‘exclusive’ control of the UN or whether the State of origin still exercises some
form of control over its nationals working for the UN, which is a matter not
completely clarified in practice.

Many of the crimes considered are often associated with forms of sexual abuse
and criminal misbehaviour, and not with the conduct of hostilities or the accom-
plishment of the mission’s mandate. Crimes such as sexual abuse, rape, prostitu-
tion, murder and bribery, are usually defined in national criminal codes and
some of them in international law treaties. The legal basis for punishing those
crimes may be based on a complex interrelationship between national and inter-
national law.

The legal regulation of PKOs is based on international law, and in particular
on the UN Charter. The mandates of PKOs are usually framed under inter-

References:

70 See McCoubrey and White (n 1); E Schmidl, Peace Operations Between War and
Peace (Frank Cass, London 2000); T Findlay, The Use of Force in Peace Operations
(OUP, Oxford 2002).

71 ILC Draft Articles on the Responsibility of International Organizations, ‘Report of
the International Law Commission Fifty-Sixth Session’ (2004) UN Doc A/59/10; C
(Martinus Nijhoff, Leiden 2005).

72 ILC Draft Articles (n 71) art 5.

73 Behrami v France and Saramati v France, Germany and Norway (2007) 45 EHHR
Authority and Control” Test’ (2008) 19 EJIL 509.

74 See s 5.B below.
national law, within a UN Security Council resolution, and address issues like the protection of the civilian population, the implementation of peace agreements, and the possible use of force for those purposes. International law, in the form of IHL and IHRL, would also play a role, even with some difficulties, due to the unclear position of the troops and other personnel in the field under UN PKO Mandate. The various legal regimes that may apply to peacekeepers would also include the respect for the national law of the sending State and of the host State where they are deployed.\(^75\)

Some of the crimes under discussion, if committed in the context of an armed conflict, would entail the application of IHL.\(^76\) However, the majority of alleged cases committed by peacekeepers, both military and civilian personnel, can be defined as ordinary crimes. Therefore, a distinction has to be made regarding the personnel involved. In the case of military personnel, violations would concern military disciplinary measures, including national military criminal codes. In the case of civilian personnel, UN codes of conduct and national criminal law would be applicable. Furthermore, UN personnel regulations include a series of obligations for different categories of individuals working for the organization.\(^77\) Among them, the SG bulletins regulate the conduct of personnel for administrative and disciplinary purposes.\(^78\) Finally, SOFAs and MoUs signed by the UN and the States concerned, including TCCs and host States, may identify the rules that apply to UN personnel.

Regarding military personnel, their behaviour and possible punishment fall under the exclusive authority of the sending State or TCC, under the standard rule included in MoUs signed by the UN and each TCC.\(^79\) It is reasonable to think that the crimes under consideration would fit within the general disciplinary powers of control that the State has on its contingents,\(^80\) due also to the SOFA\(^81\) between the UN and the host State, which provides exclusive jurisdiction to the TCC.\(^82\) This principle has not been challenged by any of the UN documents relating to the accountability of peacekeepers.\(^83\) The revised 2007 MoU does not provide a clear list of crimes that should be prosecuted.

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\(^{75}\) ‘Comprehensive Strategy’ (n 10) para 78.


\(^{77}\) UN, ‘Public Information Guidelines for Allegations of Misconduct Committed by Personnel of UN Peacekeeping and Other Field Missions’ DPKO/MD/03/00996, DPKO/CPD/DPIG/2003/001.

\(^{78}\) The Secretary-General Bulletin entitled ‘Status, Basic Rights and Duties of United Nations Staff Members’, issued on 1 November 2002 (ST/SGB/2002/13), provides a commentary on these rules and also contains the International Civil Service Commission standards of conduct.

\(^{79}\) 1991 MoU (n 51) s 47(b).

\(^{80}\) McCoubrey and White (n 1) 178.

\(^{81}\) See s 4.B below.

\(^{82}\) UNSG, ‘Model Status of Forces Agreement for Peacekeeping Operations’ (9 October 1990) UN Doc A/45/594 annex para 41; ‘Comprehensive Strategy’ (n 10) para 78.

\(^{83}\) See UN Doc A/60/19 (22 March 2006) para 65.
It refers to the obligation of governments, through commanders of national contingents, to deal with ‘serious matters involving the discipline and good order of members of its national contingent including any disciplinary action taken for violations of the United Nations standards of conduct or mission-specific rules and regulations or failure to respect the local laws and regulations’. In the new Annex H to the revised 2007 MoU, as part of the UN standards of conduct, three UN documents are mentioned: ‘Ten Rules – Code of Personal Conduct for Blue Helmets’; ‘We are United Nations Peacekeepers’ and a list of behaviours addressing ‘Prohibitions on Sexual Exploitation and Abuse’.

More general obligations also derive from Article 101 of the UN Charter which requires from its personnel the ‘highest standards of integrity’. Standards defined in the 1999 and 2003 Secretary-General bulletins may also be applied to non-military personnel, because reference to these documents has been included in contracts and other labour documents involving the UN and its personnel. However, in the revised 2007 MoU there is not yet a clear definition of accountability for the contingent commanders, while the lack of adequate sanctions on the TCC or on individual members of the mission still leave the legal enforcement quite weak. Some of the issues raised by the revised 2007 MoU will be discussed in the relevant following parts of this article.

A. Privileges and Immunities in PKOs

One of the issues that may affect the proper investigation and prosecution of the crimes under consideration is the international system of diplomatic immunities. IOs and their officials enjoy immunities as institutions that operate in the international system as legal subjects. The preamble of the 1961 Convention on Diplomatic Relations asserts that ‘the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States’. Immunities and privileges recognized in contemporary international law are meant to facilitate activities and functions of foreign agents in the country where they are officially accredited.

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84 2007 Revised MoU (n 63) art 7 ter (2).
87 Based on the UN Doc ST/SGB/2003/13 (n 34).
88 Defeis (n 9) 209.
89 Vienna Convention on Diplomatic Relations (Vienna 18 April 1961) 500 UNTS 95.
Many IOs enjoy immunities and privileges under international law.\textsuperscript{90} Regarding the UN, the issue has been addressed since 1946 by the GA,\textsuperscript{91} based on Article 105(1) of the UN Charter, which states that ‘The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes’, and in paragraph 2 that ‘Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization’. It is also important to remember that paragraph 3 establishes that ‘The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose’. International officials have privileges and immunities similar to those of diplomatic personnel,\textsuperscript{92} especially with regard to functions in relation to the goals of the organization for which they act.\textsuperscript{93} The question is how these immunities apply to PKOs.

PKOs are designed to intervene in international crises and they are an emanation of the implied powers of the UN.\textsuperscript{94} PKOs become subsidiary bodies created \textit{ad hoc} by one of the principal organs of the UN.\textsuperscript{95} In PKOs reference is usually made to Article 105 of the UN Charter on privileges and immunities of the organization and its staff; therefore, staff employed in PKOs enjoy immunities and privileges accorded to the UN. Additional diplomatic privileges are granted under the Convention on the Privileges and Immunities of the United Nations;\textsuperscript{96} by the Convention on the Privileges and Immunities of the Specialized Agencies,\textsuperscript{97} and by the 1994 Convention on the Safety of United Nations and


\textsuperscript{91} UNGA Res 22 (I) (13 February 1946).


\textsuperscript{93} Ibid 180.

\textsuperscript{94} McCoubrey and White (n 1) 39–45.


\textsuperscript{96} Convention on the Privileges and Immunities of the United Nations (13 February 1946) 1 UNTS 15.

\textsuperscript{97} Convention on the Privileges and Immunities of the Specialized Agencies (21 November 1947) 33 UNTS 261.
Associated Personnel (1994 General Convention) and its 2005 Optional Protocol. The 1994 Convention prohibits any action against UN and associated personnel, including acts against the person or liberty of UN staff or associated personnel, their private home or means of transport, and against official premises. ‘Staff of the United Nations’ includes persons engaged or deployed by the UN Secretary-General as members of a UN operation and other officials and experts on mission in the UN or agencies that act in an official capacity. ‘Associated personnel’ includes those sent by a government or an intergovernmental organization with the agreement of the competent organ of the UN; people working for the UN Secretary-General or a specialized agency; persons deployed by non-governmental humanitarian institution under an agreement with the UN Secretary-General or with a specialized institution carrying out activities in support of the execution of the UN operation’s mandate. The Convention does not apply to UN coercive operations authorized by the Security Council by virtue of Chapter VII of the Charter. However, it would apply in most PKOs and would protect UN personnel from actions taken in the context of investigations and prosecution against them.

B. Status of Forces Agreements

Because the 1994 Convention does not directly refer to PKOs, the UN and TCC have adopted SOFAs, which define the rights and obligations of military personnel engaged in each mission, including immunities and privileges. The SOFA currently used by the UN is based on a 1990 model, based on State practice in this field. In the case of criminal conduct of a member of the armed forces, paragraphs 5 and 8 of the SOFA establish that the judicial action remains in the exclusive jurisdiction of the TCC.

Regarding jurisdiction, paragraph 46 (SOFA) determines that all UN PKO staff, including locally recruited personnel, are immune from legal process in respect of words spoken or written and of acts performed by them in their official capacity. In the case of criminal offences, two different rules apply.

101 UN Doc A/45/594 (n 82).
Under paragraph 47(a) if ‘the accused person is a member of the civilian component or a civilian member of the military component, the Special Representative/Commander shall conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceedings should be instituted’. If the accused is a member of the military component of the UN PKO, under paragraph 47(b), he or she ‘shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in the host country or territory’. The immunity of UN personnel raises problems in relation to the prosecution of those crimes, because States do not easily accept that their personnel abroad should be subject to local or international prosecution, as is clearly evidenced by the position of certain governments with regard to international criminal jurisdictions. In particular, this issue has been the basis of quite complex diplomatic and legal negotiations regarding the exemption from prosecution from International Criminal Court (ICC) jurisdiction, with specific reference to the UN mission in Bosnia–Herzegovina (UNMIBH), under pressure from the United States.

C. The Nature of the Crimes and the Basis for Prosecution

It may be useful to consider the nature of crimes to identify the possible legal obligations under which individuals should be prosecuted, as they may also identify the competent jurisdiction to deal with those cases. Three types of violation committed by personnel working in UN PKOs may be identified. The first category includes violations of IHL during the conduct of hostilities, generally committed by armed forces engaged in the mission. The second category refers to human rights violations committed by personnel working for the missions, including military, police and civilian components, which relate to possible abuses attached to the accomplishment of the mandate, for instance when using their powers of searching and arresting. A third category, which is the main focus of this article, includes abuses and misconducts that are fundamentally criminal in nature, and are unrelated to the mandate of the mission. They include sexual abuse, rape, theft and other crimes.

The question here is whether they are human rights abuses, criminal conducts, misbehaviour or disciplinary matters. As generally recognized by IHRL, official positions may lead to human rights violations, engaging State responsibility, even if the action was committed by the officer ultra vires. Some acts

105 McCoubrey and White (n 1) ch 8.
can be classified as human rights violations, because the perpetrators impinge on the rights of individuals that are defined and protected under IHRL, such as the rights of the child, health and body integrity of the victim of abuse, and are committed either by State officials seconded to the UN, or by UN officers and agents abusing their official position.

Under IHRL, State officials are responsible for abuses, linked to the international obligations of their respective State. In the case of UN officers, the UN is not party to international law treaties on human rights, and from the legal perspective, the UN is not bound by treaty law. Furthermore, it has no permanent police and judicial bodies that might investigate and prosecute its own personnel. However, this impasse can be overcome in two ways. Due to the general obligation of the UN to promote and protect human rights under its constitutive Charter, customary law obligations would bind the UN which would be ‘constitutionally mandated to promote the advancement of human rights’. It would be then relevant to determine whether certain criminal acts under consideration are now offences under international customary law. The other option is to attribute to the State of nationality of the individual the task of prosecuting the person for violation of IHRL as part of the State obligation under IHRL and as a UN Member State.

The criminal acts trigger the responsibility of their respective State and/or institution with regard to the obligation of respecting human rights. This would bring into action the possible extraterritorial applicability of human rights law when national personnel are acting abroad. This is still a complex issue that is not always appreciated by States that contribute PKO personnel.

However, the various types of violation are not easily identified because the law regulating PKOs is also unclear and it is sometimes difficult to define under which legal framework the criminal act may be framed. The possible

107 UN Charter arts 1(3), 55(c) and 56.
concurrent application of IHL, human rights law and national criminal law is the source of this unclear state of affairs.

If a member of the armed forces engaged in PKO has committed a violation of IHL in principle, as established by the general rules of IHL,112 and reaffirmed in the 1999 UN SG Bulletin,113 he or she would face prosecution in the courts of the TCC,114 confirmed by the new Model MoU between the UN and the TCC.115

In the case of human rights violations, the grounds for prosecution are based on international obligations of States that provide UN personnel, who may retain their jurisdiction over nationals abroad for violation of IHRL and, in some cases, for the prosecution of criminal acts foreseen under their national criminal law. This seems more an issue of competence related to the exercise of jurisdiction, rather than a matter concerning the definition of the applicable law and its qualification as IHRL or criminal law. The documents and reports adopted by the UN on this matter do not clarify those issues. They focus on the disciplinary aspects of the misconduct of UN personnel, rather than on the clarification of responsibility and accountability of States and IOs for the wrongdoings, and for damages to the victims. Under existing rules, the UN peacekeeping force, established under SC or GA mandate, is a subsidiary organ of the organization. For the UN this means that ‘an act of a peacekeeping force is, in principle, attributable to the Organization’.116 The relationship between the UN and TCC is defined in Article 9 of the Model MoU,117 which outlines the concurrent responsibility of the UN and the State. The UN shall be responsible for damages or loss of property, death or personal injury caused by the personnel or equipment provided by the government ‘in the performance of services or any other activity or operation’ under the MoU. However, ‘if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government shall be liable for such claim’.118 This clear-cut distinction is not always possible, because it depends on which entity: State, UN or other organization (ie NATO) exercises effective control over the personnel and over the operation.

In the following sections of this article, several options will be considered, on the basis of UN recommended measures.

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112 In the 1949 Geneva Conventions I art 49; II art 50; III art 129; IV art 146. The four Geneva Conventions were adopted by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War (Geneva 21 April–12 August 1949, signed on 12 August 1949).
114 Ibid art 4: ‘Violations of International Humanitarian Law’.
117 See above (n 100).
118 UN Doc A/51/967 (1997) annex; see also ST/AI/1999/6 annex.
5. Jurisdictional Gaps or Legal Vacuum?

Several UN reports have identified a ‘jurisdictional gap’ when a crime is committed in a host State that is unable to prosecute the alleged offender, due to its specific circumstances. As PKOs act within a situation of armed conflict or high instability, it is not always possible to provide a proper judicial and investigation system to deal with criminal acts by peacekeepers. If other States, including the TCC, have not extended their criminal jurisdiction to crimes committed in the host State, there could be a jurisdictional gap that may leave the alleged criminal unpunished. However, the lack of willingness by UN Member States to effectively prosecute their personnel involved in alleged criminal acts should not be underestimated. To address, in part, this problem, and some of the legal issues that may create obstacles to proper judicial action, the UN provided a set of options that are analysed below.

A. Jurisdiction Ratione Personae and Peacekeeping Personnel

As mentioned before, different types of PKO personnel are regulated by different rules. The Zeid Report identified at least five categories of personnel: UN staff; UN Volunteers (UNVs); individual contractors and consultants; civilian police and military observers; and military members of national armed forces. This subdivision does not facilitate the task of prosecution in cases of alleged criminal offences by peacekeepers.

UN personnel are governed by UN Staff Rules and other administrative UN regulations, including the SG bulletins, and also enjoy privileges and immunities under the 1994 UN Convention on Privileges and Immunities of the UN. The UNVs working for UN PKOs are regulated by their own rules of conduct, and have been covered by the privileges and immunities that are defined in the 1991 Model MoU. Individual contractors and consultants are regulated by UN standard conditions of contract specified in specific administrative instructions. Under these instructions, they do not have the status of UN officers, therefore they are subject to the local law of the host State, but they can be granted the status of experts on mission when travelling on behalf of the UN. Civilian

119 UNGA, Sixth Committee, 5th Meeting (AM) (10 October 2008) UN Doc GA/L/3342.
120 UN Doc A/62/329 (n 66) para 17.
121 ‘Comprehensive Strategy’ (n 10) paras 15–22.
122 UN ‘Staff Regulations of the United Nations and Provisional Staff Rules’ (21 October 2009) UN Doc ST/SGB/2009/7.
124 See (n 51) ss 24–31, 46–9.
125 ‘Consultants and Individual Contractors, Administrative Instruction’, Consolidated text of ST/AI/1999/7, as last amended by ST/AI/1999/7/Amend.1 (effective 1 April 2006).
126 Ibid s 5.4.
Police and military observers are covered by the privileges and immunities as experts on mission for the UN. As experts on mission they are also subject to the ‘Regulations Governing the Status, Basic Rights and Duties of Officials Other Than Secretariat Officials and Experts on Mission’.127 The rules for police and military observers are defined in the DPKO’s ‘Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers’.128 Military personnel have privileges and immunities, and are also governed by the SOFAs with the host State.

The main distinction is based on military members of national contingents and other types of personnel. The first are considered to fall under the ‘exclusive jurisdiction’ of the TCC. The other cases are covered by the UN personnel status and immunities. This issue needs further clarification. The distinction is based on the relationship of the personnel with the UN. Due to the absence of a permanent UN military structure under UN direct command, military personnel ‘are provided by a sending State as representatives of that State’.129 Their status is covered by a MoU between the sending State and the UN, which gives the TCC exclusive jurisdiction over its troops on the basis of a practice established since UNEF, and included in paragraph 47(b) of the Model SOFA. This issue has been particularly significant for all TCCs because they would not allow their troops to fall under foreign jurisdiction.130

Military observers are also military officers who are ‘assigned’ to the UN.131 They are nominated by their Governments following a request by the Secretary-General and serve the United Nations in a personal capacity and not as representatives of their State’.132 They are classified as ‘experts on mission’ as defined in Article VI of the 1946 Convention on the Privileges and Immunities of the United Nations, by paragraph 47(a) of the Model SOFA,133 and by a MoU between the UN and the sending State.134

127 UNGA Res 56/280 (27 March 2002).
129 UN Doc A/62/329 (n 66) para 56.
131 Military observers are subject to different financial and accountability regimes compared with national contingents, they are not entitled to carry weapons, they are specifically prohibited from seeking and accepting instructions from their government or any other authority except the UN, see ‘UN Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission’ (ST/SGB/2002/9).
132 UN Doc A/62/329 (n 66) para 55.
133 This provides that the UN Representative/Commander shall conduct any necessary supplementary inquiry, besides the host State, and then agree with the government whether or not criminal proceedings will be instituted. So, military observers remain members of their national armed forces and subject to the military jurisdiction of their sending State, this jurisdiction is in addition to, and not to the exclusion of, the laws of the host State, see ibid para 64.
134 UN Doc A/45/594 (n 82) annex para 26.
Officials and experts on mission are not clearly defined under international law. The Draft Convention contains two possible definitions. One includes ‘Members of the United Nations PKO to whom article V or article VI of the 1946 General Convention applies, in whole or in part, pursuant to either the provisions of the status-of-forces-agreement entered into by the United Nations and the host State for the PKO or, pending the conclusion of such an agreement, the provisional application of the model status-of-forces-agreement (A/45/594) dated 9 October 1990’. The second option includes official and experts ‘who are present in an official capacity in the area where a United Nations PKO is being conducted and who enjoy privileges and immunities of the United Nations pursuant to either articles V and VI of the General Convention, if applicable, or Article [sic!] 105 of the Charter of the United Nations’. This definition seems wider than the previous one, and it adopts the definition given by article 1(a)(i) of the 1994 General Convention. It has been suggested that ‘even though the 1994 General Convention does not define experts on mission, these individuals are UN agents but not UN officials’. However, this new classification does not clarify the legal status of those ‘agents’, with the risk of adding even more uncertainty to an already complex matter, unless it is used to define the issues of individual, State and UN responsibility under international law.

A third category concerns the status of ‘formed police units’ in PKOs. The GLE noted that there are ongoing discussions on the legal status of those units, but that the members of such units are currently classified as experts on mission and therefore they also enjoy functional immunities.

There is a problem concerning the identification of the rules applicable to other UN agencies, because their privileges and immunities are not regulated under the UN Charter and the 1994 General Convention, but by specific legal documents, and their immunities may be waived by the heads of their respective organizations. To further complicate the matter, not all States are parties to the 1994 General Convention. In those cases, it has been suggested that the personnel legal status would derive from article 105 of the UN Charter, and that the privileges and immunities defined in the 1994 General Convention, being widely accepted, may constitute the minimum standards for the imple-
mentation of Article 105, and be regarded as general customary law.\textsuperscript{143} The GLE suggested including also personnel who are not members of the PKO, but who act for other UN agencies and programmes, in the Draft Convention because the local population would not easily distinguish between the different types of personnel. In a subsequent Note, the Secretary-General supported that option, considering that ‘there is no major policy impediment as to why a convention could not apply to cover all persons participating in the United Nations operations, irrespective of the department, office, programme or fund with whom they are engaged’.\textsuperscript{144} However, any change regarding the legal status of military observers and police units should also be reflected in their relationship with the UN, and in relation to the host State as defined in the SOFA and in the Status of Mission Agreements (SOMAs), to provide a uniform and clear definition of the applicable law.

\textbf{B. Jurisdiction Ratione Materiae}

As already mentioned before, the discussion on criminal accountability of peacekeepers had started with cases related to sexual abuse. The Zeid Report referred to ‘serious misconduct’ based on the 2003 SG Bulletin and the Staff Regulations and Rules, which justify summary dismissal from service of a staff member found culpable by the Secretary-General.\textsuperscript{145} The subsequent debate on issues of criminal accountability has identified other crimes. Article 3 of the Draft Convention states that a UN official or an expert on mission commits a crime ‘if that person intentionally engages in conduct which constitutes one of the serious crimes set out in paragraph 2 of the present article’. The ‘serious crimes’ listed are ‘for each State party establishing and exercising jurisdiction… those which, under the national law of that State party, correspond to:

\begin{itemize}
  \item[(a)] Murder;
  \item[(b)] Wilfully causing serious injury to body or health;
  \item[(c)] Rape and acts of sexual violence;
  \item[(d)] Sexual offences involving children;
  \item[(e)] An attempt to commit any crime set out in subparagraphs (a) to (d); and
  \item[(f)] Participation in any capacity, such as an accomplice, assistant or instigator in any crime set out in subparagraphs (a) to (e).\textsuperscript{146}
\end{itemize}

The 2007 Note by the Secretary-General recognizes ‘the difficulty in establishing a finite list of crimes that should be covered by a convention’. There is concern about other crimes such as torture and degrading treatment, but also theft,

\textsuperscript{143} See statement made by the UN Legal Counsel at the 1016th meeting of the Sixth Committee of the GA on 6 December 1967 ST/LEG/SER, C/5 (1967) UN Juridical Ybk 311–14 paras 9–11.
\textsuperscript{144} UN Doc A/62/329 (n 66) para 34.
\textsuperscript{145} 2003 SG Bulletin (n 34) s 3.2(a).
fraud and money-laundering,\textsuperscript{146} identified by the Secretariat following the allegations of gold and arms trafficking against MONUC.\textsuperscript{147} Furthermore, the Ad Hoc Committee\textsuperscript{148} clarified that the broader range of crimes should be divided into two notionally different sets: ‘crimes committed against the general populace and those committed against the Organization itself’.\textsuperscript{149} It is not clear whether this distinction would have different legal consequences for the criminal accountability of individuals, or could lead to different procedures of investigation.

Compared with national criminal law, the above-mentioned list is too vague to match the strict standards required under criminal law,\textsuperscript{150} even if international tribunals have adopted less stringent standards sometimes.\textsuperscript{151} The UN Secretariat pointed out that the Draft Convention should not try to define crimes that are already recognized by all Member States, and there would not be new crimes under international law that might require agreed definitions. However, it should be noted that there are differences in criminal law among national jurisdictions regarding, for instance, the age limits for sexual consent and punishment, prostitution, certain sexual behaviour, such as homosexuality, and rules of criminal procedure.

To avoid further obstacles to the exercise of proper legal action, the GLE suggested that, rather than trying to harmonize criminal law of UN Member States, efforts should focus on ‘identifying a matrix of crimes common to most jurisdictions’ to avoid impunity. The Secretariat suggested that crimes should be defined ‘under the national law of the State asserting jurisdiction and that are punishable under that nation’s law by at least two/three years’ imprisonment’.\textsuperscript{152} To support this position, the UN Secretariat mentioned the example of the UN Model Treaty on Extradition,\textsuperscript{153} which defines extraditable offences as those ‘which are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum of period of at least one/two year(s), or by a more severe penalty’.\textsuperscript{154} In case of uncertainty about the crimes that have been given extraterritorial effect under the Draft Convention, Member States might notify the Secretary-General of such crimes.\textsuperscript{155}

\begin{footnotes}
\item[146] 2007 Report of the Ad Hoc Committee, UN Doc A/62/54 (n 57) para 22.
\item[147] UN Doc A/62/329 (n 66) para 37.
\item[148] See above (n 46).
\item[149] UN Doc A/62/54 (n 57) para 22.
\item[150] See ICTY, Prosecutor v Vasiljević IT-98-32 (29 November 2002) para 193.
\item[152] UN Doc A/62/329 (n 66) para 39.
\item[153] UN Doc A/RES/45/116 (14 December 1990).
\item[154] UNGA Res 45/116 annex art 2.
\item[155] UN Doc A/62/239, para 41.
\end{footnotes}
6. The Exercise of Jurisdiction

Issues concerning the effective exercise of jurisdiction are particularly relevant considering the immunity from local jurisdiction. It is clear that criminal acts are not part of the ‘official functions’ of UN personnel. Nevertheless, this does not necessarily mean that UN officers shall be subject to the jurisdiction of the host State, where the crime was committed. It has been rightly observed that when States have a ‘dysfunctional legal system’ it may not be in the interest of the UN to agree, under the SOFAs, ‘to the host State instituting criminal jurisdiction or to waive immunities or certify the absence of immunity where the host State requests the United Nations to do so’.157

Despite the fact that this practice seems to conceal forms of impunity, in reality when the local legal system does not provide sufficient guarantees, a criminal action that does not fulfil internationally recognized standards of criminal and procedural law might lead to a violation of human rights of UN officers, in particular the right to a fair trial.158

Another relevant aspect regarding the exercise of jurisdiction by a State is the so-called ‘dual criminality’ principle.159 This implies that some States may extend their jurisdiction to acts committed abroad, but only when the conduct also constitutes a crime where it was committed, and vice versa. Several States apply this rule as a prerequisite for extradition and legal assistance in criminal matters.160 It has been suggested that this precept could be limited ‘by encouraging States to review or to adopt a liberal interpretation of their requirements and to co-operate with each other to the maximum possible extent in the investigation and prosecution of serious crimes committed by peacekeeping personnel, in particular those involving sexual exploitation and abuse’.161 However, it is not quite clear, from the legal point of view, how States could ‘limit’ or ‘interpret’ their criminal law standards, only in relation to PKOs.

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156 See above (n 90).
157 UN Doc A/60/980 (n 40) para 19.
161
It is a fundamental legal standard that the law applies without discrimination based on the principle of equality before the law.\(^{162}\) States should define the cases when the ‘dual criminality’ rule would be applied. A mere ‘rule of interpretation’ would not meet the criminal law standards of certainty and might be a source of discriminatory treatment. On the issue of dual criminality, Article 5 of the Draft Convention affirms that the definition of States’ jurisdiction concerning the identified crimes does not ‘impose an obligation on a State party to establish jurisdiction over conduct which does not constitute a crime under the law of the State where the conduct occurred’. However, it would be relevant to clarify which rules under IHRL should be incorporated in national criminal law to punish officials who may commit abuses not yet defined under national law but that may violate rights defined under international law, such as the 1999 UN Convention on the Rights of the Child, which may set higher age limits compared with national law.

A third issue regarding the exercise of jurisdiction is that some States would not prosecute in the absence of the alleged offender (prosecution ‘in absentia’). In those cases, the prosecution could start after the alleged offender is present in the territory of the State that may exercise jurisdiction. This could be facilitated through extradition to secure custody of that person. However, it is well known that there are problems regarding extradition, not only in relation to peacekeeping personnel, as mentioned earlier. These problems are particularly serious when the host State asking for extradition has a dysfunctional legal system. It has been suggested that in these cases, under the rule-of-law mandate of PKOs, the UN should provide assistance to the host State ‘to rehabilitate its relevant authorities that are involved in the extradition process, at least in relation to serious crimes’.\(^{163}\) Even if this sounds a good suggestion, in reality it may take a long time to provide proper training of the judiciary and reforms of the local legal system. Therefore, the reasonable time required for the exercise of criminal prosecution,\(^{164}\) as part of the fair trial definition, might not be matched. Some States base extradition and cooperation in criminal matters on the principle of reciprocity, particularly in the absence of a treaty defining the type of cooperation.\(^{165}\) For European States this may also involve compliance with Article 6 of the European Convention on Human Rights, regarding the fair trial conditions.\(^{166}\)

Finally, it may be relevant to consider the possible role of the ICC. This option seems more remote and not feasible at this stage, due to the present nature of international crimes defined in the 1998 Rome Statute.\(^{167}\) The jurisdiction of the ICC would apply only to the most serious crimes, which are


\(^{163}\) Ibid para 25. See Durch et al (n 9) ch 4.


\(^{166}\) Ibid s 447, in particular regarding the admissibility of evidence carried out abroad.

defined in its Statute.\textsuperscript{168} Despite the gravity of crimes committed by peacekeepers, in particular those with sexual connotations,\textsuperscript{169} they seem isolated and sporadic cases committed by individuals, lacking the requirement of crimes against humanity that are ‘committed as part of a widespread or systematic attack’\textsuperscript{170} against the civilian population. The very nature of international crimes, as defined and intended in present international law, is to provide remedies for widespread abuses and violations of human rights and humanitarian law, as part of policy and systematic political and military plans, rather than deal with individual criminal misconduct of isolated individuals.\textsuperscript{171} War crimes\textsuperscript{172} in the form of grave breaches of the Geneva Conventions, in particular torture or inhuman treatment,\textsuperscript{173} and wilfully causing great suffering, or serious injury to body and health, would not need the widespread and systematic requirement. However, it would probably be difficult to consider peacekeepers as parties involved in an international armed conflict,\textsuperscript{174} as States would not regard the PKO as fully regulated under IHL for the reasons already mentioned before.

It is also important to remember here that States have concerns regarding the possible exercise of jurisdiction by the ICC over their national troops. The case of the United States’ strategy towards the ICC, including forms of immunity\textsuperscript{175} for its peacekeepers, is quite emblematic to clarify this point.\textsuperscript{176}

The GLE has defined these crimes as not ‘merely ordinary crimes’,\textsuperscript{177} due to the special responsibility to protect the population where they are deployed.\textsuperscript{178} If this may be acceptable in principle, it is also difficult to define a new category of crimes, based on this type of justification. All these issues are further discussed below in relation to specific aspects of States’ jurisdiction. The analysis includes the jurisdiction of the host State, the jurisdiction of the sending State, the UN

\begin{itemize}
\item \textsuperscript{168} \textit{Ibid} arts 5–8.
\item \textsuperscript{169} See C Chinkin, ‘Rape and Sexual Abuse of Women in International Law’ (1994) 5 \textit{EJIL} 326.
\item \textsuperscript{171} See s 6.D(ii) below.
\item \textsuperscript{172} Rome Statute (n 167) art 8.
\item \textsuperscript{173} \textit{Ibid} art 8(2)(a)(ii).
\item \textsuperscript{174} ICTY, \textit{Prosecutor v Tadic} (Interlocutory Appeals on Jurisdiction) IT-94-1-AR72 Appeals Chamber (2 October 1995) para 70.
\item \textsuperscript{177} UN Doc A/60/980 (n 40) para 57.
\item \textsuperscript{178} \textit{Ibid} para 55.
\end{itemize}
jurisdiction and possible alternatives, such as judicial cooperation, extradition and international jurisdiction.

A. UN Jurisdiction

The UN has clearly affirmed that there are limits to its exercise of jurisdiction. The 2007 Note by the Secretariat underlines the fact that the UN can develop and implement standards and special measures, including the 2003 SG Bulletin, to improve the so-called ‘zero tolerance’ policy through dissemination, education, pre-deployment and in-mission training campaigns; the establishment of Conduct and Discipline Units in Headquarters and in UN missions, regular patrolling and creation of out-of-bound areas to implement discipline and behaviour. However, it clearly stated that ‘the Secretariat cannot hold a person criminally accountable’. The UN can adopt disciplinary sanctions for its personnel, based on administrative investigations, and related to individual behaviour that breaches the standards mentioned before. However, the UN cannot exercise forms of legal jurisdiction to punish criminal actions committed by its own personnel, due to the lack of structures, personnel and funding.

In the 2003 SG Bulletin, violations of standards were defined as ‘serious misconduct’. The UN administrative investigation would be carried out only after the applicable code of conduct was identified and the specific behaviour constituted an alleged breach of that code. The only exception to this general rule is when the UN mission has an executive mandate providing governmental powers, including law enforcement and prosecutorial powers in the host State, as in the case of the UN missions in Kosovo and Timor-Leste. Having administrative control over the territory, the UN organs in the field may exercise judicial functions, which should also comply with international human rights standards. Under these circumstances the Secretary-General might have fewer concerns in waiving the immunities of UN personnel. In the Gashi case, related to arbitrary detention in Kosovo, UNMIK decided to compensate the alleged victims after a decision by a panel of international judges in Pristina. However, most PKOs would not have this mandate, because host

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179 See UN Docs A/60/19 (22 March 2006) para 65; and A/61/645 (n 140) para 40.  
180 ST/SGB/2003/13 (n 34) above.  
181 UN Doc A/62/329 (n 66) para 16.  
182 See s 7.A below.  
183 UN Doc A/62/329 (n 66) para 15.  
187 See Sweetser (n 9) 1665; Rawski (n 9) 122.
States would not easily accept those pervasive powers on their territory. In all other cases, the only possible option is the waiver of immunities by the Secretary-General followed by criminal proceedings by a competent criminal court. For this reason UN bodies have tried ‘to identify a State that may be able to exercise jurisdiction over the alleged offender and to assess whether the conduct may amount to criminal conduct under the laws of that State’. These options are considered in the following three sections.

B. The Host State Jurisdiction

The GLE affirmed that ‘as far as possible, the host State should exercise jurisdiction’ on crimes committed in its own territory. This is an undisputed principle based on the principle of sovereignty, and can be exercised ‘regardless of the identity of the alleged offender or of the victim, of whether another State can exercise jurisdiction over the same conduct’. Furthermore, there is an obligation for UN peacekeeping personnel to respect all local law and regulations ‘as a corollary to their enjoyment of privileges and immunities in the host State’. Article 7 of the Draft Convention adopts this principle, establishing that:

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[t]he State party in the territory of which the alleged offender is present shall, if it does not extradite that person, be obliged, without exception whatsoever and without undue delay, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a serious nature under the law of that State.
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There are several advantages in applying this rule because witnesses and evidence are generally located where the criminal act was committed and the investigation can be better carried out, compared with trials conducted abroad, which may imply transfer of witnesses and evidence, leading necessarily to delays and extra costs. Another advantage is the impact on the local population which would perceive a ‘greater sense of justice being done and being seen to be done’, an issue that has been pointed out also in relation to the establishment of international criminal tribunals.

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188 UN Doc A/60/980 (n 40) para 16.
189 Ibid para 27.
190 Ibid para 27(a).
191 Ibid para 27(c).
192 This text is derived from art 14 of the Convention on the Safety of United Nations and Associated Personnel (n 98) and from article 8(1) of the International Convention on the Suppression of Terrorist Bombings (UNGA Res 52/164 annex).
193 UN Doc A/60/980 (n 40) para 27(d).
When the host State has a dysfunctional legal system, the GLE suggests that the UN should ensure the interests of the alleged offender, for instance through ad hoc agreements between the host State and the UN before the waiver of immunity. Also, the host State should agree to accept UN assistance to ensure the respect of human rights standards in dealing with the case. This procedure might create a double standard, one for the local population and one for international personnel. The GLE considered that despite reasonable concern regarding this risk, it is already accepted that military contingents are subject to the exclusive foreign jurisdiction, and the consideration is that in those cases, ‘some accountability may often be better than none for the victims’. This reasoning has clearly some appeal, but it is based on practical reasons rather than on legal standards, as it is clearly a form of discrimination to impose the application of human rights standards for one group of people, and admit that others, in the same circumstances, would be treated differently within the same jurisdiction and by the same judicial authorities.

C. Hybrid Tribunals

A possible option that could overcome problems related to the exercise of jurisdiction by the host State might be the establishment of hybrid tribunals. Examples include the Special Court for Sierra Leone, the Extraordinary Chambers in Cambodia and the Special Panels for serious crimes established by the United Nations Transitional Administration in East Timor (UNTAET). The experience of hybrid tribunals is linked to post-conflict situations addressing the prosecution of the most serious international crimes. This would not usually be the case for the crimes under consideration. The GLE suggests that ‘hybrid tribunals can be established to deal exclusively with domestic crimes, including those committed by peacekeepers, which do not rise to the level of international crimes’. The identified advantages include the involvement of the international community, which would entail international standards of procedures according to international human rights principles. It would also avoid double standards between peacekeepers and the local population. The same report identifies also two limiting factors: the host State consent to establish such a type of tribunal; and the limitations linked to the financial commitment for UN Member States.

194 A/59/710 para 18.
195 A/60/980 (n 40) para 30.
197 See Schabas (n 151) above.
198 Ibid para 34
D. Jurisdiction of Other States

Due to some difficulties that can arise from the exercise of criminal jurisdiction by the host State, other States might exert jurisdiction to prosecute crimes committed by peacekeepers. Under international law, the exercise of criminal jurisdiction is based on five possible grounds when crimes are committed outside the territory of a State:

(i) nationality or active personality, when a State can assert its jurisdiction for acts committed abroad by its citizens;
(ii) effects or objective territoriality, when acts committed abroad have or may have effects on the territory of that State;
(iii) passive personality, in cases when the victim of the crime is a national of that State;
(iv) protective principle, when jurisdiction is considered to protect essential interests of the State affected by that conduct abroad;
(v) universal jurisdiction, in case of crimes defined under international law and without regard to the nationality and territorial nexus of the offender with the State exercising jurisdiction.

The GLE considered that only a few of those principles would be relevant in the case of peacekeeping personnel. In particular it discussed the nationality and universal grounds for jurisdiction. The GLE suggested that all States ‘should establish jurisdiction over serious crimes against the person, in particular those involving sexual exploitation and abuse, committed by their nationals in peacekeeping operations’. 201

(i) TCC jurisdiction

The nationality principle would ensure that when the host State is not able to exercise its jurisdiction, the sending State would conduct the investigation and subsequent prosecution. Furthermore, the exercise by the State of jurisdiction over its own citizens does not require any international agreement, as this is a consequence of the exercise of sovereign powers of the State over its nationals. In 2008 and 2009, the UN Secretariat published a list of replies from Member States regarding their existing laws criminalizing the mentioned crimes.202 Different rules apply that show some problems in the application of national criminal legislation to nationals abroad. For instance, the Argentinean Penal Code can be applied to offences committed in the national territory,203 and would not apply to international civil servants, as they are not considered to be gov-

201 UN Doc A/60/980 (n 40) para 47.
202 UN Doc A/63/260 (11 August 2008); A/64/183 (28 July 2009).
ernment agents or employees. Similarly, in the case of Canada, based on the
common law tradition, the application of Canadian criminal law is limited to the
national territory, the only exception being the possible prosecution of inter-
national crimes. In the case of Ireland, serious offences committed by Irish
UN personnel in another State would not be prosecuted in Ireland. Some
States already allow the prosecution of nationals serving in UN missions. In the
case of Germany, Brazil, Sweden and Switzerland, nationals can be
prosecuted also when serving for the UN. A quite developed system is foreseen
by New Zealand. The 1971 Armed Forces Discipline Act allows for jurisdiction
on Defence Forces anywhere, also when acting as members of UN missions.
The United Nations (Police) Act 1964 establishes the same jurisdiction in the case
of UN police units. The more recent Crime and Misconduct (Overseas Operations) Act 2004 would apply to any other citizen who does not fit into the two
previous cases, serving in an ‘overseas operations force’. The US Uniform
Code of Military Justice provides a very detailed set of crimes, including child
abuse, sexual harassment, rape, cruelty and maltreatment. It also al-

tows for prosecution of military personnel while on duty and when still enlisted
in US military service. Other States, such as Australia, have amended their na-
tional criminal law, to incorporate the possible prosecution of their nationals
serving abroad under international mandate. Furthermore, some States have
specific provisions that extend their criminal jurisdiction when nationals and
permanent residents are involved in sexual tourism abroad. These provisions

204 Ibid art 1(2).
205 Canada, Criminal Code (RS, 1985, c C-46), s 7.
206 UN Doc A/63/260 (n 202) para 21.
207 Germany, Criminal Code (13 November 1998) (Federal Law Gazette I 945, 3322), ss 5,
6(2)–(8).
208 Brazil, Penal Code, Decreto Lei no 2848 (7 December 1940) art 7(2)(b).
210 Switzerland, Criminal Code (21 December 1937) arts 3–7 and Military Criminal Code
(13 June 1927) arts 3, 8, 10.
211 New Zealand, Armed Forces Discipline Act 1971 no 53 (Royal Assent 12 November
1971).
212 Ibid s 78.
213 Ibid s 8.
214 New Zealand, United Nations (Police) Act 1964, no 1 (Royal Assent 21 June 1964)
s 3.
215 Crimes and Misconduct (Overseas Operations) Act 2004 no 17 (Date of Assent 5
April 2004) (as at 1 October 2008) s 3.
216 USA, UCMJ 64 Stat 109, 10 USC c 47 (2009).
217 Ibid para 843.
218 Ibid para 1561.
219 Ibid para 920.
220 Ibid para 893.
221 Ibid para 802, art 2.
223 New Zealand, Crimes Act 1961 No 43 (as at 1 June 2010), s 98AA, s 134, s 144A; UK,
Sexual Offences Act 2003 (c 42).
are meant to address that specific issue, but they could be used in the case of sexual abuses by peacekeepers, as criminal prosecution is not limited to civilian personnel only. It seems that different approaches in national criminal law do not help the consistent punishment of nationals abroad who commit offences, nor the determination of national jurisdiction related to international officers and the types of crimes that would fall within the competence of national criminal courts.

(ii) Universal jurisdiction

Vis-à-vis universal jurisdiction, the GLE identified both positive and negative elements. Sexual abuse and other related crimes, such as rape and enforced prostitution, are part of the conduct (actus reus) of crimes against humanity, and grave breaches of the 1949 Geneva Conventions. In the context of an international armed conflict, fundamental assaults on human health, physical integrity and dignity are grave breaches of the Geneva Conventions. IHL prohibits acts of sexual violence in internal armed conflicts as well. Common Article 3 of the 1949 Geneva Conventions prohibits ‘violence to life and person’, ‘cruel treatment’, ‘torture’ or ‘other outrages upon personal dignity’. Protocol II Additional to the 1949 Geneva Conventions, governing the protection of civilians in internal armed conflicts, explicitly refers to ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’. International criminal law also applies to sexual abuses in situations of armed conflict, even if committed for personal motives and not as part of a widespread policy.

Also, there is an interesting relationship between the crime of torture, inhuman and degrading treatment, and forms of sexual violence and abuse, and even enslavement. Some of these crimes may be linked to the alleged cases of trafficking in persons, which have been denounced in some cases. Crimes against humanity can be committed by anyone, even if not affiliated officially to a State and the ICC does not require the link between the act of torture and a public official. In the opinion of the ICC rape and sexual violence may con-
stitute genocide, and they can be prosecuted by the ICC under its Statute or by any national court as *jus cogens* norms.\(^{232}\)

The recourse to international criminal law and to the possible use of universal jurisdiction by any national tribunal would require the *jus cogens* status of the specific crimes, as they would constitute *erga omnes* obligations,\(^{233}\) including the obligation to prosecute their alleged perpetrators, and the obligation to punish or to extradite (*aut punire aut dedere*).\(^{234}\) However, it is difficult to affirm that the crimes committed by peacekeepers are so recognized under international law.\(^{235}\)

It should be kept in mind that international crimes are also very narrowly constructed, as they require specific conditions, such as widespread and planned behaviour, which would rarely occur in cases involving peacekeeping personnel in such crimes on an individual basis. It is true that war crimes do not need that specific element, and one rape would be enough to fit it into that category. However, it may be excessive to use the reference to international crimes in the cases under consideration. If they are considered war crimes, an armed conflict, either international or non-international, should be identified. In the case of PKOs it is difficult to define the position of the parties in relation to the local conflict, unless the UN troops do get involved, under their mandate, in the conduct of the hostilities.\(^{236}\)

The position of the GLE in this context is to avoid the need to consider the crimes as international crimes.\(^{237}\) This may be right, as if they were properly prosecuted by national competent authorities there should not be the need to find complex legal solutions, which are not fully accepted under current international law.

However, there are concerns that certain crimes committed by peacekeepers are not ‘merely ordinary crimes’, because they are committed against the population that should be protected from abuses and widespread violence. The gravity of those crimes would be based ‘on the breach of what is akin to a relationship of trust between the peacekeeper and the member of the community he or she is sent to protect and assist’.\(^{238}\) Furthermore, there is an argument that the criminal conduct would prejudice the ‘credibility of the Organisation


\(^{237}\) UN Doc A/60/980 (n 40) paras 57, 63(e), 71(a).

\(^{238}\) *Ibid* para 55.
and its important role in undertaking peacekeeping operations.\textsuperscript{239} If the second argument is more related to the consequences of the acts, the first one seems to provide more room for legal discussion.

It is true that the position of the peacekeepers is different from that of the local population, as they have certain means and powers that put them in a situation of privilege. However, the reference to the ‘trust’ is a weak legal justification. It would be better to use more accepted concepts of criminal law to define extra responsibility for the members of UN PKOs. In criminal law there is a concept of aggravating circumstances when certain crimes are committed by people who abuse their power or official authority. Another option would be to consider that they have a ‘duty of care’, or commit an abuse of position of trust\textsuperscript{240} due to their institutional responsibilities, including the responsibility to protect\textsuperscript{241} exercised by the international community, which put them in a unique position in relation to the victims and to other people, which makes their crime or misbehaviour particularly odious. This option would provide a clearer base for accountability and it could be included in national criminal provisions concerning national personnel acting abroad in peace operations.

7. International Judicial Cooperation

In cases under consideration, it is particular important to define forms of judicial cooperation not only among States but also with IOs. Some States already have in place forms of legal cooperation, mainly through bilateral extradition treaties. The Australian Mutual Assistance in Criminal Matters Act 1987\textsuperscript{242} allows discretionary cooperation with States but not with the UN.\textsuperscript{243} Similar provisions exist in New Zealand,\textsuperscript{244} which do not bar New Zealand authorities from providing assistance in case of requests from the UN. Other States have manifested a ‘willingness’ to facilitate investigations and prosecution involving UN personnel and crimes of a serious nature.\textsuperscript{245} Some States do not exclude cooperation with the UN but under national criminal law they would not be able to disclose information regarding ongoing investigations.\textsuperscript{246}

\textsuperscript{239} Ibid paras 55, 56.
\textsuperscript{240} UK, Sexual Offences Act 2003 (c 42) s 16.
\textsuperscript{242} Australia, Mutual Assistance in Criminal Matters Act 1987 (Cth) Act no 85 of 1978.
\textsuperscript{244} New Zealand, Mutual Assistance in Criminal Matters Act 1992 no 86 (Royal Assent 25 September 1992) part 3.
\textsuperscript{245} For instance Belgium, UN Doc A/63/260 para 39.
\textsuperscript{246} Czech Republic, Code of Criminal Procedure, Act No 141/1961 (1995), No 141 (no 152), s 376, \textit{ibid} para 42.
Article 10 of the Draft Convention defines the areas of cooperation, including investigations, criminal and extradition proceedings, and assistance in obtaining evidence. The article clarifies that cooperation shall be based on existing arrangements on mutual legal assistance, and that in the case of absence of such agreements, ‘States parties shall afford one another assistance in accordance with their national law’.

Extradition is a well-established practice of cooperation between States to ensure prosecution of alleged criminals. Extradition treaties define the crimes that can be the object of request for extradition. Article 8 of the Draft Convention suggests that in cases of crimes defined in Article 3, if they are not already included in an extradition treaty, they should be incorporated in existing treaties and in any future treaty. Some States consent to extradition when a treaty is in force with the State formulating the request. In the absence of a treaty, the Draft Convention recommends that States Parties should consider the Draft Convention, once entered into force, as the legal basis for extradition. Nevertheless, certain specific conditions under national and international law, such as fair treatment and trial, based on human rights standards, may still apply.

Other forms of cooperation foreseen by the Draft Convention include the transfer of criminal proceedings between States ‘in cases where such transfer is considered to be in the interests of the proper administration of justice’; the transfer of prisoners in order to complete their sentence in a different country; cooperation in the context of use of evidence obtained in the host State also in the case of administrative investigation conducted by the UN. Cooperation includes also the fact that the State Party that prosecutes the alleged offender shall communicate the final outcome of the proceedings to the Secretary-General, who shall transmit that information to all the other States Parties and to the host State. 

A. Investigation

The Zeid Report bluntly states that ‘those who violate United Nations standards need to be punished’. The report identifies some problems in dealing with proper investigation of alleged cases. It is clearly recognized that the presumption of innocence as a general principle of criminal law should apply, in particular by the D PKO, which is usually in charge of a ‘preliminary investigation’. The enquiry procedure for civilian police officers and military observers is based on two phases, a ‘preliminary investigation’ and a subsequent ‘board of inquiry’

247 2006 Draft Convention (n 44) art 8(2) and (3).
248 Ibid art 11.
249 Ibid art 12.
250 Ibid art 16.
251 Ibid art 17.
252 ‘Comprehensive Strategy’ (n 10) para 28.
decision. If from the investigation it appears that a serious misconduct is well founded, the head of mission shall establish a board of inquiry. Similar procedures are applied to UN staff, but in case of well-founded misconduct emerging from the preliminary investigation the matter is passed to the Assistant Secretary-General for Human Resources Management. Issues related to investigations were addressed in a 2004 OIOS report. For investigation purposes, OIOS has grouped allegations into Category I and Category II, depending on the risk such cases present to the UN. However, the report does not define the meaning of ‘risk’. It may represent a danger to the progress of the operation, or a threat to the security of its personnel and infrastructure. The Office of Human Resources Management in the Department of Management may adopt disciplinary measures for UN civilian personnel. Evidence and procedures adopted by the board of inquiry, as an organ of investigation in UN missions, do not follow proper legal and judicial proceedings, and the documentation gathered is not made available because of the UN ‘policy of not releasing documents that might be used by third parties to make claims against the Organization’. When allegations of serious misconduct concern military and police personnel, the UN may repatriate the individuals concerned and ban them from future PKOs. However, disciplinary sanctions and any other judicial actions remain the responsibility of the national jurisdiction of the individual involved.

The Zeid Report formulates two main suggestions regarding the investigation procedures. The first one focuses on establishing a more professional in-

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**Notes:**

254 Misconduct is defined as ‘Failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and the Staff Rules or other relevant administrative issuances, or to observe the standards of conduct expected of an international civil servant, may amount to misconduct and may lead to the institution of a disciplinary process and the imposition of disciplinary measures for misconduct’ (2003) SG Bulletin (n 34) Rule 10.1(a).

255 UNDPKO (n 253) paras 15-22.


258 Category I includes: all sexual exploitation and abuses offences including rape, transactional sex, exploitative relationships and sexual abuse, cases involving risk of loss of life to staff or to others, abuse of authority or staff, conflict of interest, gross mismanagement, bribery/corruption, illegal mineral trade, trafficking with prohibited goods, life threat/murder, abuse or torture of detainees, arms trade, physical assault, forgery, embezzlement, major theft/fraud, use, possession or distribution of illegal narcotics, waste of substantial resources, entitlement fraud and procurement violations, ibid para 26.

259 Category II includes: discrimination, harassment, sexual harassment, abuse of authority, abusive behaviour, basic misuse of equipment or staff, simple theft/fraud, infractions of regulations, rules or administrative issuances, traffic-related violations, conduct that could bring the UN into disrepute, breaking curfew, contract disputes and basic mismanagement, ibid para 27.

260 ‘Comprehensive Strategy’ (n 10) para 28.
vestigative mechanism, in particular when dealing with criminal allegations.261 The new mechanism might include a permanent professional capacity linked to the DPKO, but maintaining total independence from the command structure of the Department. It could be based on a regional structure, and it would replace the preliminary investigation and the board of inquiry.262 This would make available a permanent and less expensive structure. It would also provide a professional procedure based on the fundamental rules of criminal law, protecting the rights of individuals who are accused of individual crimes.

Regarding military personnel, the Zeid Report suggests that the TCC should participate in the investigation process. A military lawyer, preferably a prosecutor, with knowledge of national military law, could support the investigation and assist in the collection of relevant material for further national prosecution. This provision should be included in the UN model MoU, which could incorporate the obligation for the TCC to nominate a military prosecutor easily deployable, at short notice, to the mission to assist the DPKO investigations.263

A second suggestion includes the possibility of establishing on-site court martial systems ‘for serious offences that are criminal in nature’.264 This option would facilitate access to witnesses and the acquisition of evidence in the mission area. The report raises some doubts regarding the opportunity of having a court martial in the host State, which might generate some problems. However, this problem seems to be solved under paragraph 47(b) of the Model SOFA, which provides the exclusive jurisdiction to prosecute military components of the mission to the States of origin. According to the report, the establishment of a foreign court martial would be implied in that provision. Nevertheless, the set of investigative powers that could be used in this case is not clear. For instance, whether foreign police officers and investigative authorities could search, arrest and interrogate alleged accused and witnesses, and the forms of cooperation with the local police and the judicial authorities. Those issues should be further defined, as some States might not easily agree to allow foreign investigative and judicial bodies to act on their territory, under foreign authority, and possibly concerning their own citizens.

Rules of criminal procedure are quite detailed in all major legal systems, particularly with regard to the right to a fair trial. It should be noted that such specific rules are not defined in the documents that presently regulate UN personnel. The adoption of international rules of criminal procedure might be a quite complex issue, even if the rules adopted by international criminal jurisdictions could provide a good framework. However, their applicability to UN PKOs might need further negotiations regarding specific rules applicable to them, with a process that would still limit the judicial action with the ratification of UN Member States.

261 In particular when dealing with sexual exploitation, and abuse, sex crime investigation involving children, and access to modern forensic methods, ibid para 36.
262 Ibid paras 31–2.
264 Ibid para 35.
B. Organizational, Managerial and Command Accountability

There is a perception that ‘neither the Organization nor its civilian managers and military commanders’ show particular efforts and/or are held accountable for addressing sexual exploitation and abuse in PKOs. The Zeid Report provides mainly organizational and managerial suggestions for the running of the missions. Some essential measures include the raising of the awareness among UN and related personnel about sexual abuse, which is defined in the 2003 SG Bulletin. Suggested actions include: intensive training of peacekeepers before, at arrival and during the mission; links to local communities to assist the submission of individual complaints; collection of data concerning abuses and responses by each mission; the possibility of including full-time personnel conduct officers, on the examples of operations in Burundi, Cote d’Ivoire, the DRC and Haiti; and an increase in the number of female military personnel, including at senior level, to discourage sexual exploitation.

Some provisions already exist in this area of concern, such as the prohibition, under UN standards of conduct, of sexual activity with prostitutes. However, the report identifies a problem when peacekeepers are provided with condoms under action by the DPKO and the Joint UN Programme on HIV/AIDS. Therefore a confused and contradictory message seems to be passed to the personnel. Clearer messages should be sent to soldiers, taking into account the 2003 SG Bulletin. Also early warning information should be used by managers in missions to identify possible abuses, and the use of more established and professional units by TCCs might improve the behavioural standards in each mission.

The new model MoU includes a series of relevant obligations. They include the obligation for governments to inform its personnel of the UN standards of conduct, to impose clearer obligations on commanders of national contingents regarding disciplinary matters, and address issues of investigation, exercise of jurisdiction by governments and accountability of personnel.

Ibid para 37. See also J Clayton and J Bone, ‘Sex Scandal in Congo Threatens to En-gulf UN’s Peacekeepers’, The Times (23 December 2004).

266 2003 SG Bulletin (n 34).

267 In July 2008, the Department of Field Support launched the Misconduct Tracking System (MTS), a global database and confidential tracking system for all allegations of misconduct, providing statistics that are available on the Conduct and Discipline website <http://cdu.unlb.org>.


269 UN Doc A/56/30 (2001) para 13 and annex II.

270 ‘Comprehensive Strategy’ (n 10) paras 44–6.

271 2007 Revised MoU (n 63) art 7 bis.

272 Ibid art 7 ter.

273 Ibid art 7 quarter.

274 Ibid art 7 quinquies.

275 Ibid art 7 sexies.
C. Individual Disciplinary, Financial and Criminal Accountability

There have been some cases in which national authorities have penalized their personnel, under their military and/or criminal justice systems, who have engaged in sexual exploitation and abuse, including dismissal from the military, custodial sentences and loss of rank.\textsuperscript{276} France, for example, has reportedly imprisoned one of its peacekeepers for filming himself having sex with children, while countries including Morocco, Nepal, Pakistan, South Africa and Tunisia have announced disciplinary action against some of their peacekeepers.\textsuperscript{277} The government of Morocco convicted four soldiers serving as UN peacekeepers for engaging in trafficking.\textsuperscript{278}

The problem identified in the Zeid Report is the widespread perception that members of PKOs who commit sexual abuses ‘rarely if ever face disciplinary charges for such acts and, at most, suffer administrative consequences.’\textsuperscript{279} It is particularly worrying that the Report affirms that ‘such perceptions are not without foundation.’\textsuperscript{280} There are several reasons that in, part, justify this situation. Some have been mentioned before, regarding the investigation procedure. Two other reasons are mentioned in this section: (i) the reluctance of States to admit that their troops commit such crimes, and (ii) the lack, in many areas where UN personnel are employed, of a reliable legal system, that could permit local prosecution, after the UN Secretary-General had waived the immunities of staff accused of serious offences.\textsuperscript{281} Due to this complex situation, the report provides a set of options based on disciplinary, financial and individual criminal accountability.

Regarding disciplinary measures, there may be different types of sanctions, depending whether the personnel are UN staff or military members of national contingents. UN staff who violate the 2003 SG Bulletin standards should be subject to disciplinary action, unless the Secretary-General accepts ‘an immediate resignation’ and the individual concerned would be never re-employed by the UN.\textsuperscript{282} These provisions are based on Staff Regulations and Rules, which give these powers to the Secretary-General as head of the UN administration.\textsuperscript{283} Regarding similar violations by civilian police, military observers and other civilian personnel the Report suggests that their contracts should be terminated. For military personnel, the Report suggested an amendment to the model MoU to include a clear obligation for TCCs to institute disciplinary action and appropriate legal proceedings, a measure later adopted in 2006.\textsuperscript{284}

\textsuperscript{276} UNGA Res A/61/645 (n 140) para 37.
\textsuperscript{278} \textit{Trafficking in Persons Report} (United States Department of State 2006) 184.
\textsuperscript{279} ‘Comprehensive Strategy’ (n 10) para 66.
\textsuperscript{280} \textit{Ibid} para 66.
\textsuperscript{281} \textit{Ibid} para 67.
\textsuperscript{282} \textit{Ibid} para 68.
\textsuperscript{283} UN, ‘Staff Regulations’ (n 122) Rule 10.1 and 10.3.
\textsuperscript{284} See s 7.A.
Financial accountability is also taken into consideration, not only as a form of sanction, but as a means to provide assistance to acknowledged victims. The Report mentions the so-called phenomenon of ‘peacekeeper babies’, who result from relationships between local women and UN peacekeepers. Recommendations are based on existing UN Staff Rules which permit the imposition of fines on staff members who are guilty of misconduct. The suggestion is that fines imposed for violations of the 2003 SG Bulletin should be sent to a voluntary Trust Fund for Victims to provide assistance to victims of sexual exploitation and abuse by UN peacekeepers. Amendments should be added to relevant documents to extend these measures to civilian police and military observers. For national military contingents, the report suggests that the daily allowance of soldiers found guilty of sexual crimes should be collected through national authorities, so that financial support could be provided to the victims. It is stressed, under the 1999 SG Bulletin on ‘Family and Child Support Obligations of Staff Members’, that the UN is authorized to honour court orders against UN staff members for family support. In this case Section 2.2 of the 1999 SG Bulletin clearly affirms that:

In accordance with staff regulation 1.1 (f), the privileges and immunities of the United Nations are conferred in the interests of the Organization and furnish no excuse to staff members who are covered by them for the non-performance of their private legal obligations.

This provision indicates that certain limitations to immunities and privileges of the UN staff are allowed, and they impose duties on UN staff that can be implemented under the law.

The report also suggests practical measures to support and assist the mother of a peacekeeper baby. They include the request of a DNA test for UN staff, and in the case of a positive result, the possibility of financial help deducted from the UN staff member at dismissal, based on his salary income, pension or other financial sanction that can be applied by the State of nationality. In the case of military contingents, the report suggests that the UN should provide help for mothers to file claims that would be transmitted to the TCC for consideration in its legal system.

Individual criminal accountability is also considered. Suggestions are offered for two types of peacekeeping personnel: military members of contingents and UN staff and experts on mission. This distinction is based on the fact that the

285 See Sweetser (n 9) 1661-160.
286 ‘Comprehensive Strategy’ (n 10) paras 71 and 56.
287 Ibid para 71.
288 Ibid para 75.
290 Ibid ss 2.1, 4.1 and 4.2.
291 ‘Comprehensive Strategy’ (n 10) para 76.
292 Ibid para 77.
MoU provides that military personnel in PKOs are subject to the exclusive criminal authority of the TCC. However, under the practice established by the Model UN SOFA, States should provide formal assurances that they would exercise jurisdiction with respect to crimes committed in the mission area. The Report regrets that the practice mentioned is no longer used by the UN, and it should be clearly reinserted to guarantee a legal obligation for States towards the UN.

In general, the Zeid Report underlined the lack of support in the investigative part by different components of the mission. The enquiry revealed problems of transparency and affected genuine cooperation by States. It is important to note that this attitude does not help the cause of justice and to clarify the responsibility of those individuals responsible for grave abuses. The Report suggests a set of possible remedies. First of all the Special Committee should request the Secretary-General to obtain formal assurances regarding the exercise of their jurisdiction when a DPKO investigation has well-founded allegations against a military member of a mission. Secondly, if national authorities do not prosecute, they should submit a report to the Secretary-General explaining why prosecution was not appropriate. Thirdly, that the GA makes this procedure ‘an essential condition for acceptance of an offer from a troop-contributing country to supply troops to the UN’. Finally, to monitor the compliance with the mentioned rules, the Secretariat-General should indicate, in its annual report to the Special Committee the actions taken by troop-contributing States, and in a separate part of the report indicate the details of cases that were not properly addressed, indicating the name of the contributing country, without revealing the identity of individual members of the contingent. The report considers that these measures would show that the UN and States do not ‘tolerate acts of sexual exploitation and abuse by military members of their contingents’.

Since 2007 the Secretary-General has submitted a report to the GA regarding data on investigations into sexual exploitation and related offences. In 2007 the GA adopted a ‘Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel’ , ‘to ensure that victims of sexual exploitation and abuse by United Nations staff and related personnel receive appropriate assistance and support in

293 2007 Revised MoU (n 63) art 7(1) quinquies.
294 UN Doc A/45/594 (n 82) annex para 48.
295 For example, it mentions an exchange of letters between the Secretary-General and Finland of 21 and 27 June 1957, where formal assurances were given by Finland that it would exercise jurisdiction over any of its contingents assigned to the UN Emergency Force who committed crimes in the peacekeeping area (UNTS vol 271, 135).
296 ‘Comprehensive Strategy’ (n 10) para 78.
297 Ibid para 81.
298 Ibid para 82.
299 Ibid para 83.
300 UN Doc A/61/957 (15 June 2007).
a timely manner, with particular attention ‘to assist and support complainants, victims and children born as a result of sexual exploitation and abuse by United Nations staff and related personnel’.

8. Conclusions

The UN is actively adopting new measures to address misconduct by peacekeepers that amount to criminal acts. It is very important to identify and prosecute individuals who are responsible for violations that infringe fundamental rights, not only to ensure the consistent action of UN missions, but also to avoid tensions with local communities that may compromise the success of a PKO. The purpose of PKOs, in the context of either the UN or other international organizations, is to protect individuals in situations of extraordinary suffering. As pointed out by Radhika Coomaraswamy, Special Rapporteur on Violence against Women, the UN would lose ‘its moral force if it fails to respond when those within the United Nations system violate human rights’. Furthermore, there is a risk that the UN and other IOs that do not address the issue of immunities in cases of human rights violations might be considered to be authorizing such violations, in particular when victims are not provided access to adequate remedies. Some cases have already pointed out the importance of addressing the system of international immunities with regard to responsibility of IOs.

The analysed documents make special reference to enhancing cooperation between States and the UN, and reaffirm the general obligations to respect the principles of international law related to the protection of human rights. Actions include policy-oriented strategies, administrative powers of control exercised by States and by UN bodies, and the fundamental willingness of States to exercise jurisdiction in alleged cases of crimes committed by nationals who serve in UN PKOs. This would also include strengthening training activities for staff who are sent to peace missions. Training should inform about legal limitation of immunities, the State’s jurisdiction, the defini-

302 Ibid annex para 1.
303 Ibid para 4.
304 ICISS report (n 241); UN ‘Implementing the Responsibility to Protect’ (12 January 2009) UN Doc A/63/677.
306 Sweetser (n 9) 1675.
308 UN Security Council Res 1325 (2000) recognized ‘the importance of … specialized training for all peacekeeping personnel on the protection, special needs and human rights of women and children in conflict situations.’
tions of crimes, the criminal consequences and the fundamental guarantees that alleged perpetrators must enjoy.

Several measures should be adopted to clarify the legal uncertainties that still surround the practical prosecution of UN personnel in cases of misbehaviour. Due to the lack of UN police and judiciary, there is a need to clarify and implement the obligations of Member States in dealing with the investigation and prosecution, rather than codify new rules. The crimes and misbehaviour of UN peacekeepers should be identified, probably through a relevant UN body, such as the DPKO. The acts under consideration identified as misbehaviour are essentially of a criminal nature. They may not reach the qualification of international crimes, but there would be no need to use this option if States applied standard criminal law effectively. However, the role of international criminal courts should be considered only as a subsidiary option, and only for those crimes that have been internationally defined, such as torture. Even in that case, the possible prosecution by international courts, including the ICC, seems too remote and illusory.

Once the UN competent bodies have identified the types of crime that should be prosecuted, States contributing personnel for PKOs should include them in national criminal law, in military criminal codes, and should define the exercise of national jurisdiction on crimes and misbehaviour committed by nationals while serving in peace operations of international organizations. A second national measure would be the clarification of extradition and judicial cooperation among States and the UN when dealing with the prosecution of those crimes. Some clarification should also be provided regarding the possible deadline for prosecution and the possible consequences in case of failure to investigate and prosecute to avoid forms of hidden impunity.

A special burden should be put on commanders of national contingents, because in cases concerning military and police personnel, these issues should be part of the disciplinary measures under the responsibility of national officers in the field. The revised 2007 MoU includes some improvements, providing an obligation for each commander of a contingent with the authority to ensure compliance with UN standards, local laws and regulations. However, there are no clear consequences for the commander who does not act properly. Reforms of the SOFAs and SOMAs between the national State and the host State should include realistic and feasible mechanisms for the prosecution of UN PKO personnel in case of alleged violations.

At international level, the Draft Convention might provide some further assistance. However, it would be relevant to clarify the issues of limitations on immunities for UN personnel, and the procedure for dealing with cases of criminal conduct, in the case of inaction by the State of nationality of the individual. When certain criminal acts also imply human rights violations, it would be relevant to clarify the level of responsibility of the UN and of the sending State. This

309 2007 Revised MoH (n 63) annex H.
is particularly important when UN officers are also national officers, for the
proper attribution of responsibility in dealing with the victims of abuse.

It is necessary to set limitations on immunities and the conditions under which
they must be suspended or waived. This implies also a definition of crimes that
outweigh the immunities, the conditions for the exercise of criminal jurisdiction
and the competent authority. The Secretary-General may decide to waive the im-
munity of an official who works for the UN but it is important to clarify which
State would have jurisdiction in the specific case. Definitions of forms of subsidi-
iary jurisdiction when a State is not exercising criminal jurisdiction on its nationals
are also relevant, and national legislation should be enacted to support adequate
investigation and prosecution. Once an independent investigative body has found
reasonable grounds for prosecution, the jurisdiction should be exercised in the
order defined by the GLE. These measures would avoid legal gaps and proced-
ural loopholes that allow forms of impunity for crimes committed abroad.

It is also important to strengthen independent investigation to ensure the
principle of presumption of innocence. The establishment since 2005 of Conduct
and Discipline Units in UN Headquarters and in several peace missions may
further support this effort. They address issues such as preventing misconduct,
handling complaints and data management and ensuring compliance with UN
standards of conduct, even if they do not conduct investigations, which are
handled by the UNs’ OIOS. It has been suggested that independent Civil Pro-
vosts should be appointed in UN missions to enhance collaboration with the host
State’s criminal justice system. However, priority should be given to the clar-
ification of the legal conundrum because procedural and enforcement mechan-
isms would help to support the application of legal rules more effectively, and
not vice versa.

Finally, it would be appropriate to establish a more stringent monitoring me-
chanism. Since 2007 the UN has collected relevant information on alleged vio-
lations and Member States’ actions to deal with them. This information is
presently published in a Secretary-General report to the GA. The annual re-
ports mention statistical data, but they do not refer to specific countries and to
their personnel. There should be some form of further scrutiny, possibly within
a UN human rights body, such as the Human Rights Council, as the main UN
human rights institution, for its consideration of national implementation. Sug-
gestion could be provided by the Human Rights Council Advisory Committee

310 See Durch et al (n 9) 60–5.
311 UN, ‘UN Establishes Peacekeeping Conduct and Discipline Units’, Press Release,
PKO 120 (3 August 2005).
312 Ibid 60.
313 As part of UN efforts to improve transparency, the DPKO and Department of Field
Support (DFS) will issue quarterly press releases to make public updated statistics
regarding sexual exploitation and abuse cases. The statistics will be updated simultan-
eously on the Conduct and Discipline website <http://cdu.unlb.org/> see UN Press
Releases and Statements (New York 5 February 2010).
314 See UN Doc A/61/957 (15 June 2007); A/62/890 (25 June 2008); A/63/720 (17 February
2009).
which could recommend implementation-oriented mechanisms. Of course, not all misconducts are human rights abuses, and those acts would occur outside the territory of the State involved. However, with regard to human rights violations, this might help the international scrutiny regarding national compliance with human rights law, including the extraterritorial application of human rights norms, and it would underline the UN commitment to enforce and protect human rights as part of its mandate under the Charter.

It should be stressed that misbehaviour and criminal conduct should be dealt with primarily by appropriate criminal and disciplinary measures. If members of national contingents and UN personnel were investigated and prosecuted without delay, the risk of misbehaviour would probably be reduced. One of the functions of criminal law is the prevention of crime through the certainty of the sanction. From the information now available, it seems that abuses by peacekeepers have been ignored for too long, leaving room for the presumption of impunity hidden under immunity. There is now a significant awareness and international concern on this matter and the UN seems to take it seriously. More action and cooperation are needed by Member States, who cannot complain about the inefficiency of the UN when they themselves are not using appropriate national judicial mechanisms to deal with the criminal behaviour of their officers and citizens.