Faculteit Rechtsgeleerdheid
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MISCONDUCT BY UNITED NATIONS PEACEKEEPING PERSONNEL, A LEGAL ANALYSIS

HOW TO ENHANCE THE CRIMINAL ACCOUNTABILITY OF MILITARY PEACEKEEPING PERSONNEL

Masterproef van de opleiding
'Master in de rechten'

Ingediend door

Benjamin Magnus
(studentennr. 01008466)

Promotor: Prof. Dr. An Cliquet
Commissaris: Anemoon Soete

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The fact that I am writing these words means that I am finalizing my thesis. It has been an interesting and above all enlightening experience to immerse myself in the problems relating to criminal misconduct by military peacekeeping personnel. Admittedly, the eventual outcome of my work would have never been the same without the help and support from several people.

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Benjamin Magnus

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SUMMARY (NL)

1. De vredesoperaties van de Verenigde Naties hebben als doel de vrede te bewaren in (potentiële) conflictsituaties. VN blauwhelmen vervullen daarbij zowel civiele, politionele als militaire taken. Sinds de jaren '90 duiken er echter verhalen op in verband met crimineel gedrag van vredestroepen. Toen in 2004 de vredestroepen in Congo (MONUC) werden beschuldigd van criminele feiten, startte de VN een onderzoek. Uit gesprekken met de lokale bevolking bleek dat er heel wat seksuele contacten waren tussen lokale bevolking en blauwhelmen, waaronder ook gevallen van seksuele uitbuiting en seksueel misbruik.[1] De VN nam vervolgens een aantal maatregelen om crimineel gedrag van vredestroepen te bestrijden. Helaas blijkt uit recente rapporten dat de problemen nog niet opgelost zijn. Nog steeds worden misdrijven gepleegd en worden lokale vrouwen en meisjes seksueel uitgebuit en misbruikt.

Deze inbreuken dienen in eerste instantie te worden aangepakt om bijkomend leed voor slachtoffers te voorkomen. Daarnaast beschadigen verhalen van misbruik en uitbuiting door blauwhelmen ook het imago van de VN en haar vredesoperaties. De bedoeling van deze thesis is om te bepalen hoe het crimineel gedrag van vredestroepen kan worden uitgeroeid. De focus ligt hierbij op de strafrechtelijke aansprakelijkheid van militaire blauwhelmen.[2]

2. Bij de analyse van het regulerend kader bleek dat een aantal zaken de strafrechtelijke aansprakelijkheid van militaire blauwhelmen verhindert of toch op z'n minst bemoeilijkt. Zo meldt de lokale bevolking niet elk incident, worden beschuldigingen weinig transparant afgehandeld, neemt het onderzoek te veel tijd in beslag en is er een algemeen gebrek aan vertrouwen vanwege de bevolking. Het grootste probleem is echter de afhankelijkheid van de landen die troepen leveren (zendstaten).

Zendstaten zijn exclusief bevoegd om criminele feiten gepleegd door militair vredespersoneel te vervolgen. Dit betekent dat enkel zendstaten in staat zijn om militaire blauwhelmen te straffen voor misdrijven die zij hebben gepleegd tijden een VN vredesoperatie, ook al vonden de feiten plaats op het grondgebied van de gaststaat. Als tegenprestatie moeten deze landen wel garanderen dat ze hun bevoegdheid ook daadwerkelijk kunnen en zullen uitoefenen. Hier wringt momenteel het schoentje. Deze garanties zijn immers niet veel waard doordat de huidige regeling geen

[1] Voornamelijk 'transactionele seks' kwam vaak voor. Daarbij gebruiken lokale vrouwen en meisjes seksuele handelingen als ruilmiddel voor voedsel of geld. Zo gaven blauwhelmen vaak 1 of 2 US dollar of een aantal eieren in ruil voor seksuele gunsten van lokale vrouwen en meisjes.

[2] '*Criminal accountability*' is niet eenvoudig te vertalen, maar ik koos uiteindelijk voor 'strafrechtelijke aansprakelijkheid'. Hiermee doel ik op het gerechtelijk terechtstellen van militaire blauwhelm voor het plegen van criminele feiten.

procedure voorziet om zendstaten te sanctioneren indien zij hun beloftes niet nakomen. Bijgevolg nemen zendstaten niet altijd gepaste maatregelen tegen blauwhelmen die worden beschuld van criminal gedrag, wat leidt tot straffeloosheid.

3. De volgende stap was dan ook om na te gaan hoe de straffeloosheid van militair vredespersoneel kan worden aangepakt. Deze thesis bespreekt een aantal voorstellen om de strafrechtelijke aansprakelijkheid van militaire blauwhelmen te verhogen.

Naast het verbeteren van het contact tussen de vredestroepen en de lokale bevolking en het doorvoeren van een aantal wijzigingen inzake de organisatie van de vredestroepen, is voornamelijk de voorgestelde procedure voor het behandelen van beschuldigingen van groot belang. Deze thesis stelt voor om zowel het onderzoek van beschuldigingen als de vervolging van militair vredespersoneel grondig te herstructureren. Met het oog op deze herstructurering dient er binnen de VN een orgaan te worden opgericht dat de behandeling van beschuldigingen van criminele feiten door blauwhelmen coördineert.[3]

In mijn voorstel worden beschuldigingen voortaan enkel en alleen onderzocht door een onafhankelijk team.[4] Dit moet ervoor zorgen dat het onderzoek snel, onpartijdig en grondig kan worden uitgevoerd door een team van experts. De zendstaat behoudt wel haar centrale rol in de vervolging van militaire blauwhelmen, zij heeft immers de primaire jurisdictie over criminele feiten gepleegd door haar troepen. Een belangrijke vernieuwing is de subsidiaire bevoegdheid van een internationaal tribunaal om zich uit te spreken over misdrijven gepleegd door militair vredespersoneel.[5] Dit moet voorkomen dat de uiteindelijke sanctionering van blauwhelmen enkel en alleen afhankelijk is van de zendstaat.

4. Hoewel de in deze thesis besproken voorstellen vrij ambitieus zijn, zouden ze volgens mij aanvaardbaar moeten zijn voor de betrokken partijen. Ik geloof dan ook dat ze realiseerbaar zijn, al kan de uitvoering van bepaalde voorstellen wel enige tijd in beslag nemen.[6] Net daarom moet de VN dringend actie ondernemen en het regulerend kader van militair vredespersoneel wijzigen. Enkel door zowel op korte als op lange termijn te werken kan het gebrek aan strafrechtelijke

[3] In mijn thesis noem ik deze instantie de Central office regarding Allegations of Misconduct by Peacekeepers (CAMP). CAMP bestaat uit vier departementen: Investigation Department, Review Board, Database Department, Monitoring and Cooperation Department.
[4] Dit onderzoeksteam is een onderdeel van de Investigation Department.
[5] Idealiter zou deze subsidiaire jurisdictie kunnen worden uitgeoefend door het Internationaal Strafhof. Daarvoor zou men dan wel de materiële bevoegdheid van het Hof moeten uitbreiden met een nieuw misdrijf. Bovendien moeten zowel gaststaten als zendstaten de bevoegdheid van het International Strafhof erkennen, op z'n minst met betrekking tot misdrijven gepleegd door militaire blauwhelmen.
[6] Met name de totstandkoming van de vernieuwde procedure voor het vervolgen van misdrijven, waarbij een internationaal tribunaal subsidiaire bevoegdheid heeft, zou ongetwijfeld gepaard gaan met langdurige onderhandelingen en overleg.

aansprakelijkheid van militaire blauwhelmen grondig worden aangepakt. De VN dient haar verantwoordelijkheid op te nemen en moet ernaar streven om het crimineel gedrag van blauwhelmen volledig uit te roeien.

LIST OF ACRONYMS AND ABBREVIATIONS

CAMP	Central office regarding Allegations of Misconduct by Peacekeepers
CDU	Conduct and Discipline Unit
CPI	Convention on the Privileges and Immunities of the United Nations
DRC	Democratic Republic of the Congo
IAC	International armed conflict
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
MINURSO	United Nations Mission for the Referendum in Western Sahara
MINUSTAH	United Nations Stabilization Mission in Haiti
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MoU	Memorandum of Understanding
NGO	Non-governmental organization
NIAC	Non-international armed conflict
OIOS	Office of Internal Oversight Services
SEA	Sexual exploitation and abuse
SOFA	Status of Forces Agreement
TCC	Troop contributing country

UN	United Nations
UNEF I	First United Nations Emergency Force
UNFICYP	United Nations Peacekeeping Force in Cyprus
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNOCI	United Nations Operation in Côte d'Ivoire
UNOSOM	United Nations Operation in Somalia
UNSCOB	United Nations Special Committee on the Balkans
UNTSO	United Nations Truce Supervision Organization
US	United States of America

INTRODUCTION

1. United Nations peacekeeping operations are established to maintain international peace and security, one of the main objectives of the United Nations. Through peacekeeping, the UN has helped many states and peoples during their recovery from unraveling conflicts. The Nobel Committee acknowledged the UN's contributions by awarding the United Nations Peacekeeping Forces the Nobel Peace Prize in 1988. The Committee praised the UN for "[representing] the manifest will of the community of nations to achieve peace through negotiations".[7] Furthermore, the Nobel Committee commended how peacekeeping forces had played an important role in the development of the United Nations as a legitimate, effective international organization: "Thus, the world organization has come to play a more central part in world affairs and has been invested with increasing trust".[8]

2. UN Peacekeeping Forces were awarded the Nobel Peace Prize in a time when the general belief was that the role of peacekeeping would only increase in the (near) future. The Cold War was coming to an end and tensions between East and West were easing. Hence the Security Council was expected to play a more active role in the resolution of conflicts by instituting peacekeeping operations and possibly even provide them with broader mandates. However, optimism was cut down by the end of the 1990s. Not only had operations in Rwanda, Bosnia and Somalia basically failed, the UN also faced numerous allegations regarding misconduct by its peacekeeping personnel.

3. A peacekeeping operation is instituted in order to keep the peace between several countries or between several (armed) groups within one country. Peacekeepers are consequently often deployed in places that recently endured some kind of conflict. Many peacekeepers have devoted and even sacrificed their lives to help people in countries all over the world. Their devotion, sacrifices and achievements are illustrative for all the good that United Nations peacekeeping, and the United Nations in general, stand for. Unfortunately however, some have also gravely dishonored their duty as a peacekeeper by committing crimes towards locals rather than providing comfort and protection.

4. Allegations were made with respect to peacekeepers committing crimes during their deployment. The alleged misconduct includes serious criminal offences such as rape, sexual exploitation and abuse, sex-trafficking and violations of human rights. There were, for instance,

[7] Nobel Prize, Nobel Prizes and Laureates, The Nobel Peace Prize 1988, http://www.nobelprize.org/nobel_prizes/peace/laureates/1988/press.html (consultation 12 August 2015).
[8] *Ibid.*

complaints of misconduct by peacekeeping personnel during the operations in Bosnia and Herzegovina, Cambodia, East Timor and the Democratic Republic of the Congo. As complaints might not always reach the appropriate authorities, chances are that actual misconduct is even more widespread than numbers show. Although one of the first reactions by the UN was rather inappropriate, the UN eventually acknowledged the problem and started investigations.[9] This resulted in a number of commissions, reports and even new regulation. Despite the UN's efforts, recent reports show that peacekeepers continue to commit crimes while deployed on a mission.[10]

5. Peacekeepers are often stationed in countries and societies that were recently involved (or still are) in a conflict. The population often endured severe social and economic hardships and locals find themselves in extreme poverty, without help of local authorities. Hence they are very vulnerable during peacekeeping operations. In these circumstances, locals tend to look up to UN peacekeeping personnel and trust them to provide peace and security. When peacekeepers subsequently abuse their trust and commit crimes against the local population, they worsen their situation instead of helping them. One can only conclude that criminal misconduct of peacekeepers is an atrocity of the highest level.

6. A grave problem with regard to crimes committed by peacekeepers, is that many of the offenders are not punished for their crimes. The UN and the countries involved are apparently not capable of adequately sanctioning peacekeepers for their criminal misconduct. This is not only terrible for the victims but also disgraceful for the United Nations. The allegations of criminal misconduct by peacekeepers strongly affect the image of UN peacekeeping and thus the UN in general. These allegations may even compromise the future of UN peacekeeping because the support and trust from the local population is crucial for a peacekeeping operation. The fact that the state of *de facto* impunity of peacekeepers continues does not help in this regard.

Scope of the thesis

7. This thesis examines the current framework for addressing criminal misconduct by military peacekeeping personnel. The main goal is to identify the existing problems regarding their criminal accountability and determine how these problems can be resolved. In order to do that, I will examine the legal and political framework in which peacekeeping personnel operate.[11] This

[9] *Infra* 40 para. 88.
[10] A recent report regarding allegations of misconduct by peacekeepers in Haiti shows that the problem remains highly relevant today. OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 21 para. 47.
[11] Conduct by peacekeepers is primarily regulated by agreements between the UN and the Member States that are involved in the peacekeeping operation (mainly the host state and troop contributing countries).

framework is crucial for understanding the obstacles that prevent the punishment of criminal conduct by military peacekeepers.

8. Contemporary peacekeeping operations bestow different responsibilities on the UN peacekeeping force. Modern peacekeeping duties still include traditional military tasks, but they now also involve civilian and/or police responsibilities. Hence there are different categories of peacekeeping personnel. Importantly, the conduct of each category is regulated differently. Whilst the civilian and policing peacekeepers usually fall under the full authority of the UN, military peacekeepers are subject to specific regulation. It is therefore crucial to stress that this thesis focuses on the accountability of *military* peacekeeping personnel. I will not elaborate on the rules and issues regarding other categories of peacekeeping personnel.[12]

9. The purpose of this thesis is to determine how to enhance the criminal accountability of military peacekeepers. This thesis will consequently not discuss whether or not troop contributing countries or the UN can be held accountable for crimes committed by peacekeeping personnel.[13]

Outline of the thesis

10. The first chapter provides an introduction into peacekeeping operations. Its first subchapter defines peacekeeping operations, elaborates on the inception of peacekeeping and discusses the principles that guide peacekeeping operations. This part in other words does not specifically address misconduct by peacekeeping personnel. The second subchapter examines the rules governing peacekeeping operations. Considering the scope of this thesis, the subchapter will primarily focus on rules that relate to misconduct by military peacekeepers.

The second chapter considers the allegations of criminal misconduct by peacekeeping personnel. Its main objective is to generate an understanding of the concept criminal misconduct as it is

[12] I focus on military peacekeepers for several reasons. Firstly, I cannot discuss all categories of peacekeeping personnel in light of this thesis due to a limited amount of words. I decided to focus on military peacekeepers because they constitute the largest component of UN peacekeeping operations. Hence the accountability of this 'group' is the most relevant according to me. Furthermore, when I was carrying out research in the matter I quickly discovered that I found the legal framework of this category the most interesting. As I will discuss in the following chapters, problems arise due to a clash of interests between parties, both on international and national level. I find the resulting situation, which is very complicated, to be a very interesting topic for a master dissertation in the field of law.

[13] However, this is a very interesting topic as well. For more information, see J. N. MAOGOTO, "Watching the Watchdogs: Holding the UN Accountable for Violations of International Humanitarian Law by the 'Blue Helmets' ", *Deakin Law Review* 2000, vol. 5, 47-80; K. M. LARSEN, "Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' test", *European Journal of International Law* 2008, vol. 19, issue 3, 509-531; C. LECK, "International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct", *Melbourne Journal of International Law* 2009, vol. 10, issue 1, 346-364; R. BUCHAN, "UN peacekeeping operations: when can unlawful acts committed by peacekeeping forces be attributed to the UN?", *Legal Studies* 2012, vol. 32, issue 2, 282-301.

used throughout this thesis. In addition it determines which factors contribute to the criminal conduct of military peacekeepers and looks into allegations of misconduct by members of the peacekeeping force deployed in the Democratic Republic of the Congo.

Chapter three examines how the UN addresses the allegations of criminal misconduct by peacekeeping personnel. The chapter discusses the UN strategy to eliminate sexual exploitation and abuse, the procedure for investigating allegations, and the sanctioning of military peacekeepers by the UN.

The fourth chapter examines how military peacekeepers can be held criminally accountable. The first two subchapters analyze the application of national criminal laws, respectively the law of the host state and the law of the troop contributing country. The subsequent subchapters assess whether international law could be used to enhance the criminal accountability of military peacekeepers. Subchapter three considers the application of international humanitarian law, subchapter four examines whether international criminal law could be of use.

The fifth chapter uses the information that was gathered in the previous chapters to determine how the criminal accountability of military peacekeepers can be enhanced. It proposes several adjustments to the current regulation of criminal misconduct by military peacekeeping personnel.

The thesis ends with a conclusion on the criminal accountability of military peacekeepers.

I. LEGAL FRAMEWORK OF PEACEKEEPING OPERATIONS

11. The legal basis of United Nations peacekeeping is not as straightforward as one might expect. Remarkably, the Charter of the United Nations, the constituent treaty of the UN, does not mention the word peacekeeping.[14] It is therefore not easy to determine the precise scope and content of peacekeeping operations. As there are several types of peace operations, it may be confusing whether a particular operation falls under UN peacekeeping or not. The main goal of this chapter is to provide some clarification in the matter. It elaborates on how and why UN peacekeeping evolved over time and discusses the rules governing UN peacekeeping operations. Basically, it will depict the legal and factual background in which UN peacekeeping personnel operate. This should enhance our understanding of the existing legal framework for addressing misconduct by UN peacekeeping personnel.

12. The chapter is divided in two subchapters. Subchapter one provides a background of UN peacekeeping. It discusses the rationale of UN peacekeeping and examines how peacekeeping has changed since the first full peacekeeping operation in 1956 (sections 1.1 and 1.2). Furthermore, it examines the main principles governing peacekeeping operations and distinguishes peacekeeping from other forms of UN engagement such as peacemaking and peace enforcement (sections 1.3 and 1.4). Subchapter two discusses the rules governing UN peacekeeping operations. Considering the scope of this thesis, it will primarily focus on rules that relate to criminal misconduct of military peacekeeping personnel. Section 2.1 deals with the responsibilities of the UN organs involved in peacekeeping and the establishment of peacekeeping operations. Section 2.2 examines the composition of the peacekeeping force. Lastly, section 2.3 elaborates on the agreements concluded between the UN and Member States that are involved in a peacekeeping operation.

1. Defining United Nations peacekeeping operations

13. It is important to sketch the background of UN peacekeeping in order to understand the circumstances in which a peacekeeping force operates. This ought to enhance the understanding of the circumstances in which peacekeepers have been committing crimes against local people. Moreover, it may facilitate the development of solutions for (possible) problems regarding their accountability. Keeping this in mind, this subchapter will not be overly detailed as this is not necessary for the purpose of the thesis.

[14] Charter of the United Nations, 26 June 1945.

1.1. The inception of United Nations peacekeeping

14. The practice of peacekeeping is not an invention of the United Nations.[15] The League of Nations, the organization that is generally regarded as the predecessor of the UN, instituted several peacekeeping initiatives at the time. These were carried out to prevent unrest and violence in the aftermath of World War I.[16] Unfortunately, the League became rather ineffective by the end of the 1930s because, among others, the United States of America (hereafter: US) and the Soviet Union refused to participate in its activities.[17] Hence the League was not able to prevent the outbreak of World War II and thus failed in one of its main objectives, preserving international peace and security.

15. After World War II, the United Nations was formed as a new worldwide effort to maintain international peace and stability. The Charter of the United Nations states that the purpose of the UN is "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace […]".[18] The UN Security Council was assigned the primary responsibility for the maintenance of international peace and security.[19]

Chapter VI and VII of the Charter contain measures the UN Security Council can take to maintain international peace and security. Chapter VI deals with the "Pacific Settlements of Disputes", whereby the power of the Security Council is essentially limited to making recommendations regarding the peaceful settlement of a dispute.[20] Chapter VII however, institutes the Security Council with broad powers and enforcement measures, which it can use when it determines there is a threat to the peace, a breach of the peace or an act of aggression.[21] The Charter thus contains principles for the peaceful resolution of disputes as well as enforcement actions in case peaceful methods of settlement fail. Remarkably, it does not mention the term 'peacekeeping'. As a result, UN peacekeeping does not have a straightforward legal basis in the Charter. Although this may cause confusion regarding the legal basis of peacekeeping

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[15] R. MURPHY, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice*, Cambridge, Cambridge University Press, 2007, 1.
[16] For example, the League supervised the international administration of the Saar region, a German industrial center where French, Belgian and British forces had policing roles. O. SIMIC, *Regulation of Sexual Conduct in UN Peacekeeping Operations*, Springer eBooks, 2012, 14.
[17] O. SIMIC, *Regulation of Sexual Conduct in UN Peacekeeping Operations*, Springer eBooks, 2012, 15.
[18] Art. 1 Charter of the United Nations.
[19] Art. 25 Charter of the United Nations.
[20] Chapter VI Charter of the United Nations.
[21] Chapter VII Charter of the United Nations.

operations, the lack of an express mention of peacekeeping may have facilitated the development of peacekeeping as a flexible response to international crises.[22]

16. The first full peacekeeping operation, UNEF I, was established in 1956 following the reactions of the United Kingdom, France and Israel to the nationalization of the Suez Canal by Egypt.[23] As France and the United Kingdom, two permanent members of the Security Council with veto power, were involved in the Suez crisis, the peacekeeping operation was not established by the Security Council. Instead the crisis was handled by the General Assembly. It adopted Resolution 998 (ES-1) and thereby authorized the Secretary-General to set up an international United Nations Force.[24] The first-ever peacekeeping operation was thus created outside the confines of the primary organ responsible for international peace and security, the Security Council. Furthermore, it was not the result of extensive planning or discussion regarding the definition, principles or scope of peacekeeping operations. In fact, UNEF I was a pragmatic and creative response to a complex problem that could not be addressed by the procedures available at the time. The drafters of the UN Charter had not foreseen the establishment of peacekeeping operations.[25] This is crucial for understanding how peacekeeping has evolved over time.

1.2. The evolution of United Nations peacekeeping

17. From the very beginning, a peacekeeping operation was an *ad hoc* reaction to a certain conflict. Since conflicts changed over time, it was only logical that peacekeeping changed as well. Changes in the world order and the type of conflicts required a different role and mandate for peacekeepers. The literature on UN peacekeeping generally identifies three generations of peacekeeping.[26]

18. Traditional peace operations, referred to as first generation peacekeeping, have the same characteristics as UNEF I. The parties to a conflict usually consent to the presence of a

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[22] R. MURPHY, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice*, Cambridge, Cambridge University Press, 2007, 5.

[23] Observation forces were deployed during the period 1946-1956 (UN Observers in Indonesia 1947-50, UN Sub-Commission on the Balkans (UNSCOB) 1947-54, UN Truce Supervision Organization in Palestine (UNTSO) 1949-present, UN Military Observer Group in Indian and Pakistan (UNMOGIP) 1949-present), but these are generally not considered full peacekeeping forces. See N. MACQUEEN, *Peacekeeping and the International System*, London, Routledge, 2006, 61-78; N. D. WHITE, *Keeping the Peace: the United Nations and the maintenance of international peace and security*, Manchester, Manchester University Press, 1997, 218.

[24] Resolution 998 (ES-I) by the United Nations General Assembly (4 November 1956), *UN Doc.* A/RES/998 (ES-I) (1956); N. D. WHITE, *Keeping the Peace: the United Nations and the maintenance of international peace and security*, Manchester, Manchester University Press, 1997, 218.

[25] M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 49.

[26] However, some authors identify 4 or even 5 generations. For example, see K. M. KENKEL, "Five generations of peace operations: from the 'thin blue line' to 'painting a country blue' ", *Revista Brasileira de Politica International* 2013, vol. 56, issue 1, 122-143.

peacekeeping force after reaching an agreement regarding a ceasefire or withdrawal. Peacekeepers then monitor a truce or troop withdrawal, or act as a buffer zone between two or more hostile parties. In the meanwhile, the search for a solution through political negotiations is continued.[27]

Although first generation peacekeeping proved to be an important instrument for resolving conflicts or preserving fragile accords, it also faced some problems. The main critique was that peacekeeping operations delayed conflicts rather than actually solving them.[28] They did not facilitate the resolution of the underlying conflict. In addition, the world encountered more and more intra-state conflicts as the Cold War was ending. This development posed new challenges for the UN and UN peacekeeping, since UN peacekeeping was initially designed for inter-state conflicts.

19. This led to a new generation of 'multidimensional' peacekeeping.[29] These second generation peacekeeping operations combine traditional peacekeeping with efforts to find a peaceful solution for the underlying conflict.[30] They are an alternative for traditional peacekeeping operations, which can still be useful in the aftermath of certain conflicts. The inclusion of new tasks and responsibilities resulted in a much broader mandate for peacekeeping forces.[31] Apart from military functions, peacekeepers also had to carry out various police and civilian tasks, such as election monitoring, disarmament or resettlement of refugees.[32] Second generation peacekeeping forces consequently not only comprised of the traditional military personnel, but involved police and civilian capabilities as well.[33] Because of their broader role, peacekeepers came into contact with the local population more often. This may be one of the reasons why allegations regarding their misconduct started around this period.

20. After peacekeeping missions in Rwanda, Bosnia and Somalia had basically failed, the Brahimi Report called for a change in peacekeeping in the year 2000.[34] Although the report

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[27] M. W. DOYLE and N. SAMBANIS, "The UN Record on Peacekeeping Operations", *International Journal* 2007, vol. 62, issue 3, (495) 499.
[28] United Nations Peacekeeping Force in Cyprus (UNFICYP), March 1964-present; M. W. DOYLE and N. SAMBANIS, "The UN Record on Peacekeeping Operations", *International Journal* 2007, vol. 62, issue 3, (495) 501.
[29] The use of the term generation does not mean that only the most recent generation of peacekeeping is used nowadays. The type of peacekeeping operation established by the UN depends on what is necessary according to the situation. In other words, the 'creation' of second generation peacekeeping did not terminate first generation peacekeeping. The same goes for third generation vis-à-vis second generation peacekeeping.
[30] M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 19-20.
[31] M. W. DOYLE and N. SAMBANIS, "The UN Record on Peacekeeping Operations", *International Journal* 2007, vol. 62, issue 3, (495) 502.
[32] General Assembly, Report of the Secretary-General "An Agenda for Peace" (17 June 1992), *UN Doc.* A/47/277 (1992).
[33] O. SIMIC, *Regulation of Sexual Conduct in UN Peacekeeping Operations*, Springer eBooks, 2012, 22-23.
[34] General Assembly, Report of the Panel on United Nations Peace Operations (21 August 2000), *UN Doc.* A/55/305-S/2000/809 (2000).

reaffirmed the principles of traditional peacekeeping, it recommended giving peacekeeping operations more 'robust rules of engagement'.[35] Although this new form of 'robust peacekeeping' shows more resemblance with peace enforcement under Chapter VII of the Charter, the UN has clearly stated that these are different operations and that they should not be confused.[36]

1.3. Principles guiding United Nations peacekeeping

21. Because of the *ad hoc* creation of UNEF I, the strategy and main principles of UN peacekeeping were basically developed along the way.[37] These principles are: consent of the parties, impartiality and restrictions on the use of force.[38] Although these principles stilly apply to contemporary peacekeeping operations, they have come under pressure the last decades due to the different circumstances in which peacekeeping forces are deployed and the subsequent changes in peacekeeping.

1.3.1. Consent

22. A key principle of UN peacekeeping is that the main parties to the conflict must consent to the peacekeeping operation. This requires the commitment of the parties involved in the conflict and their support regarding the mandate of the peacekeeping operation.[39] Their approval is essential because it enables the peacekeeping force to carry out its tasks with the necessary freedom of action, both politically and physically. Furthermore, consent ensures respect for the sovereignty of the host state.[40] The deployment of peacekeeping operations is not a decision the UN can take on its own.[41]

The requirement of consent follows from the nature of peacekeeping rather than from the legal framework.[42] Legally speaking, under Chapter VII of the Charter, the Security Council can deploy a UN force on a state's territory without consent.[43] However, this necessarily implies using force

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[35] General Assembly, Report of the Panel on United Nations Peace Operations (21 August 2000), *UN Doc.* A/55/305-S/2000/809 (2000), 10 para. 55.
[36] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 34.
[37] Secretary-General Dag Hammarskjöld and Canadian foreign minister Lester Pearson both played a crucial role in the creation of UN peacekeeping. Harmmarskjöld was given a broad mandate by the General Assembly when it set up UNEF I. Lester Pearson developed many of the ideas and principles behind UN peacekeeping. He was also responsible for the proposal of Resolution 998 (ES-1). P. F. DIEHL, *International Peacekeeping*, Baltimore, Johns Hopkins University Press, 1993, 31; K. DOMBROSKI, *Peacekeeping in the Middle East as an International Regime*, London, Routledge, 2007, 44.
[38] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 31-35.
[39] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 31.
[40] M. W. DOYLE and N. SAMBANIS, "The UN Record on Peacekeeping Operations", *International Journal* 2007, vol. 62, issue 3, (495) 501.
[41] O. SIMIC, *Regulation of Sexual Conduct in UN Peacekeeping Operations*, Springer eBooks, 2012, 16.
[42] A. ORAKHELASHVILI, "The Legal Basis of the United Nations Peace-Keeping Operations", *Virginia Journal of International Law* 2003, vol. 43, issue 2, (485) 519.
[43] Under Chapter VI, the Security Council cannot take actions without the consent of the host state.

against that state, which is not the intent of peacekeeping operations.[44] The peacekeeping operation would then increase the level of hostilities instead of reducing it.

23. During its mandate, the peacekeeping force must strive to maintain the consent of the main parties involved. This requires all peacekeepers to have a thorough understanding of the local history, culture and customs.[45] According to 'United Nations Peacekeeping Operations: Principles and Guidelines', one of the key documents issued by the UN regarding peacekeeping operations, the consent should also entail trust between the parties in a post-conflict environment.[46] The absence of trust could render the consent uncertain and unreliable.[47] If the consent is not given or withdrawn, the peacekeeping operation should probably be annulled.[48] In that case, the peacekeeping force can only remain on the state's territory if the UN is willing to change its mandate to an enforcement mandate under Chapter VII.[49]

24. The expansion of intra-state conflicts and the abovementioned new generations of UN peacekeeping complicated the application of the principle of consent. Intra-state conflicts generally involve several factions or groups within one country. Although there is no legal requirement to obtain the consent of non-state actors for establishing a peacekeeping force, considering the nature of peacekeeping operations it is advisable to obtain their consent nonetheless.[50] Unfortunately, the complicated nature of these conflicts can make it difficult to obtain the permission from each faction that plays a role in the conflict.[51] The UN therefore tries to involve these parties as much as possible, but may eventually authorize a peacekeeping operation without their consent.[52]

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[44] Such an operation without consent is considered a peace *enforcement* operation.
[45] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 32.
[46] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008.
[47] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 32.
[48] Consent for UNEF I was withdrawn by the Egyptian government just before the 1967 war, resulting in the withdrawal of the peacekeeping force on Egyptian territory and Gaza. United Nations Peacekeeping, Peacekeeping operations, Past peacekeeping operations, UNEF I, Background, http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html (consultation 15 August 2015).
[49] N. D. WHITE, *Keeping the Peace: the United Nations and the maintenance of international peace and security*, Manchester, Manchester University Press, 1997, 233.
[50] A. ORAKHELASHVILI, "The Legal Basis of the United Nations Peace-Keeping Operations", *Virginia Journal of International Law* 2003, vol. 43, issue 2, (485) 521.
[51] Furthermore, factions that agree to the presence of a peacekeeping force may not always have full control over their region and/or 'supporters'. M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 22.
[52] M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 22. For more information on the principle of consent: Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 31-33; A. ORAKHELASHVILI, "The Legal Basis of the United Nations Peace-Keeping Operations", *Virginia Journal of International Law* 2003, vol. 43, issue 2, (485) 518-523.

1.3.2. Impartiality

25. Impartiality requires a peacekeeping force to not favor the interests of one of the parties over another. Although it may not always be easy, it is vital that the UN upholds this principle at all times. An impartial peacekeeping force is indispensable because it supports the legitimacy and credibility of the peacekeeping operation.

26. Although some authors use 'neutrality' as a synonym for impartiality, the UN has stipulated that impartiality is not to be confused with neutrality or inactivity: "United Nations peacekeepers should be impartial in their dealings with the parties to the conflict, but not neutral in the execution of their mandate".[53] In addition, the UN stated that impartiality should not be used as an excuse for doing nothing in the face of behavior or actions that undermine the peace process or violate the international norms and principles that a peacekeeping operation upholds.[54] Although the principle of impartiality thus prohibits peacekeepers to interfere with the underlying conflict, it also requires them to intervene when necessary. One could compare it with a policeman or referee being impartial, but penalizing an infraction of the rules by one of the parties nonetheless. It is essential that the reaction (e.g. an arrest or in case of a peacekeeping operation a public statement by the UN) of the 'referee' is the same, whoever committed the violation.[55]

Apart from *being* impartial, it is also important that peacekeepers *seem* impartial. They must act in such a way that none of the parties can have legitimate concerns regarding the impartiality of the UN. Transparency and communication are indispensable during the mandate of the peacekeeping force. When a peacekeeping operation encounters a problem with one of the parties, the peacekeeping force should act in a transparent and open manner.[56] Criminal misconduct of peacekeepers thus clearly endangers the impartiality of the peacekeeping force. The fact that there is not much transparency regarding the handling of allegations of misconduct is regrettable.

27. The impartiality of a peacekeeping operation is often reflected in the countries that contribute troops. Especially during the Cold War and in tense conflicts, the contributing countries were often so called non-aligned states.[57] As these countries do not really support one of the major powers, their presence can enhance the feeling of impartiality of the peacekeeping

[53] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 33; P. F. DIEHL, *International Peacekeeping*, Baltimore, Johns Hopkins University Press, 1993, 7-9; N. D. WHITE, *Keeping the Peace: the United Nations and the maintenance of international peace and security*, Manchester, Manchester University Press, 1997, 235-237.
[54] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 33.
[55] M. W. DOYLE and N. SAMBANIS, "The UN Record on Peacekeeping Operations", *International Journal* 2007, vol. 62, issue 3, (495) 500.
[56] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 33-34.
[57] P. F. DIEHL, *International Peacekeeping*, Baltimore, Johns Hopkins University Press, 1993, 8.

force.[58] Countries that have an interest in the conflict generally do not contribute peacekeepers either, because their conduct would be an easier target for claims regarding partiality. The permanent members of the Security Council generally do not contribute peacekeeping personnel, albeit this custom is maintained less rigorously since the end of the Cold War.[59]

1.3.3. Restrictions on the use of force

28. One of the most important features of peacekeeping operations is that they are not enforcement tools. Peacekeeping is not aimed at stopping the fighting between rival enemies in the middle of a conflict. This is a key difference with traditional military operations.[60] Peacekeepers are therefore only allowed to use force in certain situations (referred to as the principle of non-enforcement) and are lightly armed compared to their colleagues in collective security operations.[61]

29. The principle of non-enforcement originally implied that the use of force was only justified in case of self-defense. Peacekeepers were only allowed to use their weapons to protect themselves, the lives of their fellows or to protect UN positions and property. They were not allowed to use force to defend the local population or to initiate an attack.[62] These guidelines are not only linked to the principle of non-enforcement, but to the principle of impartiality as well. UN peacekeeping's main objective is to preserve the peace, not to win wars or choose sides between parties.[63]

30. However, as was already discussed, peacekeeping evolved along the way. Peacekeeping forces are now often deployed in environments where militias and criminal gangs create an unstable and thus dangerous environment. In addition, so-called 'spoilers' may threaten the peace process. These spoilers are "individuals or parties who believe that the peace process threatens

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[58] For example, the UN did not ask Western allies of the US, such as NATO members, or allies of the Soviet Union, such as East European states, to contribute peacekeeping troops. Hence more neutral countries such as Australia, Canada, Finland, Indonesia, Ireland and Sweden were frequently asked to contribute troops. K. ISHIZUKA, "Perspectives on UN peacekeeping collaboration between Japan and Australia" in B. WILLIAMS and A. NEWMAN (eds.), *Japan, Australia and Asia-Pacific Security*, London, Routledge, 2006, (144) 152.

[59] N. D. WHITE, *Keeping the Peace: the United Nations and the maintenance of international peace and security*, Manchester, Manchester University Press, 1997, 238. The permanent members of the UN Security Council vested with veto-power are: China, France, Russia, United Kingdom, and United States. Major powers United States (28) and Russia (4) still contribute remarkably less military troops than countries such as Bangladesh (8106), India (6864), Rwanda (5057), Brazil (1262), and Uruguay (1437). For more information on contributing countries: United Nations Peacekeeping, Resources, Troops and police contributors, http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml (consultation 15 August 2015).

[60] P. F. DIEHL, *International Peacekeeping*, Baltimore, Johns Hopkins University Press, 1993, 5-7.

[61] P. F. DIEHL, *International Peacekeeping*, Baltimore, Johns Hopkins University Press, 1993, 7.

[62] O. SIMIC, *Regulation of Sexual Conduct in UN Peacekeeping Operations*, Springer eBooks, 2012, 16-17.

[63] M. W. DOYLE and N. SAMBANIS, "The UN Record on Peacekeeping Operations", *International Journal* 2007, vol. 62, issue 3, (495) 500.

their power and interests, and will therefore work to undermine it".[64] According to the UN, these changed circumstances justify a new policy regarding the use of force during peacekeeping operations.

Peacekeepers are now allowed to use force in defense of the mandate as well. This enables a peacekeeping force to carry out its mandate and defend the local population when necessary.[65] In practice, the Security Council has given peacekeeping forces the authorization to use force at the tactical level "to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order".[66]

1.4. Distinguishing peacekeeping from other peace-support operations

31. If the UN wants to intervene in a certain conflict or situation, it can do so in several ways. The deployment of a peacekeeping force is not the UN's only option. I will briefly discuss some alternatives in order to explain the differences with peacekeeping.

1.4.1. Peacemaking[67]

32. "Peacemaking generally includes measures to address conflicts in progress and usually involves diplomatic action to bring hostile parties to a negotiated agreement."[68] The Security Council may, under Chapter VI of the Charter, recommend peaceful ways to settle a dispute or avoid a conflict (e.g. judicial settlement, mediation). The Secretary-General often plays an important role in this process by bringing issues to the attention of the Security Council or by exercising its 'good offices' to help resolve a conflict. Thus peacemaking can be complementary to peacekeeping but is less invasive as it does not involve the deployment of a peacekeeping force.

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[64] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 32 and 43. For more information on the change in policy and the reasons for a new generation of peacekeeping, see the Brahimi Report (General Assembly, Report of the Panel on United Nations Peace Operations (21 August 2000), *UN Doc.* A/55/305-S/2000/809 (2000)).

[65] The idea is that, if there are spoilers that interfere with the operation, peacekeepers can only keep the peace if they are able to target these spoilers and prevent them from impairing the peace process. Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 34-35; M. W. DOYLE and N. SAMBANIS, "The UN Record on Peacekeeping Operations", *International Journal* 2007, vol. 62, issue 3, (495) 511; M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 17-18.

[66] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 34.

[67] *Ibid.* 17-18.

[68] *Ibid.* 18.

Institutions or people outside the UN can play an important role in peacemaking, by easing tensions between parties or by bringing issues to the attention of the public (e.g. non-governmental groups, governments or prominent personalities).

1.4.2. Peacebuilding[69]

33. The main goal of peacebuilding is to rebuild the country and prevent a relapse into conflict. It is thus aimed at creating sustainable peace and a brighter future for the parties to a conflict. It works by addressing the deep-rooted structural causes of violent conflicts and seeks to "enhance the capacity of the state to effectively and legitimately carry out its core functions".[70] Just like peacemaking, peacebuilding can be complementary to peacekeeping. Apart from the UN, a variety of actors can be part of the peacebuilding process (e.g. governments, non-governmental organizations).[71]

1.4.3. Peace enforcement[72]

34. The distinction between peacekeeping and peace enforcement is the probably the hardest but definitely the most important to make. According to the UN:

> "Peace enforcement involves the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force. Such actions are authorized to restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression. […]"[73]

Peace enforcement is instituted by the Security Council, which has the power to do so under Chapter VII of the Charter. Since traditional peacekeeping operations were considered peaceful settlements of disputes under Chapter VI, the easiest way to distinguish peacekeeping from peace enforcement was to identify the legal basis of an operation. However, contemporary peacekeeping operations are often instituted under Chapter VII as well. The legal basis is therefore no longer relevant to distinguish peacekeeping from peace enforcement.

35. The difference between peace enforcement and peacekeeping is nevertheless quite clear when we consider the three main principles that guide peacekeeping operations: consent, impartiality and non-enforcement.[74] Although the parties to a conflict do not always give their

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[69] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 18.
[70] *Ibid.*
[71] For more information on peacebuilding: R. JENKINS, *Peacebuilding: From Concept to Commission*, New York, Routledge, 2013, 119 p; D. SANDOLE, *Peacebuilding*, Cambridge, Polity Press, 2010, 251 p.
[72] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 18.
[73] *Ibid.*
[74] N. MACQUEEN, *Peacekeeping and the International System*, London, Routledge, 2006, 61-78.

consent *before* the start of a peacekeeping operation, possibly because of practical problems or because there is no time to wait, the basic idea is still that their consent is necessary. In the event that no consent was obtained, the UN strives to obtain it afterwards. Peace enforcement operations however, can be imposed on parties without their permission. These operations are primarily military operations, often aimed at enforcing a particular outcome. Peace enforcement is consequently not necessarily impartial with regard to the underlying conflict, nor is the use of force restricted to self-defense.[75]

2. Rules governing peacekeeping operations

36. The purpose of this subchapter is to examine the rules governing United Nations peacekeeping operations. Considering the scope of this thesis, I will primarily focus on rules that are relevant with respect to handling criminal conduct of military peacekeepers.

Section 2.1 deals with the establishment of peacekeeping operations. It considers the roles of the UN organs involved and examines how a peacekeeping operation is established in practice. Section 2.2 discusses the composition of the peacekeeping force. Lastly, section 2.3 elaborates on the Status of Forces Agreement between the UN and host state and the Memorandum of Understanding between the UN and troop contributing countries. These agreements contain crucial provisions with respect to criminal misconduct of military peacekeepers.

2.1. The establishment of a peacekeeping operation

37. Remarkably, there is no pre-determined legal framework regarding the authorization of UN peacekeeping operations. There is no procedure that outlines who can establish a peacekeeping operation and on which basis they can do so, or how a peacekeeping force operates on the ground. The UN consequently handles every conflict on an *ad hoc* basis. The UN has however developed some guidelines regarding the preparation, deployment and organization of peacekeeping operations.

38. The Charter of the United Nations confers the Security Council with the primary responsibility in the area of international peace and security.[76] One of the Council's most important instruments for maintaining international peace is the establishment of a peacekeeping operation. However, the Security Council is not the only actor involved in UN peacekeeping. The General Assembly may act in matters concerning peace and security if the Council is unable to

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[75] N. MACQUEEN, *Peacekeeping and the International System*, London, Routledge, 2006, 61-78.

[76] Art. 24 para. 1 Charter of the United Nations. The specific powers of the Security Council can be found in Chapter V: the Security Council; Chapter VI: the Pacific Settlement of Disputes; Chapter VII: Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression; and Chapter VIII: Regional Arrangements and Chapter XII: International Trusteeship System.

take on its responsibility. Several times in history, the General Assembly stepped in when the Security Council was blocked following a veto by one of its permanent members. The Secretary-General plays an important role in peacekeeping operations as well, especially with regard to the organizational and logistical aspects. Apart from UN organs, peacekeeping operations are also dependent on other parties such as participating countries and the host state.

2.1.1. UN organs involved in peacekeeping operations

2.1.1.1. Security Council

39. The Security Council's competences with regard to peacekeeping can be found in Chapter VI and VII of the UN Charter. Secretary-General Hammarskjöld wittily stated that peacekeeping belongs to Chapter VI ½, as it seems to fall between the peaceful settlements of disputes envisaged under Chapter VI and the enforcement measures under Chapter VII.[77]

When confronted with a certain situation/conflict, the Security Council performs a case-by-case analysis of the situation and assesses the different options for UN engagement.[78] The UN Secretariat strongly supports the Council in this analysis and may give its own appraisal of the situation.[79] If the Council believes a peacekeeping operation is necessary, it issues a resolution that authorizes the deployment of a peacekeeping force. This so-called 'enabling resolution' mentions the legal basis on which the operation is founded, defines the content and scope of the mandate, and usually refers to a more detailed plan by the Secretary-General.

40. Chapter VI can only be invoked as legal basis if the Council encounters a situation that is likely to endanger international peace and security. Chapter VII is to be used when there is a dangerous situation or threat to the peace that already exists. The main difference is in other the words the *potential* threat in case of Chapter VI and the *present* threat of Chapter VII. In addition, Chapter VII can be used to bypass Article 2 (7) of the Charter, which contains an important principle concerning the sovereignty of Member States:

> "7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require

[77] E. CLEMONS, "No Peace to Keep: Six and Three-Quarters Peacekeepers", *New York University Journal of International Law and Politics* 1993, vol. 26, issue 1, (107) 109.
[78] The UN has listed some conditions that it deems necessary for a good outcome of peacekeeping operations: a peace to keep, positive regional engagement, the full backing of a united Security Council, a clear and achievable mandate with recourses to match. Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 49-51.
[79] Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008, 48.

the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."[80]

This implies that the UN is not allowed to deploy a peacekeeping force on the territory of a state without its consent, unless the peacekeeping operation is based on Chapter VII. But following the principle of consent, it is improbable that such an operation would still be considered peacekeeping.

2.1.1.2. General Assembly[81]

41. The primary responsibility of the Security Council in the area of international peace and security is not exclusive. The General Assembly may also undertake action, but it has to respect the express limitation provided for in Article 12 of the Charter. It prohibits the General Assembly from making recommendations with regard to any dispute or situation that is under consideration by the Security Council, provided that the dispute or situation falls under the functions assigned to the Council in the Charter.[82] The General Assembly can thus only assume responsibility if the Security Council does not.[83] The Council could for example be unable to act because of a disagreement among the permanent members. The General Assembly is thus in principle capable of establishing a peacekeeping operation.[84]

Despite its secondary role, the General Assembly has made very important contributions to the development of UN peacekeeping. The most crucial one is undoubtedly the authorization of the first full-scale peacekeeping force in 1956, UNEF I. At the time, the General Assembly carried out its responsibility instead of the Security Council, which was basically paralyzed because the permanent members had opposing interests.[85]

2.1.1.3. Secretary-General[86]

42. The provisions of the Charter do not seem to bestow the Secretary-General much powers with regard to international peace and security.[87] Nonetheless, the consecutive Secretary-Generals

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[80] Art. 2 para. 7 Charter of the United Nations.
[81] A. ORAKHELASHVILI, "The Legal Basis of the United Nations Peace-Keeping Operations", *Virginia Journal of International Law* 2003, vol. 43, issue 2, (485) 504-507.
[82] Art. 12 para. 1 Charter of the United Nations
[83] This limitation is evidently related to the Council's primary responsibility in the matter.
[84] The General Assembly cannot authorize forcible actions against a state, but this is normally not the case in peacekeeping operations.
[85] In the case of UNEF I, France and the United Kingdom used their veto in the Security Council to prevent the adoption of a resolution that called upon Israel to withdraw its armed forces behind the established armistice lines. United Nations Peacekeeping, Peacekeeping operations, Past peacekeeping operations, UNEF I, Background, http://www.un.org/en/peacekeeping/missions/past/unef1backgr2.html (consultation 15 August 2015).
[86] Although a Secretary-General can obviously be a woman as well, I will refer to the Secretary-General by using 'he' because it is very impractical to constantly use 'he or she', and because all Secretary-Generals were men up to now.

have managed to broaden their mandate up to an impressive set of responsibilities with regard to the promotion of international peace and security.[88]

A pertinent question is whether the Secretary-General can establish a peacekeeping operation. The Secretary-General's autonomous competences do not allow him to authorize a peacekeeping operation. But following Article 98 of the Charter, the Security Council can delegate the establishment of a peacekeeping operation to the Secretary-General. Thus in practice, the Secretary-General *can* organize a peacekeeping operation, but only when this task is entrusted to him by the Council. Nonetheless, the deployment of the observation force in Afghanistan (UNGOMAP) was initially organized by the Secretary-General and only retrospectively endorsed by the Security Council.[89]

2.1.2. Deciding to establish a peacekeeping operation[90]

2.1.2.1. Assessment of the situation

43. According to Article 99 of the Charter of the United Nations, the Secretary-General may bring "any matter which in his opinion may threaten the maintenance of international peace and security" to the attention of the Security Council.[91] The Security Council then decides whether it is necessary to undertake action. If so, the Security Council needs to assess the situation and determine which form of UN engagement is advisable. However, the Security Council is not able to decide on the appropriate way forward on its own. It needs to reach out to the parties involved in the conflict, such as the host state and potential troop contributing countries.

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[87] The relevant provisions can be found in Chapter XV: the Secretariat of the Charter of the United Nations. Article 97 mainly deals with the appointment of the Secretary-General. Article 98 indicates that the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council may entrust tasks to the Secretary-General. Article 99 empowers the Secretary-General to bring any matter which in his opinion may threaten the maintenance of international peace and security to the attention of the Security Council.

[88] For instance, the Secretary-General can offer his good offices in order to try and resolve a dispute, issue fact-finding missions, or consult with Member States regarding the deployment of a peacekeeping force. United Nations Peacemaking, Peacemaking Mandate, The Secretary-General & Mediation, http://peacemaker.un.org/peacemaking-mandate/secretary-general (consultation 15 August 2015); Resolution 46/59 by the United Nations General Assembly (9 December 1991), *UN Doc.* A/RES/46/59 (1991); United Nations Peacekeeping, Peacekeeping operations, Forming a new operation, http://www.un.org/en/peacekeeping/operations/newoperation.shtml (consultation 15 August 2015).

[89] Resolution 622 (1988) by the United Nations Security Council (31 October 1988), *UN Doc.* S/RES/622 (1988). It therefore seems like this particular competence of the Secretary-General is still up for debate. For more information on the Secretary-General's powers with regard to the establishment of a peacekeeping operation: A. ORAKHELASHVILI, "The Legal Basis of the United Nations Peace-Keeping Operations", *Virginia Journal of International Law* 2003, vol. 43, issue 2, (485) 507-513.

[90] In order not to complicate things more than necessary, I will consequently refer to Security Council as the organ responsible for establishing peacekeeping operations. I will not repeatedly mention that the General Assembly can also establish a peacekeeping operation if the Security Council does not carry out its primary responsibility.

[91] Art. 99 Charter of the United Nations.

i. The sovereign host state

44. One of the most significant problems of peacekeeping operations is that they interfere with the sovereignty of a state. Wherever the UN wants to deploy peacekeepers, they will always be stationed on the territory of at least one state. That state is called the 'host state'. Article 2, paragraph 7 of the Charter prohibits the UN from deploying a peacekeeping force on the territory of a state without that state's consent, unless the operation is based on Chapter VII.[92] However, to deploy a UN force without the host state's consent would most likely be considered enforcement action and not peacekeeping.

The consent is normally obtained in the 'Status of Forces Agreement' between the UN and the host state, which defines their respective relationship. Importantly, this agreement also contains crucial provisions with regard to the criminal jurisdiction over crimes committed by military peacekeeping personnel. I will further discuss the content of Status of Forces Agreements in section 2.3.1.

ii. Non-state parties to the conflict

45. It follows from the principle of consent and more generally from the rationale of peacekeeping that the support of the local population is very important. Inter-state conflicts normally do not pose problems in this regard as both states generally have an effective government in place. Since a democratically elected government normally represents the will of the people, that government's consent to the peacekeeping operation implies the approval of the people. However, contemporary peacekeeping forces are often stationed in a country that recently experienced a (violent) intra-state conflict. In the aftermath of such a conflict, an effective and legitimate government is unfortunately not always present. If so, the UN will not be able to obtain a valid permission of the host state. It is not clear what the UN should do in this event, as Article 2 (7) of the Charter only requires the consent of the host state.[93] The provision does not discuss what should happen in the absence of a legitimate government.[94]

Apart from the legal requirement in Article 2 (7), approaching the local parties also enhances the chance of obtaining the support from the local population. Without their support it may be hard for peacekeepers to function properly.[95] Moreover, if armed rebels strongly oppose the peacekeeping operation and they decide to take up arms in order to get rid of the peacekeeping

[92] Art. 2 para. 7 Charter of the United Nations. *Supra* 16 para. 40.
[93] Art. 2 para. 7 Charter of the United Nations.
[94] Discussing the possibility of deploying a peacekeeping force in a failed state and the requirements in this regard would lead too far away from the subject of this thesis.
[95] General Assembly, Report of the Panel on United Nations Peace Operations (21 August 2000), *UN Doc.* A/55/305-S/2000/809 (2000), 4-5.

force, they could really endanger the peacekeepers involved. The peacekeepers, usually lightly armed in accordance with the principle of non-enforcement, would probably not be able to hold of the rebels.

46. The UN therefore tries to include local parties as much as possible in the decision process. The Secretary-General consults not only with the government, but also with parties on the ground, regional actors and – if the situation permits it – with the armed groups that have power in the country.[96]

iii. Troop contributing countries

47. A peacekeeping operation needs peacekeeping personnel. This rather obvious fact leads up to a crucial issue with regard to UN peacekeeping. How does the United Nations form a peacekeeping force; who provides all the personnel? Article 43 of the Charter provides for the conclusion of an agreement between the UN and its Member States regarding a UN military force.[97] The idea was that Member States would deliver military units to the UN and that the UN would form some kind of standing army or police force that could intervene when necessary. However, the UN and Member States have not concluded an agreement under Article 43 up to this day. The UN consequently does not have own 'personnel' to execute its decisions.

This implies that for every peacekeeping operation, the UN needs to ask Member States to contribute peacekeeping personnel. Importantly, Member States are in no way obliged to provide any. The UN therefore consults with Member States while planning a peacekeeping operation.[98] By involving Member States in the decision process preceding a peacekeeping operation, the UN hopes to find countries willing to participate and contribute troops.[99] These countries are called the 'troop contributing countries' (hereafter: TCCs).

48. The Secretary-General is usually responsible for reaching out to Member States through informal consultations. If he receives an offer from a country willing to contribute troops, he primarily consults with the Security Council. If the Security Council gives its consent, the

[96] General Assembly, Report of the Panel on United Nations Peace Operations (21 August 2000), *UN Doc.* A/55/305-S/2000/809 (2000), 5-6.
[97] Art. 43 Charter of the United Nations.
[98] United Nations Peacekeeping, Peacekeeping operations, Forming a new operation, http://www.un.org/en/peacekeeping/operations/newoperation.shtml (consultation 15 August 2015).
[99] The Security Council then asks the Secretary-General to find Member States that are willing to participate. The ICJ has confirmed that the Secretary-General is empowered to do so in the Advisory Opinion on *Certain Expenses*. ICJ, *Certain expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, ICJ Reports 1962, 175-177.

agreement is recorded in an exchange of letters between the Secretary-General and the government concerned.[100]

Participating states and the UN must agree on the conditions under which their respective contingents will operate. If the UN and the TCC reach an agreement with regard to the contribution of personnel and/or equipment, they conclude a Memorandum of Understanding.[101] Although the agreement can differ for every peacekeeping operation, the Secretary-General developed a draft model in 1991, based on established practice and previous agreements.[102] The Memorandum of Understanding will be further discussed in section 2.3.2.

2.1.2.2. Decision

49. After consulting with Member States, parties on the ground, participating states and others, the UN needs to decide whether or not it will establish a peacekeeping operation. The Security Council (or the General Assembly in its subsidiary role in peace and security) makes this decision with the support of the UN Secretariat. The Secretariat provides the Council with an assessment of the situation on the ground. The Secretariat is definitely capable of fulfilling this advisory role since the Secretary-General conducts the consultations with the parties involved.[103]

The Security Council or the General Assembly then issues a resolution to authorize the peacekeeping operation. This enabling resolution defines the mandate of the peacekeeping force.

2.2. The peacekeeping force[104]

50. The peacekeeping force is an *international* force, composed of peacekeepers from all over the world. This may pose problems for the functioning of the force. As military contingents come from various countries, they will most likely have different habits on a personal and professional level. Furthermore, the question is whether contingents will want to cooperate with contingents from other countries and respect the (possibly foreign) commander of the force.[105]

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[100] M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 36.
[101] A Memorandum of Understanding was initially called a 'Troop Contribution Agreement'.
[102] General Assembly, Report of the Secretary-General "Model agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-keeping Operations" (23 May 1991), *UN Doc.* A/46/185 (1991); M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 36-37.
[103] Peace Operations Training Institute, *Principles and Guidelines for UN Peacekeeping Operations,* Williamsburg, 2010, http://cdn.peaceopstraining.org/course_promos/principles_and_guidelines/principles_and_guidelines_english.pdf (consultation 15 August 2015), 17.
[104] As noted earlier, a contemporary peacekeeping force contains a military, civilian and police component. In light of this thesis, this section only issues with regard to the military component.
[105] According to Zwanenburg, commanders of national contingents have countermanded orders of a UN commander on several occasions. M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 41.

From the very beginning, the UN acknowledged this problem. In his second report on UNEF I, Secretary-General Hammarskjöld stated that a "problem of first instance, therefore, was that of harmonizing the international character of the Force with the fact of its being composed of national contingents".[106]

51. A minimum level of unity of command is necessary for a proper functioning of the peacekeeping force.[107] Without an effective command structure, a peacekeeping force cannot effectively carry out its task and realize the purpose of the operation. However, contributing countries are not always willing or able to hand over the full authority over their contingents to the UN.[108] At the very least, they retain the capability to withdraw their troops. Hence there is a conflict between the desire for unity of command and the interests of TCCs. The eventual outcome of this balancing exercise often depends on the specific political context in which the peacekeeping operation is established. The UN negotiates these matters with the TCC. If an agreement is reached, the conditions are put into the Memorandum of Understanding, the formal agreement between the TCC and the UN.

The Memorandum of Understanding and the 'Transfer of Authority' integrate national contingents of peacekeeping operations into the organizational apparatus of the UN.[109] In addition, the TCC instructs its contingent to serve the UN.[110] The peacekeeping personnel remain in their national service but are international personnel for the period of their assignment.[111] Possible issues regarding the authority over peacekeepers can be resolved by recognizing different levels of command. For example, a member of the TCC (e.g. Minister of

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[106] M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 36, citing General Assembly, Report of the Secretary-General "Summary study of the experience derived from the establishment and operation of the Force" (9 October 1958), *UN Doc.* A/3943 (1958), para. 127.

[107] R. MURPHY, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice*, Cambridge, Cambridge University Press, 2007, 106.

[108] Often, these problems originate in the laws and policy of contributing states. For instance, Canadian law does not allow the national command of Canadian Forces to be handed over to a foreign commander. R. MURPHY, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice*, Cambridge, Cambridge University Press, 2007, 106.

[109] The Transfer of Authority is the national order that confers command on the UN. M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 37.

[110] M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 37.

[111] According to Secretary-General Hammarskjöld, this constitutes an "effective marriage of national military service with international function". M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 37-38, citing General Assembly, Report of the Secretary-General "Summary study of the experience derived from the establishment and operation of the Force" (9 October 1958), *UN Doc.* A/3943 (1958), para. 128.

Defense) can retain full command authority over its national contingents while the *operational* control is handed over to a (foreign) commander in the peacekeeping force.[112]

52. During their assignment, military peacekeepers are an integral part of the peacekeeping operation.[113] The Secretary-General has full authority regarding the deployment, organization and conduct of the operation, including the personnel provided by participating states. He exercises this responsibility in close coordination with the Security Council. However, the participating states retain some power over the troops they contribute. Apart from matters with regard to administrative authority such as promotion and pay, TCCs also maintain criminal jurisdiction over the contributed troops.[114]

53. The Force Commander exercises the military command over the peacekeeping operation, on behalf of the Secretary-General. This implies that the Force Commander, through the chain of command, exercises command over the contingents.[115] As contemporary peacekeeping operations also contain a large civilian component, there is a 'Special Representative of the Secretary-General' as well. He or she is the Head of Mission and has the authority over both the civilian and military components of the operation. As Head of Mission, the Special Representative exercises the authority of the Secretary-General in the field and is responsible to the Secretary-General.[116] In his or her absence, the Force Commander is the Head of Mission.[117]

54. An important aspect of a peacekeeping force, especially with regard to criminal conduct of peacekeeping personnel, is the maintenance of discipline and good order among peacekeepers. In general, agreements between the UN and the host state and between the UN and TCCs contain provisions with regard to maintaining discipline.[118]

The Status of Forces Agreement between the UN and the host state usually instructs the Special Representative of the Secretary-General to take all appropriate measures to ensure discipline and good order among UN peacekeeping personnel.[119] The Memorandum of Understanding

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[112] M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 39-41.
[113] *Ibid.* 38-39.
[114] *Ibid.* 38-39.
[115] *Ibid.* 39.
[116] *Ibid.* 39.
[117] In practice, an internal document sets forth the division of responsibilities between the Force Commander and the Special Representative of the Secretary-General. M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 39.
[118] I say 'in general' because both the Model Memorandum of Understanding and the Model Status of Forces Agreement contain such a provision. Therefore these provisions are normally also present in the actual agreements between the UN and the TCC, respectively host state.
[119] Para. 40 Model Status of Forces Agreement. I use the word 'usually' because the Model SOFA provides for this arrangement. The Model SOFA will be further discussed in section 2.3.1.

however, normally asserts that each commander of the respective national contingents is responsible for the discipline and good order of all members of the contingent.[120] Although the content of the Status of Forces Agreement and the Memorandum of Understanding may seem at odds, they are not. In its agreement with the host state, the UN basically 'promises' the host state that the Special Representative will ensure good discipline and order. By requiring the commander of the national contingent to maintain discipline and good order among all members of the contingent, the Special Representative in fact passes on this task to the commander of the national contingent. It is therefore ultimately the task of the commanders of the national contingents to maintain discipline and order, albeit the Special Representative is also responsible for the proper conduct of the peacekeeping force.[121]

TCCs have to make sure that the commander of its national contingent has the authority to maintain discipline and good order among all members of the contingent. They also have to ensure that all members of its contingent comply with the "United Nations standards of conduct, mission-specific rules and regulations and the obligations towards national and local laws and regulations in accordance with the status-of-forces agreement".[122]

2.3. Formal agreements with Member States

55. The presence of foreign forces on the territory of a sovereign state has always been a complex but interesting legal situation. Even if the host state consents to the presence of troops on its territory, the legal status of the force remains somewhat unclear. Especially with regard to peacekeeping operations, the situation is rather complicated. I say this because there are several parties involved in the operation. First, there is the relationship between the UN and the sovereign state that consents to the presence of the peacekeeping force, the host state. The second relationship is between the United Nations and the Member States that provide troops and equipment, the so-called troop contributing countries.

These relationships are recorded in agreements between the parties: respectively the Status of Forces Agreement and the Memorandum of Understanding. Together with the Security Council resolution that establishes the mandate of the peacekeeping operation, these agreements form the three key documents that govern UN peacekeeping operations.[123]

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[120] Para. 7.5 Model Memorandum of Understanding. I use the word 'normally' because the Model Memorandum of Understanding provides for his arrangement. The Model Memorandum of Understanding will be further discussed in section 2.3.2.

[121] It is however questionable whether the Special Representative can actually make sure that peacekeepers respect local laws. *Infra* 26 para. 58.

[122] Para. 7.5 Model Memorandum of Understanding.

[123] B. OSWALD, H. DURHAM and A. BATES, *Documents on the Law of UN Peace Operations*, Oxford, Oxford University Press, 2010, 51.

The Status of Forces Agreement will be discussed in section 2.3.1, the Memorandum of Understanding in section 2.3.2.

2.3.1. Status of Forces Agreement (SOFA)

56. A Status of Forces Agreement (hereafter: SOFA), sometimes referred to as Status of Mission Agreement, is an agreement between a host state and the country/organization that deploys troops on the host state's territory. It is widely used to regulate the legal status of foreign forces stationed on the territory of a sovereign state. In light of this thesis, I will only discuss the provisions of SOFAs that may impact the criminal accountability of military peacekeeping personnel.

57. A SOFA is mission specific, which implies that the content of the agreement is different for every peacekeeping operation. In spite of that, the UN worked out a Model SOFA at the request of the General Assembly. It was completed in 1990 and was based on established practice in previous operations. Ever since, the Model is used as guidance during negotiations regarding the deployment of a peacekeeping force. Parties can modify the provisions according to their own preferences and the specific requirements of the mission.[124]

2.3.1.1. Exclusive jurisdiction troop contributing country

58. The SOFA determines the legal status, privileges and jurisdictional immunities of UN peacekeeping personnel deployed on the territory of the host state, including military contingents. Very important in this regard, is the fact that UN SOFAs stipulate that each TCC has exclusive criminal jurisdiction over the military members of its respective contingent. The Model SOFA provides for the exclusive criminal jurisdiction of sending states in paragraph 47 (b):

> "Military members of the military component of the United Nations peace-keeping operation 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 [host country/territory]."[125]

Such an exclusive criminal jurisdiction implies that only the TCC is competent to prosecute military peacekeepers for crimes committed during their assignment. The host state cannot bring actions against military peacekeepers that are stationed on its territory. In order to ensure that this does not prevent peacekeepers from respecting local laws and regulation, SOFAs generally dictate that the peacekeeping force and its peacekeepers must respect the laws of the host state.[126]

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[124] Para. 1 Preamble to the Model SOFA.
[125] Para. 47 (b) Model SOFA.
[126] Para. 6 Model SOFA.

They confer the Special Representative of the Secretary-General and/or the Force Commander the responsibility to ensure that military peacekeepers genuinely respect local laws.[127] However, in practice the effectiveness of this provision is questionable considering the waiver of jurisdiction by the host state. According to Burke, "local law can in reality only be applicable to military personnel if integrated into the laws of the TCC that actually govern their contingents deployed abroad".[128] Furthermore, she states that it is difficult to see how the Special Representative of the Secretary-General or the Force Commander could exercise their responsibility to ensure that peacekeepers do not commit offences against the local population.

2.3.1.2. Absence of a SOFA between the host state and the United Nations

59. As noted above, the UN should conclude a SOFA in order to obtain the consent of the host state. However, the UN is not always able to negotiate a SOFA (in time). It is for instance possible that there is no effective and legitimate government to negotiate an agreement with.[129] Similarly, the situation at hand may require the rapid deployment of a UN force because long negotiations would imply a humanitarian tragedy. Another reason may be that the parties disagree over certain issues, such as taxes or visas.[130] In general, the UN then manages to conclude a SOFA *after* stationing troops, but on rare occasions there is no agreement with the host state at all.[131]

60. In the absence of a SOFA, the legal status of the peacekeeping force is not regulated by an agreement between the host state and the UN. The question is which rules then govern the conduct of peacekeeping personnel. The Model SOFA could play a crucial role in the absence of a mission specific SOFA. *If* the jurisdictional provisions in the Model SOFA have acquired the status of customary international law, the exclusive criminal jurisdiction of the TCCs, as provided for in Article 47 (b) of the Model SOFA, automatically applies to conduct of military peacekeepers.[132]

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[127] *Supra* 23 para. 53-54.
[128] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 67.
[129] This is definitely not unthinkable, since contemporary peacekeeping operations are often stationed in a county that recently experienced a divisive internal conflict.
[130] W. T. WORSTER, *Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement*, presentation at the Studiecentrum voor Militair Recht en Oorlogsrecht, http://www.ismllw-be.org/session/2013_03_26%20WORSTER%20WT.pdf (consultation 15 August 2015).
[131] There was for example no agreement for the UN operation in Somalia because there was no government to negotiate an agreement with. In the case of the UN mission in Western Sahara (MINURSO), there was no agreement with Morocco until a year after the deployment of the force. M. ZWANENBURG, *Accountability under International Humanitarian Law for United Nations and NATO Peace Support Operations*, doctoral dissertation Law Faculty Leiden University, 2004, 37.
[132] These jurisdictional provisions are Articles 46 to 49 of the Model SOFA. Customary international law is described by Article 38 (b) of the Statute of the International Court of Justice as "a general practice accepted as law".

61. In order to determine whether Article 47 (b) of the Model SOFA constitutes customary international law, one must first understand the requirements to attain the status of customary international law. Article 38 of the Statute of the International Court of Justice sets forth two requirements.[133] First, there needs to be a widespread and consistent state practice in the matter. Second, there needs to be a belief that this practice is required by a rule of law.[134] This second, moral aspect of customary international law is called the '*opinio juris*'.[135] It refers to the reason why nations act in accordance with a certain practice. This psychological element distinguishes voluntary practice from practice that is the result of a state feeling obliged to act accordingly.

Hence the following question needs to be answered in light of this thesis: is there sufficient state practice regarding the application of the jurisdictional provisions of the Model SOFA and if so, do states apply these provisions because they believe a rule of law obliges them to?

62. The fact that the Model SOFA was based on past practice strongly supports the claim that the application of the Model is now state practice. In addition, numerous bilateral agreements between the UN and host states since 1990 have reaffirmed the jurisdictional provisions regarding military peacekeepers. Furthermore, agreements between the UN and TCCs generally refer to the exclusive jurisdiction of TCCs over the behavior of their military contingents.[136] On the other hand, it is worth noting that the Model SOFA can be altered for each mission in order to meet specific requirements and inquiries. If the Model SOFA is perceived as customary international law by states, then why is it still necessary to negotiate each specific SOFA? This may indicate that states do not feel obliged to abide to the provisions of the Model SOFA and that the requirement of *opinio juris* is therefore not met.[137]

63. Both the UN General Assembly and the Security Council have voiced their opinion in the matter. The General Assembly issued a resolution in which it recommended that the Model SOFA applies in the interim, awaiting a specific SOFA.[138] Importantly, such a recommendation

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[133] Art. 38 (b) Statute of the International Court of Justice.

[134] J. L. SLAMA, "Opinio Juris in Customary International Law", *Oklahoma City University Law Review* 1990, vol. 15, issue 2, (603) 605; R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 67.

[135] '*Opinio juris sive necessitatis*' in full. This is a Latin phrase, meaning: a conviction that the rule is obligatory. J. L. SLAMA, "Opinio Juris in Customary International Law", *Oklahoma City University Law Review* 1990, vol. 15, issue 2, (603) 605.

[136] Art. 7 quinquiens Model Memorandum of Understanding. It is in the interest of both the UN and the TCC to deem the Model SOFA provisionally applicable until a specific SOFA arranges the status, immunities and privileges of the peacekeeping force. Note that a host state has no input in the Memorandum of Understanding between the UN and TCC. Hence it is questionable whether such an agreement between the UN and a TCC is actually relevant for determining the customary status of the Model SOFA.

[137] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 100.

[138] Resolution 52/12 B by the United Nations General Assembly (19 December 1997), *UN Doc.* A/52/L.72/Rev.1 (1997), para. 7.

by the General Assembly is non-binding for Member States. The Security Council has issued several resolutions in which it stated that the Model SOFA apply provisionally until the parties agree on a specific SOFA to govern the peacekeeping operation.[139] As opposed to the General Assembly's recommendation, a resolution by the Security Council is binding for the Member States, following Article 25 of the Charter.[140] Although these actions by the General Assembly and the Security Council support the possible customary international law status of the Model SOFA, they also raise some questions. For instance, why would the Security Council and General Assembly explicitly discuss the provisional application of the Model SOFA if the Model constitutes customary international law? If it did, wouldn't that be pointless as the provisions then apply anyway?[141]

64. When host states consent to the deployment of a peacekeeping force on their territory, they generally afford jurisdictional immunity to these forces. There consequently seems to be a consistent practice to afford jurisdictional immunity to a visiting peacekeeping force.[142] However, it remains unclear whether this practice of affording immunity is the result of host states feeling obliged to so by a rule of law. This practice may as well be a result of practical considerations. It is therefore questionable that the application of the Model SOFA also contains the moral element *opinio juris*. Because of the remaining doubt regarding *opionio juris*, I believe that at this moment the Model SOFA does not constitute customary international law. For the remainder of this thesis I will therefore assume that the Model SOFA has not attained the status of customary international law.[143]

65. Thus, the jurisdictional provisions of the Model SOFA are not applicable in the absence of a mission specific SOFA. This raises questions with regard to the legal status of military peacekeepers and, more specifically, the rules governing their conduct. In theory, they could be subject to the jurisdiction of the host state. If so, that state's laws would be applicable to their

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[139] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 98. An example of such a resolution is Resolution 1528 (2004), which authorized the establishment of a peacekeeping operation in Ivory Coast (UNOCI). Resolution 1528 (2004) by the United Nations Security Council (27 February 2004), *UN Doc.* S/RES/1528 (2004), para. 9.

[140] Art. 25 Charter of the United Nations.

[141] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 98. Ironically, the fact that both the Security Council and the General Assembly have issued resolution regarding the provisional application of the Model SOFA may indicate that the required opinion juris is not present at the moment.

[142] This is clearly coherent with the 'state waiver theory'. *Infra* 58 para. 127.

[143] It must nonetheless be noted that there is no consensus regarding this matter. For other opinions with respect to the customary international law status of the Model SOFA, see for example W. G. SHARP, "Protecting the Avatars of International Peace and Security", *Duke Journal of Comparative and International Law* 1996, vol. 7, issue 1, (93) 118 and 135.

conduct. Another option is the application of international humanitarian law. These issues will be discussed in Chapter IV.

2.3.2. Memorandum of Understanding (MoU)[144]

2.3.2.1. Introduction

66. A United Nations peacekeeping operation requires equipment and peacekeeping personnel. Since the UN does not have an own standing army, it relies on contributions by Member States. Each time it wants to establish a peacekeeping operation, the UN has to ask Member States to participate by providing equipment and peacekeeping personnel.[145] Without their support, it is impossible to deploy a peacekeeping operation. The UN obviously tries to find as many states willing to participate as possible.[146] Countries that agree to contribute to a certain peacekeeping operation enter into a formal agreement with the UN. This formal agreement is called the Memorandum of Understanding (hereafter: MoU).[147]

67. The MoU basically governs the relationship between the UN and the troop contributing country. It covers the administrative, logistical and financial aspects with regard to the Member States' contribution of personnel, equipment and services.[148] Since 2007, the MoU also specifies the standards of conduct that apply to peacekeeping personnel.[149] It now also contains provisions regarding discipline, investigations, jurisdiction and accountability.[150] Considering the fact that the SOFA between the UN and the host state provides for the exclusive jurisdiction of the sending state with regard to misconduct by its military peacekeepers,[151] these provisions in the MoU definitely influence the accountability of military peacekeeping personnel for crimes they committed.

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144 The updated version of the revised Model Memorandum of Understand of 2007 can be found in the COE Manual. General Assembly, Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual) (20 January 2015), *UN Doc.* A/C.5/69/18 (2015), Chapter 9: Memorandum of understanding (hereafter: Model Memorandum of Understanding).

145 In light of this thesis, the contribution of equipment by Member States is not relevant. I will only discuss rules and issues regarding the contribution of troops that may affect the accountability of military peacekeepers for crimes committed while deployed on a peacekeeping operation.

146 Member States are in no way obliged to participate in peacekeeping operations.

147 An agreement between the UN and a TCC was initially called a 'Troop Contribution Agreement' until the name changed to 'Memorandum of Understanding' in 1997.

148 Art. 3 Model Memorandum of Understanding.

149 Art. 7 bis Model Memorandum of Understanding, Annex H Modem Memorandum of Understanding.

150 Art. 7 ter–sexies Model Memorandum of Understanding.

151 The term 'sending state' refers to the country that contributes peacekeeping personnel. It can be used as a synonym for troop contributing country.

68. Quite similar to the Model SOFA, the UN issued a Model agreement in 1991.[152] However, the current Model is completely different from the '91 version. The first big changes were made in 1996, when both the content and the layout were revised.[153] In 1997 the name of the agreement was changed from 'Troop Contribution Agreement' to 'Memorandum of Understanding', albeit the content did not undergo noteworthy modifications.[154] Following numerous allegations of misconduct by peacekeeping personnel in the beginning of the 2000s, the UN undertook several actions to address the problems at hand, including the Model MoU that was in force at the time. The UN set in motion another revision of the Model, which resulted in the Model MoU of 2007.

2.3.2.2. The revised Model Memorandum of Understanding of 2007

69. The revised Model MoU of 2007 implemented two important changes with regard to the criminal accountability of military peacekeepers. The first change was the introduction of a code of conduct in Annex H, titled "We are United Nations peacekeeping personnel". The annex basically sets forth the behavior that is expected from peacekeeping personnel.[155] It is therefore mainly directed at the peacekeepers themselves. In the same vein Article 7 bis obliges Member States to ensure that their contingents fully understand and apply the UN standards of conduct.[156]

70. The second change is the addition of several provisions regarding misconduct by peacekeeping personnel, namely articles 7 ter-sexies.[157] Article 7 ter of the MoU declares the Commander of the sending state's national contingent responsible for the discipline and good order of all the members of its contingent. The provision also regulates the communication with the force commander in case of misconduct and the training of peacekeepers. Article 7 quater describes the procedure that is to be followed in case of allegations regarding misconduct. It

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[152] General Assembly, Report of the Secretary-General "Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations" (23 May 1991), *UN Doc.* A/46/185 (1991).
[153] General Assembly, Note by the Secretary-General "Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment" (6 July 1996), *UN Doc.* A/50/995 (1996).
[154] General Assembly, Note by the Secretary-General "Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment" (27 August 1997), *UN Doc.* A/51/967 (1997).
[155] The document is, as the title suggests, written in first-person plural. For example: "We [peacekeepers] will always:" "Respect local laws, customs and practices and be aware of and respect culture, religion, traditions and gender issues" and "Report all acts involving sexual exploitation and abuse". Peacekeepers are not allowed to "Commit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children", "Commit any act involving sexual exploitation and abuse, sexual activity with children under 18, or exchange of money, employment, goods or services for sex" or "Become involved in sexual liaisons that could affect our impartiality or the well-being of others". See Annex H, Model Memorandum of Understanding.
[156] Art. 7 bis Model Memorandum of Understanding.
[157] These Articles respectively cover: Discipline (7 ter), Investigations (7 quater), Exercise of jurisdiction by the Government (7 quinquiens), Accountability (7 sexies). Article 7 septies (Environmental compliance and waste management), is not relevant here considering the subject of this thesis.

clearly states that the TCC has the primary responsibility to investigate any act of misconduct by a member of its national contingent.

71. Article 7 quinquiens deals with the exercise of jurisdiction by the TCC. In this provision, the TCC assures the UN that it shall exercise its jurisdiction with respect to any crimes or offences committed by its military contingents. In Article 7 sexies the sending state assures the UN that, if suspicions of misconduct are well founded, the case will be forwarded to the appropriate authorities for due action. These articles are very important, as they contain much-needed commitments from the TCC. Such commitments were absent in the MoU prior to the 2007 revision.[158]

Note however that these commitments are not accompanied by specific procedures and/or sanctions in case the sending state does not exercise its jurisdiction in the end. As I will discuss in Chapter IV, this remains a vital problem with regard to the criminal accountability of military peacekeepers.

2.3.2.3. Conclusion

72. The Memorandum of Understanding is one of the key documents with regard to a UN peacekeeping operation. Importantly, the present Model now includes provisions that specifically regulate criminal conduct of military peacekeeping personnel. Despite these improvements however, it remains uncertain whether a TCC will truly exercise its exclusive jurisdiction when confronted with misconduct by its military peacekeepers. The MoU still lacks clear-cut assurances that sending states will hold the military peacekeepers criminally accountable if they have committed crimes. The MoU does not, for instance, provide for a follow-up by the UN regarding the prosecution of alleged offenders. These persisting problems will be discussed further in Chapter IV.

[158] General Assembly, Note by the Secretary-General "Reform of the procedures for determining reimbursement to Member States for contingent-owned equipment" (27 August 1997), *UN Doc.* A/51/967 (1997).

II. CRIMINAL MISCONDUCT

73. This chapter will provide some insight into the allegations of misconduct by peacekeeping personnel. The objective is to generate an understanding of the concept misconduct used throughout this thesis. Although this information is arguably not truly indispensable to understand the legal framework governing misconduct by peacekeepers, I believe this chapter is imperative to comprehend the gravity of the crimes committed by peacekeepers and the importance of improving the current situation.

The chapter contains three subchapters. First, I will discuss what is understood under criminal misconduct. Apart from defining misconduct, this also entails some examples and figures of criminal misconduct by military peacekeepers. Subchapter one further discusses why the misconduct of peacekeeping personnel is so troublesome for the population of the host state. In addition, I will consider the possibility that incidents regarding misconduct by peacekeeping personnel are underreported. The objective of subchapter two is to establish which factors contribute to criminal misconduct by peacekeepers. Subchapter three looks into allegations of misconduct by the peacekeeping force deployed in the Democratic Republic of the Congo (hereafter: DRC). I will mainly discuss the investigation held by the Office of Internal Oversight Services (hereafter: OIOS) in 2004.[159] However, it is not my intention to elaborate on the details of these allegations too much or to carry out a thorough analysis of what happened in the DRC. The objective is to provide examples of misconduct by peacekeepers in order to better understand possible flaws in the current system and the importance of improving the legal framework.

1. Criminal misconduct by military peacekeepers

1.1. What is to be understood under criminal misconduct?

74. The Conduct and Discipline Unit (hereafter: CDU) of the UN defines misconduct as "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances or to observe the standards of conduct expected of an international civil servant. […] Similar

[159] OIOS was established by the General Assembly in 1994 and is the internal oversight body of the UN. It assists the Secretary-General in fulfilling his oversight responsibilities in respect of the resources and staff of the UN through investigation, inspection and evaluation services. It aims to promote responsible administration of resources, a culture of accountability and transparency, and improved program performance. Resolution 48/218 B by the United Nations General Assembly (12 August 1994), *UN Doc.* A/RES/48/218 B (1994).

provisions apply to all other categories of UN peacekeeping personnel".[160] Accordingly, if a peacekeeper fails to comply with his or her obligations under the Charter or does not observe the standards of conduct, he or she is guilty of misconduct. The victims of crimes involving UN personnel are members of the local populations of the host state, namely civilians.[161] As was noted earlier, this thesis focuses on criminal misconduct by *military* peacekeepers.[162]

75. Even though criminal misconduct encompasses all sorts of crimes, peacekeepers are predominantly accused of crimes involving the sexual exploitation and abuse of local women and girls.[163] Moreover, sexual exploitation and abuse (hereafter: SEA) of locals surely represent the gravest breach of a peacekeeper's duties.[164] The vast majority of the actions undertaken by the UN therefore target SEA by peacekeepers. Similarly, this thesis mostly deals with problems regarding SEA. However, this certainly does not mean that the concept 'criminal misconduct' as used in this thesis only relates to SEA. Apart from SEA, peacekeepers have for example also been linked to accounts of engaging in torture, murdering detainees, and firing at unarmed civilians.[165]

76. The UN differentiates between sexual exploitation and sexual abuse. The 2003 Secretary-General bulletin regarding SEA provides for two separate definitions.[166] The bulletin defines sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or

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[160] The CDU is part of the Department of Field Support. It is the successor of the Conduct and Discipline Team established in November 2005 as part of a series of reform within the UN intended to target misconduct by peacekeeping personnel. The CDU provides policy guidance for conduct and discipline issues and supervises the state of discipline in peacekeeping operations. The CDU's website is https://cdu.unlb.org/AboutCDU.aspx (consultation 15 August 2015).

[161] S. CHUN, *Sexual Exploitation and Abuse by UN Peacekeepers*, International Peace Research Institute Oslo, Policy Brief October 2009, http://file.prio.no/Publication_files/Prio/Sexual%20Exploitation%20and%20Abuse%20by%20UN%20peacekeepers,%20PRIO%20Policy%20Brief%2010%202009.pdf (consultation 9 August 2015), 1.

[162] Nonetheless, examples and figures referred to in this chapter may also relate to misconduct by other categories of peacekeeping personnel, since these examples and figures are only intended to depict the crimes that peacekeepers may commit while deployed.

[163] F. LEWIS, "Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress", *Southern California Interdisciplinary Law Journal* 2014, vol. 23, issue 3, (595) 597.

[164] A. R. HARRINGTON, "Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing them in the Future", *ILSA Journal of International & Comparative Law* 2005, vol. 12, issue 1, (125) 133.

[165] F. LEWIS, "Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress", *Southern California Interdisciplinary Law Journal* 2014, vol. 23, issue 3, (595) 598.

[166] The 2003 Bulletin is a very important document issued by the Secretary-General that was a landmark in the UN's policy with respect to criminal misconduct by peacekeepers. The Bulletin provides for special measures for the protection of the local population from SEA by peacekeepers. The Bulletin is still very important today. Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse (9 October 2003), *UN Doc.* ST/SGB/2003/13 (2003) (hereafter: Secretary-General's Bulletin 2003).

politically from the sexual exploitation of another".[167] The term sexual abuse refers to an "actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions".[168] These definitions basically criminalize any form of sexual relation in the context of a peacekeeping operation. Note that whether or not both parties consent to the sexual relationship is irrelevant.

77. One of the first times allegations of misconduct by peacekeepers received mass attention was in the aftermath of the peacekeeping operation in Somalia in the beginning of the 1990s (UNUSOM). In 1997, a former Belgian paratrooper made allegations of human rights abuses committed by members of the Belgian armed forces during the operation in Somalia in 1993. One of the pictures he showed displayed a Somali boy being swung over an open fire, apparently threatened of being burned alive. The ex-paratrooper contended that this was common practice among the soldiers. Other pictures showed a couple of paratroopers urinating on a Somali man lying on the ground.[169] Canadian and Italian peacekeepers were accused of committing similar crimes during their deployment in Somalia.[170] Other allegations include human trafficking, sexual slavery, rape, soliciting prostitutes, forcing children into prostitution, and having sex with minors.[171] Often small sums of money suffice to buy sexual relations with local women or girls (so-called transactional sex).[172]

78. An unavoidable consequence of all the sexual relationships between peacekeepers and local women and girls, is the conception and birth of children.[173] Very often, peacekeepers father children with local women and girls and subsequently leave these so-called 'peacekeepers babies' behind.[174] This leads to a great number of babies in the host state growing up without a father. Moreover, peacekeepers often do not support the women they impregnated, leaving mother and

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167 Section 1 Secretary-General's Bulletin 2003.
168 Section 1 Secretary-General's Bulletin 2003.
169 J. N. MAOGOTO, "Watching the Watchdogs: Holding the UN Accountable for Violations of International Humanitarian Law by the 'Blue Helmets' ", *Deakin Law Review* 2000, vol. 5, (47) 52-53.
170 C. H. FARNSWORTH, *Torture by Army Peacekeepers in Somalia Shocks Canada*, N.Y. Times, 27 November 1994, http://www.nytimes.com/1994/11/27/world/torture-by-army-peacekeepers-in-somalia-shocks-canada.html (consultation 15 August 2015); J. N. MAOGOTO, "Watching the Watchdogs: Holding the UN Accountable for Violations of International Humanitarian Law by the 'Blue Helmets' ", *Deakin Law Review* 2000, vol. 5, (47) 53.
171 M. NDULO, "The United Nations Responses To The Sexual Abuse And Exploitation Of Women And Girls By Peacekeepers During Peacekeeping Missions", *Berkeley Journal of International Law* 2009, vol. 27, issue 1, (127) 129; M. O'BRIEN, "Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes", *International Criminal Law Review* 2011, vol. 11, issue 4, (803) 805.
172 As will be discussed in subchapter 3, peacekeepers in Congo often only paid one US dollar or a couple of eggs to induce sexual favors from local women or girls.
173 The figures mentioned with respect to peacekeeper babies in this paragraph relate to all categories of peacekeeping personnel, not only military peacekeepers.
174 M. NDULO, "The United Nations Responses To The Sexual Abuse And Exploitation Of Women And Girls By Peacekeepers During Peacekeeping Missions", *Berkeley Journal of International Law* 2009, vol. 27, issue 1, (127) 157.

child in a desperate financial situation.[175] According to estimations, peacekeeping soldiers fathered 24 500 babies in Cambodia and 6 000 babies in Liberia.[176] These are astonishing and above all disturbing figures. According to the Australian newspaper 'The Age', at least 20 babies fathered by peacekeepers were abandoned in East Timor. The newspaper further reports that local women often covered up the birth of these babies.[177]

79. Recent numbers show that present-day peacekeeping operations still face the issue of peacekeeper babies. No less than 12 of the 51 allegations regarding misconduct by peacekeepers in 2014 were associated with paternity claims, seven of which were of sexual exploitation and five of which were of sexual abuse.[178] A problem with respect to peacekeeper babies is that it is very hard for a mother to prove that her child was fathered by a peacekeeper. In most cases the only information these mothers have is a first name, the unit's nationality and the period of deployment. In addition, the peacekeeper is often beyond the reach of the host state courts the moment he returns to his home state. In paragraph 7.26 of the Model MoU, TCCs declare that they understand the importance of settling matters relating to paternity claims. The paragraph further provides that TCCs will facilitate such claims and forward them to the appropriate national authorities.[179] Nonetheless, the OIOS Evaluation Report of 2015 indicates that not a single case of paternity has been formally established up to now.[180]

80. Pursuant to General Assembly Resolution 57/306, the Secretary-General annually issues a report concerning SEA by UN peacekeeping personnel that provides an overview of allegations made in the preceding year.[181] This overview includes the amount of allegations involving peacekeeping personnel in total as well as each category separately. Each report also provides information about the crime of which the peacekeeper is accused. The following table shows relevant figures for the years 2012 to 2014.

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[175] M. NDULO, "The United Nations Responses To The Sexual Abuse And Exploitation Of Women And Girls By Peacekeepers During Peacekeeping Missions", *Berkeley Journal of International Law* 2009, vol. 27, issue 1, (127) 158.
[176] *Ibid.* 157.
[177] L. MURDOCH, *UN's legacy of shame in Timor*, The Age, 22 July 2006, http://www.theage.com.au/news/world/uns-legacy-of-shame-in-timor/2006/07/21/1153166587803.html?page=fullpage (consultation 15 August 2015).
[178] General Assembly, Report of the Secretary-General "Special measures for protection from sexual exploitation and sexual abuse" (13 February 2015), *UN Doc.* A/69/779 (2015), 4 para. 10. Importantly, the abovementioned figures regarding peacekeeper babies concern babies fathered by all categories of peacekeeping personnel, and not only military peacekeepers.
[179] Para. 7.26 Model Memorandum of Understanding.
[180] OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 26 para. 65.
[181] Resolution 57/306 by the United Nations General Assembly (22 May 2003), *UN Doc.* A/RES/57/306 (2003). Another source for figures with respect to allegations of misconduct is the CDU: Conduct and Discipline Unit, Statistics, https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitationandAbuse/AllegationsbyCategoryofPersonnelPerMissionSexualExploitationandAbuse.aspx (consultation 11 August 2015).

Table 1. Figures misconduct 2012-2014

	2012	2013	2014
SEA allegations involving peacekeepers	60	66	51
Most egregious forms of SEA	27	32	18
- Involving minors	18	18	13
- Non-consensual sex	9	14	5
Allegations involving military peacekeepers	17	33	22
Military peacekeepers involved in allegations[1]	18	48	28

[1] One allegation can involve multiple peacekeepers.
Source: Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse", 2012, 2013 and 2014.[182]

These figures show that a substantial part of the allegations involve minors or non-consensual sex, the so-called most egregious forms of SEA. The percentage of allegations involving military peacekeepers lies between 28 and 50 percent.[183]

Between 2008 and 2013, military peacekeepers accounted for 50 percent of all allegations regarding peacekeeping, albeit military peacekeepers accounted for 71 percent of all peacekeeping personnel. Military peacekeepers thus contributed a proportionately smaller number of allegations than civilian and police peacekeepers.[184]

1.2. Underreporting of incidents

81. According to Chun, it is questionable whether the current data on sexual misconduct by peacekeepers accurately reflect the actual extent of the problem. Several NGOs that operate in conflict zones suggest that SEA is underreported, ensuing victim's unawareness of reporting mechanisms and fear of stigmatizations by their own communities.[185] With regard to sexual crimes such as rape, victims are likely to feel anxiety over discussing a crime that is of such personal nature. Some cultures may even blame the victims of sexual abuse or forbid discussions

[182] General Assembly, Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse" (28 February 2013), *UN Doc.* A/67/766 (2013); General Assembly, Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse" (14 February 2014), *UN Doc.* A/68/756 (2014); General Assembly, Report of the Secretary-General "Special measures for protection from sexual exploitation and sexual abuse" (13 February 2015), *UN Doc.* A/69/779 (2015).
[183] 28 % in 2012, 50 % in 2013 and 43 % in 2014.
[184] Civilian peacekeepers accounted for 17 percent of the peacekeeping personnel but for almost twice as much allegations, 33 percent. Police accounted for 11 percent of the peacekeepers and 12 percent of the allegations. OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 9-10.
[185] S. CHUN, *Sexual Exploitation and Abuse by UN Peacekeepers*, International Peace Research Institute Oslo, Policy Brief October 2009, http://file.prio.no/Publication_files/Prio/Sexual%20Exploitation%20and%20Abuse%20by%20UN%20peacekeepers,%20PRIO%20Policy%20Brief%2010%202009.pdf (consultation 9 August 2015), 2.

concerning sexual topics. Exposing the crime may consequently lead to a community stigma and long-term consequences, such as loss of income and health care costs.[186]

82. Another aspect may be that the local population is not always aware of the regulations applicable to the peacekeeping force and the reporting mechanisms in place. Be that as it may, even in case victims are aware it is not unlikely that they currently have little faith in the justice system. Therefore it is very important that victims feel safe to report misconduct directly with the mission.[187]

An investigation carried out by the OIOS indicates that many incidents of SEA are indeed not reported by the local population. Surveys conducted in Haiti and Liberia demonstrated significant underreporting of incidents involving transactional sex.[188] In conclusion, it is essential to not overly rely on figures regarding allegations of misconduct by peacekeepers.

1.3. Why is criminal conduct of UN peacekeeping personnel disturbing?

83. First and foremost, the crimes committed by peacekeepers are a tragedy for the victims involved and the country hosting the peacekeeping operation. The criminal activity of peacekeepers can undermine the security and social development in the host state.[189] Especially prostitution in conflict zones is problematic, because it generates numerous brothels that are often operated by organized criminal groups. The women and girls in brothels are generally forced to work there, either by poverty or by members of these criminal groups.[190] In Bosnia and Kosovo for instance, investigations uncovered that peacekeepers visited brothels that relied on women sold into forced prostitution.[191] Peacekeepers thus indirectly supported activities of organized criminal groups.

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[186] W. J. DURCH, K. N. ANDEWS and M. L. ENGLAND, *Improving Criminal Accountability in United Nations Peace Operations*, Washington DC, Stimson Center, 2009, 31; M. NDULO, "The United Nations Responses To The Sexual Abuse And Exploitation Of Women And Girls By Peacekeepers During Peacekeeping Missions", *Berkeley Journal of International Law* 2009, vol. 27, issue 1, (127) 143.

[187] W. J. DURCH, K. N. ANDEWS and M. L. ENGLAND, *Improving Criminal Accountability in United Nations Peace Operations*, Washington DC, Stimson Center, 2009, 31.

[188] During interviews in Haiti, 231 individuals admitted to transactional sexual relationships with MINUSTAH personnel for various reasons. None knew of MINUSTAH's reporting mechanisms or its hotline. A survey in Monrovia, Liberia in 2012 indicated that one quarter of the city's women aged 18 to 30 had engaged in transactional sex with UN peacekeeping personnel. These numbers are significantly less than the amount of allegations made. OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 21-22 para. 47-49.

[189] S. CHUN, *Sexual Exploitation and Abuse by UN Peacekeepers*, International Peace Research Institute Oslo, Policy Brief October 2009, http://file.prio.no/Publication_files/Prio/Sexual%20Exploitation%20and%20Abuse%20by%20UN%20peacekeepers,%20PRIO%20Policy%20Brief%2010%202009.pdf (consultation 9 August 2015), 3.

[190] *Ibid.*

[191] O. BOWCOTT, *Report reveals shame of UN peacekeepers*, The Guardian, 25 March 2005, http://www.theguardian.com/world/2005/mar/25/unitednations (consultation 15 August 2015).

The support of the local population is essential for successfully carrying out the operation's mandate. By committing crimes against the local populations and by exploiting and abusing them, peacekeepers obviously lose their much-needed support.

84. The criminal misconduct displayed by peacekeepers is also problematic for the UN itself. The misbehavior of these perpetrators may affect the moral of UN personnel that *is* trying to help people from all around the world. Furthermore, it could become difficult to gain the support of the international community to establish new peacekeeping operations in the future.[192] All in all, the criminal misconduct of military peacekeepers strongly affects the image of UN peacekeeping and the UN in general.

2. Contributing factors

85. A first step in solving the problem of misconduct is to detect the factors contributing to criminal misconduct of military peacekeepers. In order to do anything about these crimes, it is imperative no know how it is possible that peacekeepers lower themselves to disturbing actions such as rape and enforced prostitution. Although the presence of these contributing factors does not necessarily mean that criminal misconduct is taking place, they indicate a higher risk of misconduct by peacekeeping personnel.

2.1. Conditions in the host state[193]

86. In general, a country hosting a peacekeeping operation recently endured a conflict of significant magnitude. Such conflicts result in numerous problems for the country and its civilian populations. Often there is no adequate judicial and policing system in place to protect civilians. Furthermore, the conflict may have separated family member from each other, resulting in people living alone with little or no family to support them. In such circumstances civilians are unfortunately afforded little protection against criminals that want to benefit from the situation. Women and girls are then particularly vulnerable to exploitation and abuse.

In addition, the economic problems of the country may lead to serious poverty among the civilian population. Without access to legitimate work opportunities, offering sexual favors may

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[192] S. CHUN, *Sexual Exploitation and Abuse by UN Peacekeepers*, International Peace Research Institute Oslo, Policy Brief October 2009, http://file.prio.no/Publication_files/Prio/Sexual%20Exploitation%20and%20Abuse%20by%20UN%20peacekeepers,%20PRIO%20Policy%20Brief%2010%202009.pdf (consultation 9 August 2015), 3.

[193] V. L. KENT, "Peacekeepers as Perpetrators of Abuse: Examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations", *African Security Review* 2005, vol. 14, issue 2, (85) 86; A. SHOTTON, "A Strategy to Address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel", *Cornell International Law Journal* 2006, vol. 39, issue 1, (97) 103.

be the only way to survive for local women and girls.[194] This leads to appalling situations where women offer their bodies in return for ridiculously low amounts of money such as one or two US dollars.

2.2. Characteristics of the peacekeeping force

87. UN peacekeepers are very wealthy compared to the local population, giving them a considerable amount of power over the poor civilians. Apparently, some peacekeepers abuse their position of power to gain sexual favors.[195] Considering the fact that peacekeepers are supposed to offer support to civilians and help guide them away from present-day troubles, one can only strongly condemn such actions.

88. Another determinant may be that the bulk of personnel deployed on a peacekeeping mission are men.[196] According to Defeis "a hyper-masculine culture exists that seems to encourage sexual exploitation and abuse".[197] In such an environment, a bond tends to form that protects the members from outside accusations.[198] One of the first reactions of a UN official to allegations of SEA explicitly referred to this masculine environment. The UN Secretary-General's Special Representative to Cambodia reportedly responded to allegations of SEA by peacekeepers by saying that it was natural for young soldiers to want to chase young beautiful women after enduring the rigors of the field.[199] This infamous 'boys will be boys' response, however misguided it may be, illustrates how the predominantly masculine makeup of the peacekeeping force can influence the force's behavior. In this regard, Notar contends that a lack of recreational facilities for peacekeepers may be one of the reasons why some of them resort to other activities such as sex. She therefore advocates more athletic facilities, Internet cafes, and other recreational accommodations so that peacekeepers have something to do during their leisure time.[200]

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[194] During interviews conducted by the OIOS in Haiti in 2014, rural women frequently cited "hunger, lack of shelter, baby care items, medications and household items" as the 'triggering need". OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 21 para. 47.

[195] V. L. KENT, "Peacekeepers as Perpetrators of Abuse: Examining the UN's plans to eliminate and address cases of sexual exploitation and abuse in peacekeeping operations", *African Security Review* 2005, vol. 14, issue 2, (85) 86.

[196] In 2014, men constitute 97 % of military personnel. United Nations Peacekeeping, Issues, Gender and peacekeeping, Women in peacekeeping, http://www.un.org/en/peacekeeping/issues/women/womeninpk.shtml (consultation 15 August 2015).

[197] E. F. DEFEIS, "U.N. Peacekeepers and Sexual Abuse and Exploitation: an End to Impunity", *Washington University Global Studies Law Review* 2008, vol. 7, issue 2, (185) 191.

[198] *Ibid.*

[199] S. WHITWORTH, *Men, Militarism & UN Peacekeeping: a Gendered Analysis*, London, Lynne Rienner Publishers, 2004, 71.

[200] S. A. NOTAR, "Peacekeepers as perpetrators: sexual exploitation and abuse of women and children in the Democratic Republic of the Congo", *American University Journal of Gender, Social Policy & the Law* 2006, vol. 14, issue 2, (413) 422.

89. The lack of managerial and command oversight with respect to conduct and discipline of peacekeeping personnel is also a matter of concern. Because military peacekeepers are under the command and control of the UN on one hand, but are at the same time still considered a contingent of their respective TCC, it is not always easy to ascertain which party is responsible for maintaining discipline and order in the peacekeeping force. Moreover, the divided responsibilities between the UN and TCCs may have the result that none of the parties involved can actually impose discipline on the military peacekeepers. For example, interviews conducted by the OIOS indicated that senior mission leaders felt like they had accountability without authority with regard to enforcement actions. All Force Commanders that were interviewed felt "excluded from the enforcement process".[201] This may lead to a situation where neither the UN nor the TCC is able or willing to administer the discipline and conduct of military peacekeepers.

90. The biggest problem with regard to misconduct by peacekeeping personnel is that many military peacekeepers are not or barely punished for committing crimes against the local population. This leads to a state of *de facto* impunity, where the absence of penalties for wrongdoings enables peacekeepers to do whatever they want. The main problem here is in other words a lack of criminal accountability with respect to military peacekeepers.

The best way to describe this problem is by explaining how several 'filters' in the enforcement process prevent the widespread sanctioning of criminal misconduct by military peacekeepers. First of all there is the abovementioned underreporting of incidents, which already strongly reduces the peacekeeper's chances of getting caught. A next step is the investigation of the allegation. According to OIOS, between 2010 and 2013 87 of 229 allegations (38 percent) were found to have been substantiated. Importantly, the report declares that there may be several reasons for an allegation being unsubstantiated, including insufficiency of evidence and unavailability of witnesses.[202] The next step is the sanctioning of the offenders of the remaining allegations. This entails several problems, including the exclusive jurisdiction of the TCC with respect to criminal misconduct by its military peacekeepers. Unfortunately, TCCs are not always able or willing to prosecute their military peacekeepers that are accused of criminal conduct.[203] A huge problem in this regard is the lack of information regarding the disciplinary actions undertaken by TCCs.

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[201] OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 18 para. 34.
[202] General Assembly, Report of the Secretary-General "Special measures for protection from sexual exploitation and sexual abuse" (13 February 2015), *UN Doc.* A/69/779 (2015), 7-8 para. 25.
[203] I elaborate on the prosecution of military peacekeepers by the TCC in Chapter IV.

The result of all these filters is that only a small amount of the peacekeepers that violate laws, codes of conduct and principles upheld by the United Nations is eventually punished for what they have done. This impunity is not only a problem in and of itself, it is also one of the reasons why criminal misconduct by military peacekeepers seems to persist.

3. Case study: the Democratic Republic of the Congo[204]

91. On August 2, 1998, Rwanda invaded the Democratic Republic of the Congo in an effort to push for another regime change in Kinshasa. This marked the start of the 'Second Congo War', sometimes also referred to as the 'Great African War'.[205] It was an extremely complicated conflict that involved many different actors following ambitions of local rebel forces and territorial interests of other African countries such as Angola, Namibia, Rwanda, Uganda and Zimbabwe.[206]

In July 1999, five regional states (Angola, Namibia, Rwanda, Uganda and Zimbabwe) and the DRC signed the Lusaka Ceasefire Agreement.[207] Not long after that, the United Nations Security Council established the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in order to promote peace and stability in the DRC.[208] The SOFA between MONUC and the government of the DRC was signed May 8, 2000.[209] The initial task of the

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[204] I chose the operation in the DRC as the topic for this case study for two reasons. First, the allegations made in 2004 marked the start of a changed approach towards criminal misconduct by the UN (e.g. the Zeid Report in 2005). Second, the DRC still faces a lot of problems with respect to misconduct by military peacekeepers. According to the 2015 OIOS Evaluation Report, the single largest source of SEA allegations has been the peacekeeping operation in the DRC (MONUC and MONUSCO). The SEA allegations in MONUSCO and it predecessor MONUC accounted for 45 percent of all peacekeeping-related SEA allegations between 2008 and 2013. OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 9.

[205] The conflict is normally called the 'Second Congo War, the 'First Congo War' being the foreign invasion of Zaire in 1996-1997 led by Rwanda, that saw Joseph-Desiré Mobutu replaced by Laurent-Desiré Kabila. However, the conflict is sometimes also referred to as the 'First African World War', but according to historian David Van Reybrouck this is not a suitable name since the First and Second World War also greatly impacted the African continent. D. VAN REYBROUCK, *Congo, een geschiedenis*, Amsterdam, De Bezige Bij, 2010, 463 (The English title is *Congo, the epic history of a people*, published by HarperCollins in 2014).

[206] At a certain moment, it involved up to nine African countries and about thirty local militias. For more information on the history of the DRC, see D. VAN REYBROUCK, *Congo, een geschiedenis*, Amsterdam, De Bezige Bij, 2010, 680 p (The English title is *Congo, the epic history of a people*, published by HarperCollins in 2014).

[207] The Lusaka Ceasefire Agreement was signed July 10, 1999. The United Nations was notified of the Agreement by the Permanent Representative of Zambia to the United Nations through a letter dated 23 July 1999. Security Council, Letter dated 23 July 1999 from the Permanent Representative of Zambia to the United Nations addressed to the President of the Security Council (23 July 1999), *UN Doc.* S/1999/815 (1999).

[208] Earlier that year the UN had already deployed military liaison personnel to the capitals of the signatories of the Ceasefire Agreement to support the implementation of the Agreement (Resolution 1258 (1999)). Paragraph 4 of Resolution 1279 provided that personnel authorized under previous resolutions, namely Resolution 1258 (1999) and Resolution 1273 (1999) would constitute the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) until 1 March 2000. Resolution 1258 (1999) by the United Nations Security Council (6 August 1999), *UN Doc.* S/RES/1258 (1999); Resolution 1279 (1999) by the United Nations Security Council (30 November 1999), *UN Doc.* S/RES/1279 (1999), para. 4.

[209] Remarkably, it was impossible to find an extract of the mission-specific SOFA. The SOFA is however mentioned in paragraph 5 of a report by the Secretary-General in 2000. Security Council, Third report of the Secretary-General

force was to plan for the observation of the ceasefire and disengagement of forces and maintain liaison with all parties to the Ceasefire Agreement.[210] In the following years the mandate of MONUC was expanded to include other tasks such as supervising the implementation of the Ceasefire Agreement.[211] In 2010, the Security Council adopted Resolution 1925, which not only extended the mandate of MONUC but also changed the name of the operation into the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). At the same time the mandate of the mission was adapted to the new phase that had been reached by the DRC.[212]

92. Ever since the establishment of MONUC, peacekeepers have played an important role in protecting civilians from rape, murder and looting of armed militias. The devotion and sacrifices made by many of these peacekeepers should be remembered at all times. Unfortunately, the actions of some peacekeepers have besmeared many of the good that is being done by the vast majority of them. In 2004, several newspaper articles reported misconduct by peacekeeping personnel in the DRC, including rape, torture, transactional sexual relationships, the desertion of so-called 'peacekeeper babies', and the pornographic videotaping of Congolese women and children.[213]

93. All the media attention eventually led to a full investigation by OIOS between May and September 2004. Since most of the allegations concerned peacekeepers stationed in Bunia, a city in the northeastern part of the DRC, the investigation team mainly operated from there.[214] A total of 72 allegations were investigated, 68 of them involving military contingent personnel.[215] Of these 68 allegations, OIOS closed 44 after preliminary investigations had shown that the victims

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on the United Nations Organization Mission in the Democratic Republic of the Congo (12 June 2000), *UN Doc.* S/2000/566 (2000), para. 5.

[210] Resolution 1279 (1999) by the United Nations Security Council (30 November 1999), *UN Doc.* S/RES/1279 (1999), para. 5.

[211] Several resolutions were agreed upon in this regard. For a list of resolutions regarding MONUC: United Nations Peacekeeping, Peacekeeping operations, Past peacekeeping operations, MONUC, United Nations Documents on MONUC, http://www.un.org/en/peacekeeping/missions/past/monuc/resolutions.shtml (consultation 15 August 2015).

[212] Resolution 1925 (2010) by the United Nations Security Council (28 May 2010), *UN Doc.* S/RES/1925 (2010), para. 1.

[213] S. A. NOTAR, "Peacekeepers as perpetrators: sexual exploitation and abuse of women and children in the Democratic Republic of the Congo", *American University Journal of Gender, Social Policy & the Law* 2006, vol. 14, issue 2, (413) 414. See for example M. LACEY, *In Congo War, Even Peacekeepers Add to Horror*, N.Y. Times, 18 December 2004, http://www.nytimes.com/2004/12/18/international/africa/18congo.html?_r=1& (consultation 15 August 2015); K. HOLT, *DR Congo's shameful sex secret*, BBC News, 3 June 2004, http://news.bbc.co.uk/2/hi/africa/3769469.stm (consultation 15 August 2015).

[214] Bunia is situated in the Ituri District and served as the headquarters and logistics base of MONUC, sector 6. At the time of the investigation, nearly 11 000 military personnel were deployed by MONUC in the DRC, of that number some 4 500 were deployed in Ituri. General Assembly, Investigations by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo (5 January 2005), *UN Doc.* A/59/661 (2005), 3 para. 4.

[215] Considering the scope of this thesis, I will only address these 68 allegations.

and/or witnesses could not be identified. 7 other cases were closed because they had been previously investigated and the results notified to MONUC administrators. OIOS closed 3 additional cases that could not proceed to the identification stage because the alleged perpetrators were no longer present in the mission area. As a result, only 14 allegations remained, out of which OIOS eventually developed 19 cases. In 6 of them, the allegations were fully substantiated. In 2 cases, the evidence was convincing but not fully substantiated. Although there was evidence of sexual exploitation by peacekeepers in the remaining 11 cases, it was not corroborated. Note that the 'investigation filter' already eliminated 62 out of 68 allegations involving military peacekeepers.

94. The OIOS report contains several case studies of SEA allegations. In case A for example, a 14-year-old girl had sexual relations with a MONUC soldier in return for 1 or 2 US dollars or two eggs.[216] Two witnesses, respectively 12 and 15 years old, had introduced the girl to the soldier. The witnesses and the victim clearly described the soldier, which lead to his identification. Investigators could however not interview the soldier because he was already repatriated. In another case (case D), a 13-year-old girl reported that she and her friend regularly went to the military camp to have sex with different soldiers.[217] In return she received a little bit of money, ranging form 3 to 5 US dollars. Together with another victim, she identified a soldier from photographs and line-ups. OIOS investigators interviewed the soldier, during which he denied any involvement with local women or girls. The report contains several other cases that are similar to these ones, in which underage girls declare having sex with MONUC soldiers in return for some food or money. In none of the cases did peacekeepers admit to having sexual contact with Congolese women or girls.

95. Most of the victims identified during the investigations were girls between 12 and 16 years old. The victims were poor and often illiterate village girls whose lives were torn apart by the civil war that preceded the presence of the peacekeeping force. For most of the victims having sex with the peacekeepers was "a means of getting food and sometimes small sums of money. The boys and young men who facilitated sexual encounters between peacekeepers and the girls sometimes received food as payment for their services as well."[218] These boys basically acted as procurers and were paid 1 US dollar or given some food for each girl that they 'delivered' to the peacekeepers.

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[216] General Assembly, Investigations by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo (5 January 2005), *UN Doc.* A/59/661 (2005), 5 para. 12-13.
[217] *Ibid.* 6 para. 16.
[218] *Ibid.* 4 para. 11.

The OIOS report further states that interviews with local girls and women indicated the "widespread nature of the sexual activity occurring in Bunia between peacekeepers and the local population. Although many of them could not identify the particular peacekeepers involved, their reports of regular sexual contact were detailed and convincing. A number of girls said that they had never looked at the faces of the peacekeepers or that they were not able to differentiate among non-Congolese."[219] The lack of recognition is one of the key problems with regard to the punishment of alleged perpetrators. The OIOS report contends that the chance of identification could be increased by "ensuring that incidents are reported shortly after their occurrence".[220] The report also suggests facilitating more contact between girls and skilled investigators that are able to draw these girls out.[221]

96. The report identified several causes that contributed to the sexual abuse. First, it points to the fact that the military camps are very close to the local population. While this may provide extra security against militias, it also enables informal interaction between locals and peacekeepers and thus creates an environment in which exploitation and abuse is more likely to occur.[222] In this regard the report also notes that the inadequate security perimeter around the military camp allows both peacekeepers and visitors to move around without being noticed. Furthermore, OIOS investigators found that the efforts by contingent commanders to enforce discipline amongst the soldiers were simply inadequate.[223]

Besides these structural problems, the extreme vulnerability of the local population also plays a massive role with regard to their sexual exploitation and abuse. Many families were separated by internal conflict, which resulted in children living alone with other children or with family members that are unable to support them. Consequently, they often live in extreme poverty and the subsequent hunger pushes them to make contact with peacekeepers, hoping they will get food or a little bit of money.[224] Unbelievable yet true, several peacekeepers then preyed on the weakness and vulnerability of locals in order to satisfy their own sexual needs. Needless to say, such actions can only be classified as horrendous crimes. Victims of such abuse are undoubtedly scarred for the rest of their lives. Moreover, it affects the reputation of the UN and endangers the continuation of UN peacekeeping operations.

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[219] General Assembly, Investigations by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo (5 January 2005), *UN Doc.* A/59/661 (2005), 4 para. 11.
[220] *Ibid.* 5 para. 11.
[221] *Ibid.* 5 para. 11.
[222] *Ibid.* 9 para. 30.
[223] *Ibid.* 9 para. 34.
[224] *Ibid.* 9 para. 31-33.

97. With regard to the investigation itself, OIOS investigators encountered some difficulties concerning cooperation from TCCs. Two out of three contingents failed to provide requested information or assistance in time or actively interfered with the investigation. TCCs thus showed themselves unwilling to assist the OIOS in identifying possible perpetrators. With regard to the ultimate prosecution of the alleged perpetrators, it is very hard to determine whether TCCs actually sentenced these peacekeepers for their misconduct. This lack of transparency is precisely one of the problems with regard to the *de facto* impunity of military peacekeepers.

98. It seems fair to assume that the abuse of local women and girls was not an isolated action of one or two peacekeepers. Common sense can only lead one to consider the possibility that not all the incidents regarding misconduct by peacekeepers are reported to the relevant authorities.[225] One can hardly imagine that all the victims, who are often very young girls, are able to find the courage and strength to go local and/or UN authorities to report each incident. It is therefore very unlikely that these 72 allegations represent all the girls that were abused by peacekeepers in the DRC.

99. The eventual outcome of the investigation was that only 6 out of 68 allegations were fully substantiated. Whether or not TCCs took action with regard to these 6 offenders is unclear. Lets assume that some of these allegations were false (e.g. 8 false allegations, which is a pretty high estimate) and that all 6 offenders were sanctioned by their TCC. Even then, the amount of military peacekeepers deployed in the DRC that were held accountable for their crimes is only 10 percent. Keeping in mind that many incidents were probably not even reported in the first place and that it is unlikely that all 6 peacekeepers were eventually sanctioned, one can only conclude that military peacekeepers in the DRC were hardly held accountable for their criminal conduct. Needless to say that this state of impunity is very alarming with regard to the elimination of criminal misconduct in the (near) future.

[225] *Supra* 37 section 1.2.

III. HOW THE UN ADDRESSES ALLEGATIONS OF CRIMINAL MISCONDUCT BY MILITARY PEACEKEEPING PERSONNEL

100. This chapter examines how the UN addresses allegations of criminal misconduct by military peacekeepers. It provides an understanding of how the UN approaches the matter and what it does to prevent criminal conduct of peacekeepers.

The first subchapter discusses the approach of the UN towards criminal misconduct and SEA in particular. It discusses the standards of conduct set out by the UN and the UN strategy to eliminate SEA by peacekeepers. Subchapter two explains how allegations of misconduct by military peacekeepers are currently investigated. The third subchapter examines whether the UN can sanction military peacekeepers that committed crimes against the local population. The chapter ends with a conclusion regarding the capacity of the UN to address criminal misconduct by military peacekeeping personnel.

1. The approach of the United Nations

1.1. Standards of conduct

101. The United Nations took a clear stance with regard to SEA in 2003, when it issued the Secretary-General's Bulletin 2003. Besides defining the concepts sexual abuse and sexual exploitation, the bulletin also imposed a zero tolerance policy with regard to SEA. It specified the behavior expected of peacekeepers and the responsibilities of the Head of Mission with regard to SEA. The Bulletin first affirms that SEA is unacceptable behavior and prohibited conduct for UN personnel.[226] It then states that three types of 'actions' are forbidden for United Nations personnel: sexual exploitation and sexual abuse, sexual activity with children (persons under the age of 18), and exchange of money, employment, goods, or services for sex, including sexual favors or other forms of humiliating, degrading or exploitative behavior.[227] Sexual relationships between United Nations staff and beneficiaries of assistance are not prohibited however, the Bulletin only *strongly discourages* such a relationship.[228]

102. In addition to the Bulletin, the UN also adjusted the content of the agreements with TCCs. As noted above, the revised Model Memorandum of Understanding contains several provisions

[226] Section 3 para. 1 Secretary-General's Bulletin 2003.
[227] Section 3 para. 2 (a)-(c) Secretary-General's Bulletin 2003.
[228] Section 3 para. 2 (d) Secretary-General's Bulletin 2003.

regarding the conduct of peacekeeping personnel.[229] The Model MoU obliges TCCs to ensure that all the members of its contingent comply with UN standards of conduct, including the conduct provided for in Annex H "We are United Nations peacekeeping personnel".[230] Furthermore, the TCC has to make sure that all members of its national contingent are familiar with and fully understand the conduct that is expected from them.[231] TCCs must therefore provide adequate and effective pre-deployment training in those standards to all members of its national contingent.[232]

1.2. Strategy to eliminate sexual exploitation and abuse[233]

103. In addition to setting standards of conduct for peacekeeping personnel, the UN outlined a strategy to eliminate SEA by peacekeepers. The strategy rests on three pillars: the prevention of misconduct, the enforcement of UN standards of conduct, and taking remedial action. Conduct and discipline units operating in the peacekeeping operations are supposed to help maintain proper conduct of peacekeepers. These units also receive all allegations of misconduct in missions and make recommendations for onward investigations.[234]

1.2.1. Prevention[235]

104. The UN wants to prevent incidents of SEA by providing training, raising awareness and taking preventive measures. All peacekeeping personnel receive mandatory training before they are deployed on a peacekeeping operation. Since 2005, training regarding the prevention of SEA is mandatory for all personnel on arrival in a peacekeeping mission. With regard to military peacekeepers, the TCCs are responsible for providing this training. TCCs receive a lot of support from the CDU, who helps them improve their pre-deployment training. Several measures are taken to raise awareness of SEA by peacekeepers, including poster campaigns, brochures, newsletters, websites, and radio broadcasts. Furthermore, 'Conduct and Discipline Teams' seek to raise awareness by reaching out to host populations, relevant civil society organizations, international organizations, and NGOs. The UN also takes preventive measures at field level to prevent incidents and enforce compliance with the UN standards of conduct. These measures

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229 Art. 7 bis Model Memorandum of Understanding. *Supra* 30-31 para. 69-71.
230 Para. 7.2 Model Memorandum of Understanding.
231 Para. 7.3 Model Memorandum of Understanding.
232 Para. 7.4 Model Memorandum of Understanding.
233 The CDU provides a lot of information about the UN's policy regarding SEA by peacekeeping personnel. For more information: Conduct and Discipline Unit, About CDU, https://cdu.unlb.org/AboutCDU.aspx (consultation 11 August 2015).
234 W. J. DURCH, K. N. ANDEWS and M. L. ENGLAND, *Improving Criminal Accountability in United Nations Peace Operations*, Washington DC, Stimson Center, 2009, 13.
235 The information on the prevention of SEA is taken from the CDU's website: Conduct and Discipline Unit, UN Strategy, Prevention, https://cdu.unlb.org/UNStrategy/Prevention.aspx (consultation 11 August 2015).

include restriction of movement, curfews, requiring soldiers to wear uniforms outside barracks, designating off-limits areas, and increased patrols around high-risk areas.

1.2.2. Enforcement[236]

105. In case prevention did not work and a peacekeeper is accused of criminal misconduct, the UN strives to carry out a thorough investigation of the allegation. This administrative investigation is carried out by OIOS. If the allegation is substantiated, the UN can take disciplinary actions against UN personnel. However, as will be discussed in subchapter 2, the responsibility for investigating an allegation against members of military contingents rests with the TCC.[237] The TCC is responsible for carrying out the investigation and taking subsequent disciplinary action if necessary. Afterwards, the TCC is supposed to report back to the UN on the outcome of the investigations and actions taken with regard to the peacekeeper involved.[238] Notwithstanding the TCC's primary responsibility in this regard, the UN initiates an investigation if the TCC does not timely notify the UN of its intent to investigate.[239]

106. As a result, the UN can in fact only contribute to the enforcement of military peacekeepers by facilitating the reporting of misconduct, both by the local population and by other peacekeepers. In this regard missions have established a range of reporting mechanisms to ensure locals can report misconduct, including locked drop-boxes, private meeting rooms, telephone hotlines, and regional focal points. In addition, the UN's 'whistleblower policy' protects members that report misconduct in good faith from retaliation.[240]

1.2.3. Remedial action[241]

107. Remedial action focuses on providing assistance to victims of SEA. In December 2007, the General Assembly adopted a resolution that reinforced the UN's endeavor to provide assistance to victims of SEA.[242] Importantly, the provided assistance does not replace or negate the responsibility of alleged perpetrators, nor is it an acknowledgment of the validity of a claim.[243]

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[236] The information on the enforcement UN standards of conduct is taken from the CDU's website: Conduct and Discipline Unit, UN Strategy, Enforcement, https://cdu.unlb.org/UNStrategy/Enforcement.aspx (consultation 11 August 2015).
[237] Art. 7 quater Model Memorandum of Understanding.
[238] Para. 7.19 Model Memorandum of Understanding.
[239] Para. 7.13 Model Memorandum of Understanding.
[240] Secretary-General's Bulletin: Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations (19 December 2005), *UN Doc.* ST/SGB/2005/21 (2005).
[241] The information on remedial action is taken from the CDU's website: Conduct and Discipline Unit, UN Strategy, Remedial Action, https://cdu.unlb.org/UNStrategy/RemedialAction.aspx (consultation 11 August 2015).
[242] Resolution 62/214 by the United Nations General Assembly (7 March 2008), *UN Doc.* A/RES/62/214 (2008).
[243] R. BURKE, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law*, Leiden, Martinus Nijhoff, 2014, 41; Resolution 62/214 by the United Nations General Assembly (7 March 2008), *UN Doc.* A/RES/62/214 (2008), para. 14.

Assistance and support is provided to complainants, victims, and children born as a result of SEA. Complainants are persons who allegedly have been sexually exploited or abused by UN personnel.[244] In order to receive assistance, the allegation must be officially registered. Victims are persons whose claims of SEA have been substantiated.[245] To fall under the category of children born as a result of SEA, a court of law must have determined that one is born as a result of SEA by UN personnel.[246]

108. The provided assistance includes medical, legal, psychological, and social services. Complainants receive 'basic assistance'. This includes psychological counseling, shelter, protection if their security is at risk, and helping out with pursuing claims against the alleged perpetrator. When a victim's case is substantiated, he or she can receive additional help. The strategy recommends that the UN and national governments work together to facilitate pursuits of paternity and child support claims. Children born as a result of SEA are entitled to medical, legal and psychological care.

2. Investigations into allegations of misconduct

2.1. Procedure

109. Article 7 quater of the Model MoU sets forth the procedure for investigating an allegation of misconduct or serious misconduct by a military peacekeeper.[247] The most important thing to remember is that the government of the TCC has the primary responsibility for investigating any acts of misconduct committed by a member of its national contingent.[248] This means that the TCC has precedence with regard to the investigation, but if the TCC does not investigate the UN will. This principle runs through the whole procedure of the investigation.

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[244] Resolution 62/214 by the United Nations General Assembly (7 March 2008), *UN Doc.* A/RES/62/214 (2008), para.5 (c).
[245] *Ibid.* para.5 (d).
[246] *Ibid.* para.5 (e).
[247] "Misconduct means any act or omission that is a violation of United Nations standards of conduct, mission-specific rules and regulations or the obligations towards national and local laws and regulations in accordance with the status-of-forces agreement where the impact is outside the national contingent."; "Serious misconduct is misconduct, including criminal acts, that results in, or is likely to result in, serious loss, damage or injury to an individual or to a mission. Sexual exploitation and abuse constitute serious misconduct." General Assembly, Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual) (20 January 2015), *UN Doc.* A/C.5/69/18 (2015), Chapter 2, Annex A para. 24 and 32.
[248] Para. 7.10 Model Memorandum of Understanding. I will use the term 'TCC' when talking about the government of the TCC in order not to complicate things. However, the Model MoU consistently uses the term 'Government'. Similarly I will often use 'military peacekeeper' instead of 'member of its national contingent'.

110. In case the TCC has *prima facie* grounds indicating that a member of its national contingent committed an act of serious misconduct, it shall immediately inform the UN and forward the case to its appropriate national authorities for investigation.[249]

The procedure is more complicated when the UN has *prima facie* ground indicating that a military peacekeeper committed an act of criminal conduct. First of all the UN must without delay inform the TCC. If, in case of an allegation of serious misconduct, it is necessary to preserve evidence and the TCC does not conduct fact-finding proceedings, the UN is allowed to initiate a preliminary fact-finding inquiry of the matter.[250] The UN will only investigate until the TCC starts its own investigation.

111. The TCC has to notify the UN as soon as possible, and no later than 10 working days after the time of notification by the UN, that it will start its own investigation of the alleged serious misconduct.[251] If it does not, the TCC is considered to be unwilling or unable to conduct such an investigation. The UN itself may then initiate an administrative investigation of the alleged serious misconduct. The administrative investigation conducted by the UN must respect the legal rights of due process provided to the military peacekeeper by national and international law. Furthermore, the investigation team of the UN has to include a representative of the TCC if the TCC provides one. The concern behind these requirements is the admissibility of evidence in domestic proceedings.[252] In the event that the TCC decides to start its own investigation, the UN provides all available material of the case to the TCC without delay. If the UN has completed the administrative investigation, it provides the TCC with its findings and the gathered evidence.[253]

112. If the UN is conducting the investigation, the TCC should instruct the commander of its national contingent to cooperate and to share documentation and information. Through said commander, the TCC must also instruct the members of its national contingent to cooperate with the investigation.[254] However, this cooperation with UN investigations is subject to the

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[249] Para. 7.11 Model Memorandum of Understanding.
[250] The preliminary investigation has to meet certain procedural requirements: "[…] any such preliminary fact-finding inquiry will be conducted by the appropriate United Nations investigative office, including the Office of Internal Oversight Services, in accordance with the rules of the Organization. Any such preliminary fact-finding inquiry shall include as part of the investigation team a representative of the Government. The United Nations shall provide a complete report of its preliminary fact-finding inquiry to the Government at its request without delay." Para. 7.12 Model Memorandum of Understanding.
[251] The TCC shall immediately inform the UN of its decision to start investigations and includes the identities of the official(s) it sends to investigate the matter. Para. 7.15 Model Memorandum of Understanding.
[252] Z. DEEN-RACSMÁNY, "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", *Journal of Conflict & Security Law* 2011, vol. 16, issue 2, (321) 338.
[253] Para. 7.13 Model Memorandum of Understanding.
[254] Para. 7.14 Model Memorandum of Understanding.

TCC's applicable national laws, including military laws.[255] This might pose problems if a TCC's legislation does not permit disclosing information on ongoing investigations.[256] In that case the TCC cannot provide information and documentation to the UN. Article 7 quater further states that the UN and the TCC will cooperate with each other, and that the UN shall provide administrative and logistical support to the TCC representatives that conduct the investigation.[257]

113. Importantly, paragraph 7.19 of the Model Memorandum of Understanding maintains that "Subject to its national laws and regulations, the Government shall provide the United Nations with the findings of investigations conducted by its competent authorities, including any National Investigations Officers, into possible misconduct or serious misconduct by any member of its national contingent."[258] However, TCCs do not always communicate how allegations were eventually handled.[259]

2.2. Investigations in practice

114. Although it is useful to discuss the procedure set out by the Model MoU, it is equally important to examine how the UN and the TCCs carry out investigations in practice. The 2015 OIOS Evaluation Report indicates that there are still some problems in this regard. Nonetheless, the table below shows that the cooperation of TCCs seems to be improving.

Table 2. Figures investigation 2012-2014

	2012	2013	2014
Allegations involving peacekeepers	60	66	51
Referred investigations involving military peacekeepers	13	29	19
- Investigations conducted by TCC or TCC and UN	9	20	12
- Investigations conducted by UN	4	2	7
- Response pending	0	7	0
Military peacekeepers involved in investigations[1]	18	44	25

[1] One investigation can involve multiple peacekeepers.
Source: Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse", years 2012, 2013 and 2014.[260]

[255] Para. 7.14 Model Memorandum of Understanding.
[256] Z. DEEN-RACSMÁNY, "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", *Journal of Conflict & Security Law* 2011, vol. 16, issue 2, (321) 338.
[257] Para. 7.16, 7.17, 7.18, 7.21 Model Memorandum of Understanding.
[258] Para. 7.19 Model Memorandum of Understanding.
[259] *Supra* 72 para. 160.
[260] General Assembly, Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse" (28 February 2013), *UN Doc.* A/67/766 (2013); General Assembly, Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse" (14 February 2014), *UN Doc.* A/68/756 (2014); General Assembly, Report of the Secretary-General "Special measures for protection from sexual exploitation and sexual abuse" (13 February 2015), *UN Doc.* A/69/779 (2015).

Considering that in 2010 only 7 out of 31 allegations were investigated by TCCs, it is apparent that TCCs are increasingly conducting the investigations into allegations of criminal misconduct by military peacekeepers.[261]

115. However, the OIOS Evaluation Report also highlighted some remaining issues. The Report for instance revealed a problem of tardiness with regard to investigations. Only a few TCCs comply with the 10-day deadline and some do not even reply at all. It is important that investigations are conducted in time to assure victims of SEA that something is being done about their allegations.[262] Furthermore, delays in initiating TCC investigations may result in a loss of evidence.[263]

116. Since allegations involving military peacekeepers are primarily investigated by TCCs, it is possible that military personnel in the same mission are subjected to different investigative standards. In interviews conducted by the OIOS, several interviewees argued that the UN needs to develop uniform standards in order to prevent possible differences between investigations.[264] The Report further notes that several high placed interviewees perceived a "lack of independence and an inherent and irreconcilable conflict of interest in requesting national investigators to investigate their own troops".[265] Several parties involved in other words criticize the fact that TCCs investigate their own military peacekeepers.

117. Because conducting an investigation involves multiple actors with distributed responsibilities, it may be hard to pinpoint the party responsible for the tardiness or inadequacy of said investigation. Accordingly, the OIOS Evaluation Report of 2015 established that each part of the enforcement architecture tends to see the other parties as responsible for possible performance shortfalls.[266] Regardless of who is responsible, it is imperative that both the UN and TCCs keep improving their cooperation with regard to investigations. Especially the tardiness of the procedure needs to be addressed. It is crucial that investigations are completed quickly but thoroughly.

3. Sanctioning military peacekeepers

118. As the United Nations is the organization that authorizes the establishment of the peacekeeping operation, one might assume that it can also sanction military peacekeepers and

[261] OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 15 para. 20.
[262] *Ibid.* 15 para. 21-22.
[263] *Ibid.* 16 para. 25.
[264] *Ibid.* 16 para. 25.
[265] *Ibid.* 15 para. 25.
[266] *Ibid.* 10 para. 11. One could argue that this puts into perspective the criticism concerning investigations conducted by TCCs.

hold them criminally accountable for committing crimes during their assignment. However, the UN cannot conduct a criminal investigation into alleged criminal conduct of persons participating in a peacekeeping operation.

In the same vein the UN is unable to hold a person criminally accountable.[267] In case of allegations of serious misconduct involving military personnel however, the UN *can* repatriate the individuals involved and bar them from future peacekeeping operations. Disciplinary and other judicial actions remain the sole responsibility of the TCC of the individual involved.[268]

4. Conclusion

119. This chapter demonstrates that the UN is trying to reduce criminal conduct of military peacekeeping personnel. Because the UN cannot punish military peacekeepers by taking disciplinary measures against them, the UN's actions primarily revolve around the prevention of criminal misconduct. An important step in this regard was declaring standards of conduct applicable to military peacekeepers. In addition, the UN strategy to eliminate SEA illustrates the UN's willingness to really address the lack of criminal accountability of military peacekeepers.

120. Besides its more general responsibilities regarding military peacekeepers, the UN also has a subsidiary role with regard to the investigation of allegations of criminal misconduct. This role is very important because TCCs often do not initiate an investigation. In that case the UN starts a preliminary investigation. The fact that the UN has to wait for ten days of inaction by the TCC before it can commence the investigation is a serious problem. By that time a lot of evidence can be gone, making it very hard to build a case against the accused peacekeeper. I think it is therefore advisable that the UN would take on more responsibilities with respect to the investigation of allegations. I will discuss these adjustments more thoroughly in Chapter V.

121. One might presume that the UN cannot do much about the impunity of military peacekeepers because it cannot take disciplinary measures against military peacekeepers. The UN is however still *the* key actor with regard to peacekeeping operations. The UN for instance establishes the peacekeeping operation and negotiates the agreements with the host state and TCCs. Both SOFAs and MoUs are crucial for holding military peacekeepers accountable. The UN is therefore definitely capable of altering the legal framework of peacekeeping operations and the regulation of criminal misconduct by military peacekeepers. The UN must take up its

[267] General Assembly, Note by the Secretariat "Criminal accountability of United Nations officials and experts on mission" (11 September 2007), *UN Doc.* A/62/329 (2007), 8 para. 16.
[268] Conduct and Discipline Unit, UN Strategy, Enforcement, https://cdu.unlb.org/UNStrategy/Enforcement.aspx (consultation 9 August 2015).

responsibility and instigate the changes that are necessary to enhance the criminal accountability of military peacekeeping personnel.

IV. HOLDING MILITARY PEACEKEEPERS ACCOUNTABLE

122. In this part of my thesis I will discuss the different options for holding military peacekeepers criminally accountable for crimes committed during their deployment. The main purpose is to explore how peacekeepers can be brought to justice and to identify problems in this regard. I will therefore assess the possible application of different sets of law. However, I will not carry out an extensive theoretical analysis of these different sets of law, since this is not necessary in order to ascertain how peacekeepers can *in practice* be held accountable. I will discuss whether a given set of laws is applicable, the merits of its application and the potential problems in this regard.

123. First, I will examine the application of the laws of the host state (subchapter one). The main question here is whether military peacekeepers can be prosecuted under local criminal law. As we will see, there are some difficulties in this regard following a waiver of jurisdiction by the host state. Second, I will determine whether the laws of the troop contributing country apply to misconduct by peacekeepers (subchapter two). Subchapter three examines whether military peacekeepers can be punished trough international humanitarian law. Subchapter four considers the application of international criminal law. In any case, its application is rather narrow since international criminal law only applies to a limited number of crimes. The chapter ends with some concluding remarks on the criminal accountability of military peacekeeping personnel.

1. Host state jurisdiction

124. In theory the host state can apply its laws and regulations to prosecute military peacekeepers, following its territorial jurisdiction over all persons and activities within its territory. At first glance, this seems a good way to hold peacekeepers accountable for their misconduct. It implies that the host state investigates whether peacekeepers committed the alleged crimes and then possibly prosecutes them. However, host states consistently waive their jurisdiction with regard to criminal conduct by military peacekeepers.[269] The SOFA between the UN and host state consistently provides for the exclusive criminal jurisdiction of the TCC with regard to crimes committed by national contingents. As a result, the host state has no jurisdiction over military peacekeeping personnel and cannot prosecute them for crimes they committed during their assignment.

[269] *Supra* 25 para. 58.

125. It is clear that this waiver of jurisdiction and the resulting immunity are key elements regarding the accountability of military peacekeepers. This subchapter will first determine the scope of the waiver of jurisdiction and the rationale of it (section 1.1). This should enable us to ascertain whether the resulting immunity for military peacekeepers is really necessary and justified considering its positive and negative consequences. In addition, this might provide useful information regarding possible alternatives for the current regulation.

Section 1.2 considers the hypothesis that the UN did not manage to conclude a SOFA with the host state. I will discuss whether other rules could possibly render military peacekeepers immune from host state jurisdiction. If there are none, military peacekeepers are in principle not immune from host state jurisdiction in absence of a SOFA. This implies that the host state then has jurisdiction over criminal conduct of military peacekeepers. The question is whether such host state jurisdiction would improve the accountability of military peacekeepers and whether it would be acceptable for the UN and TCCs.

1.1. Waiver of jurisdiction

1.1.1. State waiver theory

126. It is well established in international law that a foreign force is immune from host state jurisdiction while on another state's territory with consent.[270] There is however some discussion regarding the theory underlying this principle. Although everyone recognizes the sovereign equality of states, according to which each state is independent and equal, there is no consensus regarding its repercussions. According to the 'fundamental right theory', it follows from the sovereign equality of states that armed forces of a state are automatically immune from host state jurisdiction: as both states are equal, armed forces are not subject to the jurisdiction of the host state.[271]

127. However, jurisprudence and doctrine now endorse the 'state waiver theory'.[272] This theory contends that foreign forces are in theory subject to the jurisdiction of the host state and are therefore not automatically immune from host state jurisdiction.[273] In practice however, host

[270] This principle is referred to by Worster as the doctrine of state immunity. W. T. WORSTER, "Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement", *Military Law and the Law of War Review* 2008, vol. 43, issue 2, (277) 283-284.
[271] W. T. WORSTER, "Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement", *Military Law and the Law of War Review* 2008, vol. 43, issue 2, (277) 284.
[272] *Ibid.* 286-295.
[273] Worster argues that this does not impede the sovereign equality of states, because a state then *willingly* places its organs or troops within another state's territory. Hence that state cannot claim to be subjected to the other state's jurisdiction against its will. W. T. WORSTER, "Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement", *Military Law and the Law of War Review* 2008, vol. 43, issue 2, (277) 295.

states often waive their jurisdiction and afford immunity to military peacekeepers. According to the state waiver theory, the immunity of military peacekeeping personnel is therefore the result of a waiver of jurisdiction by the host state, not of the status of a peacekeeping force. Such an explicit waiver is thus absolutely necessary for military peacekeepers to be immune from host state prosecution.

Although the result is ultimately the same, namely immunity, the starting position is completely different. This is very important, especially in the absence of an agreement between the host state and the UN. The question remains why a foreign force such as a peacekeeping force is exempted from host state jurisdiction.

1.1.2. Rationale of immunity from host state jurisdiction

128. Following its absolute jurisdiction, a sovereign state has jurisdiction over all those present on its territory. However, often exceptions are made with regard to foreign forces or foreign personnel present on a country's territory. Diplomats, for example, are granted privileges and immunities according to international law. Diplomatic immunities were initially justified by the principle of extraterritoriality. The idea was that the premises of diplomats ought to be treated as national territory and therefore received an 'extraterritorial' status.[274] The principle of extraterritoriality is no longer relevant today, since the preferred approach with regard to jurisdictional immunity is now based on the doctrine of 'functional necessity'.[275] According to this doctrine, someone is granted immunity in order to enable him or her to function without being hindered by the host state.[276] The immunity is thus granted for functional reasons and not to benefit the interests or needs of the individual.[277]

129. The immunity granted to a specific person or function can be adjusted depending on the requirements or objective of the immunity. A Head of State for example, requires a different sort of immunity than a diplomat or peacekeeper. Burke identifies three types of immunity: absolute,

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[274] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 73, 80.
[275] *Ibid.* 80.
[276] According to the doctrine of functional necessity, a diplomat is immune from host state jurisdiction so that he can carry out his tasks and duties without being hindered by the country where he is deployed. The Preamble to the Vienna Convention on Diplomatic Relations clearly supports the theory of functional necessity: "Realizing 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 State." Para. 4 Preamble to the Vienna Convention on Diplomatic Relations, 18 April 1961.
[277] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 82; D. W. BOWETT and G. P. BARTON, *United Nations Forces: A Legal Study of United Nations Practice*, London, Stevens, 1964, 441. See for example Article IV, section 14; Article V, section 20; and Article VI, section 23 of the Convention on the Privileges and Immunities of the United Nations, 13 February 1946.

concurrent and qualified.[278] Absolute immunity implies that the 'subject' is completely immune from host state jurisdiction, without restrictions; concurrent jurisdiction exists when two or more courts from different systems simultaneously have jurisdiction over a given case;[279] and qualified immunity indicates that one's immunity is inherently limited to a specific capacity, for example acts carried out in one's official capacity.[280] The current trend in international law favors the more restricted forms of immunity, such as concurrent and qualified immunities.[281] Absolute immunity is now considered to go too far, or at least further than necessary. The NATO for example, provides for concurrent jurisdiction when forces of one NATO State Party are sent to serve in the territory of another Party. Both the sending and receiving state then have jurisdiction.[282]

130. Despite this trend towards more restricted forms of immunity, the TCCs in peacekeeping operations retain exclusive jurisdiction with regard to all crimes committed by military peacekeepers, without any restrictions. UN SOFAs thus provide for the absolute immunity of military peacekeepers from host state jurisdiction, against the current trend in international law.

131. The question is *why* military peacekeepers are granted absolute immunity by the host state. The answer is not clear-cut because peacekeeping operations involve various parties and interests. A first reason is to assure TCCs that their troops will not be subjected to trial in the host state. This understandably worries TCCs since it is not unlikely that the host state lacks adequate judicial guarantees and sufficient human rights standards at the time of the peacekeeping operation. The fact that the UN decided to establish a peacekeeping operation indicates that the host state is facing several problems. I believe it is therefore not unreasonable to assume that the county's legal system is therefore not completely 'in order'. Hence it makes sense that TCCs want to make sure that their nationals are not prosecuted by the host state. Important to note, the exclusive jurisdiction of the TCC is thus a demand of the TCC, not the host state or the UN.

A second reason also follows from the host state's judicial system. Lets assume there is no adequate judicial system in place following the recent conflict in the country. If crimes would solely be investigated by the host state, this would lead to impunity for military peacekeepers. A way to ensure that peacekeepers do not get away with criminal conduct is to enable TCCs to

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[278] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 79.
[279] A fictional example is the concurrent jurisdiction of Belgium and France with regard to the murder of a French national by a French national on Belgian territory. In this case, Belgium has jurisdiction following its territorial jurisdiction, while France can also assume jurisdiction following the active (offender) or passive (victim) personality principle.
[280] R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 79.
[281] *Ibid.* 79.
[282] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, Art. VII para. 1.

prosecute them. This way the TCC's jurisdiction prevents a 'jurisdictional gap' with regard to criminal misconduct of military peacekeepers.[283]

132. To be honest, I find it hard to believe that these concerns are the only reasons for the exclusive jurisdiction clause in SOFAs. I believe it is more likely that TCCs did not want to hand over the power over their nationals to the UN or the host state. By retaining exclusive jurisdiction, TCCs make sure that no other country or the UN has any form of power over their peacekeepers. As the UN heavily relies on these countries for the establishment of peacekeeping operations, the UN basically has to give TCCs what they want. Without the voluntary contributions of TCCs, there is no peacekeeping force and consequently no peacekeeping operation. The fact that Member States are in no way obliged to contribute troops, personnel or equipment is something one must always keep in mind when trying to determine the reason behind certain aspects of UN peacekeeping.

Bowett clearly supports this view and contends that the only real justification for the exclusive criminal jurisdiction of TCCs is political, and to ensure the continued contribution of troops by Member States.[284] If the genuine concern of TCCs had been to prevent a 'jurisdictional gap' and subsequent impunity, they would prosecute the peacekeepers accused of crimes more actively than they do at the moment.

133. Whatever the true reason behind the exclusive jurisdiction may be; it was definitely not the intention to give military peacekeepers a free pass during their deployment. Peacekeepers were not granted immunities so that they could get away with murder, rape, sexual exploitation and other crimes without punishment. The current state of impunity was not the purpose of the grant of immunity. Illustrative for this, is the fact that the Model SOFA maintains that the UN will obtain assurances from TCCs regarding the prosecution of military peacekeepers.[285]

1.1.3. A solution in sight?

134. Although it is very interesting and important to determine how we got to the point where we are now, namely a culture of impunity with regard to criminal misconduct by military peacekeepers, it is even more important to determine how these problems can be solved in the (near) future. A pertinent question I want to answer in this subchapter is whether it would help if the host state could assume jurisdiction over criminal misconduct by military peacekeepers. In

283 R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 71.
284 R. BURKE, "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity", *Journal of Conflict & Security Law* 2011, vol. 16, issue 1, (63) 79; D. W. BOWETT and G. P. BARTON, *United Nations Forces: A Legal Study of United Nations Practice*, London, Stevens, 1964, 437-441.
285 Art. 48 Model SOFA.

other words: could host state jurisdiction solve the lack of criminal accountability of military peacekeeping personnel?

135. To adequately answer this question, one must consider several aspects. First of all, host state jurisdiction must be feasible politically speaking. As noted earlier, TCCs have a lot of negotiation power concerning peacekeeping operations and will not like the idea of host states prosecuting their national contingents.[286] It therefore seems unlikely that TCCs will agree to host state jurisdiction over criminal conduct by military peacekeepers. Second, host states must be capable of prosecuting alleged offenders. The fact that a peacekeeping operation was deemed necessary by the UN usually indicates that the host state recently encountered some kind of conflict and is thus at the very least unstable at that moment in time. Hence the legal system of the host state probably does not meet the human rights standards that are required by the UN and TCCs. If so, it is not desirable that peacekeeping personnel are adjudicated that legal system. Another problem is that peacekeepers are deployed for a limited period of time, which implies that a host state would only have a narrow time frame to investigate and prosecute. Although extradition might provide a solution, countries are normally not keen on extraditing their nationals to other countries. Moreover, the laws of TCCs may hinder the extradition of nationals or demand that military personnel are tried in homeland military tribunals.[287]

Considering all these aspects, I do not believe that enabling the host state to assume jurisdiction over military peacekeepers would solve the present problem of impunity.

1.2. What happens in absence of a SOFA?

136. Up until now I have discussed the exclusive jurisdiction of TCCs provided for in a specific SOFA between the host state and the UN. However, the UN and the host state do not always conclude a specific SOFA.[288] If absence of a mission specific SOFA, there seems to be a legal vacuum with regard to the jurisdiction over military peacekeepers. The question is which rules then govern possible criminal conduct of military peacekeepers. I will examine whether military peacekeepers are afforded immunities by other rules of law. If not, the host state will in principle assume jurisdiction.

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[286] F. LEWIS, "Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress", *Southern California Interdisciplinary Law Journal* 2014, vol. 23, issue 3, (595) 620-621.
[287] *Ibid.* 615.
[288] *Supra* 26 para. 59.

1.2.1. Other immunities?

137. As noted above, I do not believe the jurisdictional provisions of the Model SOFA constitute customary international law.[289] As a result, the TCC's exclusive jurisdiction over members of its military contingent, provided for in the Model SOFA, does not apply in absence of a mission specific SOFA. This implies that the host state has not waived its jurisdiction over the military peacekeepers. It is possible however, that other rules of law grant military peacekeepers immunity from host state jurisdiction.

138. I will first look into the Charter of the United Nations and determine whether it contains provisions that may apply to conduct of military peacekeepers. Second, I will consider whether there is customary international law – other than the already examined Model SOFA – in this regard. Further, I will discuss whether military peacekeepers enjoy immunities under international humanitarian law.

I carry out this analysis because I think it is an interesting line of reasoning. One must nevertheless keep in mind that it rarely happens that the UN is not able to conclude a mission specific SOFA when establishing a peacekeeping operation.[290]

1.2.1.1. Charter of the United Nations

139. Article 105 of the Charter provides for the immunity of the UN and its personnel:

> "1. 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.
> 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."[291]

140. The General Assembly adopted the 'Convention on the Privileges and Immunities of the United Nations' (hereafter: CPI) on 13 February 1946 in order to clarify the privileges and immunities of the UN and its personnel.[292] The Convention clearly states that the privileges and immunities are not intended for the personal benefit of the individuals, but to ensure the

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[289] *Supra* 28 para. 64.
[290] *Supra* 26 para. 59.
[291] Art. 105 Charter of the United Nations.
[292] Article 105 paragraph 3 of the UN Charter empowered the General Assembly to do so: "3. 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." For more information on the CPI and immunities afforded to the UN and its personnel, see F. RAWSKI, "To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations", *Connecticut Journal of International Law* 2002, vol. 18, issue 1, 103-132.

independent exercise of their functions.[293] The CPI identifies three categories of UN personnel that are granted immunities: representatives of the Members of the United Nations, United Nations officials, and experts on mission for the United Nations.[294] Importantly, neither the Charter nor the CPI affords immunities to military peacekeeping personnel. Military peacekeepers therefore do not derive immunities from these legal instruments. This means that the Charter and the CPI do not curtail the host state's jurisdiction over criminal misconduct by military peacekeepers.

1.2.1.2. Customary international law

141. It is worth considering the possibility that there is a customary norm of international law that obliges host states to grant immunities to military peacekeepers.[295] It is important to distinguish this 'assertion' from the earlier discussion regarding the Model SOFA.[296] This assertion refers to a specific practice of host states to waive their jurisdiction over criminal conduct of a foreign force such as a peacekeeping force, regardless of legal instruments such as mission specific or Model SOFAs.

Theoretically, the absence of a waiver of jurisdiction by a host state could occur in two different situations. First, it is possible that the host state consented to the establishment of the peacekeeping operation itself, but did not waive its jurisdiction over criminal conduct of peacekeepers. Second, it is possible that the host state did not even consent to the peacekeeping operation in the first place.

i. Consent of the host state: an automatic waiver of jurisdiction?

142. One could argue that host states consistently waive their jurisdiction over criminal conduct of military peacekeepers (state practice) when consenting to the establishment of a peacekeeping operation on their territory. I refer to this assumption as an 'automatic waiver of jurisdiction'. In the same vein, one could argue that host states act accordingly because they feel obliged by a rule of law (*opinio juris*). If both these elements were present, there would be a customary rule of international law. However, it seems such an automatic waiver of jurisdiction is not supported by state practice and/or *opinio juris*.

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[293] Respectively Article IV, section 14 (representatives); Article V, section 20 (officials); and Article VI, section 23 (experts on mission) of the Convention on the Privileges and Immunities of the United Nations.
[294] Respectively Article IV-VI Convention on the Privileges and Immunities of the United Nations. These representatives are the "Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations". Art. IV, section 11 Convention on the Privileges and Immunities of the United Nations.
[295] In order to attain the status of customary international law, there needs to be sufficient state practice and *opinio juris*. *Supra* 27 para. 61.
[296] *Supra* 26 section 2.3.1.2.

The fact for instance, that the UN and the host state negotiate an agreement every time a peacekeeping force is deployed contradicts the alleged automatic waiver of jurisdiction. If there would be a customary norm of international law, such negotiations would simply be unnecessary. Furthermore, the state waiver theory asserts that each state has the exclusive jurisdiction over its territory and that only the host state can waive its jurisdiction over visiting forces.[297] The state waiver theory does consequently *not* support the assumption that a host state's consent to the presence of a peacekeeping force always implies a waiver of jurisdiction. The automatic waiver of jurisdiction theory must therefore be rejected.

ii. No consent of the host state

143. What if the UN was not able to obtain the host state's consent but deployed a peacekeeping force nonetheless? Admittedly, questions can be raised regarding the peacekeeping nature of the UN operation in that case, since peacekeeping operations traditionally require the consent of the host state. However, contemporary peacekeeping operations challenge the traditional principles that guide UN peacekeeping. One of these challenges is presented by the fact that host states may not have an effective and legitimate government in place in the aftermath of a divisive internal conflict. If so, it is possible that a peacekeeping force is deployed without the consent of the host state.

144. Peacekeepers could be immune from host state jurisdiction in such a situation, if they were granted immunities by international customary law. This requires both sufficient state practice and *opinio juris*. However, considering there is no customary norm of international law that automatically affords immunities to military peacekeepers in the event that the host state consented to their presence, it is only logical that there is no such norm when the host state did not even consent to the presence of the military peacekeepers in the first place. This would contradict the state waiver theory even more.

iii. Conclusion

145. Military peacekeepers are not granted immunities from host state jurisdiction by a customary norm of international law. Maintaining otherwise would contradict the state waiver theory, which contends that immunities from host state jurisdiction are afforded by the host state.

[297] *Supra* 58 para. 127.

1.2.1.3. International humanitarian law

146. Another possibility is that military peacekeepers are afforded immunities by international humanitarian law (hereafter: IHL). IHL governs the conduct of belligerent parties during an armed conflict. As will be discussed more extensively in subchapter three, IHL may apply to conduct of military peacekeepers in certain situations. This is however, rather unlikely considering the prerequisites.[298]

IHL imposes several duties and prohibitions on the parties to an armed conflict, including the protection of civilians during an armed conflict. Following the principle of distinction, one of the most important rules of IHL, a combatant is not allowed to target civilians. In case a military peacekeeper infringed one of these IHL provisions by committing crimes against locals, the court of the TCC normally exercises jurisdiction over the infringement of its national.[299] In that event the host state thus 'loses' its jurisdiction over the incident in question.

147. However, it is rather unlikely that a situation will occur where the following prerequisites are all met: the host state and UN have not concluded a SOFA providing for the TCC's exclusive jurisdiction over criminal offences; IHL applies to the conduct of the military peacekeeper; and the peacekeeper infringed an IHL provision applicable to his misconduct towards the local population. If such a situation occurs nonetheless, the TCC will in theory assume jurisdiction and not the host state.

1.2.2. No immunity: host state jurisdiction?

148. As the previous paragraphs explained, it is improbable that another rule of law grants military peacekeepers immunity from host state jurisdiction. Consequently, the territorial jurisdiction of the host state is not 'countered' in the absence of a waiver of jurisdiction by the host state. The host state then, in theory, assumes jurisdiction over criminal conduct by military peacekeepers on the host state's territory. It would however be politically unacceptable for a TCC that the host state prosecutes its military peacekeepers for crimes committed during the peacekeeping operation.[300] Moreover, it may be impossible for a host state to prosecute a military peacekeeper since peacekeepers are only deployed for a limited period.[301] It is therefore very unlikely that TCCs or the UN (pressured by the TCC in question) would actually permit the host state to prosecute a military peacekeeper.

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[298] As will be determined in subchapter three, a peacekeeping operation is sometimes involved in an armed conflict, albeit not always.
[299] *Infra*, 82 para. 188.
[300] *Supra* 61 para. 132.
[301] *Supra* 61 para. 132.

Therefore I believe that, although it is theoretically possible that a host state has jurisdiction over criminal misconduct by military peacekeepers, this would never be acceptable for the UN and the TCC. According to me, host states will thus not be able to prosecute military peacekeepers in practice.

1.3. Conclusion

149. It seems fair to assume that the UN, host states and TCCs did not expect so much problems regarding criminal misconduct by military peacekeepers. Nonetheless, many allegations of crimes committed by military peacekeepers have been made and there is clearly a lack of accountability in this respect. The fact that host states are currently unable to prosecute military peacekeepers due to the TCC's exclusive jurisdiction certainly plays a part in this problem. A competent host state with an adequate judicial system could probably put an end to the current state of *de facto* impunity. However, it is not a stretch of the imagination to suggest that the majority of the host states are not equipped with an unbiased, adequate judicial system that meets all the human rights standards.

This leads me to believe that granting the host state jurisdiction over criminal conduct by military peacekeepers will not solve the current problem of impunity. Not only is this unrealistic considering the interests of TCCs, it would also not guarantee a fair trial for all peacekeepers.

2. Jurisdiction of the troop contributing country

150. As noted above, the TCC has exclusive criminal jurisdiction in respect of any criminal offences that may be committed by military members of its national contingent. It appears that the TCC is the best forum for holding military peacekeepers criminally accountable for crimes committed against the local population. Although this is probably true, there are also some problems in this regard.

The analysis carried out in this subchapter is based on the assumption that the investigation by the UN or the TCC was completed and that its conclusion is that the suspicions of criminal misconduct are well founded. The starting point of the analysis in this subchapter is in other words the end of the investigation.[302]

151. The subchapter first examines the exclusive jurisdiction of TCCs (section 2.1). It then discusses whether TCCs can assume jurisdiction over criminal conduct of military peacekeepers (section 2.2). Section 2.3 deals with some problems that may arise when a TCC want to exercise its jurisdiction over criminal misconduct of a military peacekeeper, including the possible

[302] For an analysis of the investigation procedure and possible problems in this regard: *supra* 50 subchapter 2.

unwillingness of TCCs. The subchapter ends with a conclusion on the exercise of jurisdiction by TCCs.

2.1. Exclusive jurisdiction of troop contributing countries

152. Article 47 (b) of the Model SOFA provides for the exclusive jurisdiction of TCCs with regard to military peacekeepers. Note that the SOFA is an agreement between the UN and the host state and does not bind TCCs. Importantly, Article 48 of the Model SOFA states:

> "The Secretary-General of the United Nations will obtain assurances from Governments of participating States that they will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving with the peace-keeping operation."[303]

This provision clearly intends to prevent that the inability or unwillingness of the TCC to exercise its jurisdiction could lead to impunity for military peacekeepers. Accordingly, Article 7 quinquiens of the Model MoU contains the TCC's assurance that it shall exercise its exclusive jurisdiction in respect of any crimes or offences that might be committed by its military peacekeepers.[304] In the same vein, Article 7 sexies states that the TCC ensures that the case will be forwarded to the appropriate authorities for due action if suspicions of misconduct are well founded.[305] Furthermore, the TCC "agrees that those authorities shall take their decision in the same manner as they would in respect of any other offence or disciplinary infraction of a similar nature under its laws or relevant disciplinary code".[306] The TCC also agrees to "notify the Secretary-General of progress on a regular basis, including the outcome of the case".[307]

153. The aforementioned provisions are obviously important with regard to a TCC's exercise of jurisdiction, as they all contain assurances that TCCs will follow-up on the criminal misconduct of its military peacekeepers. However, one may notice that the provisions are rather vague. For instance, the Model MoU does not clarify what kind of assurances the UN requires from TCCs. Moreover, the Model MoU does not stipulate what happens if a TCC does not comply with the MoU. It does not provide for sanctions or any other way to ensure that the TCC in question is not making empty promises with regard to exercising jurisdiction over criminal conduct of military peacekeepers. The same goes for the 'updates' provided for in paragraph 7.24 of the Model MoU. The draft model proposed by the Secretary-General stated that TCCs had to keep

[303] Art. 48 Model SOFA.
[304] Para. 7.22 Model Memorandum of Understanding.
[305] Para. 7.24 Model Memorandum of Understanding
[306] Para. 7.24 Model Memorandum of Understanding.
[307] Para. 7.24 Model Memorandum of Understanding.

the Secretary-General informed of the progress every 120 days after the referral of a case.[308] However, the final text of the Model MoU adopted by the General Assembly merely requires notifications *on a regular basis*. At no point does the MoU specify what this actually means.

2.2. Assuming jurisdiction

154. The fact that TCCs have exclusive jurisdiction with regard to criminal misconduct of military peacekeepers does not necessarily mean that they also *can* assume jurisdiction over such criminal misconduct. This depends on whether the national law of the TCC provides for jurisdiction in case of criminal acts committed abroad (extraterritorial jurisdiction).[309] There are six more or less conventional grounds for exerting jurisdiction over a crime committed outside the territory of the state.[310] The first one is the 'active personality principle', according to which a state can exercise its jurisdiction when the alleged offender of the crime is a national.[311] Following the 'objective territoriality principle', a state can assume jurisdiction for acts committed abroad that have or may have effects on the territory of that state.[312] The 'passive personality principle' asserts that a state can exercise jurisdiction if the victim of the crime is a national of that state. According to the 'protective principle', a state can exercise jurisdiction in order to protect essential interests of that state from the effects of the extraterritorial crime.[313] Following the 'representation principle', a state can exert jurisdiction when a state that normally has jurisdiction requests this state to assume jurisdiction in the matter.[314] Lastly, 'universal jurisdiction' provides for jurisdiction regardless of the accused's nationality or where the crime was committed. Because of its potentially wide application, universal jurisdiction normally only applies to severe crimes such as crimes against humanity or genocide.

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[308] General Assembly, Note by the Secretary General "Revised draft model memorandum of understanding between the United Nations and [participating State] contributing resources to [the United Nations Peacekeeping Operation]" (3 October 2006), *UN Doc.* A/61/494 (2006), Art. 7 septies para. 1; Z. DEEN-RACSMÁNY, "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", *Journal of Conflict & Security Law* 2011, vol. 16, issue 2, (321) 341.

[309] Z. DEEN-RACSMÁNY, "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", *Journal of Conflict & Security Law* 2011, vol. 16, issue 2, (321) 340.

[310] This does not mean that every state recognizes all these principles. It implies that (some of) these principles can be used by states to assume extraterritorial jurisdiction.

[311] The active personality principle is also referred to as the nationality principle.

[312] M. ODELLO, "Tackling Criminal Acts in Peacekeeping Operations", *Journal of Conflict and Security Law* 2010, vol. 15, issue 2, (347) 376.

[313] *Ibid.* 376.

[314] This principle is often used when extradition is not possible or desirable. In line with this principle, some treaties contain an obligation to 'or extradite, or prosecute' (*aut dedere aut judicare*). C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht in hoofdlijnen, Deel 1: Strafrecht*, Antwerpen-Apeldoorn, Maklu, 2011, 154.

155. It appears that especially the active personality principle could be very useful with respect to the jurisdiction of a TCC. Fortunately, the principle is widely recognized by states.[315] Following the active personality principle, courts of the TCC can assume jurisdiction when a member of the national contingent commits a crime in the host state. If not, universal jurisdiction may provide for the jurisdiction of the TCC nonetheless. However, not many countries accord universal jurisdiction to its courts. Moreover, it is unlikely that a state applies universal jurisdiction whilst not recognizing the active personality principle.[316] If a state does apply universal jurisdiction nonetheless, it will normally only exercise its jurisdiction with regard to a limited amount of grave crimes. The objective territoriality, passive nationality, and protective principle are not relevant with regard to criminal conduct of military peacekeepers.

156. Following the broad application of the active personality principle in national laws, the vast majority of TCCs are normally able to assert jurisdiction over criminal offences committed by its military peacekeepers. Other principles of criminal procedure could nonetheless prevent the application of national criminal law. First of all the conduct in question must be considered a crime under the national criminal law of the TCC. If not, the TCC cannot assume extraterritorial jurisdiction over the misconduct of the military peacekeeper. It is however improbable that the criminal misconduct as discussed in Chapter II does not constitute a crime in a TCC.[317]Another principle that may effect the application of the TCC's criminal law is the 'dual criminality principle'. This principle maintains that a state should only exercise extraterritorial jurisdiction if the conduct in question also constitutes a crime where it was committed.[318]

157. Note that the UN does not require TCCs to prove that they can assume extraterritorial jurisdiction with respect to crimes committed by their military peacekeepers. Hence it is possible that a TCC is simply not *able* to exercise jurisdiction over criminal misconduct by military

[315] Some states do not apply the active personality principle in general but limit the application to certain crimes, or crimes committed in a certain context or by a specific category of nationals (e.g. military personnel). For example, Canadian law provides for extraterritorial jurisdiction in several contexts, including offences committed by Canadian military personnel: National Defence Act, R.S.C. 1985, c. N-5, as amended, ss. 67, 130 and 132, https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-n-5/latest/rsc-1985-c-n-5.html#PART_II_THE_CANADIAN_FORCES_43159 (consultation 15 August 2015); Law and Government Division, International Dimensions of Domestic Criminal Law: Extraterritoriality and Extradition, 14 October 2008, PRB 01-17E, http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0117-e.pdf (consultation 15 August 2015), 2.

[316] The reason for this assertion is that universal jurisdiction goes beyond the active personality principle, since it also applies to foreigners as opposed to the active personality principle, which only applies to nationals.

[317] Art. 7 quinquiens paragraph 2 Model MoU could provide a solution in case a certain act of a military peacekeeper does not constitute a crime under the national criminal law of the TCC. The paragraph asserts that the TCC shall exercise "such disciplinary jurisdiction as might be necessary with respect to all other acts of misconduct committed by any members of the Government's national contingent […] that do not amount to crimes or offences". Para. 7.23 Model Memorandum of Understanding.

[318] M. ODELLO, "Tackling Criminal Acts in Peacekeeping Operations", *Journal of Conflict and Security Law* 2010, vol. 15, issue 2, (347) 370. The dual criminality principle is often used as a prerequisite for extradition. It is less often used however as a prerequisite for exercising of extraterritorial jurisdiction over nationals.

peacekeepers. In other words, the exclusive jurisdiction of the TCC provided for in the Model SOFA can be worth nothing in practice. Although it is important to acknowledge this possibility, one must remember that in general the TCC *will* be able to assume jurisdiction over criminal conduct by military peacekeepers.

For the remainder of this subchapter I will assume that the TCC is able to assert jurisdiction, since this is normally the case.

2.3. Possible problems for exercising jurisdiction

158. The fact that a TCC can assert jurisdiction, does not imply that it will actually prosecute military peacekeepers for their criminal misconduct. Despite the fact that TCCs normally assure the UN that they will exercise jurisdiction in the MoU, they may decide not to prosecute. As noted earlier, the UN cannot use sanctions to enforce the TCC's assurances. The UN is in other words powerless if a TCC does not take actions with respect to accused military peacekeepers. Other issues may also arise with regard to the prosecution of military peacekeepers by the TCC.

2.3.1. Unwilling troop contributing countries

159. It is possible that a TCC simply does not want to prosecute its military peacekeepers. If so, it is likely that the TCC already demonstrated its unwillingness in an earlier stage by letting the UN investigate the allegation. Several factors can make a TCC reluctant to pursue an allegation of criminal misconduct. First of all, it is not easy to prosecute a military peacekeeper. Broadly speaking, the TCC has to look into the allegation, cooperate with the UN and possibly investigate, hold a trial in the TCC, and regularly inform the UN of the progress made. This evidently takes some effort. Furthermore, the TCC may not want to prosecute because it would damage the image of its national contingent and the country in general.

Imagine a case where several Belgian military peacekeepers sexually exploited and abused local women and girls.[319] If allegations are made and the investigation shows that they are well founded, the case will be referred to the Belgian government. In theory, Belgium must then assume its responsibility and forward the case to the appropriate authorities for prosecution. This could however bring a lot of attention to the misconduct of the peacekeepers and subsequently a lot of pressure on the Belgian government. In addition it would be very bad press and damage the image of Belgium and the Belgian military in particular. These considerations could lead a TCC to not prosecute.

[319] This is a fictional example.

160. A problem with regard to the sanctioning of military peacekeepers by TCCs is that there is not much information available. Although TCCs are supposed to regularly report how the case is progressing, not all TCCs do. Furthermore, the Model MoU does not require the TCC to inform the UN why it is not prosecuting a peacekeeper accused of criminal misconduct.[320] Hence one can only guess why a TCC does not prosecute a military peacekeeper.

Nonetheless, several OIOS reports contain information regarding actions imposed on military peacekeepers by TCCs. The annual reports for example, contain information regarding actions taken by TCCs in the preceding year. The following table shows the responses of TCCs in the years 2012 to 2014.

Table 3. Response troop contributing countries 2012-2014[321]

	2012	**2013**	**2014**
Amount of responses with regard to military personnel[1]	11	20	9
- Proceedings abandoned on procedural grounds	/	/	2
- Dismissal	3	4	4
- Action of administrative nature	/	/	3
- Imprisonment	7[2]	10	2
- Other disciplinary measures	2	8	/
- No information on sanction	2	/	/

[1] Military personnel refers to military peacekeepers and military observers. A response can involve multiple peacekeepers.
[2] In 2012, jail terms ranged from 30 to 60 days for 4 personnel and 6 months to a year for 3 personnel. No information available on the years 2013 and 2014.
Source: Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse", years 2012, 2013 and 2014.[322]

The received information shows that the sanctions imposed on military peacekeepers are not very hard. Less than half of the military personnel was sentenced to prison, about a quarter was only dismissed. However, one cannot really infer anything from these numbers because not all TCCs inform the UN on the eventual outcome of allegations. This lack of information and transparency is one of the main problems with regard to the prosecution of military peacekeepers by TCCs.

161. Prince Zeid acknowledged this problem in the 'Zeid Report' in 2005: "troop-contributing countries are often reluctant to admit publicly to acts of wrong doing and consequently lack the

[320] Z. DEEN-RACSMÁNY, "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", *Journal of Conflict & Security Law* 2011, vol. 16, issue 2, (321) 341.
[321] The categories of disciplinary actions vary because of the different categories used in the reports.
[322] General Assembly, Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse" (28 February 2013), *UN Doc.* A/67/766 (2013), 6 para. 15; General Assembly, Report of the Secretary General "Special measures for protection from sexual exploitation and sexual abuse" (14 February 2014), *UN Doc.* A/68/756 (2014), 5 para. 17; General Assembly, Report of the Secretary-General "Special measures for protection from sexual exploitation and sexual abuse" (13 February 2015), *UN Doc.* A/69/779 (2015), 5 para. 16.

will" to prosecute alleged offenders.[323] He proposed to oblige the TCC to forward the case to the appropriate authorities.[324] However, the final text of the Model MoU does not contain such an obligation. There is therefore no certainty whatsoever that a TCC will actually prosecute military peacekeepers. Clearly, this is a serious problem for holding peacekeepers accountable for their criminal misconduct.

2.3.2. Evidence

162. Since the alleged crime occurred in the host state, evidence will be located there. Similarly, victims and potential witnesses are normally nationals of the host state. Hence all the necessary aspects to prosecute a military peacekeeper and substantiate the allegation before court are situated in the host state. This may cause practical problems during the trial, for example with regard to testimonies of victims and/or witnesses. Taking into account that victims and witnesses were involved in a crime committed by a person that was indirectly representing the TCC, it is not improbable that they do not trust the proceedings in the TCC. It may therefore be hard to convince them to testify before a court in the TCC. The language barrier may also be an issue in this regard.

Importantly, the TCC could also face problems with respect to the admissibility of evidence that was gathered during the investigation, since every country has different criminal procedure rules. As such, it is possible that the investigation team did not respect the requirements for gathering evidence, rendering the evidence inadmissible. This problem can particularly occur when the UN conducted the investigation. However, the revised Model MoU aims to solve this problem by requiring that the UN investigation team must contain a representative from the TCC if the TCC provides one.[325]

2.3.3. Disparity

163. The preceding paragraphs demonstrated that there can be significant differences in jurisdiction, capability and willingness of TCCs with regard to the prosecution of military peacekeepers. As a result, military peacekeepers will be sanctioned differently depending on their nationality. This creates a different standard of conduct for military members of the same peacekeeping force. Such an uneven treatment of criminal misconduct by peacekeeping personnel does not send a good signal to the local population and the rest of the world. It gives

[323] General Assembly, A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations (24 March 2005), *UN Doc.* A/59/710 (2005), para. 67.
[324] Z. DEEN-RACSMÁNY, "The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?", *Journal of Conflict & Security Law* 2011, vol. 16, issue 2, (321) 340.
[325] Para. 7.13 Model Memorandum of Understanding.

the impression that peacekeepers are arbitrarily disciplined for committing crimes and not consistently.[326]

2.4. Conclusion

164. The SOFA between the host state and the UN provides for the exclusive jurisdiction of the TCC with respect to any criminal offence committed by a member of its national contingent. A TCC is consequently well placed to adjudicate criminal misconduct of its military peacekeepers. Following the active personality principle, the vast majority of countries can assume jurisdiction and prosecute a military peacekeeper if necessary. TCCs are therefore the ones who can and should hold military peacekeepers accountable for their criminal misconduct. However, it appears that not all TCCs take up their responsibility in this regard.

165. The primary problem is that TCCs do not have to prove that they can and will prosecute military peacekeepers that committed crimes against the local population. The UN basically takes their word for it. If a TCC does not want to prosecute a military peacekeeper it can rather easily decide not to, without repercussions from the UN. In the same vein, TCCs do not always report on the outcome of proceedings. As a result, it is often impossible to find out whether TCCs eventually sanctioned an accused peacekeeper or not.

166. The lack of transparency with regard to actions taken against military peacekeepers is unacceptable. If there would be more clarity on the handling of cases, TCCs might be pressured to act with respect to its military peacekeepers. First of all the UN could reprimand TCCs for not complying with the MoU and urge them to take actions against military peacekeepers accused of criminal misconduct. Considering that the UN heavily depends on TCCs for peacekeeping operations, it is probably hard for the UN to impose actual sanctions on TCCs when they do not prosecute military peacekeepers. However, the public opinion could also pressure TCCs to take actions and ensure that military peacekeepers cannot walk away unpunished. But unfortunately it is very hard to galvanize the public opinion when there is hardly any information on the handling of allegations.

3. International humanitarian law

167. The previous subchapters discussed the possibility of using the national criminal law of the two countries involved, namely the host state and the TCC, to prosecute military peacekeepers accused of criminal misconduct. What this subchapter and the next will do, is determine whether provisions of *international* law can be used to sentence military peacekeepers that committed

[326] This seems to be a legitimate impression unfortunately.

crimes against local civilians. This subchapter starts this 'international section' by examining if international humanitarian law can be used to prosecute military peacekeeping personnel.

Section 3.1 examines the scope of IHL in order to determine whether it contains provisions that can be used to target criminal misconduct by military peacekeepers. Section 3.2 explains the conditions for applying IHL and then examines whether IHL can be applied to criminal misconduct of military peacekeepers. Afterwards, section 3.3 determines who can exercise jurisdiction over crimes committed by military peacekeeping personnel. I end the subchapter by evaluating the application of international humanitarian law in the conclusion.

3.1. Scope of international humanitarian law

168. International humanitarian law or *jus in bello* governs the conduct of belligerent parties during armed conflicts.[327] The content of IHL is divided in two main categories: international armed conflicts (hereafter: IACs) and non-international armed conflicts (hereafter: NIAC). IACs and NIACs are regulated by different rules.[328] Whether a conflict is considered international or non-international mainly depends on the involvement of two or more states.

The main objective of IHL is to protect certain categories of persons during an armed conflict and to regulate the use of inhumane weapons. Two series of treaties are very important in this regard: the Geneva Conventions, which aim at protecting persons that are not or no longer taking part in hostilities; and the Hague Conventions, which mainly target the means and methods of warfare.

169. The provisions of IHL concerning the protection of certain individuals could be useful to enhance the criminal accountability of military peacekeepers. If these provisions protect civilians during an armed conflict, it may be possible to use them as a legal basis to prosecute military peacekeepers that have infringed one of these provisions.[329] The next paragraphs intend to give an overview of provisions that may be applicable to crimes committed by military peacekeepers. I will first consider the provisions regarding NIACs and then turn to IHL provisions that regulate conduct during IACs.

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[327] J. SAURA, "Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations", *Hastings Law Journal* 2006-07, vol. 58, issue 3, (479) 487. International humanitarian law is sometimes also referred to as the 'Law of Armed Conflict' or the 'Law of War'.

[328] Traditionally, there were not a lot of rules with respect to NIACs. However, as more and more conflicts tend to be non-international, NIACs are now also regulated more extensively. An important advance in this regard was the entry into force in 1977 of Additional Protocol II to the Geneva Conventions.

[329] This subchapter only considers aspects and/or provisions of IHL that may be useful to prosecute military peacekeepers. Other issues of IHL will not be discussed, unless they are in some way relevant to the topic of this thesis.

3.1.1. Non-international armed conflicts

170. Common article 3 of the Geneva Conventions asserts that persons taking no active part in the hostilities during NIACs:

> "shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> […]
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;"[330]

171. Article 4 of Additional Protocol II, which also deals with NIACs, elaborates on the humane treatment of persons who do not or no longer take part in hostilities. The second paragraph contains some examples of prohibited acts: "violence to the life, health and physical or mental well-being of persons"; "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".[331]

3.1.2. International armed conflicts

172. The Fourth Geneva Convention deals with the protection of civilians during IACs.[332] Article 27 asserts that protected persons shall at all times be treated humanely. Also, "women shall be protected against any attack on their honor, particular against rape, enforced prostitution or any form of indecent assault".[333] Article 32 prohibits "measures of brutality" by civilian or military agents against protected persons.[334] However, the scope of these articles is rather limited because Article 4 defines 'protected persons' as persons who find themselves "in the hands of persons a Party to the conflict or Occupying Power of which they are not nationals".[335] Moreover, the Convention does not protect a national of a state that is not bound by the Convention.[336] It is consequently not certain that all civilians of the host state fall under the protection of the Fourth Geneva Convention. Luckily, other legal sources may also protect civilians during an IAC. Additional Protocol I to the Geneva Conventions for instance, contains

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330 Art. 3 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949 (hereafter: Fourth Geneva Convention).
331 Art. 4 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), 8 June 1977 (hereafter: Additional Protocol II).
332 Except Article 3 Fourth Geneva Convention, which addresses NIACs.
333 Art. 27 para. 2 Fourth Geneva Convention.
334 Art. 32 Fourth Geneva Convention.
335 Art. 4 para. 1 Fourth Geneva Convention.
336 Art. 4 para. 2 Fourth Geneva Convention.

rules regarding the protection of victims during IACs. Article 76 of the Protocol provides for the protection of women: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."[337] The Protocol also declares that "children shall be the object of special respect and shall be protected against any form of indecent assault".[338]

173. Apart from civilians, IHL also protects prisoners of war. These are basically members of the armed forces that have fallen into the power of the 'enemy'. Importantly, they are only protected during IACs. The main legal source for this protection is the Third Geneva Convention, which provides for the humane and respectful treatment of prisoners of war.[339] This may be relevant since allegations have been made of peacekeepers mistreating prisoners.[340]

3.1.3. Customary rules of international humanitarian law

174. As one may have noticed, the protection afforded by the treaties differs in case of non-international and international armed conflicts. However, numerous rules of IHL have attained the status of customary international law.[341] In 2005, the International Committee of the Red Cross (hereafter: ICRC) finished a study on the customary rules of IHL applicable in international *and* non-international armed conflicts. The study resulted in a list of 161 IHL rules that now constitute customary IHL. Particularly Part V concerning the treatment of civilians and persons hors de combat is relevant in light of this thesis. These rules of customary IHL grant civilians the same level of protection in both categories of armed conflict. Customary IHL rules that are relevant in light of this thesis are for example: humane treatment of civilians and persons

[337] Art. 76 para. 1 Additional Protocol I.
[338] Art. 77 para. 1 Additional Protocol I.
[339] Article 13 of the Third Geneva Convention provides for the humane treatment of prisoners of war: "Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. […] Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited." Article 14 of the Third Geneva Convention provides for the respectful treatment of prisoners of war "Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men. […] ". Art. 13 Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III), 12 August 1949 (hereafter: Third Geneva Convention); Art. 14 Third Geneva Convention.
[340] During the peacekeeping mission in Somalia in 1993, Italian soldiers allegedly "kept prisoners for interrogation tied up in the sun and deprived of water, or given only spicy food to increase their thirst. If they refused to talk, they were subjected to blows, burning cigarettes applied to the soles of their feet, electric shocks to the body, including to the testicles, or were thrown against razor wire fences." J. N. MAOGOTO, "Watching the Watchdogs: Holding the UN Accountable for Violations of International Humanitarian Law by the 'Blue Helmets' ", *Deakin Law Review* 2000, vol. 5, (47) 53.
[341] The list of rules is available at ICRC, War & Law, Treaties and customary law, Customary law, Customary IHL database, Rules, https://www.icrc.org/customary-ihl/eng/docs/v1_rul (consultation 15 August 2015).

hors de combat;[342] prohibition of violence to life of civilians;[343] prohibition of torture, cruel or inhumane treatment and outrages upon personal dignity;[344] and prohibition of rape and other forms of sexual violence.[345]

3.1.4. Conclusion

175. The overview of IHL provisions in the preceding paragraphs demonstrates that military peacekeepers may have infringed several rules of IHL by committing the crimes mentioned in Chapter II. The question that remains however, is whether IHL applies to conduct of military peacekeepers during peacekeeping operations and if so, which provision then apply.[346]

3.2. Application of international humanitarian law

176. Applying IHL provisions to conduct of military peacekeepers entails two steps. First of all, the peacekeepers must be operating in an (international or non-international) armed conflict (section 3.2.1). Second, the rules of IHL have to be applicable to criminal misconduct of military peacekeepers (section 3.2.2).

3.2.1. Is a peacekeeping operations an armed conflict?

177. IHL only applies during an armed conflict. The term armed conflict is therefore of paramount importance. Surprisingly, the term is not defined in any of the treaties. There is however a more or less universally accepted definition of armed conflict, set forth by the 'International Criminal Tribunal for the former Yugoslavia' (hereafter: ICTY) in the Tadic case.[347] The Appeals Chamber of the ICTY ruled that "an armed conflict exists whenever there is resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[348] The first part of the definition refers to IACs, the second part to NIACs.

Important to note, an armed conflict does not require a formal declaration of war or anything similar. It is a pure factual term, used to describe a situation where the hostilities between parties

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[342] ICRC, War & Law, Treaties and customary law, Customary law, Customary IHL database, Rules, Rule 87, https://www.icrc.org/customary-ihl/eng/docs/v1_rul (consultation 15 August 2015).
[343] *Ibid.* Rule 89.
[344] *Ibid.* Rule 90.
[345] *Ibid.* Rule 93.
[346] This subchapter only examines the application of IHL to conduct of military peacekeeping personnel. It is not within the scope of this thesis to determine whether the United Nations itself is subjected to provisions of IHL. To assess the responsibilities and duties of UN under IHL would lead us too far outside the scope of this thesis.
[347] ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A (2 October 1995).
[348] *Ibid.* para. 70.

have reached a certain threshold. The existence of an armed conflict thus solely depends on the concrete facts of the situation.

178. In order to determine whether IHL applies to conduct of military peacekeepers, we must therefore first of all determine whether peacekeeping forces operate in armed conflicts. Importantly, only the *circumstances* in which peacekeeping operations operate will matter in this regard. The UN's classification or description of a particular operation is irrelevant, following the definition of armed conflicts.

179. Since peacekeepers were not allowed to use force in traditional peacekeeping operations, it is not hard to establish that these operations are not armed conflicts. Considering that no violence can be used by peacekeepers in such an operation, there is no armed conflict. As a result, IHL normally does not apply to conduct of military peacekeepers deployed in a traditional peacekeeping operation. The verdict with respect to contemporary peacekeeping operations is unfortunately not as straightforward. As was explained in chapter I, nowadays peacekeepers are often authorized to use force in self-defense.[349] This self-defense may also include the protection of the mandate of the mission. If peacekeepers resort to such force during their mission, they may become involved in an armed conflict.

180. Because of the inherent factual nature of the term armed conflict, it is impossible to make a general statement regarding the armed conflict status of peacekeeping operations. One cannot simply discard the suggestion that contemporary peacekeeping missions operate in armed conflicts, but one cannot assert that *all* peacekeeping missions operate in armed conflicts either. In practice, an assessment of the specific situation surrounding the peacekeeping operation will be necessary in order to ascertain whether a particular peacekeeping force is operating in an armed conflict.

3.2.2. Application of international humanitarian law to UN peacekeeping personnel

181. We have now established that it is possible that a peacekeeping operation is involved in an armed conflict. However, this does not necessarily mean that IHL also applies to conduct of military peacekeepers. There used to be some debate regarding this matter.

3.2.2.1. Can international humanitarian law apply to a UN force?

182. The main argument against the application of IHL with respect to peacekeeping personnel was that the UN peacekeeping force acted as a law-enforcer, not a belligerent. The subsequent

[349] *Supra* 13 para. 30.

hostilities consequently did not possess the character of war.[350] Furthermore, the application of IHL would "presuppose a degree of equality between the warring parties, whereas no such equality could exist between" a UN peacekeeping force acting as law-enforcer and the forces of an aggressor.[351]

However, Greenwood contends that these arguments are not convincing. The first one does not hold up because the existence of an armed conflict and the subsequent application of IHL depend on the actual hostilities taking place, not on the characterization of those hostilities. Whether the hostilities possess the 'character of war' is thus irrelevant. The second argument is unconvincing because the rules of IHL apply equally to all the parties of a certain conflict, without making a distinction between aggressor and victim.[352] Similarly, the motivation behind the actions of a peacekeeping force is irrelevant when assessing the existence of an armed conflict.

183. The discussion was largely settled when the Secretary-General issued a bulletin on the observance of IHL by UN forces in 1999.[353] Section 1 of the Bulletin states:

> "The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence."[354]

This leads to the conclusion that IHL *can* apply to members of a UN peacekeeping force.

3.2.2.2. Provisions of international humanitarian law applicable to criminal misconduct of military peacekeepers

184. Even though we now know that IHL also applies to a peacekeeping force, it remains unclear which exact provisions will apply to misconduct of military peacekeepers. Several sources are relevant in this regard.

i. Secretary-General's Bulletin 1999

185. A first source is the Secretary-General's Bulletin of 1999. It contains several principles and instructions regarding conduct of peacekeeping personnel during an armed conflict. These

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350 C. GREENWOOD, "International Humanitarian Law and United Nations Military Operations", *Yearbook of International Humanitarian Law* 1998, vol. 1, (3) 14.
351 *Ibid.* 14.
352 *Ibid.* 7.
353 Secretary-General's Bulletin: Observance by United Nations forces of international humanitarian law (6 August 1999), *UN Doc.* ST/SGB/1999/13 (1999) (hereafter: Secretary-General's Bulletin 1999).
354 Para 1.1 Secretary-General's Bulletin 1999.

include the treatment of civilians, women and children in particular.[355] These instructions are binding on members of the UN force since they are issued by the Secretary-General in his capacity as 'commander in chief'.[356] However, the application of the Bulletin is limited. First, it is only binding because of the Secretary-General's capacity as commander in chief. It can therefore not serve as a legal basis for the prosecuting military peacekeepers. Second, the scope of the Bulletin seems to be narrower than IHL usually prescribes. It provides for the application of the principles to the "extent and for [the] duration of the engagement" of the UN forces.[357] According to the ICTY in the Tadic case:

> "International humanitarian law applies from the initiation of such armed conflicts and extends *beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved*. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[358] (emphasis added)

Comparing these two, the application of IHL as set forth by the ICTY is clearly broader than the Secretary-General's interpretation. Thus, it is probable that the application of 'traditional' IHL is wider than the principles set out by the Secretary-General's bulletin. Considering the limitations of the Bulletin, it is necessary to examine whether other sources apply to criminal misconduct of military peacekeepers.

ii. Customary international humanitarian law

186. Besides the Secretary-General's instructions, military peacekeepers involved in armed conflicts are also bound by customary international humanitarian law.[359] The customary rules established by the ICRC can therefore be used against those military peacekeepers, provided that the crimes they committed fall under one of customary international law provisions.[360]

iii. National laws of the troop contributing country

187. In addition to the Secretary-General's Bulletin and customary IHL, military peacekeepers may also be bound by IHL through the application of laws of their respective TCC. A peacekeeping force is composed of national contingents from states that are all party to the

[355] Section 7 Secretary-General's Bulletin 1999.
[356] D. SHRAGA, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", *American Journal of International Law* 2000, vol. 94, issue 2, (406) 409.
[357] Para. 1.1 Secretary-General's Bulletin 1999.
[358] ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A (2 October 1995), para. 70.
[359] D. SHRAGA, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", *American Journal of International Law* 2000, vol. 94, issue 2, (406) 409.
[360] *Supra* 77 para. 174.

Geneva Convention, and mostly also party to the Additional Protocols. Following Article 1 of the Conventions and Article 1 of the Protocols, these countries are obliged to make sure that "members of their armed forces respect the provisions of the Conventions and the Protocols 'in all circumstances'".[361] According to Greenwood, this obligation includes the situation where a state's armed forces are serving in a force under UN command and control.[362] This view is supported by section 2 of the Secretary-General's Bulletin, which states that its provisions do "[not] replace the national laws by which military peacekeepers remain bound throughout the operation".[363] As a result, military peacekeepers are bound by the IHL treaties to which their respective TCC is a party. A downside of using TCCs to apply IHL is that, because not all TCCs have ratified IHL treaties to the same extent, different members of the same force could be subject to different rules.[364]

3.3. Jurisdiction with regard to international humanitarian law

188. An important aspect that has not been discussed yet is who can exercise jurisdiction over military peacekeepers that infringed IHL provisions. An extensive study is not required to answer this matter, since section 4 of the Secretary-General's Bulletin clearly states that members of the military personnel of a United Nations force are subject to prosecution in their national courts.[365] In addition, the Model SOFA and Model MoU both provide for the exclusive jurisdiction of the TCC with respect to any crime that might be committed by military peacekeepers during their assignment.[366] The ultimate responsibility for the prosecution of military peacekeepers thus rests with the TCC.

3.4. Conclusion

189. The assessment of IHL has revealed two major problems regarding the application of IHL to criminal misconduct of military peacekeepers. First, IHL does not per se apply to conduct of all military peacekeepers, since a peacekeeping force does not necessarily operate in an armed conflict.[367] As a result, peacekeepers are governed by different rules depending on the situation in

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[361] C. GREENWOOD, "International Humanitarian Law and United Nations Military Operations", *Yearbook of International Humanitarian Law* 1998, vol. 1, (3) 18.
[362] *Ibid.* 17.
[363] Section 2 Secretary-General's Bulletin 1999.
[364] Customary international humanitarian law on the other hand would evidently apply to all members of the force equally, since it applies regardless of nationality.
[365] Section 4 Secretary-General's Bulletin 1999.
[366] Art. 47(b) Model SOFA: "in respect of any criminal offences"; Art. 7 quinquiens Model Memorandum of Understanding: "exclusive jurisdiction in respect of any crimes or offences".
[367] Considering the requirements for the application of IHL, it would seem that most peacekeeping forces generally not operate in armed conflicts. However, as noted earlier, whether or not IHL applies depends on the factual circumstances in which peacekeepers operate.

which they operate.[368] This different treatment is evidently not beneficial when trying to combat the present-day impunity of military peacekeepers.

Second, only the courts of the TCC can exercise jurisdiction with respect to infringements of IHL by military peacekeepers. Thus, just like was the case in the previous subchapter, the result ultimately depends on the TCC. This begs the question whether the application of IHL has any added value. The TCC might as well apply its own criminal law instead of IHL provisions. Whatever the case, an application of IHL by the TCC is likely to encounter the same problems as the application of national criminal law by the TCC.

4. International criminal law

190. One may have noted that the contemporary legal framework concerning criminal misconduct of military peacekeepers entrusts the TCCs with a lot of responsibilities. So much even that the eventual outcome of the allegations of misconduct heavily depends on the willingness of the TCC to investigate and prosecute alleged offenders. Since all peacekeepers are evidently attached to different TCCs, this creates a situation where the conduct of peacekeepers is governed by different sets of rules. Imagine a case where a Belgian, Dutch and French military peacekeeper rape and sexually exploit a 15-year-old girl while deployed on a peacekeeping operation.[369] Under the current framework, it is possible that one of them is convicted by his country of nationality and has to go to jail, that another one is repatriated but not prosecuted, and that the last one is still a peacekeeper deployed on the same mission.[370] What I intend to illustrate with this example is that the present framework contains no assurances of a consistent approach towards criminal misconduct of military peacekeepers. A possible solution for this problem may be an international tribunal that adjudicates crimes committed by military peacekeepers. Such an international body could ensure a consistent treatment of all the alleged offenders. Furthermore, it would help reduce the current dependency on TCCs with respect to the prosecution of military peacekeepers.

191. An existing international body that may be able to carry out such a task is the International Criminal Court (hereafter: ICC), located in The Hague. It is possible that the ICC is a suitable forum to prosecute military peacekeepers that are accused of committing crimes against the local population. This subchapter will look into this possibility and determine whether the ICC could

[368] Moreover, even if IHL applies to a certain peacekeeping operation, it is possible that military peacekeepers from the same force are governed by different IHL provisions. *Supra* 83 para. 189.
[369] This is a fictional example. Unfortunately however, it is not an improbable example.
[370] Obviously, the problem would not be that one of them got convicted while the other one got away, the problem is that two of them got away. In real life, chances are that all three of them would have walked away unpunished.

bring military peacekeeping personnel that committed crimes during their deployment to justice.[371]

I will start of by examining how the ICC functions. I will primarily focus on aspects of the ICC that are relevant in light of this thesis, and especially the Court's jurisdiction. However, other issues that may hinder the ICC to prosecute military peacekeepers will also be discussed. In the conclusion I combine all the gathered information and determine whether the ICC could prosecute military peacekeepers and if it could, whether that would improve the current situation.

4.1. The International Criminal Court (ICC)

4.1.1. Establishment

192. The ICC was established in 2002 by the 'Rome Statute of the International Criminal Court' (Rome Statute).[372] In order to be considered a member state of the ICC, a state must have signed and ratified the Statute.[373] Many countries participated in the negotiations and signed the resulting agreement that established the ICC. Presently, 123 countries are State Parties to the Rome Statute.[374] However, a considerable amount of countries are still not member of the ICC, including rather important countries such as China, Russia and the United States.[375] This could definitely impact the capability of the ICC to prosecute military peacekeepers. This largely depends on the rules governing the jurisdiction of the Court, which will be discussed in the following paragraphs.

4.1.2. Jurisdiction

193. In order to enable the ICC to adjudge in a certain matter, a case must first be brought before the Court. As is often the case with international tribunals, the Rome Statute contains certain thresholds in this respect. There are only three ways for a case to reach the ICC: a referral of a situation by a State Party, a referral of a situation by the UN Security Council, or the

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[371] Up to this day, the International Criminal Court has not investigated or prosecuted military peacekeeping personnel for alleged criminal misconduct towards the local population. I make this statement based upon my research (30 July 2015).

[372] The Rome Statute was signed on 17 July 1998, and entered into force 1 July 2002.

[373] The deadline for signing the Rome Statute was 31 December 2000. After expiry of the deadline, the only way states can become a member to the ICC is by joining in one step (signing first and ratifying afterwards is thus no longer possible).

[374] ICC, Assembly of States Parties, States Parties to the Rome Statute, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (consultation 15 August 2015).

[375] The People's Republic of China has signed nor ratified the Statute; Russia signed the Rome Statute 13 September 2000 but has not ratified it; the US signed 31 December 2000 but on 6 May 2002 informed the UN Secretary-General that the US no longer intended to become State Parties. Under Secretary of State for Arms Control and International Security John R. Bolton, *International Criminal Court: Letter to United Nations Secretary-General Kofi Annan*, 6 May 2002, http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm (consultation 15 August 2015).

initiation of an investigation by the Prosecutor (*proprio motu)*.[376] Consequently, a private person is not able to independently initiate proceeding before the Court, only the UN, the Prosecutor or a State Party can. Be that as it may, even these three cannot refer every crime to the ICC. The Rome Statute clearly sets certain limits in this regard.

4.1.2.1. Jurisdiction *ratione materiae*

194. The jurisdiction of the ICC is limited to four crimes, listed in Article 5 of the Rome Statute: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[377] We will however not discuss the crime of aggression since the Court cannot yet exercise its jurisdiction over the crime and because misconduct of peacekeepers does not seem to fall under the definition that was adopted.[378] Obviously, this limitation of crimes greatly reduces the Court's jurisdiction. The question is whether criminal misconduct of military peacekeeping personnel falls under one of these categories. This matter will be further discussed in section 4.2.1.

4.1.2.2. Universal jurisdiction?

195. If the ICC would have universal jurisdiction, it could adjudge every crime that falls under its *ratione materiae* competences, no matter where the crime was committed or by whom.[379] However, the ICC does not have universal jurisdiction since Article 12 of the Rome Statute clearly limits the Court's jurisdiction. If a case is referred to the ICC by a State Party or if the Prosecutor initiated the investigation, the Court can only exercise its jurisdiction in two situations.[380] Firstly, the Court has jurisdiction when the state on the territory of which the incident occurred is a State Party (referred to as the 'territorial state'). This follows from the territorial jurisdiction of a state. The second situation Article 12 refers to, is when the person accused of the crime is a national from a State Party (referred to as the 'state of nationality). This follows from the active personality principle, according to which a state can exercise its jurisdiction when the alleged

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376 Art. 13 Rome Statute of the International Criminal Court. See Article 14 regarding the referral by a State Party; Article 15 regarding the *proprio motu* investigation by the Prosecutor.
377 Art. 5 para. 1 Rome Statute of the International Criminal Court.
378 During the negotiations, states could not reach an agreement concerning the definition of the crime of aggression, which led to Article 5, paragraph 2: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." In 2010, several countries reached an agreement regarding the definition and defined a crime of aggression as follows: "1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."
379 T. ONGENA, "Een internationaal strafhof: kan Sisyphus eindelijk rusten?", *Panopticon* 1999, (230) 235.
380 Art. 12 Rome Statute of the International Criminal Court.

offender of the crime is a national.[381] Hence the Court can only assume jurisdiction if the incident occurred on a State Party's territory or if the alleged offender's home country is a State Party. It is not necessary that bot preconditions are met, one suffices.[382] Importantly, there are no such preconditions in case of a referral by the UN Security Council. Consequently, the Security Council could refer an incident where a Russian committed a crime on US territory, even though both the US and Russia are not members of the ICC.[383] The subsequent consequences for UN peacekeeping operations will be discussed in section 4.2.2.

4.1.2.3. Subsidiary jurisdiction

196. An important aspect of the ICC's functioning is its complementary nature with respect to national criminal jurisdictions.[384] The Court does not have a compulsory jurisdiction, unlike the Yugoslavia and Rwanda Tribunals.[385] Its subsidiary role is also reflected in Article 17 of the Rome Statute, according to which:

> "The Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;"

The Court itself can determine whether a state is unwilling or unable to prosecute.

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381 The active personality principle is also referred to as the nationality principle. *Supra* 69 para. 154.
382 It is interesting to know that if a non-member State is one of the countries listed in Article 12 (the territorial state or the state of nationality), that State can accept the Court's jurisdiction with respect to the crime in question. If this were the case, the Court *can* exercise its jurisdiction over that crime. Art. 12 para. 3 Rome Statute of the International Criminal Court.
383 Obviously, this is a very simplistic example, considering the required gravity of the crime. Such a referral would be rather unlikely in real life, since both countries are permanent members of the Security Council and could veto such a referral.
384 Art. 1 Rome Statute of the International Criminal Court; para. 10 of the Preambule to the Rome Statute of the International Criminal Court.
385 T. ONGENA, "Een internationaal strafhof: kan Sisyphus eindelijk rusten?", *Panopticon* 1999, (230) 237. See Article 9 (2) ICTY-Statute: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." and Article 8 (2) ICTR-Statute: "The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda."

4.2. Obstacles for prosecution of military peacekeepers by the ICC

197. The introduction on the ICC's functioning already displayed several elements that may hinder the prosecution of military peacekeepers by the Court. These and others will be discussed in the following sections. I will first determine whether misconduct of military peacekeepers, as defined in Chapter II, falls under the jurisdiction *ratione materiae* of the Court (section 4.2.1).[386] Subsequently, I will look into possible problems relating to the fact that not every country is a member of the ICC (section 4.2.2). Section 4.2.3 discusses problems that may arise with regard to evidence of crimes committed by military peacekeepers. The last issue I look into relates to how cases are brought before the Court (section 4.2.4).

4.2.1. Jurisdiction *ratione materiae*

198. The ICC currently only has jurisdiction with respect to the most serious crimes, namely the crime of genocide, crimes against humanity, and war crimes. The following paragraphs intend to ascertain whether the criminal misconduct of military peacekeepers, as discussed in Chapter II, constitutes one of these crimes.

4.2.1.1. The crime of genocide

199. Article 6 of the Rome Statute defines genocide as any of the acts listed in the Article, "committed with [the] intent to destroy, in whole or in part, a national, ethnical, racial or religious group". Misconduct by peacekeepers clearly does not correspond to this description. Therefore, the criminal misconduct by military peacekeepers cannot be considered genocide.[387]

4.2.1.2. Crimes against humanity

200. Article 7 of the Rome Statute contains a list of acts that may constitute a crime against humanity. The list contains six categories of sexual offences: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence of comparable gravity.[388] Clearly, some of these acts may be relevant with regard to the SEA of the local population by military peacekeepers.[389] However, these acts must be "committed as part of a

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[386] Importantly, every time I mention the term 'misconduct', I refer to misconduct by peacekeepers as was discussed in Chapter II.

[387] Evidently, if the misconduct of a group of peacekeepers would be the targeting of members of a specific group (e.g. an ethnical group) with the intent to destroy that group, this would be considered genocide. However, misconduct in this thesis refers to misconduct as in Chapter II.

[388] Art. 7 para. 1 (g) Rome Statute of the International Criminal Court. The Office of the Prosecutor issued a 'Policy Paper on Sexual and Gender-Based Crimes' in June 2014.

[389] For an analysis of the constitutive elements of these crimes, see M. O'BRIEN, "Sexual Exploitation and Beyond: Using the Rome Statute of the International Criminal Court to Prosecute UN Peacekeepers for Gender-based Crimes", *International Criminal Law Review* 2011, vol. 11, issue 4, 803-827.

widespread or systematic attack directed against any civilian population, with knowledge of the attack".[390]

201. The wording of Article 7 indicates that the attack does not need to be widespread *and* systematic, one of both suffices. It is not required that each act, for example rape, is widespread or systematic, as long as the act is part of a widespread or systematic attack against a civilian population.[391] However, the definition of 'attack against any civilian population' in Article 7, paragraph 2 (a) limits the scope of the crime. Article 7 defines such an attack as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." Hence the crime needs to be part of a state or organizational policy. This is exactly where the shoe pinches. What prevents the application of Article 7 is the fact that the peacekeepers' misconduct is not part of an organized effort intended to harm the civilian population.[392] As Harrington says:

> "However widespread the abuses are, it is highly unlikely that there was a specific U.N. protocol or plan to perpetrate sexual abuses on the local populations of the mission areas; it is also improbable that there was a specific plan in place at the mission level by U.N. staffers and administrators to do the same thing. The ICC statute […] [provides] no basis for prosecution of peacekeepers for war crimes or crimes against humanity unless the abuses were committed as an overall part of a plan to target the local population for abuse […]."[393]

Thus, it is highly unlikely that the criminal misconduct of military peacekeepers could lead to the ICC prosecuting them for crimes against humanity.

4.2.1.3. War crimes

202. The last way for the ICC to assume jurisdiction over military peacekeepers is to prosecute them for committing war crimes. First of all, a war crime requires the existence of an armed conflict. As discussed in the previous subchapter, it is possible that military peacekeepers operate

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[390] Art. 7 para. 1 Rome Statute of the International Criminal Court.
[391] ICTY, *Prosecutor v. Dusko Tadic*, Appeals Judgement, Case No. IT-94-1-A (15 July 1999), n. 311 to para. 248, citing ICTY, *Prosecutor v. Mile Mrksic et al.*, "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", Trial Chamber I, Case No. IT-95-13-R61 (3 April 1996), para. 30. "However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above."
[392] F. LEWIS, "Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress", *Southern California Interdisciplinary Law Journal* 2014, vol. 23, issue 3, (595) 612.
[393] A. R. HARRINGTON, "Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing them in the Future", *ILSA Journal of International & Comparative Law* 2005, vol. 12, issue 1, (125) 141-142.

in an armed conflict.[394] However, this is definitely not always the case. In case the peacekeeping operation *is* involved in an armed conflict, there are still other conditions to fulfill.

Article 8 of the Rome Statute asserts that "The Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes".[395] Importantly, the words 'in particular' indicate that such a plan or policy or a large-scale commission is only a suggestive threshold.[396] Hence a war crime does not require a supporting policy or plan.

Article 8 of the Rome Statute also contains a list of acts that are considered war crimes. These acts include, in case of an international armed conflict: "committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions".[397] The same list applies in case of a non-international armed conflict.[398] Misconduct by military peacekeepers, namely SEA of locals, can definitely fall under one of these acts.

203. Crimes committed by military peacekeeping personnel during their assignment can constitute a war crime. However, the possible application is rather narrow in this regard, since the military peacekeeper in question must have been operating in an armed conflict at the time of the misconduct.

4.2.1.4. Conclusion

204. The analysis of the crime of genocide, crimes against humanity and war crimes has shown that there is very little chance that the ICC could exercise jurisdiction with respect to criminal misconduct of military peacekeepers. Nonetheless, I will examine whether there are other issues that may also prevent the prosecution of military peacekeepers by the ICC. I will, in other words, continue this chapter on the assumption that the misconduct of military peacekeepers *does* accord to one of the crimes over which the ICC has jurisdiction. A first reason for this hypothesis is that State Parties could always decide to add an extra crime to Article 5, for example the crime of 'sexual exploitation and abuse'.[399] Furthermore, it is interesting to discover other problems with regard to the prosecution by the ICC in order to prevent similar problems in the future. This will

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[394] *Supra* 78 section 3.2.
[395] Art. 8 Rome Statute of the International Criminal Court.
[396] T. ONGENA, "Een internationaal strafhof: kan Sisyphus eindelijk rusten?", *Panopticon* 1999, (230) 243.
[397] Art. 8, para. 2 (b) (xxii) Rome Statute of the International Criminal Court.
[398] The only difference is that any other form of sexual violence in case of non-international armed conflicts must also constitute "a serious violation of article 3 common to the four Geneva Conventions". Art. 8 para. 2 (e) (v) Rome Statute of the International Criminal Court.
[399] Following Articles 121 and 123 of the Rome Statute, State Parties can add crimes to the list in Article 5.

be useful information when discussing possible solutions to improve the current lack of accountability.[400]

4.2.2. Involvement of non-State Parties

205. The fact that not every country is a State Party to the Rome Statute may cause problems considering Article 12 of the Statute. Following Article 12, the Court can only exercise its jurisdiction with respect to crimes committed by a military peacekeeper if the host state or the TCC is a State Party.[401] Importantly, an exception is made for the referral of a case by the UN Security Council. The referral by the Security Council will not be part of the subsequent analysis, in order to keep things clear.[402] Thus it seems that if the host state or the TCC is a State Party, the ICC can assume jurisdiction. However, Articles 16 and 98 of the Rome Statute further complicate the situation.

4.2.2.1. Article 16 of the Rome Statute

206. Following Article 16 of the Rome Statute, the UN Security Council can request the Court not to commence or proceed with an investigation or prosecution for a period of 12 months. Heavily pressured by the United States,[403] the Security Council used its power under Article 16 and adopted Resolution 1422 in July 2002.[404] In this resolution, the Security Council requested that the ICC "if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise".[405] As a result, the ICC could not prosecute peacekeepers from non-

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[400] *Infra* Chapter V.

[401] The host state is the state on whose territory the alleged crime was committed (territorial state). The TCC is the state whose national is accused of the crime (state of nationality).

[402] This exception will not be repeated every time I mention the preconditions in the following paragraphs, in order to keep things understandable. This definitely does not mean this exception should be forgotten, one must keep in mind that the Security Council can always refer a case to the ICC.

[403] The US had threatened to use its veto against the renewal of the mission in Bosnia and Herzegovina (UNMIBH). In the beginning of July 2002 the US did veto a proposal that would have renewed the mission until 31 December 2002, but the Council eventually agreed to extend the deadline of the renewal, first until 3 July, then until 15 July. This ultimately led to the adoption of Resolution 1422. N. JAIN, "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court", *The European Journal of International Law* 2005, vol. 16, issue 2, (239) 241.

[404] Resolution 1422 (2002) by the United Nations Security Council (12 July 2002), *UN Doc.* S/RES/1422 (2002).

[405] Para. 1 Resolution 1422 (12 July 2002). It is worth mentioning the fact that there was considerable debate concerning the legality of the Article 16 resolutions adopted by the Security Council. Although I will not elaborate on this discussing, for more information: B. MACPHERSON, "Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings", *ASIL Insights* 2002, vol. 7, issue 9, http://www.asil.org/insights/volume/7/issue/9/authority-security-council-exempt-peacekeepers-international-criminal (consultation 15 August 2015) or N. JAIN, "A Separate Law for Peacekeepers: The Clash between the

members, even if the host state *was* a State Party to the Rome Statute. Resolution 1422 thus basically afforded peacekeepers from countries that were not State Parties to the Rome Statute immunity from prosecution by the ICC for a period of 12 months. The Security Council also expressed its intention to renew this request for further 12-months periods for as long as necessary, which it eventually only did in 2003.[406] Hence Article 16 currently does not influence the Court's jurisdiction. However, it is still in the Security Council's power to adopt a resolution similar to Resolution 1422 if it wants to.

4.2.2.2. Article 98 of the Rome Statute

207. Another provision that may affect the ICC's jurisdiction with respect to military peacekeeping personnel is Article 98 of the Rome Statute. Following Article 86 (General obligation to cooperate) and more specifically Article 89 (Surrender of persons to the Court) of the Rome Statute, a State Party must comply when the ICC requests that State Party to surrender a person. However, Article 98 contains two exceptions to a State Party's obligations in this regard. If a request for surrender from the Court would force a State Party to act inconsistently with its obligations under international law or international agreements, the Court may only proceed with such a request if it first obtains the cooperation of the involved third state.[407] Paragraph 1 deals with a county's "obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State". This exception is not relevant with regard to military peacekeepers since military peacekeepers do not enjoy state or diplomatic immunities.[408]

208. Article 98, paragraph 2 of the Rome Statute *is* relevant. It asserts that:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its *obligations under international agreements pursuant to which the consent of a sending State is required* to surrender a person of that State to the Court,

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Security Council and the International Criminal Court", *The European Journal of International Law* 2005, vol. 16, issue 2, 239-254.

406 Para. 2 Resolution 1422 (12 July 2002). Resolution 1487 (2003) by the United Nations Security Council (12 June 2003), *UN Doc.* S/RES/1487 (2003). To my knowledge, the Council has not adopted similar resolutions since then. The Security Council probably did not authorize a third extension of the immunity in 2004 because of the Abu Ghraib prison abuse scandal. S. A. NOTAR, "Peacekeepers as perpetrators: sexual exploitation and abuse of women and children in the Democratic Republic of the Congo", *American University Journal of Gender, Social Policy & the Law* 2006, vol. 14, issue 2, (413) 414.

407 Art. 98 Rome Statute of the International Criminal Court.

408 Moreover, there is some debate about the usefulness of Article 98 (1) in general, following the decision of the ICC Pre-Trial Chamber on 12-13 December 2011 in the case of the non-cooperation of Malawi and Chad in the arrest and surrender of Sudan's President Omar Al Bashir. For more information: J. M. IVERSON, "The Continuing Functions of Article 98 of the Rome Statute", *Goettingen Journal of International Law* 2012, vol. 4, issue 1, 131-152 and D. TLADI, "Cooperation, Immunities, and Article 98 of the Rome Statute: The ICC, Interpretation, and Conflicting Norms", *Proceedings of the Annual Meeting - American Society of International Law* 2012, vol. 106, issue 1, 307-308.

unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."[409] (emphasis added)

Applied to peacekeeping operations, this article thus contends that, if a host state concluded an agreement pursuant to which the consent of the TCC is required for the surrendering of a military peacekeeper to the ICC, the Court cannot request that surrender unless it first obtains the cooperation of the TCC. The United States has entered into more than a hundred of these bilateral agreements, in order to make sure that their peacekeepers cannot be handed over to the ICC by a host state.[410] Nonetheless, there is some debate regarding the legality of these agreements.

209. Opponents of these so-called 'Article 98 agreements' have two objections. The first one is that Article 98, paragraph 2 was only intended to cover existing agreements or agreements that extended agreements that existed before the entry into force of the Rome Statute.[411] If that were true, the bilateral agreements concluded by the US after the entry into force would definitely be illegal. However, the wording of Article 98, paragraph 2 does not clearly exclude future agreements, *ergo* the different opinions and debate. Another objection is that a State Party that signs an Article 98 agreement with a non-State Party fails to meet its obligations under the Rome Statute. The line of reasoning is that the object and purpose of the Rome Statute is to ensure prosecution and punishment of the most serious of crimes.[412] They contend that a State Party is therefore not allowed to conclude agreements that make the surrender to the ICC dependent on the approval of another state, especially if that other state is not a State Party. Others suggest that Article 98 agreements are not inconsistent with the Rome Statute, provided that the agreements include provisions to ensure appropriate investigation and, if necessary, prosecution. This way the agreement would not lead to impunity.[413]

210. One can only conclude that it is currently unclear whether an Article 98 agreement could legally obstruct the surrender of military peacekeepers upon request from the ICC. Whatever the case, one must keep in mind that such agreements exist and can potentially prevent the surrender of military peacekeepers.

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[409] Art. 98 para. 2 Rome Statute of the International Criminal Court.
[410] 11 December 2006, the U.S. State Department reported 102 'Article 98 agreements'. For more information: Coalition for the International Criminal Court, Factsheet, Status of US Bilateral Immunity Agreements (BIAs), http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf (consultation 15 August 2015).
[411] D. FLECK, "Are Foreign Military Personnel Exempt from International Jurisdiction under Status of Forces Agreements?", *Journal of International Criminal Justice* 2003, vol. 1, issue 3, (651) 655; S. ZAPPALA, "The reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements", *Journal of International Criminal Justice* 2003, vol. 1, issue 1, (114) 122.
[412] Para. 4 of the Preambule to the Rome Statute of the International Criminal Court.
[413] S. ZAPPALA, "The reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements", *Journal of International Criminal Justice* 2003, vol. 1, issue 1, (114) 127.

4.2.2.3. Conclusion

211. We now know that the procedural provisions of the Rome Statute only allow the ICC to exercise its jurisdiction over crimes committed by military peacekeepers in a limited number of situations. Firstly, the Court only has complementary jurisdiction. Secondly, the Court is limited by Article 12 of the Rome Statute. It can therefore only assume jurisdiction if the host state or the TCC is a State Party. However, agreements concluded under Article 98, paragraph 2 may limit the Court's ability to prosecute military peacekeepers even further. Therefore, the Court can only be certain that its request for surrender of a military peacekeeper will be successful if the TCC is a State Party.

4.2.3. Evidence

212. In order to prosecute a military peacekeeper, a court needs to see evidence that substantiates the allegations made against him or her. This rather obvious fact may constitute another problem with regard to the prosecution by the ICC. Besides practical problems due to distance and language barriers, some of the Rome Statute's procedural rules may also hinder a proper functioning of the Court.

213. As noted above, victims of misconduct by military peacekeepers do not always find their way to the authorities to report what happened. Sometimes this is a consequence of inability or because they are not even aware of the fact that peacekeepers are not allowed to commit crimes against them and that there are authorities to which they can report misconduct by peacekeepers. Furthermore, it may be hard for victims to come forward, especially if the misconduct involves SEA. Moreover, it may be hard to convince victims to testify at the ICC in Den Hague. The same goes for witnesses that may be vital for building a case against a military peacekeeper. The Prosecutor would have to persuade these people to leave their home, family and friends in order to get the peacekeeper convicted. In addition, the possible language barrier may scare off victims or witnesses.

214. On top of these practical problems, the Rome Statute only provides the Prosecutor with a limited ability to compel witnesses to testify before court.[414] The main problem is that the Statute does not contain a penalty when a State Party fails to comply with a request of the ICC.

[414] A. R. HARRINGTON, "Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing them in the Future", *ILSA Journal of International & Comparative Law* 2005, vol. 12, issue 1, (125) 142-143.

Consequently, a State Party can ignore the Court's request to cooperate rather easily.[415] The only 'punishment' is that the Court may then "refer the matter to the Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council".[416] To say the least, this does not really empower the ICC Prosecutor in his or her search for evidence. Without good evidence, the Prosecutor will not be able to make a case against the peacekeeper accused of criminal misconduct.

4.2.4. Power of the Prosecutor

215. There are three ways a case can be brought before the ICC: referral by a State Party, referral by the Security Council or through independent actions of the Prosecutor.[417] If the Prosecutor has initiated investigations *proprio motu*, the Pre-Trial Chamber acts as a filter and determines whether there is a reasonable basis to proceed with an investigation. If so, it authorizes the commencement of the investigation.[418] The Rome Statute bestows the Prosecutor with a considerable amount of powers regarding the investigation and possible prosecution of alleged crimes.[419] As a result, the Prosecutor can easily influence the eventual outcome of a case. As the Prosecutor can be from any country, including the home country of the peacekeeper, this could lead to situations where the impartiality of the Prosecutor is questioned. Even if such accusations would be entirely unjustified, the fact that questions may be raised does not benefit the further course of the proceedings.

216. With regard to the policy of the Prosecutor, the Office of the Prosecutor in 2003 formally declared that "as a general rule, the [Office of the Prosecutor] should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for humanitarian crimes."[420] Hence the Prosecutor's policy does not seem to point towards the prosecution of peacekeepers.[421]

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[415] F. LEWIS, "Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress", *Southern California Interdisciplinary Law Journal* 2014, vol. 23, issue 3, (595) 613.
[416] Art. 87 para. 7 Rome Statute of the International Criminal Court.
[417] Art. 13 Rome Statute of the International Criminal Court.
[418] Art. 15 Rome Statute of the International Criminal Court. The Pre-Trial Chamber's assessment is legal and is not politically influenced.
[419] See Part V (Investigation and prosecution) and more specifically Article 53 of the Rome Statute of the International Criminal Court. Harrington notes that "the primary power of the court in getting a case to trial lies with the Prosecutor, who has much more power than his prosecutorial counterparts in many other countries". A. R. HARRINGTON, "Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing them in the Future", *ILSA Journal of International & Comparative Law* 2005, vol. 12, issue 1, (125) 142.
[420] Office of the Prosecutor (ICC), *Paper on some policy issues before the Office of the Prosecutor*, September 2003, http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf (consultation 15 August 2015), 7.
[421] For more information on how the discretion of the Prosecution may prevent the prosecution of peacekeepers by the ICC, see M. O'BRIEN, "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers

Therefore, it is unlikely that, even if the Court could exercise jurisdiction, the Prosecutor would initiate an investigation regarding criminal misconduct by military peacekeepers.[422]

4.3. Conclusion

217. Although an international tribunal such as the ICC seems like an excellent forum to prosecute military peacekeepers, an examination of the conditions set out by the Rome Statute clearly showed that it is currently improbable that the ICC can prosecute military peacekeepers for criminal misconduct.[423] The main reason for this is that the crimes committed by military peacekeepers, how horrendous and shocking they may be, only fall under one of the three crimes over which the ICC has jurisdiction, war crimes. Moreover, the application of war crimes to misconduct of military peacekeeping personnel is rather narrow. Nonetheless, I examined whether other issues would also prevent the Court to prosecute. This analysis provided useful information with regard to problems that may arise when using an international tribunal to prosecute military peacekeepers.

218. Apart from the high threshold regarding crimes, prosecution by the ICC would also be problematic because of the amount of countries that are not State Party to the Rome Statute. Considering the rules that govern the Court's jurisdiction, this would necessarily lead to a situation where the ICC cannot prosecute peacekeepers whose TCC is a non-State Party. Hence the ICC would not be able to guarantee an equal treatment of all peacekeepers. As one may remember, this equal treatment was initially one of the reasons to support an international tribunal such as the ICC.

219. Furthermore, two other issues came up during the assessment. First, the Rome Statute does not ensure that State Parties will comply with a request for cooperation. Consequently, it may be hard to gather sufficient evidence to properly substantiate a case against a military peacekeeper. Second, the amount of responsibilities of the ICC Prosecutor can lead to a situation where he is very powerful. Especially if peacekeepers from the same country are involved, this might raise question regarding the impartiality of the proceedings before the Court.

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by the International Criminal Court: The Big Fish/Small Fish Debate and the Gravity Threshold", *Journal of International Criminal Justice* 2012, vol. 10, issue 3, 525-546.

[422] On the other hand, the Office of the Prosecutor issued a Policy Paper on Sexual and Gender-based Crimes in June 2004, which may increase the attention towards SEA. Office of the Prosecutor (ICC), *Policy Paper on Sexual and Gender-based Crimes*, June 2014, http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (consultation 15 August 2015).

[423] I make this statement based on my assessment in the previous paragraphs.

220. Although the ICC is presently not an adequate forum to prosecute military peacekeepers, the assessment of the ICC has provided useful information.[424] We can use this information when we try to find solutions for the current lack of accountability of military peacekeepers in Chapter V.

5. Conclusion

221. The previous subchapters show that it is not easy to hold military peacekeepers criminally accountable for criminal misconduct. The host state is generally unable to act because of the exclusive jurisdiction of the TCC. Regardless of that exclusive jurisdiction clause, the host state cannot provide a good solution to the problem of impunity because of concerns regarding the adequacy of its judicial system. Although some host states may have an adequate judicial system, capable of safeguarding human rights, not *all* host states can guarantee a fair trial. Host state jurisdiction is therefore not a proper solution to the problem of impunity.

222. Following its exclusive jurisdiction over criminal offences committed by military members of its national contingent, the TCC is capable of prosecuting military peacekeepers for crimes committed during a peacekeeping operation, provided that it can exercise its extraterritorial jurisdiction. It appears however that not all TCCs are willing to take actions against their own peacekeepers. In addition they hardly inform the UN of actions taking with respect to accused peacekeepers. The lack of transparency is worrying and makes it impossible to check whether peacekeepers are eventually punished for their crimes or not.

223. I therefore examined whether international law could in any way enhance the criminal accountability of military peacekeepers. Regrettably, at this moment neither international humanitarian law nor international criminal law is capable of providing a real solution for the problem of impunity of military peacekeepers.

224. In conclusion, the only (somewhat) viable option to hold a military peacekeeper accountable is prosecution by the TCC. This requires a TCC to act when a member of its national contingent is accused of criminal misconduct. However, not all TCCs take up their responsibility in this regard. Regrettably, the current legal framework does not contain any tools that can be used to force TCCs to take measures against accused peacekeepers. The result is that many military peacekeepers are not punished for their crimes and can possibly even continue their 'career' as a peacekeeper.

[424] As noted earlier, in theory the provisions of the Rome Statute can be altered in order to make the prosecution of military peacekeepers possible. However, such a change is not on the agenda of the ICC at the moment.

The current legal framework is in other words not capable of effectively holding military peacekeeping personnel accountable for their criminal misconduct.

V. ENHANCING THE CRIMINAL ACCOUNTABILITY OF MILITARY PEACEKEEPING PERSONNEL

225. The previous chapters established that the current legal framework governing peacekeeping operations cannot ensure that military peacekeeping personnel are held accountable for criminal misconduct. Since problems are there to be solved, this chapter intends to determine which adjustments can enhance the criminal accountability of military peacekeepers. Obviously there are many ways to address a problem of this extent, and it is not always easy to figure out which way is the best. I will nonetheless try and provide an overview of the options that are both achievable and promising in my opinion. The actions presented in this chapter are thus definitely not the only possibilities for enhancing the criminal accountability of military peacekeepers.

Although some of the solutions presented in this chapter have already been considered in previous chapters, I mention them here again in order to provide a coherent overview of ways to address the lack of criminal accountability of military peacekeeping personnel.

226. Subchapter one looks into the relationship between the peacekeeping operation and the local population and how the UN should try to ameliorate their contact. The second subchapter discusses several improvements regarding the organization of the peacekeeping force. The third subchapter explains how I would handle allegations of criminal misconduct by military peacekeepers.

1. Relationship between the local population and the mission

227. The local population is obviously a key factor in the criminal misconduct of military peacekeepers. The victims of the crimes are locals and the damage caused to them by peacekeepers may affect them for the rest of their lives. Local women and girls often become victims of SEA, transactional sexual relations in particular, because of the dire situation in the host state. In absence of an adequate judicial and policing system, there is no one to protect them and offering sexual favors may be the only way to earn some money. In an ideal world, the best way to reduce SEA of locals would be solving the problems in the host state and providing legitimate work opportunities for women. The world is not ideal unfortunately, and hoping for short-term improvements in host states is probably naïve. Addressing certain aspects concerning the local population can nonetheless help improve the accountability of military peacekeepers.

228. First of all the local population needs to know the standards of conduct exist and are applicable to military peacekeepers. It is imperative that the local population realizes that the UN

strongly forbids military peacekeepers to exploit and abuse locals. The UN also needs to ensure that locals are aware of the reporting mechanisms for SEA and that women and girls actually use them. Although the UN is already addressing this issue, the OIOS Evaluation Report of 2015 indicates that there is still work to be done. Interviews with locals in Haiti (MINUSTAH) revealed that only 7 interviewees knew about the UN policy prohibiting SEA, whilst 231 individuals admitted to transactional sexual relationships with peacekeeping personnel.[425] Not a single interviewee was aware of the existing reporting mechanisms or the hotline.[426] There is clearly a lot of room for improvements with regard to informing the local population.

229. An important aspect of informing the local population is that people have to see that allegations are truly investigated and that peacekeepers are sanctioned for committing crimes. If people notice that military peacekeepers are punished for their criminal misconduct, locals will realize that it is actually useful to report incidents. More reporting of incidents by locals will in turn lead to less impunity of military peacekeepers.

2. Addressing problems in the peacekeeping force

230. Since the UN never managed to conclude an agreement under Article 43 of the Charter, there is no international standing army or police force waiting to be deployed when necessary. When the UN authorizes a peacekeeping operation, it needs to find countries that are willing to contribute peacekeeping personnel. A peacekeeping force thus contains several contingents from different TCCs. As noted above, this makes it very hard to enforce the same rules and standards of conduct on all the members of the peacekeeping force. With regard to military peacekeepers this is even harder because TCCs retain a certain amount of power over their military contingent, including the exclusive jurisdiction over their criminal misconduct. Regardless of these issues, I believe a couple of changes with regard to the peacekeeping force could improve the conduct of military peacekeepers.

2.1. Vague policy

231. The current UN policy strongly discourages consensual sexual relationships between UN personnel and 'beneficiaries of assistance'.[427] According to the 2015 OIOS Evaluation Report, to many people involved in peacekeeping operations it is not clear what this exactly means in theory

[425] The OIOS Evaluation Report does not state how many people were interviewed. Nonetheless, considering that 231 individuals admitted to transactional sexual relations with peacekeeping personnel, 7 is an shockingly now number.
[426] OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 21 para. 47.
[427] Para. 3.2 (d) Secretary-General's Bulletin 2003.

and in practice.[428] The phrase 'strongly discourages' is indeed rather ambiguous. This vague prohibition combined with the fact that missions regularly distribute condoms to mission personnel to prevent HIV transmissions, sends a conflicting message to peacekeepers.[429] The UN therefore urgently needs to clarify its policy concerning consensual relationships between peacekeeping personnel and locals.

2.2. Lack of female military peacekeeping personnel

232. Another aspect that needs changing is the predominant masculine composition of the peacekeeping force, and in particular military members of the peacekeeping force. In 2014, women only constituted three percent of military personnel. As noted in the Zeid Report, an increased presence of women in missions would promote an environment that discourages SEA of local women and children. It would facilitate contact between peacekeepers and vulnerable groups within the local society and enhance the chances of gaining the trust of the local population.[430] In addition it could change the basic attitude of the peacekeeping force. Although countries obviously cannot force women to join the army and go on peacekeeping missions, each country should at least try to persuade as many women as possible. The UN needs to urge every TCC to do so.

3. Handling allegations of criminal misconduct

233. The analysis carried out in the previous chapters revealed that there are still significant problems with regard to the investigation and prosecution of allegations of criminal misconduct by military peacekeepers. I believe the UN needs to change the way it handles these allegations. A first step in this regard is changing how the UN investigates allegations of criminal misconduct. In the same vein it is also necessary to alter the prosecution of military peacekeepers, albeit it will not be easy to implement such a change.

234. The hard thing about changing the current rules is that TCCs have to agree with changes regarding the investigation or prosecution of military peacekeeping personnel. It is unlikely that a TCC will easily hand over the control over the investigation and prosecution of military members

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[428] OIOS, Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations (15 May 2015), IED-15-001, 23 para. 54-56.
[429] The Zeid Report asserts that the distribution of condoms "may create an impression, at least in the minds of some peacekeeping personnel, of an official "zero tolerance" policy coexisting with an unofficial policy to the contrary". General Assembly, A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations (24 March 2005), *UN Doc.* A/59/710 (2005), 19 para. 44; A. R. HARRINGTON, "Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing them in the Future", *ILSA Journal of International & Comparative Law* 2005, vol. 12, issue 1, (125) 136.
[430] General Assembly, A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations (24 March 2005), *UN Doc.* A/59/710 (2005), 18 para. 43.

of its national contingent. The UN cannot really force them to do so either, considering that countries *voluntarily* contribute peacekeeping personnel. The UN will nonetheless be able to negotiate a legal framework because TCCs also benefit from participating in peacekeeping operations.[431] Countries may for instance have ideological interests in promoting international peace and security. A peacekeeping operation can also serve the economic interests of a TCC by stabilizing bordering states.[432] In addition peacekeeping operations provide valuable experiences to the soldiers of the TCC.[433] Last but not least, TCCs receive about one thousand US dollars per month for every soldier they contribute.[434] The negotiation power of TCCs should therefore not be overestimated.

All in all, the UN must try to persuade TCCs to change the rules governing military peacekeepers without losing their contributions. This implies that the adjustments proposed in this subchapter need to be acceptable for TCCs.

235. An important aspect of my proposal is an increased involvement of the UN. I therefore suggest the establishment of a bureau within the UN that is responsible for handling allegations of misconduct by peacekeeping personnel. Since this central office is crucial in the new investigation and prosecution procedures, I will first discuss the office in section 3.1. Section 3.2 covers how I would change the investigation procedure. Last but not least, section 3.3 explains how I would alter the prosecution of military peacekeepers in order to enhance the criminal accountability of military peacekeepers.

3.1. Central office regarding Allegations of Misconduct by Peacekeepers (CAMP)

236. An issue that keeps coming back with regard to investigations and prosecution is that TCCs do not always inform the UN on the progress made regarding the allegations. The information gained from TCCs that do cooperate is consequently less valuable because one cannot really infer anything from incomplete numbers and figures. Making sure that each TCC provides

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431 F. LEWIS, "Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress", *Southern California Interdisciplinary Law Journal* 2014, vol. 23, issue 3, (595) 620-621.

432 *Ibid.*

433 *Ibid.*

434 "Peacekeeping soldiers are paid by their own Governments according to their own national rank and salary scale. Countries volunteering uniformed personnel to peacekeeping operations are reimbursed by the UN at a standard rate, approved by the General Assembly, of a little over US$1,028 per soldier per month." United Nations Peacekeeping, Financing peacekeeping, http://www.un.org/en/peacekeeping/operations/financing.shtml (consultation 12 August 2015). Although 1000 US dollar may not seem that significant from our 'Western perspective', note that a great deal of the countries that contribute troops are not as 'rich' as European countries or the United States. The ten countries that contribute the most military troops are, in descending order: Ethiopia, Bangladesh, Pakistan, India, Rwanda, Nepal, China, Ghana, Burkina Faso, Indonesia. United Nations Peacekeeping, Resources, Troops and police contributors, http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml (consultation 15 August 2015).

information would enable the UN to ascertain which TCC is not taking up their responsibility. Furthermore, it would provide invaluable information to assess whether the strategy to target criminal misconduct of military peacekeepers works in practice. I therefore believe that the UN needs to take certain matters in its own hands, especially with regard to the investigation. In order to do that, the UN needs a strong central office that coordinates all the issues regarding allegations of misconduct by peacekeeping personnel, including military peacekeepers. Although such a central office could also coordinate allegations regarding misconduct by other categories of peacekeeping personnel, I will only focus on how it could operate with regard to criminal misconduct by military peacekeepers.

237. The Central office regarding Allegations of Misconduct by Peacekeepers (hereafter: CAMP) would comprise of four departments.[435] Department one would be responsible for investigating allegations of misconduct by peacekeepers (Investigation Department). Department two would contain a board of legal experts that are capable of adequately reviewing decisions of the TCC with regard to the prosecution of military peacekeepers (Review Board). A third task of CAMP would be to create a database where all the information regarding allegations is stored. This information would include reports, communication with involved parties and all other relevant aspects of each allegation (Database Department). The fourth department would be responsible for monitoring progress and maintaining contact with TCCs, including asking for updates when necessary and handling the press (Monitoring and Communication Department).

238. The Monitoring and Communication Department could play a very important role in changing the attitude of TCCs. By cleverly distributing press releases concerning criminal misconduct by military peacekeepers, it can pressure TCCs to take actions against accused individuals.[436] Of course these press releases have to respect the privacy of the individuals involved, but this would not prevent the Monitoring and Communication Department from revealing for example that three Belgian military peacekeepers are being accused of criminal misconduct. Public opinion could then play a very important role and urge countries to take up their responsibility. In the same way the public opinion could pressure countries to support the necessary changes to the legal framework. Admittedly, using the public opinion is not the 'cleanest' way to trigger change, but it might be a very effective one.

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[435] I gave the proposal a name and an acronym in order to simplify further referrals to the coordinating office. Obviously the name does not matter at all; what matters is how I would structure CAMP and how I would change the investigation and prosecution procedures.

[436] A. R. HARRINGTON, "Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing them in the Future", *ILSA Journal of International & Comparative Law* 2005, vol. 12, issue 1, (125) 148.

239. The four departments obviously have to work together and must strive to eliminate criminal misconduct by peacekeepers. I will further elaborate on the tasks and responsibilities of the departments in the following sections. Note that CAMP would take over several tasks from the Conduct and Discipline Unit. The CDU would however retain other responsibilities such as the UN Strategy for the prevention of SEA, including awareness raising and reporting mechanisms, and providing remedial assistance to victims. In my proposal, CAMP would only assume responsibilities with regard to the handling of allegations of misconduct, albeit the information from the database could obviously be used for other purposes as well.

3.2. Investigation

240. A swift, impartial and thorough investigation into each allegation is indispensable for holding military peacekeepers accountable. It is also crucial that the gathered evidence is admissible in court. As was demonstrated in previous chapters, there are currently several problems in this regard. I believe that two major adjustments to the investigation procedure could solve many problems.

3.2.1. Independent investigation

241. The first adjustment I propose is that TCCs are no longer responsible for conducting the investigation. I believe that an independent task force, more specifically an investigation team from the Investigation Department of CAMP, should carry out the investigation.[437] The investigation team would consist of skilled investigators, individuals with an expertise in SEA, and persons that are experienced in dealing with the local population, in particular local women and girls. An investigation by such a team ensures promptness, impartiality and proficiency.

242. When the investigation is finished, the investigation team writes an extensive report on its findings and concludes whether the allegation is substantiated or not (investigation report). In any case, the Investigation Department forwards the investigation report to the governments of the TCC and host state. Since it would not be necessary to wait for the TCC, the Investigation Department could immediately initiate an investigation if the allegation is substantiated. This way there would be no more delays in the investigation and thus less chance of evidence disappearing. Furthermore an independent investigation team ensures an impartial investigation into allegations of criminal misconduct by military peacekeepers.

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[437] F. LEWIS, "Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress", *Southern California Interdisciplinary Law Journal* 2014, vol. 23, issue 3, (595) 617-618.

243. An independent investigation team may however cause problems regarding the admissibility of gathered evidence in court. Potential problems of inadmissibility can be prevented by making sure that at least one member of the investigation team is aware of the rules regarding admissibility of evidence in the TCC. Each TCC should therefore assign at least two nationals with knowledge of its criminal procedure to the Investigation Department. These persons have to make sure that all the gathered evidence is admissible in the court of the TCC.

I believe it would also be very useful if the investigation team could consult an overview of the criminal procedure requirements in a TCC (e.g. how to interview victims, witnesses or accused peacekeepers). The UN should therefore, when concluding the Memorandum of Understanding, require each TCC to submit an overview of criminal procedure rules applicable in the TCC.[438] The Database Department could process the information received from TCCs.[439]

3.2.2. Cooperation from troop contributing countries

244. The investigation team can only investigate properly if it receives cooperation from the TCC involved. TCCs ought to grant the investigation team access to the information it requires. The TCC must instruct the commander and members of its military contingent to cooperate with the investigation and to share required documentation and information. If national laws of the TCC prevent such cooperation, the TCC should change the provisions in question. The cooperation of the contingent should in other words no longer be subject to applicable national laws.[440]

3.3. Prosecution of accused military peacekeeping personnel

245. I believe it is unrealistic to take away the TCC's responsibilities with regard to the prosecution of military peacekeepers. They would simply not accept such a change. However, they might agree to change the exclusive jurisdiction of TCCs into a primary jurisdiction. With primary jurisdiction I mean a situation where a TCC has the right to assume jurisdiction over criminal misconduct of its military peacekeepers, provided that the TCC complies with several conditions. If a TCC does not comply, another judicial body assumes jurisdiction.[441] This requires several changes to the procedure that is currently in place.

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[438] This could be added to the Memorandum of Understanding as a prerequisite for the deployment of troops.
[439] The Database Department could even carry out an analysis of the criminal procedure of all TCCs and establish the minimum requirements for each investigation.
[440] This requires an adjustment of Article 7 quater of the Model MoU, which states that the cooperation of the commander and members of a TCC's contingent is subject to applicable national laws. Para. 7.14 Model Memorandum of Understanding.
[441] The idea of using primary and subsidiary responsibilities comes from the rules governing the ICC and from a solution proposed in W. J. DURCH, K. N. ANDEWS and M. L. ENGLAND, *Improving Criminal Accountability in United*

3.3.1. Basic assurances

246. First of all the TCC should prove that its judicial system meets the human rights standards required by international law (e.g. fair trial). TCCs also have to assure the UN that they can and will exercise jurisdiction over criminal offences of military peacekeepers. I call these the 'basic assurances'. The current Model MoU already provides for such assurances, but the difference is that in my proposal the UN actually checks whether TCCs act according to their promises and assurances. If a TCC cannot provide such assurances or does not comply, it forsakes its primary jurisdiction over the case and an international judicial body assumes jurisdiction. If a TCC for instance assured the UN that its criminal procedure is in accordance with the required human rights standards and it turns out that this is not true, the TCC will not have jurisdiction with regard to allegations of criminal misconduct by its military peacekeepers. The international judicial body will then be able to exercise its jurisdiction.

3.3.2. Procedure

247. The starting point of the prosecution procedure is when the investigation report is sent to the governments of the host state and the TCC by the Monitoring and Communication Department of CAMP. If the report concludes that the allegation is substantiated and the TCC complies with its 'basic assurances', the TCC is requested to exercise its jurisdiction. The TCC then has to forward the report to the authorities that are competent to decide whether the military peacekeeper will be prosecuted or not. If these authorities decide that he or she should be prosecuted, the appropriate authorities of the TCC will initiate the necessary proceedings for prosecution. The TCC has then asserted its primary jurisdiction and the eventual outcome of the case depends on the judgment in the TCC's judicial system. This is in other words the 'end' of the prosecution procedure. Importantly, the TCC has to inform the Monitoring and Communication Department of CAMP about the eventual judgment on the case.

If the TCC's authorities however, decide not to initiate the prosecution of the accused military peacekeeper, they have to substantiate their decision in a report (prosecution report). The TCC has to deliver that report to the CAMP, more specifically to the Review Board. The moment the TCC decides to not prosecute and sends prosecution report to the Review Board, it waives its primary jurisdiction over the allegation in question.[442]

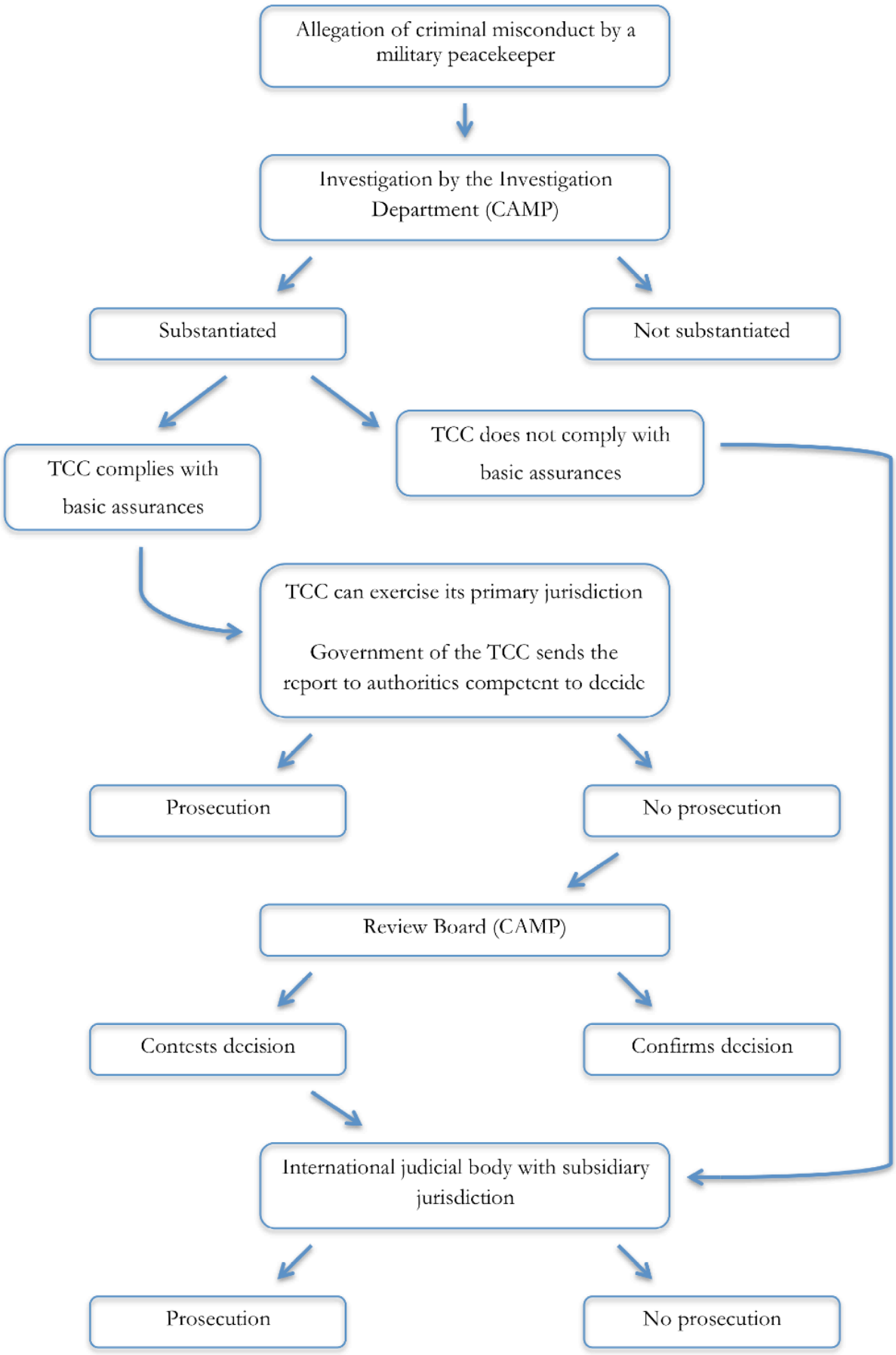
Nations Peace Operations, Washington DC, Stimson Center, 2009, 46-65. Although the initial idea is the same, the eventual development of the concept is very different.

[442] The inspiration for this scheme is the '*aut dedere aut judicare'* principle. *Supra* 69 note 314.

The Review Board consists of legal experts capable of reviewing decisions of the TCC with regard to the prosecution of military peacekeepers. The Review Board evaluates the negative decision of the TCC and determines whether the decision was justified considering the facts of the case. If the Review Board confirms the decision to not prosecute, the allegation has reached its final stage and the military peacekeeper cannot be prosecuted anymore. In the event that the Review Board contests the TCC's decision to not prosecute, it will forward the case to the international judicial body with subsidiary jurisdiction. This international tribunal will assess the reports (investigation and prosecution report) and independently determine whether it will assert its jurisdiction with regard to the allegation. The tribunal decides whether it will prosecute the accused military peacekeeper or not. This is the last stage of the procedure for prosecuting the military peacekeeper. The decision of the tribunal is therefore final.

248. The diagram on the following page depicts the new procedure for handling an allegation of criminal misconduct by military peacekeepers, from start to finish. It clarifies how the procedure would work. An aspect of the procedure that I did not include in the diagram is the TCC's and the international judicial body's duty to inform the Monitoring and Communication Department of the eventual decision on the case. Whenever a decision is been made, they have to immediately inform the Monitoring and Communication Department.

Diagram 1. Handling of an allegation of criminal misconduct by a military peacekeeper



3.3.3. Rationale of the new prosecution procedure

3.3.3.1. Subsidiary jurisdiction of an international judicial body

249. I propose a primary jurisdiction of TCCs because I believe that a TCC should be given the possibility to take up its responsibility and prosecute military peacekeepers that committed crimes.[443] The procedure should however prevent that the sanctioning of military peacekeepers ultimately depends on the willingness of the TCC. An international judicial body therefore acts as a safeguard and assumes jurisdiction in case the TCC is unwilling or unable to prosecute.

That international judicial body should be capable of assuming jurisdiction with regard to criminal misconduct by all military peacekeeping personnel. This would require the recognition and consent of all TCCs and host states. Ideally all Member States of the UN would conclude a treaty that establishes a new international court with the specific responsibility to adjudicate allegations of criminal misconduct by peacekeepers. This is unfortunately rather unlikely.[444]

250. Another option is that an existing forum extends its jurisdiction to include criminal misconduct by military peacekeepers.[445] I believe the International Criminal Court would be a suitable forum to assume such subsidiary jurisdiction, albeit this would require several adjustments to the Rome Statute. As was discussed in Chapter IV, the ICC cannot assume jurisdiction with regard to criminal misconduct of military peacekeepers at this moment. I therefore propose the adoption of a provision that provides for the subsidiary jurisdiction of the ICC with regard to criminal misconduct by military peacekeepers. The provision should incorporate two aspects.

The first aspect is the definition of criminal misconduct by military peacekeepers. The definition should take into account national criminal laws and provide an acceptable description and enumeration of criminal conduct that is universally deemed unacceptable.[446] Second, the provision has to set forth the procedure for exercising subsidiary jurisdiction, which was discussed in section 3.3.2. This also entails developing the procedure for prosecution in case the ICC decides to exercise its jurisdiction.[447]

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[443] As noted above, I also doubt whether TCCs would agree to hand over the jurisdiction to another forum.
[444] I think it is unlikely because it was already hard to establish the ICC.
[445] That forum could possibly extend its jurisdiction to criminal misconduct to other categories of peacekeeping personnel as well, but since this is not the topic of this thesis I will not discuss that possibility.
[446] I do not elaborate on the exact wording of the definition of the criminal misconduct since I believe this is not the main issue here.
[447] I do not elaborate on the exact arrangement of the procedure for prosecution by the international judicial body since I believe this is not the main issue here.

251. Importantly, it would not be necessary that all countries agree to the provision in advance. It would suffice if the provision in question were acceptable for TCCs and host states, because countries can agree to the new procedure in their Memorandum of Understanding respectively Status of Forces Agreement with the UN. This way even countries that are not a State Party to the ICC can comply with the new procedure. Formulating such a provision is undoubtedly easier said than done. The UN, and the Secretary-General in particular, have a very important role to play in this regard. The Secretary-General has to lead the negotiations and persuade TCCs that these changes are absolutely necessary.[448]

3.3.3.2. Review Board

252. The Review Board basically acts as a filter between the TCC and the international judicial body. I believe such a filter is necessary to reduce the workload of the international judicial body. If the Review Board takes out the cases where the TCC made the right decision, the international judicial body does not have to lose time by considering those allegations.

3.3.4. Potential weaknesses

253. No solution is ever perfect, and my prosecution procedure is (unfortunately) not an exception. It is very important to discuss the weaknesses of the procedure. If we know what the potential problems are, we can try to mend them by taking supporting measures.

3.3.4.1. Is justice seen to be done?

254. A problem with letting the TCC or an international body prosecute the accused peacekeeper is that the local population may not be aware of the fact that peacekeepers are sanctioned for committing crimes against the local population. If the host state would have jurisdiction, the handling of allegations would be more visible for locals. It is therefore very important that locals are informed of the handling of allegation. In this regard the UN must require both the TCC and the international body to inform the Monitoring and Communication Department of CAMP about the eventual outcome of the case.

The Monitoring and Communication Department has the very important task to inform the local population of how allegations are being handled. There are many ways to communicate to locals, and the Department should as many as possible (e.g. press releases, information campaigns, making reports public). Importantly, the communication should also involve UN personnel informing locals face to face of how what is being done about the allegations. This could

[448] Persuading the host states would probably not be the problem, since the changes do not 'worsen' their situation. It will undoubtedly be more difficult to convince TCCs.

improve the relationship between the mission and locals and consequently lead to more reporting of incidents.

3.3.4.2. Tardiness of the procedure

255. Because of the various steps in the new procedure it is possible that it will take a while before the actual proceedings start, especially if the international body assumes jurisdiction. This delays the prosecution and sanctioning of the accused peacekeeper, which is obviously not a good thing. I believe the delay is however justified because these steps enhance the criminal accountability of military peacekeepers.

Promptness is above all important with regard to gathering evidence, which is ensured by the adjustments to the investigation procedure. Furthermore, the new prosecution procedure only contains new steps in the event that the TCC does not prosecute and the Review Board has to make an assessment of the TCC's decision. In the current procedure the decision of the TCC to not prosecute would be final. In fact the procedure is therefore not delayed but rather extended in order to create an additional possibility to prosecute peacekeepers.

3.3.4.3. Long-term solution

256. Taking into account that an international judicial body must be able to take jurisdiction and that it will not be easy to persuade TCCs to change the current procedure for prosecuting military peacekeepers, it would probably take some time to carry out the changes I propose. The changed prosecution procedure is therefore in essence a long-term solution. The fact that it might take some time to execute a solution should however not stop the UN from carrying out the necessary changes. It can hardly be surprising that there is no quick and easy solution for a complicated and serious problem such as the impunity of military peacekeepers. Using the press to galvanize the public opinion could be a very effective way to encourage and persuade states to make the necessary adjustments.

In the meantime, the UN can start carrying out other changes that require less time, such as improving the reporting mechanisms, raising awareness among locals, and even changing the investigation procedure.[449]

[449] Although this would exclude the TCC from the investigation, I think TCCs would be more worried about giving up their exclusive jurisdiction for prosecuting military peacekeepers than about who carries out the investigation. In addition there are many advantages to using an independent investigation team, advantages that even TCCs cannot ignore.

4. Conclusion

257. Since the lack of criminal accountability of military peacekeeping personnel has many causes, there are also numerous actions that could help solve the problem. It is however very hard to identify the best way to address the impunity of military peacekeepers. In this chapter I have discussed several promising options that may be acceptable for the parties involved in peacekeeping operations.

258. The objective of any change to the current framework is to prevent military peacekeepers from committing crimes. Awareness and a clear policy towards misconduct by military peacekeepers are indispensable in order to achieve proper conduct. Although the UN has already taken measures to this effect, it can still ameliorate its policy regarding SEA. The current 'strongly discourage' stance on consensual sexual relationships with local women is too ambiguous. In addition TCCs and the UN must strive to engage more women in peacekeeping operations.

259. Gaining the trust of the local population is extremely difficult when at the same time members of that population are being abused and exploited by peacekeepers. It is therefore crucial that the UN informs the local population of the standards of conduct applicable to peacekeepers and illustrates how military peacekeepers are held accountable for committing crimes against locals. In the same vein it is extremely important that locals know and trust the reporting mechanisms for criminal misconduct of peacekeepers. Peacekeepers can only be punished for committing crimes if victims or witnesses report what happened. The UN should therefore increase its efforts to inform the local population of applicable standards of conduct, reporting mechanisms and sanctioning of peacekeepers. The UN is not dependent on other parties for taking the necessary actions in this regard, so there are no excuses for inertia.

260. The most important change to the current framework is how I would handle allegations of criminal misconduct by military peacekeeping personnel. Firstly an independent investigation team ensures a quick, impartial and proficient investigation of allegations. TCCs should not intervene and will only act once the investigation team has finished its report. TCCs nonetheless remain primary responsible for sanctioning accused military peacekeepers. Provided that they meet certain requirements, TCCs can still independently prosecute military members of their national contingent. An important change however is the introduction of an international judicial body with subsidiary jurisdiction. This court must prevent that the unwillingness or inability of TCCs to take actions against military peacekeepers leads to their impunity.

261. Some of the improvements I proposed will not be accepted easily by TCCs. By cleverly using the public opinion and by pressurizing TCCs, the UN should nevertheless be able to realize

these adjustments. The UN should continue to emphasize the importance of holding military peacekeepers accountably, not only for the victims and local populations but also to restore the reputation of the UN and to protect the viability of future peacekeeping operations.

CONCLUSION

262. In the 1990s allegations of criminal misconduct by peacekeeping personnel occasionally found their way to the press. Although everyone was shocked by these news reports, people basically assumed that such behavior was not common. These reports did not suggest a problem of widespread criminal misconduct by peacekeeping personnel. When in 2004 several newspaper articles reported misconduct by peacekeeping personnel in the Democratic Republic of the Congo, things started to change. The criminal misconduct of peacekeepers in the DRC received massive attention and the UN authorized a full investigation. Even though only six allegations were ultimately fully substantiated, interviews with local women and girls indicated the widespread nature of sexual activities between peacekeepers and the local population, including sexual exploitation and abuse. In the wake of these revelations the UN produced several reports and new regulation in order to combat criminal misconduct of peacekeeping personnel, including the Zeid Report in 2005 and a revised Model Memorandum of Understanding in 2007.

Despite the considerable efforts of the UN, reports show that peacekeepers continue to commit crimes against the local population. The vast majority of these crimes involve the sexual exploitation and abuse of local women and girls. Besides harming the victims themselves, these crimes affect the entire local population and hinder the recovery of the host state. In addition they damage the image of the UN, and UN peacekeeping in particular.

263. The main objective of this thesis was to ascertain how military peacekeepers can be held criminally accountable for committing crimes against the local population. An extensive analysis of the regulatory framework revealed that there are several problems in this regard.

The current regulation on criminal misconduct of military peacekeepers enables the prosecution of a military peacekeeper. If an allegation is made, the troop contributing country or the UN initiate an investigation and when the allegation is substantiated, the troop contributing country can take actions against the accused peacekeeper.[450] It is in other words *possible* to hold military peacekeepers accountable, but the problem is that the current framework does not *ensure* that military peacekeepers are held accountable. Problems range from underreporting of incidents and a lack of transparency to the arbitrary prosecution of peacekeepers by troop contributing countries.

[450] Provided that the TCC can assume extraterritorial jurisdiction over crimes committed by its nationals, more specifically military peacekeeping personnel, on foreign territory.

Troop contributing countries currently hold the reins when a military peacekeeper is accused of criminal misconduct. They are primarily responsible for investigating the allegation and have exclusive jurisdiction over any crime or offence that might be committed by a military member of their national contingent. The criminal accountability of military peacekeepers therefore ultimately depends on the troop contributing countries. If a troop contributing country is unable or unwilling to take actions, the accused peacekeeper is not sanctioned.[451] This is the main problem for holding military peacekeepers criminally accountable under the current regulation.

264. This thesis tried to find a way to solve these problems and enhance the criminal accountability of military peacekeeping personnel. Importantly, these solutions have to be acceptable for all parties involved in peacekeeping operations, in particular the troop contributing countries and the UN.[452] It is therefore essential to suggest adjustments that enhance the criminal accountability of military peacekeepers and also respect the sovereignty of troop contributing countries.

The proposals in Chapter V are intended to meet these criteria. Some of the adjustments are challenging and will probably not be accepted easily. Especially the new procedure for prosecuting military peacekeepers is bound to encounter protest from troop contributing countries. However, I believe the new procedure is reasonable and should be acceptable for the parties involved. Taking into account the difficulty of implementing the required changes, it would nonetheless take some time before the new regulation could take effect. It is thus unlikely that a new prosecution procedure can enhance the criminal accountability of military peacekeepers on short notice.

It is therefore important to note that this thesis also suggests alterations that can address the present problems more promptly, such as improving the relationship with local populations and making sure that locals are aware of the standards of conduct and of existing reporting mechanisms. These are measures the UN can take immediately, since they do not require the approval of troop contributing countries or host states. Even the implementation of a new investigation procedure where an independent team of experts carries out the investigation should be achievable within reasonable time.[453]

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[451] The UN can only repatriate the military peacekeeper involved and bar him or her from future peacekeeping operations. Only the TCC can take disciplinary measures.

[452] The UN cannot unilaterally impose regulations on TCCs since they voluntarily contribute peacekeeping personnel. The conditions of their contributions are therefore agreed upon in an agreement between the UN and the TCC, namely the Memorandum of Understanding. The host state also has to agree to changes of the legal framework in the SOFA between the UN and said state. The cooperation of host states is however less problematic since these adjustments would not really affect their current situation.

[453] Although the changes to the investigation procedure also require the consent of the TCCs, I believe these changes are less invasive. Furthermore, I think that TCCs are more protective of their powers with regard to the prosecution

In addition, the UN needs to establish a central office that is responsible for dealing with allegations of criminal misconduct by peacekeepers. This office would coordinate the handling of allegations from the moment an incident is reported until the accused peacekeeper is brought to justice. This ensures more transparency and enables the UN to take over the reins from troop contributing countries.

265. UN peacekeeping is supposed to bring peace and security to countries and peoples that recently experienced troubles. However to some people, a peacekeeping force no longer represents hope of a better future but only reminds them of when they themselves, family members or friends were harmed by a peacekeeper.

It is therefore of paramount importance that the UN does not cease its endeavors to eliminate criminal misconduct by peacekeeping personnel. Moreover, the organization should step up its efforts because the current legal framework is not capable of eradicating the present culture of impunity among peacekeepers. The UN must undertake actions in the short term in order to address the most pressing issues while simultaneously working towards a lasting solution that profoundly improves the current situation.

266. There are many obstacles between the present situation and a renewed UN peacekeeping where military peacekeepers are held accountable for their criminal conduct. Albeit some of these obstacles will not pose any problem, others will be hard to overcome. It is imperative that the UN convinces all the parties involved of the need to amend the regulation of criminal misconduct by military peacekeepers.[454] Only then can the UN hope to significantly enhance their criminal accountability and eliminate violence towards the local population.

I am not saying it will be easy for the UN to instigate the necessary changes, but this should not prevent the UN from giving it all it has got.

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of peacekeepers than of their powers with regard to the investigation. I therefore believe that changes to the investigation procedure could take effect sooner than changes to the prosecution procedure.

[454] Besides negotiating with the countries involved, the UN could also utilize the press to galvanize the public opinion and increase the pressure on states.

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