

**THE CRIMES COMMITTED BY UN PEACEKEEPERS IN AFRICA:
A REFLECTION ON JURISDICTIONAL AND ACCOUNTABILITY ISSUES**

By

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**Submitted in accordance with the requirements
for the degree of**

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

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February 2013

DEDICATION

This thesis is dedicated to all victims of UN peace operations.

DECLARATION

I declare that *The Crimes Committed by UN Peacekeepers in Africa: A Reflection on Jurisdictional and Accountability Issues* is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

KAKULE KALWAHALI (Mr)

27 February 2013

ACKNOWLEDGEMENTS

At the start of this thesis I would like to express my gratitude to the many people who have been directly or indirectly of invaluable assistance to me during my studies at UNISA. Special thanks go, firstly, to my Promoter, Professor Charnelle van der Bijl, for her patience, insight and guidance, for her words of encouragement, and her constructive criticism of the several drafts of this thesis. Even in the midst of her busy schedule, she has always made time for me to go through my work.

My sentiments of gratitude extend to all those from whom I have learned. Indeed, all that an individual knows is the total sum of what he or she has learned from those who have taught him/her either directly or indirectly. I would, therefore, illustrate this by mentioning Professor Sunette Lötter, retired Professor Snyman, and other lecturers of the Department of Criminal Law and Criminal Procedure, as well as Professor Loma Steynberg in the Department of Private law. Through Ms Karen Breckon I would like to extend my thanks to all the UNISA librarians who have always been kind and ever willing to assist me. Apart from her work as librarian, Ms Karen Breckon has been editing my essays and the drafts of my dissertation.

Other people to whom I can never sufficiently express my gratitude for all their support are:

* My wife Esther Kasoki Malunga, my children, Nathanael Yunasi and Amos Ushindi, for so much patience during the trials of postgraduate studies and my long absence from home to this end. To all of you, I would like to say thank you for understanding and accepting why I could not be with you whenever you most needed me. May you find now that your prayers and patience have been rewarded!

* Professor Samuel Ngayihembako who, as the then Rector of the Université Libre des Pays des Grands Lacs (ULPGL), initiated and projected postgraduate academic training for ULPGL lecturers, despite the meagre financial means at his disposal in times of budgetary stringency. These words of thanks extend to the current ULPGL management team for the continuation of what Professor Samuel started. The partnership between ULPGL and UNIGE has given an essential impetus towards the completion of this dissertation. May Professor

IV

Paola Gaeta find in this work an acceptable result of our discussions as well as the invaluable gains from the courses I attended as a free auditor at the Academy of Humanitarian Law during my sojourn in Geneva!

Finally, I am forever indebted to the countless outstanding men and women who, although not in the academic world but simply by their commitment and dedication to becoming the best they could, have inspired me: my mother Genevieve Kagheni, my aunt Wilfrid Kyrokyaghula, my in-laws for their immeasurable assistance during my studies far away from home, my colleagues, as well as a host of others whom space does not permit me to mention.

SUMMARY

This thesis investigates both substantive and procedural issues pertaining to allegations of crimes committed by UN peacekeepers in three African countries, Somalia, Burundi, and the Democratic Republic of Congo. Under the current UN Model Status-of-Forces Agreements, criminal jurisdiction over peacekeepers rests with their sending States. However, although the UN has no criminal jurisdiction, it has been the Office of Internal Oversight Services that has conducted investigations. It is argued that every Status of Force Agreement and every Memorandum of Understanding should contain specific clauses obligating Troop-Contributing Countries to prosecute and the UN to follow-up.

If rape, murder, assault, and any other crimes by UN peacekeepers go unpunished, the message sent to the victims is that peacekeepers are above the law. Rape is the most commonly committed crime by peacekeepers, but is usually considered as an isolated act. The procedural issue of prosecuting peacekeepers is investigated in order to establish whether troops can be caught under the ambits of the criminal law of the Host State to hold UN troops criminally accountable for their acts. The laws relative to the elements of each crime and the possible available defences under the three Host States, and the criminal law of South Africa as a Troop-Contributing Country, are discussed. The apparent lack of prosecution is investigated and existing cases of prosecution discussed. Alternatives to the unwillingness by States with criminal jurisdiction under the Status of Forces Agreement or under the Memorandum of Understanding are considered. Considering the current rules related to crimes committed by peacekeepers, the argument put forward is that crimes by peacekeepers must be dealt with completely and transparently through a Convention aiming at barring Troop-Contributing Countries who do not meet their obligations under international law from participating in future operations of peace.

This thesis, furthermore, suggests a tripartite court mechanism to fill the *lacunae* in the law relating to the prosecution of peacekeepers. It considers the issues of reserving jurisdiction over peacekeepers to the Troop-Contributing Countries which are reluctant to prosecute repatriated alleged perpetrators. The victims' importance in criminal proceedings and their right to a remedy are highlighted.

Key words: Crimes by peacekeepers, accountability of peace operation personnel, jurisdiction over crimes, domestic law, international law, status-of-forces agreements, Memorandum of Understanding, investigation, Host State, Troop-Contributing Country, tripartite on-site court, sexual crimes, war crimes, draft convention, prosecutions, state liability.

ABBREVIATIONS-ACRONYMS: GLOSSARY

Except for GC AP, HS and MDMSA as used below, which have been created by the author, all the abbreviations-acronyms are recognized as such in academic and legal publications.

AI:	Amnesty International.
AJIL:	The American Journal of International Law.
AMIB:	African Mission in Burundi.
ASIL:	American Society of International Law.
BCE:	Before Common Era.
CAT (UNCAT):	UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
CCI:	Canada Commission of Inquiry.
CNDP:	National Council for the Defence of the People (Conseil National pour la Défense de la Population).
CRC:	Convention on the Rights of the Child.
DCAF:	Democratic Control of Armed Forces.
DPKO:	Department of Peacekeeping Operations (UNDPKO).
DRC:	Democratic Republic of Congo.
EJIL:	European Journal of International Law.
Elis.:	Elisabethville (currently Lubumbashi).
Eq.:	Equateur.
EU:	European Union.
FIDH:	Federation International des Droits de l'Homme (International Federation for Human Rights).
GC AP:	Geneva Conventions Additional Protocol(s).
HHI:	Harvard Humanitarian Initiative.
HS:	Host State (the state in which a UN operation is deployed or established).
ICC:	International Criminal Court.
ICCPR:	International Covenant on Civil and Political Rights.

VIII

ICJ:	International Court of Justice.
ICLQ:	The International and Comparative Law Quarterly.
ICRC:	International Committee of the Red Cross.
ICTR:	International Criminal Tribunal for Rwanda.
ICTY:	International Criminal Tribunal for the Former Yugoslavia.
IDP:	Internally Displaced People.
IDP/SAIIA:	Institute for Defence Policy/South African Institute for International Affairs.
IJRL:	International Journal of Refugee Law.
IHL:	International Humanitarian Law.
ILC:	International Law Commission.
ILSA:	International Law Student Association.
IMT:	International Military Tribunal at Nuremberg.
IMTFE:	International Military Tribunal of the Far East.
1 ^{er} inst. :	Tribunal de première instance.
IRCT:	International Rehabilitation Council for Torture Victims.
IRRC:	International Review of the Red Cross.
ISS:	Institute for Security Studies.
JICJ:	Journal of International Criminal Justice.
JIL:	Journal of International Law.
J.T.O. :	Journal des tribunaux d'outre mer.
Jur. Col.:	Revue de doctrine et jurisprudence coloniale.
Jur. Etat :	Jurisprudence de l'Etat indépendant du Congo.
Kas. :	Kasai.
Léo. :	Léopoldville (currently Kinshasa).
LGDJ:	Librairie Générale de Droit et de Jurisprudence.
MDMSA:	Military Discipline Supplementary Measures Act (South Africa).
MONUC:	UN Organisation Mission in the Democratic Republic of Congo (Mission de l'Organisation des Nations-Unies au Congo)

IX

MONUSCO:	UN Organization Mission for the Stabilization of the Democratic Republic of Congo (Mission des Nations-Unies pour la Stabilisation du Congo)
MOU:	Memorandum of Understanding.
NATO:	North Atlantic Treaty Organization.
NGO:	Non-Governmental Organisation.
NUPI:	Norsk Utenriskpolitik Institutt.
ONUB:	UN Operation in Burundi (Opération des Nations-Unies au Burundi).
ONUC:	UN Operation in the Congo (Opération des Nations-Unies au Congo).
OUP:	Oxford University Press.
PCIJ:	Permanent Court for International Justice.
RJCB:	Revue Juridique du Congo-belge.
RUSI:	Royal United Services Institute for Defence and Security Studies.
SACJ:	South African Journal of Criminal Justice.
SALJ:	South African Law Journal.
SANDF:	South African National Defence Force.
SAPS:	South African Police Services.
SEA:	Sexual Exploitation and Abuse.
SOFA:	Status-of-Forces Agreement.
SRSG:	Special Representative of the Secretary-General (UN).
Stan. :	Stanleyville (Kisangani).
TCC:	Troop-Contributing Country (a state who has contributed personnel to a UN peace operation). It is also called sending state. The phrase sending state or TCC are used interchangeably.
TOAELP:	Torkel Opsahl Academic EPublisher.
TSAR:	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law).
UDHR:	Universal Declaration on Human Rights.
UK:	The United Kingdom.
ULPGL:	Université Libre des Pays des Grands Lacs.
UN:	The United Nations.

UNGA:	UN General Assembly.
UNHCR:	United Nations High Commissioner for Refugees.
UNITAF:	Unified Task Force.
UNODC:	United Nations Office on Drugs and Crime.
UNOIOS:	UN Office of Internal Oversight Services.
UNOSOM:	UN Operation in Somalia.
UNSG:	UN Secretary General.
UNTS:	United Nations Treaty Series.
US:	The United States (of America).
UCIHL:	University Centre for International Humanitarian Law.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

CONTEXTUAL STUDY OF CRIMES COMMITTED BY PEACEKEEPERS 1

 1.1 Problem background: Context of deployment of peacekeepers in Africa.....1

 1.2 Problem statement8

 1.3 Conceptualisation and scope of the thesis 11

 1.3.1 The concept of ‘crime’ 11

 1.3.2 Peacekeepers - Peacekeeping 13

 1.3.3 UN mission of peace or peace operations 15

 1.4 Aim of the research 17

 1.5 Method of research.....20

 1.6 Delineation and limitation of study..... 21

 1.7 Structure of research.....23

CHAPTER II

CRIMES BY PEACEKEEPERS IN THE HOST STATE26

 2.1 Introduction.....26

 2.2 Account of allegations of crimes by peacekeepers in Somalia, Burundi, and the DRC .27

 2.2.2 Incidents reported in Burundi.....29

 2.2.3 Incidents reported in the DR Congo 31

 2.2.4 Synopsis of the crimes allegedly committed by peacekeepers36

 2.3 The law of the Host State with respect to the alleged crimes37

 2.3.1 Somali law37

 2.3.1.1 Rape.....37

 2.3.1.2 Other sexual acts and sexual offences involving children.....44

 2.3.1.3 Murder 45

 2.3.1.4 Assault 52

 2.3.1.5 Synopsis of the findings on Somali criminal law55

 2.3.2 Burundian law55

 2.3.2.1 Rape.....56

 2.3.2.2 Other sexual acts and sexual offences involving children.....60

2.3.2.3 Murder	61
2.3.2.4 Assault	63
2.3.2.5 Synopsis of the findings on Burundian Criminal Law	65
2.3.3 DR Congolese law	66
2.3.3.1 Rape.....	66
2.3.3.2 Other sexual acts and offences involving children	71
2.3.3.3 Murder	74
2.3.3.4 Assault	78
2.3.3.5 Synopsis of the findings on DR Congolese Criminal Law	81
2.4 Conclusion	81

CHAPTER III

PEACEKEEPERS AND THE DOMESTIC CRIMINAL LAW OF SOUTH AFRICA AS A TROOP-CONTRIBUTING COUNTRY.....	85
3.1 Introduction.....	85
3.2 Law of South Africa as a Troop-Contributing Country	86
3.2.1 Rape	87
3.2.2 Other sexual act and sexual offences involving children.....	98
3.2.3 Murder.....	103
3.2.4 Assault.....	107
3.2.5 Synopsis of the findings on South African criminal law as a TCC	109
3.3 State liability for failure to prosecute the crimes of peacekeepers	110
3.3.1 Vicarious liability of the State for crimes committed by peacekeepers	111
3.3.2 State liability for failure to protect	118
3.3.2.1 <i>Minister van Polisie v Ewels</i> (1975) 3 SA 590 (A).....	118
3.3.2.2 <i>Minister of Safety and Security v Van Duivenboden</i> (2002) 6 SA 431 (SCA).	119
3.3.2.3 <i>Carmichele v Minister of Safety and Security and Another</i> 2001 (4) SA 938 (CC).....	121
3.3.2.4 <i>K v Minister of Safety and Security</i> 2005 (6) SA 419 (CC).....	122
3.3.2.5 The relevance of State liability cases to peacekeeping forces (if any).....	125
3.4 Conclusion	128

CHAPTER IV

THE CRIMES COMMITTED BY PEACEKEEPERS IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW	130
4.1 Introduction.....	130
4.2 The core international crimes categories	131
4.2.1 Definition of the core international crimes	131
4.2.1.1 Genocide	132
4.2.1.2 Crimes against humanity.....	136
4.2.1.3 War crimes	142
4.3. Alleged specific crimes committed by peacekeepers under international law	152
4.3.1 Rape, prostitution, and sexual offences involving children	152
4.3.2 Murder.....	155
4.3.3 Causing serious injury to body or health: torture and assaults.....	156
4.4 Issue of immunity of UN peace operations personnel	158
4.4.1 Rationale of immunities in general.....	158
4.4.2 Scope of peace operations personnel immunity.....	159
4.5 Conclusion.....	163

CHAPTER V

THE LACK OF ACCOUNTABILITY RELATED TO PROBLEMS WITH CRIMINAL INVESTIGATION	165
5.1 Introduction.....	165
5.2 The investigative authority over crimes committed by peacekeepers	167
5.2.1 Investigation by the UN Office of Internal Oversight Services (OIOS).....	167
5.2.1.1. The OIOS is not a law enforcement agency	169
5.2.1.2. Investigation needs UN personnel cooperation	171
5.2.1.3. OIOS Investigation needs Contingent Commander Cooperation	173
5.2.2 Investigation by organs of the Troop-Contributing Country	174
5.2.2.1. Canada	177
5.2.2.2. Belgium	186
5.2.2.3. South Africa	188
5.2.2.4.1 Recall of extra-territoriality issues.....	189

5.2.2.4.2 Investigation of the allegations against members of SANDF	190
5.2.3 Investigation by Organs of the Host State	196
5.2.4 Investigation by a State other than the Host State	200
5.2.5 Cooperation between the investigative authority and the Host State	201
5.3 The purpose and period of a criminal investigation.....	203
5.3.1 Victims' involvement in investigation.....	204
5.3.2. TCC investigation for court proceedings in home country.....	207
5.3.3. Investigation by the TCC towards court proceedings onsite	208
5.4 Conclusion.....	210

CHAPTER VI

JURISDICTION OVER CRIMES COMMITTED BY PEACEKEEPERS	214
6.1 Introduction.....	214
6.2. Exclusive jurisdiction of the TCC.....	215
6.3. Residual criminal jurisdiction of the Territorial State (Host State)	217
6.4. Residual criminal jurisdiction of a third State	218
6.5. The International Criminal Court and Tribunals' jurisdiction.....	220
6.6. Some prosecutions of crimes by peacekeepers: TCCs.....	222
6.6.1 Canada	222
6.6.1.1 <i>R. v. Brocklebank</i> (Appeal) [1996] C.M.A.J. No. 4.....	223
6.6.1.1.1 The facts of the case.....	223
6.6.1.1.2 The Court-martial of Appeal decision	224
6.6.1.1.3 Criticism of the decision in <i>R v. Brocklebank</i>	227
6.6.1.2 <i>R. v. Brown</i> (Appeal).....	228
6.6.1.2.1 The facts of the case.....	228
6.6.1.2.2 The Court-martial of Appeal decision	230
6.6.1.2.3 Criticism of the decision in <i>R v Brown</i>	231
6.6.1.3 <i>R. v. Boland</i> (Appeal)	232
6.6.1.3.1 The facts of the case.....	232
6.6.1.3.2 The Court-martial of Appeal decision	233
6.6.1.3.3 Criticism of the decision in <i>R v. Boland</i>	234
6.6.1.4 <i>R. v. Sox</i> (Appeal)	235

6.6.1.4.1 The facts of the case.....	235
6.6.1.4.2 The Court-martial of Appeal decision	236
6.6.1.4.3 Criticism of the decision in <i>R v. Sox</i>	237
6.6.1.5 <i>R. v. Seward</i> (Appeal)	239
6.6.1.5.1 The facts of the case.....	239
6.6.1.5.2 The Court-martial of Appeal decision	240
6.6.1.5.3 Criticism of the decision in <i>R v. Seward</i>	241
6.6.1.6 <i>R. v. Mathieu</i> (Appeal)	242
6.6.1.6.1 The facts of the case.....	242
6.6.1.6.2 Criticism of the decision in <i>R v. Mathieu</i>	243
6.6.1.7 Final comment on the prosecution of peacekeepers by Canada.....	245
6.6.2 Belgium.....	246
6.6.2.1 Case A: <i>Korad Kalid v. Paracommando Soldier</i>	247
6.6.2.1.1 Facts	247
6.6.2.1.2 The Court Martial decision.....	248
6.6.2.1.3 Criticism of the decision	250
6.6.2.2 Case B: <i>Osman Somow v. Paracommando Soldier</i>	251
6.6.2.2.1 Facts	251
6.6.2.2.2 The Court Martial decision.....	252
6.6.2.2.3 Criticism of the decision	253
6.6.2.3 Final comment on the prosecution of peacekeepers by Belgium.....	253
6.6.3 South Africa	255
6.7. Conclusion	256

CHAPTER VII

THE DRAFT CONVENTION ON THE CRIMINAL ACCOUNTABILITY OF UN OFFICIALS AND EXPERTS ON MISSION AND ON-SITE COURTS FOR PEACE MISSION PERSONNEL.....	261
7.1. Introduction.....	261
7.2. Current status of the Draft Convention	264
7.2.1 Dealing with crimes of UN experts on mission at State level.....	266

7.2.2 Role of UN regarding the curbing of crimes by UN officials and experts on mission	268
7.3. Content and scope of the Draft Convention	270
7.3.1 Personnel covered by the Draft Convention	270
7.3.2. Jurisdiction over conduct	273
7.3.3. Practical exercise of jurisdiction	276
7.3.3.1. International jurisdiction	278
7.3.3.2. Host State jurisdiction	282
7.3.3.3. Jurisdiction of the Troop-Contributing Country	284
7.3.3.4 Third State jurisdiction: universal jurisdiction	287
7.3.3.5. Hybrid jurisdiction	289
7.4. Other considerations on the Draft Convention	290
7.5. Proposed form of jurisdiction: Onsite Special Tripartite Court:	293
7.5.1 Investigation of crimes committed by peacekeepers.	296
7.5.2 Prosecution relating to crimes committed by peacekeepers.	298
7.5.3 Detention of suspected perpetrators.....	298
7.6 Conclusion	300
 CHAPTER VIII	
GENERAL CONCLUSION	304
8.1 Synthesis	304
8.2 Recommendations	319
□ Suggested Draft Convention on Accountability of UN Peace Personnel.....	320
8.3 Implications for further studies	325
8.4 Final remarks	326
 BIBLIOGRAPHY	
Principal works used (Books, monographs, dissertations and journal articles)	329
Online publications and other documents	358
UN Reports / documents	364
Table of cases	367
<i>Domestic level</i>	367

XVII

International level371
Table of legislation371
National level371
International level372

ANNEXURES.....374

Annexure A
Excerpts from Burundian Penal Code (French) - Translation by Kakule Kalwahali374

Annexure B
Excerpts from DRC legislation (French) - Translation by Kakule Kalwahali390

Annexure C
Excerpt from Act 16 of 1999 Military Discipline Supplementary Measures Act of 23 April
1999 (South Africa).397

INDEX.....399

CHAPTER I
INTRODUCTION
CONTEXTUAL STUDY OF CRIMES COMMITTED BY PEACEKEEPERS

1.1 Problem background: Context of deployment of peacekeepers in Africa

Over the past number of years, allegations of crimes committed by peacekeeping personnel where missions of peace are deployed have arisen.¹ The allegations in question include rape and other acts of sexual violence, such as prostitution in the form of engaging the services of a prostitute, sexual offences involving children, and pornography.² Crimes of murder, wilful causing of serious injury to body or health, and instances of weapons and mineral trafficking and looting have also been recorded.³ However, the greater part of the alleged crimes is of a sexual nature.

This study examines specific issues of those crimes alleged to have been committed during UN peace missions by UN peace mission personnel in three African countries. The study investigates whose responsibility it is, among the UN, the Host State⁴, and the Troop-Contributing Country,⁵ and necessitates an investigation into complex issues which are intertwined across the fields of domestic criminal law, international criminal law and humanitarian law.

The background of the United Nations interventions in each of the three African countries is presented in order to ascertain whether any crimes allegedly committed by members of UN peace personnel actually occurred on the African continent.

¹ Data established for the period between 2003 and 2008 reveal a total number of 767 allegations of crimes by UN personnel. 537 of the said allegations are crimes perpetrated by military personnel. See statistics from ‘Special measures for protection from sexual exploitation and sexual abuse’, Secretary-General’s Reports of sexual exploitation and abuse investigation data: A/59/782- Annex 1 Nature of allegations by United Nations entity and category of personnel 1 January- 31 December 2004; A/60/861-Annex I Nature of allegations by United Nations entity and category of personnel 1 January- 31 December 2005; A/61/957- Annex VI Nature of allegations by personnel of the Department of Peacekeeping Operations 1 January-31 December 2006; A/62/890-Annex VI Nature of allegations in completed investigations by category of personnel of the DPKO/DFS 1 January- 31 December 2007; A/63/720-Annex V Nature of allegations by category of personnel of the DPKO/DFS for completed investigations 1 January- 31 December 2008.

² *Ibid.*

³ *Ibid.*

⁴ A Host State is the state where a UN mission of peace is deployed.

⁵ A Troop-Contributing Country or Sending State is the state of origin (nationality) of a member of UN peace mission personnel.

The total collapse of the State in Somalia led to the United Nations intervention in this country in 1992,⁶ although its peace operations to Somalia did not actually result in a solution.⁷ Amongst other reasons, the terrain and roots⁸ of the civil war were not appropriately studied.⁹ It is not, however, the intention of the present thesis to dig deeply to show the underlying roots of the conflict, but merely to indicate that peacekeepers themselves, by committing crimes, have added to the suffering of the civilian population, especially those directly made victims of their misconduct.¹⁰ It has been reported that, during their stay in Somalia, peacekeepers committed crimes such as murder, serious injury to body, rape, other sexual offences and looting.

The first United Nations operation in Somalia (UNOSOM I) was established in April 1992, pursuant to Security Council resolution 751, to facilitate an immediate effective cessation of hostilities, to maintain a ceasefire throughout the country, which ceasefire would promote reconciliation and political settlement, and would allow to provide urgent humanitarian assistance.¹¹ Most Security Council resolutions such as of January 1992,¹² as well as all the subsequent resolutions put the emphasis on humanitarian assistance.¹³

⁶ Gall T L and Hobby J M (eds) *Worldmark Encyclopedia of the Nations: United Nations* 12th ed (2007) 70; Sadiki Koko 'Whose responsibility to protect? Reflection on the dynamics of an 'abandoned disorder' in Somalia' 2007 (16) *African Security Review* 2-13; Murithi T 'The African Union's Evolving role in Peace Operations: The African Union Mission in Burundi, the African Union Mission in Sudan and the African Union Mission in Somalia' 2008 (17) *African Security Review* 70-82. The UN intervention in the horn of Africa is considered to have been a total failure because Somalia is still in a state of civil war. Civil wars do not end by UN involvement but by a true and thorough understanding of how the conflict emerged and how it has been handled. The fighting could not end without the intervention of the world community. See Issa-Salwe AM *The Collapse of the Somali State: The Impact of the Colonial Legacy* (HAAN Publishing London 1996) 129.

⁷ Issa-Salwe AM *The Collapse of the Somali State: The Impact of the Colonial Legacy* (HAAN Publishing London 1996) 133-134.

⁸ A true resolution of a conflict necessitates a thorough understanding of how the conflict emerged and how it was perpetuated. See Kohler J *From Miraculous to Disastrous: The Crisis in Côte d'Ivoire* (Centre for Applied Studies in International Negotiations – CASIN - Geneva 2003) 11.

⁹ Philipp C E 'Somalia: A Very Special Case' in von Bogdandy A and Wolfrum R (eds) *Max Planck Yearbook of United Nations Law* (Volume 9 2005) 517-554.

¹⁰ Razack S 'From the "Clean Snows of Petawawa": The Violence of Canadian Peacekeepers in Somalia' 2000 (15) *Cultural Anthropology* 127-163, 158; Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch/-DFAIT_rport.doc [last accessed 29 September 2011].

¹¹ S/RES/751 (1992) of 24 April 1992, paragraphs 2 and 7; Young RM and Molina M 'IHL and Peace Operations: Sharing Canada' Lessons Learned from Somalia' in Fischer H *et al.*(eds) *Yearbook of International Humanitarian Law* (T.M.C. Assert Instituut the Hague 1998) 362-370, 363.

¹² S/RES/733 (1992) of 23 January 1992. See also Manoj Kumar Sinha *Humanitarian Intervention by the United Nations* (Manak Publication New Delhi 2002) 93-95.

¹³ S/RES/767 (1992) of 7 July 1992, S/RES/775 (1992) of 28 August 1992; Boulden J *Peace Enforcement: The United Nations Experience in Congo, Somalia and Bosnia* (Praeger Westport 2001) 55.

The 500-strong UN force approved by Security Council in April 1992 proved to be too few troops to handle the situation,¹⁴ to the point that by the end of the year, UNOSOM I had to be replaced by a multilateral force of 37,000 troops¹⁵ led by the United States of America.¹⁶ This latter force began to arrive in Somalia in December 1992 and stayed until replacement by UNOSOM II,¹⁷ established pursuant to Security Council resolution 814 of 26 March 1993,¹⁸ with the mandate of establishing throughout Somalia a secure environment for humanitarian aid, the restoration of stability, law and order.¹⁹ Made up of 20,000 troops, most of which integrated from UNITAF, UNOSOM II withdrew from Somalia in March 1995 without any notable achievement.²⁰ It is one of the UN peacekeeping operations that failed.

Burundi is a state situated in the African Great Lakes region. It has experienced cyclic outbreaks of *coups d'état* and conflicts since its independence in 1962.²¹ One of these coups occurred in October 1993 when the first democratically-elected Hutu President, Melchior Ndadaye, was murdered.²² The reaction of the ethnic group of the murdered president was described in a report of the United Nations Security Council, as an act of genocide against some 300,000 Tutsis and moderate Hutus.²³

After a long time of war, a peace process was initiated led by Nyerere, then President of Tanzania. With the support of the Regional Peace Initiative and the international community, a Peace Agreement was signed on 28 April 2000 in Arusha under the auspices of President Nelson Mandela of South Africa.²⁴ Article 8 of Protocol V of this Arusha Agreement provides that 'the Burundian Government shall submit to the UN a request for an international

¹⁴ Woodward P 'Somalia' in Furley O and May R (eds) *Peacekeeping in Africa* (Ashgate 1998) 143-158.

¹⁵ The Unified Task Force (UNITAF).

¹⁶ Carey M 'Peacekeeping in Africa: Recent Evolution and Prospects' in Furley O and May R (eds) *Peacekeeping in Africa* (Ashgate 1998) 13-27, 19; S/RES/794 (1992) for the establishment of safe environment for Humanitarian assistance in Somalia. See Woodward P 'Somalia' *op cit* (n 14) 46-147.

¹⁷ Woodward P *op cit* (n 14) 148.

¹⁸ Shraga D 'Military Occupation and UN Transitional Administration: The Analogy and its Limitations' in Marcelo Kohen G (ed) *Promoting Justice, Human Rights and Conflict Resolution Through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international* (Liber Amicorum Lucius Caflish/ Martinus Nijhoff Leiden 2007) 479-498.

¹⁹ *Ibid.* 483.

²⁰ Woodward P *op cit* (n 14) 150-151.

²¹ Boshoff H and Vrey W A *Technical Analysis of DDR: A Case from Burundi* (ISS Monograph Series No. 125 August 2006).

²² Keeler J A 'Genocide: Prevention through Nonmilitary Measures' 2002 (171) *Military Law Review* 135-191, 157; Kwakwa E 'Internal Conflicts in Africa: Is There a Right of Humanitarian Action?' 1994 (2) *African Yearbook of International Law* 9-45, 22.

²³ Boshoff H and Vrey W *op cit* (n 21) 3.

²⁴ Aboagye F 'The African Mission in Burundi: Lessons learned from the first African Union Peacekeeping Operations' 2004 *Peacekeeping* 9-15, 9-10.

peacekeeping force'.²⁵ The December 2002 cease-fire agreement, however, provides that the verification and control of the ceasefire agreement shall be conducted by an African Mission.²⁶

In April 2003 the African Mission in Burundi (AMIB) was deployed. Its mandate came to an end on 31 May 2004, and the United Nations Operation in Burundi took over from there, incorporating AMIB forces²⁷ (almost 50 per cent of the force personnel were from South Africa, *viz* 1,600 of 3,335 troops).²⁸ It must be recognised that the African Mission was able to oversee the implementation of the ceasefire agreements and it created the first necessary conditions suitable for the deployment of ONUB on 1 June 2004.²⁹

Authorised under chapter VII of the UN Charter,³⁰ the UN operation in Burundi departed from the country in December 2006. It was replaced by the United Nations Integrated Office in Burundi which coordinates international assistance.³¹ The integrated office provides technical assistance in developing a comprehensive security sector reform plan that includes the training of Burundi's national police and army.³² The Office also implements the national programme for the demobilisation and integration of former combatants, as well as providing training for employment and access to micro credit schemes.³³ A case of murder and cases of sexual offences were reported to have been committed by peacekeepers in Burundi.³⁴ Allegations of sexual offences have also been levelled against MONUC personnel in the neighbouring country, the Democratic Republic of the Congo (DRC).

After the United Nations Emergency Force deployed to Egypt to deal with the Suez crisis,³⁵ the following intervention of the UN on the African continent was in the Congo, to oversee

²⁵ Arusha Peace and Reconciliation Agreement for Burundi (Arusha August 28, 2000) - Protocol V: Guarantees on Implementation of the Agreement.

²⁶ Aboagye F *op cit* (n 24) 9-10.

²⁷ ONUB: Opération des Nations Unies au Burundi. See S/RES/1545 (2004) of 21 May 2004.

²⁸ Aboagye F *op cit* (n 24) 14.

²⁹ *Ibid.*

³⁰ Boshoff H and Vrey W *op cit* (n 21) 35.

³¹ BINUB: Bureau Intégré des Nations Unies au Burundi.

³² Murithi T *op cit* (n 6) 75, 76.

³³ *Ibid.*

³⁴ BBC News 'UN sex abuse sackings in Burundi: Two United Nations peacekeepers in Burundi have been sacked after having sex with prostitutes and minors' Published 2005/07/19 available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4697465.stm> [last accessed 15 December 2012].

³⁵ The UNEF was deployed to Egypt following the Suez crisis in 1956, owing to the invasion of Egypt by Great Britain, France and Israel in October that year. See Olonisakin F *Reinventing Peacekeeping in Africa: Conceptual and Legal Issues in ECOMOG Operations* (Kluwer Law International The Hague 2000) 33; UN.

the Belgian withdrawal of its troops from its erstwhile colony.³⁶ The mandate of that 60s operation in the Congo,³⁷ which lasted up to 1964,³⁸ was to prevent civil war and to ensure the withdrawal of foreign military personnel.³⁹ ONUC forces were accused of partiality, which may explain why the mission failed to restore stability.⁴⁰ No reported allegations of misconduct, however, existed against ONUC civilian and military personnel.

Thirty-five years later, precisely in 1999,⁴¹ another UN mission had to be deployed to the Democratic Republic of the Congo, after witnessing that over five million people had been declared dead owing to the ongoing crisis of armed conflict since 1996.⁴² By a 1999 resolution, the Security Council recognised that the situation in the DRC constituted a threat to international peace and security.⁴³ The origin of this second United Nations military presence in the Democratic Republic of Congo, known as the United Nations Observer Mission in the Congo,⁴⁴ has its foundations in the signature of the Lusaka agreement and the following UN resolution 1258⁴⁵ authorizing the deployment of a maximum of 90 officers.⁴⁶

Doc. A/RES/998 (ES-I) of 4 November 1956; Bothe M and Dörschel T *UN Peacekeeping: A Documentary Introduction* (Kluwer Law International the Hague 1999) 134.

³⁶ S/RES/143/1960 of 14 July 1960; S/RES/145/1960 calling upon Belgium to implement S/RES/143; S/RES/146/1960 concerning the entry of ONUC forces into the secessionist Katanga; S/RES/161/1961 on the death of Prime Minister Patrice Lumumba and the reorganisation of Congolese armed forces; and S/RES/169/1961 on an arms embargo against the Congo; Higgins R *United Nations Peacekeeping 1946-1967 Documents and Commentary volume III: Africa* (Oxford University Press Oxford 1980) 14 *et passim*.

³⁷ ONUC: Opération des Nations Unies au Congo.

³⁸ Marks J 'The Pitfalls of Action and Inaction: Civilian Protection in MONUC's Peacekeeping Operations' 2007 (16) *African Security Review* 67-80, 68.

³⁹ Boulden J *Peace Enforcement: The United Nations Experience in Congo, Somalia and Bosnia* (Praeger Westport 2001) 4.

⁴⁰ Corum J S 'Operational Problems in Peacekeeping and Humanitarian Operations' in Cilliers J and Mills G (eds) *Peacekeeping in Africa* (IDP and SAIIA 1995) 119-133.

⁴¹ MONUC : Mission de l'Organisation des Nations Unies au Congo; MONUSCO: Mission de l'organisation des Nations-Unies pour la stabilisation du Congo. See para 1 of the UN Security Council resolution 1925 (2010) (S/RES/1925 of 28 May 2010).

⁴² One of the best predictors of UN intervention is the number of the deaths in a conflict. In the area of conflict, there is the sentiment that the UN is not willing to stop the conflict, even though it seems obvious that the UN is more likely to be eager to respond quickly in Europe than it is in Africa. See Fortna VP 'Does Peacekeeping Keep Peace? International Intervention and the Duration of Peace after Civil War' 2004 (48) *International Studies Quarterly* 269-292.

⁴³ UN Security Council Resolution 1234 (1999) of 9 April 1999; Hawkins V 'History Repeating Itself: The DRC and the UN Security Council' 2003 (12) *African Security Review* 47-55, 49.

⁴⁴ Its French acronym is MONUC (Mission d'observation des Nations Unies au Congo).

⁴⁵ Res. 1258 (1999) of 6 August 1999.

⁴⁶ See para 8 of the UN Security Council Resolution S/RES/1258 (1999) of 6 August 1999; Marks J *op cit* (n 38) 69; For MONUC history, mandate the number of troops and troops contributing countries, up to the renaming of the mission on 1 July 2010, see its website: www.monuc.org [last accessed 15 December 2012]; see also in regard to MONUC strength up to 2006, Allred KJ 'Peacekeeping and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping it' 2006 (33) *Armed Forces and Society* 15-23.

Their mission was to liaise with all the warring factions, to provide technical assistance, and to prepare the deployment of military observers.⁴⁷

MONUC has been, like ONUC in the earlier 1960s, accused of partiality, and its members have been accused of colluding with armed groups to prolong the war and to benefit from the mineral resources.⁴⁸ Most importantly, MONUC personnel have been accused of committing crimes, especially sexual crimes, and trading weapons for minerals.⁴⁹ One scholar has observed that the increase of peacekeeping operations throughout the world, essentially staffed with male personnel, can lead to some specific criminal conduct with negative effects on the host populations.⁵⁰ Although peacekeepers have been accused of committing crimes where they are deployed, most of their crimes have been kept quiet.⁵¹ If in the 1990s the conduct of peacekeeping personnel has been reported and made public, it is because of the work of media and human rights organisations.⁵² One report has indicated that peacekeepers have exploited refugee children;⁵³ girls of 9, 12 and 14 have been raped by peacekeepers, and, in other instances, rape has been disguised as prostitution where some peacekeepers pooled

⁴⁷ Amongst the presence of armed forces, MONUC is the only actor with the legal legitimacy, embodied by 26 UN Security Council Resolutions, 20 UN Security Council Presidential Statements, 20 Secretary-General Reports, 5 international agreements and 5 Security Council Missions to the DRC since 1999.

⁴⁸ Osborne D 'UN Troops Traded Guns for Gold with Militias, Says Report' *The Independent* Thursday 24 May 2007 available at www.independent.co.uk/news/world/politics/un-troops-traded-guns-for-gold-with-militias-says-report-450103.html [last accessed 11 May 2011]; Plaut M 'UN Troops "Traded Gold for Guns"' *BBC News* Wednesday 23 May 2007 available at <http://news.bbc.co.uk/2/hi/africa/6681457.stm> [last accessed 15 December 2012].

⁴⁹ *Ibid.*

⁵⁰ Deen-Racsmany Z 'The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?' 2011 *Journal of Conflict & Security Law* 1-35, 1*et passim*.

⁵¹ Martin S 'Must Boys Be Boys? Ending Sexual Exploitation and Abuse in UN Peacekeeping Missions' 2005 *Refugees International* 1-32, 21.

⁵² See UN. Doc. A/59/661 of 5 January 2005 para 1. Historically men were affected by war-related consequences owing to their involvement as combatants. But, currently, effects of military presence are felt by civilians, especially women and children. See Chiziko MD 'The Responsibility to Protect: Does the African Stand-By Force Need a Doctrine for Protection of Civilian?' 2007 (2) *Interdisciplinary Journal of Human Rights Law* 73-87, 73. Disparities in national laws of TCCs do not bring views from the officials of different countries actually to see and understand the need to punish crimes against women. Thus Lithuania, Germany, Netherlands, etc. are not prepared to see their contingents prosecuted for sexual offences, especially with regard to prostitution and 'trafficking in human beings for prostitution'. See Allred KJ *op cit* (n 46) 16 *et passim*. Boys can also be victims of criminal conduct of peacekeepers. See Allais C 'Sexual Exploitation and Abuse by UN Peacekeepers: The Psychosocial Context of Behaviour Change' 2011 (39) *Scientia Militaria South African Journal of Military Studies* 1-15.

⁵³ Report of the Secretary-General on the Activities of the Office of Internal Oversight Services: Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa UN. Doc. A/57/465 of 11 October 2002 para 20 *et passim*.

their money and then all had sex with the same child.⁵⁴ Such conduct may amount either to a war crime or a specific crime as will be discussed in this thesis. As the UN Department of peacekeeping has recognised, because of the status of UN personnel, crimes committed by peacekeepers remain serious crimes.⁵⁵ As regards the host population, how can one expect members of war-torn societies, who have experienced gross violations of human rights⁵⁶ by parties to the conflict, to regain confidence in their personal environment and in the rule of law if the mission of peace meant to protect them further traumatizes them by committing human right violations, without seeing their dignity restored? When it comes to serious crimes, it is therefore imperative that perpetrators are held accountable for their crimes.⁵⁷ The prosecution of perpetrators of the crimes committed today will consequently serve as a deterrent for future crimes.⁵⁸

⁵⁴ Levin SA ‘Sexual Exploitation of Refugee Children by UN Peacekeepers’ 2003(19.3) *New York Law School J Human Rights* 833-842; Richey KC ‘Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women’ 2007 (17) *Texas Journal of Women and the Law* 109-129, 121.

⁵⁵ UNDPKO *Public Information Guidelines for Allegations of Misconduct Committed by Personnel of UN Peacekeeping and Other Field Missions* (DPKO/MD/03/00996 DPKO/CPD/DPIG/2003/001).

⁵⁶ Human rights are entitlements, basic values common to all cultures. These basic values must be respected by each and every country worldwide. Human rights are commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being. See Sepulveda M *et al. Human Rights Reference Handbook* 3rd revised edition (University for Peace Ciudad Colon-Costa Rica 2004) xxxvii *et passim*. Violation of human rights is understood as any lack of fulfillment of a duty of obligation arising from human rights instruments. Only a state or state-like entities or their agents or individuals acting as agents for those entities or at the instigation of such an agent can commit a violation of human rights. A state that respects human rights does not interfere directly or indirectly with the enjoyment of those rights. One speaks of a “violation of human rights” when the state has breached any of its obligations towards human rights, namely the obligation to respect and to protect human rights. By its actions a state can cause a right not to be enjoyed or fulfilled. A state will also violate human rights where such a state fails to prosecute those who have violated such a right, who have caused individuals to be in a situation where they cannot enjoy their rights. For instance, the Democratic Republic of the Congo is the primary protector of human rights in several international instruments it has ratified, such as the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights. As a signatory of these conventions, the Congolese state is bound to respect the human rights guaranteed in the texts and to take necessary measures to sanction and prevent violations of these rights whether committed by its own State security forces or by other non-State actors. See MONUSCO and UN Human Rights Office of the High Commissioner *Report of the United Nations Joint Human Rights Office on Human Rights Violations Perpetrated by Armed Groups during Attacks on Villages in Ufamandu I And II, Nyamaboko I And II and Kibabi Groupements, Masisi Territory, North Kivu Province, between April and September 2012*, para 14. The state is the guarantor of human rights. For more detail and for specific human rights, see Pogge T ‘Comment: Are We Violating the Human Rights of the World’s Poor?’ 2011 (14) *Yale Human Rights & Development Law Journal* 1-33, 3 *et passim*; Gorsboth M and Wolf E *Identifying and Addressing Violations of the Human Right to Water: Applying the Human Rights Approach* (Brot für die Welt Stuttgart-Germany 2008) 6, 12 *et seq.*

⁵⁷ Lindenmann J ‘Transitional Justice and the ICC: Some Reflections on the Role of the ICC in Conflict Transformation’ in Kohen MG (ed) *Promoting Justice, Human Rights and Conflict Resolution through International Law* 315-338.

⁵⁸ Lindenmann J *op cit* (n 57) 320; Ntoubandi FZ *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff Publishers Leiden 2007) 1.

1.2 Problem statement

The purpose of deploying UN forces is, amongst other tasks, to provide protection to civilians.⁵⁹ Instead of affording protection to civilians, missions of peace have constituted opportunities for crimes to be perpetrated against civilians.⁶⁰ United Nations peacekeepers are often accused of having sexually exploited women and children.⁶¹ This phenomenon of gross misconduct and human rights violations by peacekeepers is not new.⁶² For example, misconducts by peacekeepers have occurred in Bosnia, Herzegovina, Kosovo, Cambodia, Eastern Timor, and West Africa.⁶³ In most post-conflict peace operations serious human rights abuses by peacekeepers, such as sexual exploitation and abuse, are committed by almost all categories of UN personnel, military, civilian police and civilian peacekeeping personnel.⁶⁴ For instance, MONUC personnel are accused of having constituted an unflinching help to armed groups to fight against the government,⁶⁵ and to have traded or exchanged

⁵⁹ Even if civilian protection clauses exist in the MONUC mandate [see UN SC Res. 1291(2000) and 1493(2003)], and peacekeepers were supposed to use force, the interpretation, execution of those clauses are not resorted to by UN peacekeepers in the DRC when civilians' lives were at risk. See Marks J 'The Pitfalls of Action and Inaction: Civilian Protection in MONUC's Peacekeeping Operations' 2007 (16) *African Security Review* 67-80 and his reference to the tragic events of Kisangani (2002), Bunia (2003) and Bukavu (2004).

⁶⁰ Doss A (MONUC SRSG) 2009 *Nelson Mandela Lecture on African Security and Development* (RUSI Whitehall London 11 November 2009) 10.

⁶¹ Spencer SW 'Making Peace: Preventing and Responding to Sexual Exploitation by United Nations Peacekeepers' 2005 (16) *Journal of Public and International Affairs* 167-181.

⁶² Miller SK 'Accountability for the Conduct of UN-Mandated Forces under International Human Rights Law: A Case Study Concerning Sexual Abuse of the UN Mission in the Democratic Republic of Congo (MONUC)' in Arnold R and Knoops GJA (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers Ardsley 2006) 261-286.

⁶³ Notar SA 'Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo' 2006 (14) *American University of Gender Social Policy and the Law* 413-429; A report of the UN forces commander in Sierra Leone indicated that senior Nigerian military and political officials were attempting to sabotage the UN Assistance Mission to Sierra Leone by collusion with the Revolutionary United Front in order to prolong the conflict and, thereby, to benefit from the country's illicit diamond trade. See Adebajo A *Building Peace in West Africa: Liberia Sierra Leone and Guinea-Bissau* (Lynne Rienner Publishers London 2002) 101.

⁶⁴ Jennings KM and Nikolić-Ristanović V *UN Peacekeeping Economies and Local Sex Industries: Connections and Implications* (MICROCON Research Working Paper 17 Brighton 2009) 20. Not all places are considered as being off-limits so that peacekeepers find ways of continual fraternization. See Dahrendorf N *Sexual Exploitation and Abuse -Lessons Learned Study: Addressing Sexual Exploitation and Abuse in MONUC* (Discussion Paper - United Nations Peacekeeping 2006) paras 53-58.

⁶⁵ On 10 July 2008, the MONUC radio reported that an Indian blue helmet met with the CNDP leader to express his gratitude. The leader responded that he had indeed helped him a lot. MONUC rejected the declaration and judged it to be an individual and personal initiative and that the officer had failed in his obligations. In French: Un officier militaire indien, commandant d'une base de casques bleus de la MONUC au Nord-Kivu, a déclaré son soutien à Laurent Nkunda à la mi-avril 2008 à Kitchanga, à la veille de son retour dans son pays. La MONUC rejette la déclaration de ce casque bleu, la jugeant individuelle et personnelle. See MONUC Radiokapi 'Kinshasa: Pour Solidarité avec le CNDP, un casque bleu désavoué' available at <http://radiokapi.net/sans-categorie/2008/07/10> [last accessed 15 December 2012].

weapons for minerals with armed groups in the DRC.⁶⁶ Reports⁶⁷ indicate that sexual misconduct in peacekeeping missions continues unabated,⁶⁸ and the UN has recognized this.⁶⁹ Former UN Secretary-General Kofi Annan recognized that acts of gross misconduct which were committed by UN personnel in the Congo had occurred.⁷⁰

It is evident that peacekeepers are committing crimes and escaping liability and prosecution. The questions which necessarily arise are whether this is attributable to problems encountered which relate to either substantive or procedural issues or perhaps both instances. The problem which will be addressed in this thesis focuses on why peacekeepers have not been charged with crimes, and, furthermore, why, in instances where prosecutions have been conducted, such accused persons have not been punished? It will be shown that the problem has a degree of complexity as indicated earlier. It falls not only under the domestic Criminal Laws of the selected countries but across International Criminal Law as well. This thesis will proceed to investigate both substantive and procedural issues pertaining to the allegations of crimes committed by UN peacekeepers in three African countries, namely Somalia, Burundi, and the Democratic Republic of Congo. These countries have specifically been selected because, as indicated in the delimitation and delineation paragraph of this introductory chapter, the United Nations has conducted so many missions of peace on the African continent that the present study cannot undertake to analyse all the crimes committed by their personnel.⁷¹ The other reason is that two of the three missions have been completed, but crimes committed by

⁶⁶ Osborne D 'UN troops traded guns for gold with militias, says report' *The Independent* (New York Thursday 24 May 2007) available at www.independent.co.uk/news/world/politics/un-troops-traded-guns-for-gold-with-militias-says-report-450103.html [last accessed 11 May 2011].

⁶⁷ It is important to mention that media report signalled the recurrence of sexual abuse by peacekeepers. See Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo UN. Doc. A/59/661 of 5 January 2005 para 1.

⁶⁸ See Lacey M *In Congo War: Even Peacekeepers Add to Horror* (N.Y. Times Dec. 18 2004) at A1; Lynch C *UN Sexual Abuse Alleged in Congo* (Wash. Post Dec. 16 2004) at A16; Lynch C *Report on Abuse Urges DNA Tests for Peacekeepers* (Wash. Post March 25 2005) at A15 cited by Notar SA *op cit* (n 63) 414.

⁶⁹ UNGA *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects* (report prepared by Prince Zeid Ra'ad Zeid Al-Husseini March 24 2005) UN. Doc. A/59/710.

⁷⁰ Consequently to Zeid Report, the United Nations could not obfuscate the scandal. See The New World Disorder 'U.N. accused of rape, paedophilia, and prostitution: Civilians, staff in Congo under internal investigation' available at <http://www.wnd.com/2004/11/27722/> [last accessed 15 December 2012].

⁷¹ Africa is a great security-consumer of UN operations. See Tardy T 'EU-UN Cooperation in Peacekeeping: A Promising Relationship in Constrained Environment' in Berman E, Tanner F, Windmar E and Fugugosh M (dir) *The European Union and the United Nations – Partners in Effective Multilateralism* (cc78-Text.qxp 11/07/2005) 49-68, 49; Bothe M and Dörschel T 'The UN Peacekeeping Experience' in Fleck D (ed) *The Handbook of the Law of Visiting Forces* (Oxford University Press Oxford 2001) 487-506.

peacekeepers seem not to have received any attention.⁷² With respect to the Democratic Republic of Congo, the conflict is still ongoing and the mission has lasted more than thirteen years. The UN investigating division has produced reports with respect to criminal acts committed by peacekeepers, but prosecution of alleged offenders does not follow suit.⁷³

Under the current UN Model Status-of-Forces Agreement, criminal jurisdiction over peacekeepers rests with their Troop-Contributing Countries.⁷⁴ Most of the time, however, it has been the UN, through the Office of Internal Oversight Services, that investigates allegations of crimes by UN personnel. When this office finds that there is irrefutable evidence of the commission of the crime, all that the UN can do is to expel the perpetrator and send him or her home.⁷⁵ It has been reported that in March 2005, the United Nations received and investigated 150 allegations of sexual abuse by UN civilian staff and soldiers in the Congo,⁷⁶ for which ‘disciplinary action was recommended against nine civilian MONUC members and 65 soldiers, 63 of whom were expelled from the mission and repatriated.’⁷⁷ The allegations include accusations of paedophilia, rape, and prostitution.⁷⁸ Even the reported and substantiated cases of abuse by peacekeepers in the north-eastern town of Bunia in 2004 have never received prosecution.⁷⁹

The UN as such, however, has no jurisdiction to prosecute the perpetrators of the alleged crimes.⁸⁰ The only action, therefore, the UN can take is to repatriate individuals who have

⁷² Criminal acts by peacekeepers need not go unpunished. See Malan M ‘Towards Sounder Investments in Developing African Peace Operations Capabilities’ 1997 (6) *African Security Review* 17-27, 17.

⁷³ With respect to the long stay of MONUC and the ongoing conflict, Fortna has titled one of her papers in question: Does peacekeeping keep the peace? See Fortna VP ‘Does Peacekeeping Keep Peace? International Intervention and the Duration of Peace after Civil War’ 2004 (48) *International Studies Quarterly* 269-292.

⁷⁴ Para 47(b) of the Model Status of Forces Agreement, UN. Doc. A/45/594 of 9 October 1990.

⁷⁵ Martin S ‘Must Boys Be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions’ 2005 *Refugees International* 1-32, 14, 22; Rehn E and Sirleaf EJ *Women, War and Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peace-building* (United Nations Development Fund for Women New York 2002) 72; OPIE RA ‘Human Rights Violations by Peacekeepers: Finding a Framework for Attribution of International Responsibility’ 2006 (1) *New Zealand Law Review* 1-33, 27.

⁷⁶ Allred KJ ‘Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It’ 2006 (33) *Armed Forces and Society* 5-23.

⁷⁷ Ilg GM *Few Governments Answer U.N. Queries on Peacekeeper* (United Nations Inter Press Service Thursday 5 August 2010) 4.

⁷⁸ Notar SA *op cit* (n 63) 413.

⁷⁹ Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo UN. Doc. A/59/661 of 5 January 2005.

⁸⁰ O’Brien M *Protectors on trial? Prosecuting peacekeepers for war crimes and crimes against humanity in the International Criminal Court* (ARC Centre of Excellence in Policing and Security Griffith University 2012) 2. Despite misconduct by UNISOM personnel, especially soldiers, the UN never conducted an investigation. It did,

committed crimes.⁸¹ As Notar notes, ‘peacekeepers often are repatriated before the conclusion of the investigation, which contributes to a lack of accountability and timeliness in pursuing these complaints’.⁸² This same scholar also highlights the lack of transparency, in that when the Office of Internal Oversight Services has investigated allegations of crimes and misconduct by peacekeepers, the Office immediately hands the investigative reports to the Troop-Contributing Countries concerned.⁸³ The UN receives no information with respect to the course of action taken *vis-à-vis* the repatriated troops. Most countries are not willing to send information to the UN regarding the appropriate action taken.⁸⁴ The responsibility for the training, command, and discipline of peacekeeping troops lies almost entirely in the hands of the member States that contribute the troops.⁸⁵ This limits the UN’s ability to enforce consistent standards of behaviour in its missions and it fuels perceptions that the organization condones or ignores sexual abuse and other crimes committed by peacekeepers on mission.⁸⁶ The lack of UN jurisdiction over troops underlines the difficulty of maintaining discipline among military and civil personnel deployed around the world in UN operations of peace.⁸⁷ This can be remedied only if the national contingent commander can be prosecuted for having failed to prevent acts of misconduct by peacekeepers and the State of origin can be held liable and asked to pay reparation to victims. This thesis will, therefore, also investigate the critical issue of criminal liability for omissions, as well as State liability for crimes committed by its troops serving under the UN flag.

1.3 Conceptualisation and scope of the thesis

1.3.1 The concept of ‘crime’

however, paid compensation to victims. See Zwanenburg *MC Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (LLD Leiden 2004) 245.

⁸¹ Martin S ‘Must Boys Be Boys? Ending Sexual Exploitation & Abuse in UN Peacekeeping Missions’ 2005 *Refugees International* 1-32, 14.

⁸² Notar SA *op cit* (n 63) 414.

⁸³ *Ibid.*

⁸⁴ *Ibid.* 415.

⁸⁵ Article 7 of the UN Revised Model Memorandum of Understanding, 12 June 2007, UN. Doc. A/61/19 (Part III). The UN can provide pre-deployment training upon request by a State. See UN. Doc. A/63/19: Report of the Special Committee on Peacekeeping Operations and its Working Group 2009 substantive session of 23 February-20 March 2009 para152.

⁸⁶ Deen-Racsmány Z ‘The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?’ 2011 *Journal of Conflict & Security Law* 1–35, 4-5.

⁸⁷ Flesman M ‘Tough UN line on peacekeeper abuses: Action initiated to end sexual misdeeds in peacekeeping missions,’ available at www.un.org/africarenewal/magazine/april-2005/tough-un-line-peacekeeper-abuses [last accessed 15 December 2012].

In simple terms, the concept of crime indicates ‘a human act that violates the criminal law’.⁸⁸ Snyman’s definition of the concept of ‘crime’ is as follows: ‘A crime is a conduct which is legally forbidden, which may, in principle, be prosecuted only by the state, and which always results in the imposition of punishment.’⁸⁹ This definition by Snyman can also be linked to other academic authors such as Burchell and Milton,⁹⁰ Desportes and Le Gunehec⁹¹ and Pradel.⁹² Of key importance is that someone must have performed an act and his/her act or behaviour must have already been identified in terms of substantive law as criminal.⁹³ A number of criteria must normally be met for an act to be considered to be a crime and for criminal liability to result from such an act.⁹⁴ The accused must have committed an act or an omission by which the interests of an individual or of the State or the people in general are infringed. The unlawful conduct must have been performed voluntarily or negligently.⁹⁵ The punishment is meted out against the perpetrator on conviction and after prosecution in criminal proceedings the rules of which are also determined by law.⁹⁶

It is apparent that the concept of ‘crime’ is usually and technically defined by its elements, i.e. by all the requirements that need to be met to make up an offence and the procedure in court to secure a conviction. In national criminal law systems, an activity or an event is called a crime because the State has labelled it as such by law.⁹⁷ At an international level it becomes a question of ‘international crimes’, which might be understood as any conduct globally

⁸⁸ Broadly speaking, a crime is any action or omission prohibited by law. See Simester AP and Sullivan GR *Criminal Law Theory and Doctrine* 3 ed (Hart Publishing Portland 2007) 1; Kauzlarich D & Barlow H *Introduction to Criminology* 9 ed (Rowman & Littlefield Publishers Lanham 2009) 7.

⁸⁹ Snyman CR *Criminal Law* 5 ed. (LexisNexis Durban 2008) 3-5.

⁹⁰ Burchell J and Milton J *Principles of Criminal Law* (Juta Lansdowne 2005) 139.

⁹¹ Desportes F et Le Gunehec F *Droit pénal général* 10 éd (Economica Paris 2003) 377.

⁹² Pradel J *Droit pénal général* 11 éd (Cujas Paris 1996) no. 258.

⁹³ That is the quintessential of the criminal principle of legality. See Burchell J *South African Criminal Law and Procedure Volume I: General Principles of criminal law* 4 ed. (Juta Cape Town 2011) 34-37.

⁹⁴ Burchell J *op cit* (n 93) 45.

⁹⁵ For the discussion of requirements for criminal liability, see Burchell J *South African Criminal Law and Procedure Volume I: General Principles of criminal law* 4 ed. (Juta Cape Town 2011) 45-60.

⁹⁶ Molan MT *Criminal Law* 4 ed (Old Bailey Press Great Britain 2003) 2; Burchell J and Milton J *Principles of criminal law* (Juta Lansdowne 2005) 139; Pradel J *Droit pénal comparé* (Daloz Paris 2002) 257; Soyer JC *Droit pénal et procédure pénale* (LGDJ Paris 1992) 47; Levasseur G, Chavanne A et Montreuil J *Droit pénal général et procédure pénale* 10 éd (Sirey Paris 1991) 17; Stefani G, Levasseur G et Bouloc B *Droit pénal général* (Daloz Paris 1987) 118.

⁹⁷ *Ibid.*

prohibited by International Criminal Law, and/or contained in enforceable conventions or in international customary rules.⁹⁸

The present thesis investigates the crimes which may fall under national law as well as under international criminal law. The crimes in issue here are, however, those committed by a specific category of people, namely UN peacekeepers.⁹⁹

1.3.2 Peacekeepers - Peacekeeping

The concept of ‘peacekeepers’¹⁰⁰ includes all members of any category of personnel sent on a UN mission of peace: troops; military observers; civilian police; and civilian servants, whether internationally or locally recruited.¹⁰¹ They all become part of the mission to help to keep the peace, i.e. they are peacekeepers.¹⁰² The concept is, therefore, used to refer to the personnel serving on any peacekeeping mission or operation. They are peace support operations¹⁰³ personnel, military or civilian.¹⁰⁴ Civilian police and military observers are often referred to as ‘experts on mission’.¹⁰⁵ Special rules are, therefore, applicable to them. Indeed some rules specific to military contingents differ from those applicable to other categories of peacekeepers. For example, peacekeepers who are members of a military component are subjected to the criminal jurisdiction of their Troop-Contributing Country while those who are

⁹⁸ Cassese A *International Criminal Law* 2 ed. (OUP New York 2008) 3. In peace operations there may be a mix of domestic and international law. Since such law provides for criminal liability of individuals, the conduct of peacekeepers may fall under actual international criminal law. See Rowe P ‘Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents’ 2000 (5) *Journal of Conflict and Security Law* 45-62.

⁹⁹ It is now well documented that peacekeepers have been involved in sexual misconduct, smuggling, murder, torture, and even slavery. See Lineham R ‘Downwards Accountability and Consent in Comprehensive Assistance Missions’ 2007 (3) *Policy Quarterly* 14-21; Spees P ‘Gender Justice and Accountability in Peace Support Operations: Closing the Gaps’ 2004 (a Policy Briefing Paper by International Alert) 21.

¹⁰⁰ Peacekeepers are also called ‘blue helmets’ or ‘blue berets’ because of the light blue colour of their hats or hard protective head covering. See Dorn AW *Blue Sensors: Technology and Cooperative Monitoring for UN Peacekeepers - Cooperative Monitoring Centre Occasional Paper No. 36* (Canadian Forces College Toronto December 2004) 1; Van Rooyen *Blue Helmets for Africa: India’s Peacekeeping in Africa – Occasional Paper No. 60* (AIIA Johannesburg 2010) 7.

¹⁰¹ This is the meaning assigned to the concept in the present thesis. For any other meaning and use in other documents, see Findlay T *The Use of Force in UN Peace Operations* (SIPRI/Oxford University Press Oxford 2002).

¹⁰² The UN peacekeepers are sometimes called ‘Blue Helmets’, ‘Blue Berets’ and even “Blue Caps” (civilian peacekeepers) because of the colour of their headgear. See Dorn AW *op cit* (n 100) 1.

¹⁰³ Peacekeeping and peace support operations are ‘catch-all’ concepts. See Ngoma N ‘Peace Support Operations and Perpetual Human Failings: Are We All Human, or Are Some More Human than Others?’ 2005 (14) *African Security Review* 111-116, 111.

¹⁰⁴ Spees P *op cit* (n 99) 10.

¹⁰⁵ Miller AJ ‘Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations’ 2006 (39) *Cornell International Law Journal* 71- 99, 77. For the mandate of military observers, see Dorn AW *op cit* (n 100) 1.

not can be hauled before the criminal jurisdictions of the Host State, save where the Special Representative of the UN Secretary-General refuses to waive their immunity.¹⁰⁶

As some writers define it,

Peacekeeping is the deployment of United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.¹⁰⁷

Strictly speaking, the scope of peacekeeping remains limited to the activities consented¹⁰⁸ to by the parties to the conflict.¹⁰⁹ The UN requests the consent of the Host State, but, where there is no government, the UN may still deploy the mission of peace.¹¹⁰ Consent has constituted a constant feature in peacekeeping operations.¹¹¹ Consent by the warring parties allows the UN to conduct its activities on the ground freely.¹¹²

¹⁰⁶ See paras 42 and 47 of the Model Status of Forces UN. Doc. A/45/594 of 9 October 1990.

¹⁰⁷ Hough M, Du Plessis A and Kruys GPH (Eds) *Peace Support Operations: Selected United Nations and African Documents* (Institute for Strategic Studies University of Pretoria 2006) 21; Gumbi L 'Peacekeeping: A Historical Background' in Cilliers J and Mills G (Eds) *Peacekeeping in Africa* (Institute for Defence Policy and SA Institute of International Affairs 1995)27-47. In intrastate conflict it is sometimes only the consent of the legitimate government that is required. This puts the impartiality of the UN operation in doubt. See Tsangourias N 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' 2006 (11) *Journal of Conflict and Security Law* 465-482, 475 *et passim*. A peacekeeping mission can be sent where there is actually no peace to keep. See Goulding M 'The United Nations and Conflict in Africa since the Cold War' 1999 (98) *African Affairs* 155-166, 163.

¹⁰⁸ Bouvier A 'Convention on the Safety of United Nations and Associated Personnel: Presentation and analysis' 1995 (309) *International Review of the Red Cross* 638-666; Gilligan M and Stedman SJ 'Where Do the Peacekeepers Go?' 2003 (5) *International Studies Review* 37-54; Porretto G & Vité S *The Application of International Humanitarian Law and Human Rights Law to International Organizations* (Research Paper Series / Collection des travaux de recherche 2006 (1) Centre Universitaire de Droit International Humanitaire/ University Center for International Humanitarian Law 2006); Greenwood C 'Historical Development and Legal Basis of International Humanitarian Law' in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (Oxford University Press Oxford 2008)1-78; Dorn AW *op cit* (n 100) 7.

¹⁰⁹ Peacekeeping has come to involve a diverse array of activities including: confidence-building measures; cease-fire monitoring; disarmament of combatants; election monitoring; and humanitarian relief distribution. See Ndulo M 'The United Nations Responses to the Sexual Abuse and Exploitation of women and Girls by Peacekeepers during Peacekeeping Missions' 2008 (27) *Berkeley Journal of International Law* 126-160, 128.

¹¹⁰ Boutros-Ghali B 'Empowering the United Nations' 1992 (71) *Foreign Affairs* 89-102.

¹¹¹ Tsangourias N 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' 2006 (11) *Journal of Conflict and Security Law* 465-482.

¹¹² James A 'The Dual Nature of UN Peacekeeping' in Bourantonis D and Evriviades M (eds) *A United Nation for the Twenty-First Century: Peace, Security and Development* (Kluwer Law International The Hague 1996) 174; Petithomme M 'Humanitarian Assistance and the Dilemmas of Force for Peace: The 1992-1994 Peacekeeping Operations in Somalia' 2008 (7) *Human Security Journal* 32-45, 43; Ratner SR 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' 2005 (16) *EJIL* 695-719, 698. Where the UN intervention is without consent, pursuant to UN SC resolution under Chapter VII of the UN Charter, the UN can be considered as an occupying power. See de Jonge B 'The "Trembling Hand" of a One

It is important to note, however, that any activities aimed at bringing peace or maintaining it are considered as peacekeeping, in a general understanding.¹¹³ As one scholar has indicated, ‘Peacekeeping has become a synonym for almost any international activity aimed at attenuating and resolving conflict that has potential or actual international consequences.’¹¹⁴ Traditional peacekeeping is distinguished from other UN missions of peace which involve combat or enforcement powers.¹¹⁵ In such occurrences, the UN peace operations constitute a means of enforcement action and the requirement of consent is, or may be, ignored.¹¹⁶ The UN force is, therefore, deployed against the will of the host government and without its consent. In such a case, the action of the force can be justified on humanitarian basis.

Throughout this thesis, peacekeeping should be understood as including all peace support operations, *viz* traditional peacekeeping, peace enforcement operations, and other peace-related operations or missions such as humanitarian assistance. The study of crimes committed by peacekeepers includes all personnel who perform any activities pertaining to peace operations.¹¹⁷

1.3.3 UN mission of peace or peace operations

The expression ‘UN mission of peace’ includes all activities engaged in by the organisation in its efforts towards solving a conflict endangering international peace and security, whether such conflict occurs between two different States or within the frontiers of the same State.¹¹⁸

Hundred Year Old Provision: The Law of Occupation as Legal Framework for Legislative Acts in Peacekeeping Operations’ 2006 *International Law of Military Operations*, available at www.scribd.com/The-Trembling-Hand-of-a-One-Hundred-Year-Old-Provision [last accessed 25 July 2011].

¹¹³ Peacekeeping has shifted from traditional duties to be involved in taking on new tasks that raise questions over what we mean by ‘peacekeeping: civilian activities, de facto administration, etc.’ See Ian Johnstone, Tortolani BC and Gowan R ‘The evolution of UN peacekeeping: unfinished business’ 2005 (80) *Die Friedens-Warteian* 55-71, 57-58.

¹¹⁴ Chipma J ‘What Do We Understand by Peacekeeping Today?’ in Cilliers J and Mills G (eds) *Peacekeeping in Africa* (Institute for Defence Policy and SA Institute of International Affairs 1995) 1-25.

¹¹⁵ Shraga D ‘The United Nations as an Actor Bound by International Humanitarian Law’ 1998 (5) *International Peacekeeping* 64-81; Wilson G ‘The Legal, Military and Political Consequences of the ‘Coalition of the Willing’ Approach to UN Military Enforcement Action’ 2007 (12) *Journal of Conflict and Security Law* 295-330; Tittlemore BD ‘Belligerent in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations’ 1997 (33) *Stanford Journal of International Law* 61-117, 81.

¹¹⁶ Bantekas I, Nash S and Mackarel M *International Criminal Law* (Cavendish Publishing London 2001) 43.

¹¹⁷ Aoi C, De Coning C and Thakur R (eds) *Unintended Consequences of Peacekeeping Operations* (United Nations University Press Tokyo 2007); Tsangourias N ‘Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension’ 2006 (11) *Journal of Conflict and Security Law* 465-482; Spees P *op cit* (n 99) 10 *et passim*; Johnston N *Peace Support Operations* 33-50, available at www.international-alert.org/sites/default/files/library/TKPeaceSupportOperations.pdf [last accessed 15 December 2012].

¹¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva 8 June 1977 (U.N.T.S. 1125, 1-17512). An inter-state

Any mission sent by the UN to monitor or solve any situation with the potentiality of endangering international security and peace, therefore, is a mission of peace or a peace operation. The crimes committed by peacekeepers are those criminal acts perpetrated in the Host State where such peacekeepers are deployed. Those acts must be distinguished from 'acts performed on duty'.¹¹⁹ Indeed, whenever peacekeepers have been acting in a 'non-official or non-operational capacity', when their conduct is not linked to their official presence and capacity in the Host State, such acts are considered to have been actions 'off-duty'.¹²⁰ Such off-duty conduct cannot be attributable to the UN, i.e. the organization cannot be asked to pay reparations to third parties.¹²¹ Indeed, when a mission arrives in a Host State, its members are regarded as UN personnel. Their acts, therefore, are considered official when performed on duty, and private when performed off-duty.¹²² Whether committed on-duty or off-duty, criminal acts can never fall within the mandate of a peace operation.¹²³

1.3.4 Mandate of peace operations

The Security Council resolution authorizing the operation determines the mandate which defines the tasks of the operation.¹²⁴ In the course of time, the initial mandate may be altered by the passing of a new resolution, which usually occurs if the conditions of the assistance initiatives, monitoring, and prevention of violence have changed on the ground, or where it is

conflict is usually considered international armed conflict; an intra-state conflict is called armed conflict of a non-international character. Whenever a conflict crosses the borders, belligerents are assumed to be States and the conflict an international armed conflict. See Arimatsu L 'Territory, Boundaries and the Law of Armed Conflict' 2009 (12) *Yearbook of International Humanitarian Law* 157-192, 172.

¹¹⁹ Operational duties or on-duty are activities such as patrols, manning checkpoints, and guarding missions. Off-duty activities are, for instance, eating and socializing in the camp's bar and club, guided tours of Sarajevo. See Sion L 'Dutch Peacekeepers and Host Environments in the Balkans: An Ethnographic Perspective' 2008 (15) *International Peacekeeping* 201-213, 202.

¹²⁰ Leck C 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' 2009 (10) *Melbourne Journal of International Law* 346-364, 351.

¹²¹ *Ibid.*

¹²² Most UN peacekeepers' actions, especially of a sexual character would be considered as being performed off duty or out of the official/operational capacity. Such acts are considered as private and will therefore entail individual criminal responsibility. See Leck C *op cit* (n 120) 351.

¹²³ In principle acts perpetrated in a private capacity cannot be covered by immunity. The agreements signed between the UN and the Host State as well as the UN and the Troop-Contributing Countries, however, disinvest the Host State of criminal jurisdiction where the perpetrator is a member of the military component of the mission, and members of the civilian component can be prosecuted in the Host State and by its jurisdiction only upon waiver of the individual jurisdictional immunity by the UN Secretary-General. See Model SOFA and Revised Memorandum of Understanding. These agreements do not include the specific limitation that acts which remain far from official duties will not be covered by the jurisdictional immunity peacekeepers enjoy vis-à-vis the judiciary of the Host State. See Burke R 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' 2011 (16) *Journal of Conflict & Security Law* 63-104, 75.

¹²⁴ Johnston N *op cit* (n 117) 33.

necessary to adapt the operation to the changing nature of the conflict in the Host State.¹²⁵ The term ‘mandate’ is used to refer to authorisations and tasks under public international law with which a UN mission is vested. In peace operations, traditional tasks are: monitoring a ceasefire to allow space for political negotiations and a peaceful settlement of disputes; to protect civilians; to provide support to law enforcement agencies; to assist in the restructuring and reform of the armed forces; to facilitate the implementation of the peace agreement; to support the delivery of humanitarian assistance; to supervise and assist with the organization of elections; and to promote respect for human rights and investigate alleged violations.¹²⁶ In summary, mandates range from traditional monitoring of ceasefire agreements and acting as a buffer between disputing parties to conducting disarmament, demobilisation, and reintegration programmes,¹²⁷ civilian protection¹²⁸ from fighting factions and nation building tasks.¹²⁹

1.4 Aim of the research

Since peacekeepers, military, and civilian personnel do commit crimes against the laws of the Host State, against the civilians, it will be argued that every Status-of-Forces Agreement and every Memorandum of Understanding should contain specific clauses obligating Troop-Contributing Countries to prosecute and the UN to follow-up. Such clauses should be a pre-condition for the government of the Host State to consent to the mission, where this is needed, and for the UN to accept an offer to contribute personnel from any country. According to the current position of the international law related to crimes by peacekeepers, criminal jurisdiction over troops serving with a UN mission of peace lies with the Troop-Contributing Country.¹³⁰ Indeed ‘sovereign states have always been loath to allow other authorities to exercise criminal jurisdiction over their troops which is why the UN has never been in a position to prescribe standards of criminal process or substantive law to be exercised by

¹²⁵ Johnston N *op cit* (n 117) 33.

¹²⁶ Klappe BF ‘International Peace Operations’ in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (Oxford University Press Oxford 2008) 635-673.

¹²⁷ Tittmore BD *op cit* (n 115) 77.

¹²⁸ For UN Security Council resolutions for Missions with direct reference to the protection of civilians, see Holt VK ‘The Responsibility to Protect: Considering the Operational Capacity for Civilian Protection’ (Discussion Paper of Research conducted for the Stimson Center’s Project on *Operational Capacity for Civilian Protection* Washington DC 2005) 46; Breau SC ‘The Impact of the Responsibility to Protect on Peacekeeping’ 2006 (11) *Journal of Conflict and Security Law* 429-464.

¹²⁹ Johnston N *op cit* (n 117) 33.

¹³⁰ UNGA *Model Status of Forces Agreement* (SOFA) (UN. Doc. A/45/594) paras 46-48 regarding jurisdiction of peacekeepers; UNGA ‘Note by the Secretariat: Criminal Accountability of United Nations Officials and Experts on mission’ (UN. Doc. A/62/329 of 11 September 2007) para 16; Allais C ‘Sexual Exploitation and Abuse by UN Peacekeepers: The Psychosocial Context of Behaviour Change’ 2011 (39) *Scientia Militaria-South African Journal of Military Studies* 1-15, 8.

peacekeeping participants.¹³¹ It will be shown that the problem has a dimension of a complexity and is therefore not *prima facie* clear cut as one needs to consult not only domestic Criminal Law of the selected countries, but also International Criminal Law.

The aims of this thesis will be to investigate and address the following issues:

- The possibility that sexual offences, such as rape, could be elevated to the rank of war crimes when committed by peacekeepers. Rape is the most commonly committed crime by peacekeepers, but it is usually considered to be an isolated act, without connection to the armed conflict monitored by peacekeepers. In fact, if the so-called isolated sexual act is considered to be a war crime, the agreements between a Host State and the UN (i.e. a Status-of-Forces Agreement) or between the UN and the Troop-Contributing Country (i.e. a Memorandum of Understanding), will be considered as *res inter alios acta* and, therefore, have no effect on third states who will remain in a position to prosecute alleged perpetrators of such rape, provided that the latter is actually on their territory.¹³²
- How the law of the Host State is applicable to members of the UN contingents alleged to have committed crimes in Somalia, Burundi, and the DRC. In the discussion of the law of each of these Host States, the elements of the specific crime and the possibility of available defences will be presented. In this regard a discussion will be undertaken relating to Somalia, Burundi, and the DRC to establish whether troops can be caught under the ambits of the relevant crimes, or whether defences exist, which render the troops criminally unaccountable for their acts.
- The issue of state liability for omissions will also be discussed. South Africa as a Troop-Contributing Country, which has deployed troops to Africa, will be furnished as an example in discussing state liability, as well as the element of the specific crimes and the defences available to perpetrators of the crimes when prosecuted before the courts of their country of nationality.

¹³¹ Patterson M 'A Corporate Alternative to United Nations *ad hoc* Military Deployments' 2008 (13) *Journal of Conflict and Security Law* 215-232, 224.

¹³² Article 34 of the Vienna Convention on the law of treaties - see United Nations *Treaty Series*, vol. 1155, p. 331; Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch-/DFAIT_rport.doc [last accessed 29 September 2011].

- The hurdles relating to the issues of reserving jurisdiction over peacekeepers to the Troop-Contributing Countries, as well as their apparent reluctance actually to prosecute repatriated alleged perpetrators.
- The apparent lack of prosecution will be investigated and, where available, cases of prosecution discussed.
- The need to determine the best mechanism for criminal accountability for peacekeeping personnel who have actually committed crimes violating domestic or International Criminal Law.¹³³ Alternatives to the unwillingness by those States who actually have criminal jurisdiction under the Status of Forces Agreement or under the Memorandum of Understanding are considered, in particular, with emphasis on how barriers regarding investigations prior to any prosecution can be surmounted. Further arguments which will be put forward are that crimes by peacekeepers must be dealt with by clear legislation aiming at barring Troop-Contributing Countries who do not meet their obligations under International Law from participating in future operations of peace.

The ‘fear of criminal or disciplinary punishment, in addition to the deterrent effect of past convictions, is a means by which adherence to humanitarian law can be guaranteed.’¹³⁴ Without prosecutions and convictions, it may be hard to enforce human rights law and/or international humanitarian law.¹³⁵ This applies to any state forces as well as to UN peacekeepers. If a systematic mechanism is put in place, it must be a mechanism that holds every peacekeeper accountable. It will be shown that peacekeepers who allegedly committed crimes in the three selected countries of this study have not accounted for their deeds. Where attempted prosecutions were held, namely in Belgium and Canada, the sentences were not of any weight compared to the gravity of the crimes prosecuted, and the UN showed no effort to follow-up to ensure the prosecutions were serious.

It will be argued that the UN should ensure that Troop-Contributing Countries, under the existing policies, prosecute those blue helmets found to have committed crimes during UN missions of peace. Since it is the Office of Internal Oversight Services that investigates alleged crimes by peacekeepers, once this service has sufficient evidence that a crime has

¹³³ Gray C ‘Peacekeeping After the Brahimi Report: Is There a Crisis of Credibility of the UN?’ 2001 (6) *Journal of Conflict and Security Law* 267-288.

¹³⁴ Wolfrum R and Fleck D ‘Enforcement of International Humanitarian Law’ in Fleck D (ed) *The Handbook of International Humanitarian Law* 2 ed (Oxford University Press Oxford 2008) 675-722, 687.

¹³⁵ *Ibid.*

been committed, the UN should not limit its reaction to repatriation; it should also make sure that she or he faces prosecution in her/his home country. As to UN civilian personnel, the model Status-of-Forces Agreement gives the procedure to follow even if such procedure does not actually mean the wrongdoer will actually be prosecuted in the host country.¹³⁶

The study attempts, and seeks to elucidate, the meaning of the privilege of jurisdiction accorded to peacekeepers serving under the UN flag. The argument is that such a state of affairs has the appearance of an almost devised impunity, since states do not appear to be obliged to exercise the criminal jurisdiction that rests with them. It also discusses the fact that the interests of victims are not taken into consideration since the model Status-of-Forces Agreement and other agreements do not foresee that a trial in the home country takes away the right of the victims because they cannot travel to witness or to claim reparation. The study proposes some alternatives to resolving the problem and throws light on the importance of victims in criminal proceedings and their right to a remedy, and, at the very least, the right of victims to know that justice has been done.

1.5 Method of research

The method employed to conduct this research adequately is essentially analytical. The literature survey, especially with reference to domestic Criminal Law of selected countries, International Criminal Law, and international norms and principles, will help to shed enough light on the question of whether leaving criminal jurisdiction over crimes committed by peacekeepers under UN command to contributing states is the proper solution or whether, to some extent, it contradicts the objective of outlawing impunity. The research involves a literature study of UN resolutions and other official documents, textbooks, and journal articles in connection with specific UN operations of peace and available case law.¹³⁷ The primarily critical analysis of the relevant law and peacekeeping-related documents is undertaken in order to identify the shortcomings of the current mechanism put in place to deal with crimes perpetrated by UN peacekeepers.

¹³⁶ Paragraph 47(b) of the Model SOFA, UN. Doc. A/45/594. Obstacles exist as to the observance by the Host State of the international standards to assure a fair trial.

¹³⁷ It is of great importance to mention that most military court decisions in criminal matters are not made available to the public. Libraries do not have law reports on military criminal cases decided in South Africa nor elsewhere with respect to peacekeeping personnel. Military prosecutions are shrouded in secrecy. See Rehn E and Sirleaf EJ *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building* (United Nations Development Fund for Women New York 2002) 119.

1.6 Delineation and limitation of study

Since the United Nations has had many missions of peace on the African continent, and since the present study cannot undertake to analyse the crimes committed by personnel on all the different missions, the specific focus of this thesis is on those crimes committed by peacekeepers on missions in three African countries, namely Somalia, the Democratic Republic of Congo (DRC) and Burundi. Taking Canada, Belgium, and South Africa as the paradigm, the thesis investigates whether Troop-Contributing Countries have actually prosecuted, or not prosecuted, the members of their military contingents who have been accused of having committed crimes abroad, on a UN mission of peace. With respect to the DRC, the UN has conducted two missions: ONUC in the 1960s and MONUC from November 1999. It is the latter mission that is included in the study on crimes committed by peacekeepers in DRC. The analysis relates to crimes committed by UN peacekeepers, irrespective of whether these crimes may qualify as domestic or international crimes. Issues of jurisdiction relating to such conduct, problems relating to investigation, and the role victims can play in all the process are discussed.

The study does not seek to demonstrate whether these UN operations of peace were successful or not. It focuses purely on issues of criminal accountability and jurisdiction relating to peacekeepers.¹³⁸ It is the understanding of the present researcher that every allegation of a crime by a peacekeeper should be considered and prosecuted and the victim's interests taken into account in the proceedings. Prosecution of previous crimes alleged to have been committed by peacekeepers may serve to prevent future misconduct by UN personnel on mission.¹³⁹ The study does not include cases where UN operations or missions function as quasi-governments, as the latter have not been identified as such in Africa.¹⁴⁰ The failure to protect civilians under imminent threat is not part of the discussion, even though such an attitude of abstaining¹⁴¹ from fulfilling the mandate may amount to collusion with the armed

¹³⁸ Ngoma N 'Peace Support Operations and Perpetual Human Failings: Are We All Human, or Are Some More Human than Others?' 2005 (14) *African Security Review* 111-116.

¹³⁹ Ntoubandi FZ *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff Publishers Leiden 2007) 1.

¹⁴⁰ See Mégret F and Hoffmann F 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' 2003 (25) *Human Rights Quarterly* 314-342.

¹⁴¹ Darhendorf N and Shifman P 'Sexual Violence in Conflict and Post Conflict: A Need for More Focused Action' 2004 (23) *Refugee Survey Quarterly* 7-19.

group committing war crimes.¹⁴² The study is interested in allegations of crimes committed by any personnel working with UN agencies, and/or humanitarian personnel, in order to suggest ways of eliminating sexual exploitation and the abuse of women and children.

It is of crucial importance to note that, in civil law systems, especially in countries like Burundi and DR Congo, the most important source of law is Statutes (emanation of Parliament) and not case precedent. References to provisions of Codes are, therefore, considered to be a sufficient source with respect to principles of criminal law which need not be supported by case law.¹⁴³ Somali is, on the other hand, an eclectic system in that it borrows from the French, Italian, and English law system. It has a Penal Code dated 1962. This is the main source of criminal law available to any researcher, which explains the lack of references to case law in the study of principles applicable to crimes committed by peacekeepers as a system of case law precedent is not followed.¹⁴⁴

Since the aim of this thesis is not to seek to develop domestic law, a limited comparative analysis can merely be undertaken for the purposes of identifying possible substantive issues which may play a role in holding peacekeepers accountable.¹⁴⁵ A comparative study may be undertaken with the objective of influencing the melioration of the domestic law. Such an objective can be reached finding inspiration in the rules and principles of law or the legal institutions of another state.¹⁴⁶ The adoption of those foreign legal institutions considered in some way superior to be imitated or adopted, either as a whole or in part, does not mean that the State which takes inspiration in those institutions adopts a foreign law, but actually reforms its own law.¹⁴⁷ In this thesis, the focus is on International Criminal Law issues of

¹⁴² The UNSC has increasingly included civilian protection in peacekeeping mandates, especially since 1999. See Chiziko MD *op cit* (n 52) 80; Holt VK *op cit* (n 128) 53.

¹⁴³ Contrary to common-law systems, any principle of criminal law needs proof of application in case law. This is not so in civil law systems where principles are considered abstract. The influence of the Supreme Court decisions can be taken into account only in law reforms. Indeed there is no systematic publication of judicial decision, selected cases deemed to be of more than unusual interests are published. Thus, in rare instances, unwritten principles may have their origin in interpretation of the law by courts. For example with respect to some grounds of justification in the DR Congolese Criminal Law. See Crabb JH *The Legal System of Congo-Kinshasa* (The Michie Company Law Publishers Charlottesville 1970) 90.

¹⁴⁴ Military secrecy also constitutes a great limitation to the analysis of specific prosecution or principles laid by case law. See Ngoma N *op cit* (n 138) 111-116.

¹⁴⁵ The study of foreign laws is a subject of interest whenever legal science realizes that no legal system can claim perfection. See Hug W 'The History of Comparative Law' 1932 *Harvard Law Review* 1027-1070, 1028.

¹⁴⁶ Hug W *op cit* (n 145) 1029.

¹⁴⁷ *Ibid*; Eser A 'The Importance of Comparative Legal Research for the Development of Criminal Sciences' in Blancpain R (ed) *Law in Motion: Recent Developments in Civil Procedure, Constitutional, Contract, Criminal, Environmental, Family & Succession, Intellectual Property, Labour, Medical, Social Security, Transport Law* (Kluwer The Hague 1997) 492-517.

accountability and jurisdiction over peacekeepers, and culminates in a proposed amended Convention in Chapter eight which addresses many of the *lacunae* in International Criminal Law pertaining to crimes committed by peacekeepers.

1.7 Structure of research

The present study on the crimes committed by UN peacekeepers in Africa is divided into eight main subdivisions. Since chapter one has been discussed, chapter two investigates the three missions of peace during which peacekeepers have been accused of committing crimes. The chapter seeks to analyse the allegations of those crimes by peacekeepers and to study them in the light of domestic law of the Host State of the mission. This is undertaken in order to ascertain whether or not peacekeepers would be criminally liable under the territorial law of the place where the act was performed. The crime allegedly committed, its elements, and possible defences to such crime will be discussed, and peacekeepers will be investigated as possible perpetrators of these crimes. The purpose of the chapter is to try to identify whether or not peacekeepers can be held accountable in terms of the law of the Host State.

Chapter three discusses the law applicable to crimes committed by peacekeepers with respect to the domestic Criminal Law of a Troop-Contributing Country. Since the study of the law of each and every contributing country whose contingent members are alleged to have committed crimes during UN missions of peace in Somalia, Burundi, and the DRC cannot be undertaken, South African law has been selected because South Africa is an African State which has deployed troops to MONUC and ONUB, but also because it is beyond the scope of this thesis to include the study of each and every TCC criminal system and response to crimes committed by its troops while serving under the UN flag.¹⁴⁸ The focus is centred on how the alleged crimes committed by peacekeepers infringe the domestic Criminal Law of the troop-contributing countries, utilising South Africa as an example of an African State. Rape, prostitution, murder, and assault are, therefore, discussed in light of the South African law.¹⁴⁹ Special emphasis is placed on whether there can be any State liability for failure to prevent crimes or to prosecute peacekeepers who have been accused of perpetrating crimes while on mission.

¹⁴⁸ For instance MONUC is composed of 60 Troop-Contributing Countries. See Gall TL & Hobby JM (eds) *Worldmark Encyclopedia of the Nations volume 1: the United Nations* (Thomson Gale Detroit 2007) 88.

¹⁴⁹ The discussion does not imply that all the crimes presented were actually committed by South African soldiers, for most of the crimes levelled against the considered contingent were rape.

Chapter four of this thesis investigates how International Criminal Law deals with crimes committed by peacekeepers. Although many of the allegations of crimes committed by peacekeepers are of a sexual character, the chapter seeks to determine whether these offences can, therefore, be categorised under war crimes and crimes against humanity. Both categories include sexual crimes and abuses such as rape under the Rome Statute.¹⁵⁰

Chapter five presents the practical problems relating to the investigation of crimes committed by peacekeepers. It presents, first of all, the authorities invested with some investigating powers. These authorities may come from the UN, the Troop-Contributing Countries or the Host State. The chapter also questions the possible residual criminal jurisdiction of the Host State as well as of a third state. It argues that investigating crimes that have occurred outside one's own jurisdiction constitutes a difficult task. Co-operation between stakeholders is, therefore, crucial. It insists on the issue of the importance of an investigation to hold peacekeepers accountable for their crimes and on the crucial involvement of victims in the proceedings.

Chapter six explores the avenues available regarding jurisdiction over crimes allegedly committed by peacekeepers. The chapter also investigates whether the International Criminal Court may have criminal jurisdiction over the alleged misconduct of peacekeepers. As it is the duty of the Troop-Contributing Country whose contingent member is alleged to have committed a crime to prosecute such crime,¹⁵¹ the chapter discusses the relevant prosecutions in Belgium and Canada where allegations of misconduct exist pertaining to peacekeepers while on mission in Africa.

Chapter seven critically analyses the draft convention on the criminal accountability of UN officials and experts on mission.¹⁵² It will be argued that the draft remains an instrument that needs core improvement. A treaty to be presented for signature and ratification necessitates more amelioration to ensure all crimes are taken into account and the scope *ratione personae* should not be limited to UN officials and experts on mission. The chapter will also suggest the insertion, into the UN Security Council resolution that establishes a UN operation of

¹⁵⁰ Ss 7 and 8 of the Rome Statute.

¹⁵¹ Oswald B, Durham H and Bates A *Documents on the Law of UN Peace Operations* (Oxford University Press New York 2010) 56; Article 7.10 of the Revised Draft Model Memorandum of Understanding as set out in A/61/19 (Part III).

¹⁵² Annex III to UN Doc. A/60/980 of 16 August 2006.

peace, of a tripartite jurisdiction that will adjudicate any allegation of misconduct by peacekeepers, whether military or civilian.

This study concludes with Chapter eight which draws upon the findings of the seven main chapters. Recommendations are made to insure that peacekeepers are held accountable for their actions and the chapter investigates the viability of a non-partial court as a possible solution to jurisdictional issues. Other recommendation relate to the amendment of the draft convention. The benefits of doing so are highlighted. It will be shown that the extant norms with respect to peacekeepers are not adequate to ensure that justice is done and that they need to be revised and the shortcomings addressed. To this end, reform is necessitated. Draft legislation is, therefore, proposed.

CHAPTER II

CRIMES BY PEACEKEEPERS IN THE HOST STATE

2.1 Introduction

This chapter gives an account of the allegations of the specific crimes committed by peacekeepers in the Host States of Somalia, Burundi, and the Democratic Republic of Congo. The three African countries have been selected for the purpose of this study by virtue of the fact that crimes committed by peacekeepers are the most prevalent in those countries. Furthermore, although the UN missions of peace to Somalia and to Burundi have been completed, few prosecutions against peacekeepers alleged to have perpetrated murder, wilfully causing of serious injury to body, rape, and acts of sexual violence have been initiated. The allegations of crimes committed by peacekeepers who have served with different UN missions of peace on the African continent are not limited to the abovementioned crimes.¹ In the DRC, for instance, there have been allegations that peacekeepers are involved in minerals for weapons trafficking and the pillaging of natural resources.²

The chapter also discusses the question of whether or not the law of the Host State contains provisions criminalising the different crimes allegedly committed by visiting forces such as United Nations peacekeepers. Criminal conduct by any individual person, including peacekeepers, should fall under the domestic criminal law of wherever it takes place because the notion of territoriality, as the basis for criminal jurisdiction, requires that the trial of the offender shall take place where the offence was committed.³ However, it will be indicated that

¹ See UNGA *Criminal accountability of United Nations officials and experts on mission: Note by the Secretariat* (UN. Doc. A/62/329 of 11 September 2007) para 37, where it is stated that ‘The Secretariat recognizes the difficulty in establishing a finite list of crimes that should be covered by a convention. What seems clear is that a convention should not be limited to crimes against the person; the recent investigation into gold smuggling and trafficking in weapons in MONUC highlights the need for a Convention to apply to all serious crimes to ensure there is no jurisdictional gap.’

² *Ibid.* see also Adaka F ‘The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines’ 2008 (47) *Military Law and the Law of War Review* 253-265, 256.

³ See Sornarajah M ‘Extraterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives’ 1998 (2) *Singapore Journal of International and comparative law* 1-36, 2. Indeed it is in the interest of the State enacting the law to fix the territorial scope of its criminal laws. This enables such a state to set the limits of its tribunals, taking into account the existence of foreign jurisdictions. See de Vabres D *Essai d’histoire et de critique sur la compétence criminelle dans les rapports avec l’étranger* (Sirey Paris 1922) 47 *et passim*.

this might not, in fact, be the case, and the situation is not so straight-forward.⁴ The extent to which the domestic law of the three countries included in this study have enacted substantive law to deal with crimes committed by peacekeepers will, therefore, be investigated. Before doing that, an account of allegations of crimes committed by peacekeepers will be undertaken to delineate the parameters of the crimes and to provide the context in terms of which these crimes are committed.

2.2 Account of allegations of crimes by peacekeepers in Somalia, Burundi, and the DRC

Although the media has published numerous allegations regarding each and every mission of peace established in the post cold war period and deployed to Africa, the present thesis focuses on three of the UN missions of peace conducted on the African continent.⁵ Reports of crimes committed by peacekeepers began to emerge in the early 1990s,⁶ although much of the conduct of peacekeepers was considered to have been concealed or not reported.⁷

The account of allegations against peacekeepers starts with the examination of those perpetrated in Somalia, then Burundi, and, then, the DRC. The focus is on crimes against life and the physical integrity of the person. Sexual crimes, especially rape and engaging the services of a prostitute, will be explored in more depth as it will be shown that these crimes are the most prevalent. Other forms of crimes will be indicated only where possible and to show the difference between different peace operations.

2.2.1 Incidents reported in Somalia

As far as Somalia is concerned, there have been allegations of the rape of women perpetrated by peacekeepers outside the camps of internally displaced people.⁸ The victims have usually been women who left the camp to find and collect firewood.⁹ Although all the allegations of

⁴ SOFAs and Memorandums of Understanding leave criminal jurisdiction over military peacekeepers to the TCC. See *infra* 6.2 in this thesis.

⁵ UNGA *Report of the Office of Internal Oversight Services on its investigation into allegations of sexual exploitation and abuse in the Ituri region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo* (UN. Doc. A/61/841 of 5 April 2007) para 1.

⁶ With the UN mission of peace in Somalia.

⁷ For an overview of crimes committed by peacekeepers in Africa and elsewhere, see O'Brien M *Overcoming Boys-Will-Be-Boys Syndrome: Is Prosecution of Peacekeepers in the ICC for Trafficking, Sexual Slavery and Related Crimes against Women a Possibility?* (Master's thesis: University of Lund 2004) 13; DeGroot GJ 'Wanted: A Few Good Women: Gender Stereotypes and their Implications for Peacekeeping' (paper presented at the 26th annual meeting with the theme Women in NATO forces 26-31 May 2002) available at www.nato.int/ims/2002/cwinf2002/cwinf-01.htm [last accessed 19 December 2012].

⁸ O'Brien M *Overcoming Boys-Will-Be-Boys Syndrome op cit* (n 7) 13.

⁹ *Ibid.*

rape do not appear to amount to the level of widespread conduct, other cases of rape did exist.¹⁰ One example of such cases is the gang-rape of a 20-year-old Somali woman in June 1993 near the ‘Porto’ entry to Mogadishu, after one of the soldiers had beaten her into a semi-conscious state.¹¹ It has also been reported that on or about 14-15 June 1993, peacekeepers forced a Somali woman into a container and gang-raped her.¹² A similar incident is reported that another young Somali woman was raped with a pistol flare at the ‘Demonio’ check-point, North of Mogadishu, in November 1993.¹³

Other instances of criminal conduct point to acts of torture and physical abuse. There have been allegations that soldiers subjected a detained Somali man, Aden Abukar Ali, to electric shocks in the Johar camp,¹⁴ and that, in July 1993, peacekeepers had beaten and seriously injured three Somali men.¹⁵ Acts of torturing and murder of unarmed Somalis by Belgian troops stationed in Kismayo have also been reported.¹⁶ Belgian paratroopers were depicted holding a Somali boy above a campfire.¹⁷ Further instances of murder and grievous bodily harm inflicted against civilians by US troops have been reported.¹⁸ Peacekeepers from Canada have also been accused of four cases of murder.¹⁹ Some allegations are documented and supported by photographs.²⁰ All of these crimes occurred during UNOSOM II, between June and November 1993.²¹

¹⁰ The concept of ‘widespread’ may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. See Damgaard C *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer Berlin 2008) 80.

¹¹ Amnesty International ‘Italy: A briefing for the UN Committee against Torture’ (AI Index: EUR 30/002/1999 1 May 1999) 11.

¹² Lupi N ‘Report by the Inquiry Commission on the Behaviour of Italian Peacekeeping Troops in Somalia’ 1998 (1) *Yearbook of International Humanitarian Law* 375-379, 378.

¹³ *Ibid.*

¹⁴ Amnesty International ‘Italy: A briefing for the UN Committee against Torture’ (AI Index: EUR 30/002/1999 1 May 1999) 11.

¹⁵ *Ibid.*

¹⁶ With respect to the Belgian contingent, it is estimated that out of a total of 268 cases of crimes allegedly committed by Belgian troops and submitted for investigation, 58 of those cases related to murder or grievous bodily harm. One paratrooper interviewed on a Belgian radio estimated the number of killings to be four or five times higher. See de Waal A ‘US War crimes in Somalia’ 1998 (30) *New Left Review* 131-144, 135 *et seq*; Martins M S ‘Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering’ 1994(143) *US Military Law Review* 3-160, 66; Adams TK ‘SOF in Peace-Support Operations’ 1993 (6) *Special Warfare* 2-7.

¹⁷ Van Baarda TA ‘Military Ethics in Peacekeeping and in War: Maintaining Moral Integrity in a World of Contrast and Confusion’ available at <http://jha.ac/articles/a129.htm> [last accessed 1 July 2011]; Shraga D ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage’ 2000 (94) *American Journal of International Law* 406-412, 406.

¹⁸ De Waal A ‘US War crimes in Somalia’ 1998 (30) *New Left Review* 131-144, 137.

¹⁹ *Ibid.*

²⁰ Lupi N *op cit* (n 12) 376.

²¹ *Ibid.*

2.2.2 Incidents reported in Burundi

Regarding Burundi, two UN peacekeepers were repatriated in 2004 after being accused of sexual abuse²² in Muyinga at the border of Burundi with Tanzania.²³ The other instance relevant to the present study is the case of crime committed by a peacekeeper deployed with the UN mission in Burundi. A South African sergeant allegedly raped and killed a 14-year-old girl called Therese Nkeshimana.²⁴ The killing of this Burundian teenager remains the only known instance of murder perpetrated by peacekeepers deployed with ONUB.²⁵ Sergeant Philippus Jacobus Venter is also reported to have assaulted a guesthouse employee for having allegedly refused to rent him and the girl a room.²⁶

It is important to remind the reader that only discovered criminality is reported and makes its way into the statistics²⁷, and sexual violence against women is, in almost all different situations, under-reported.²⁸ This is also the case in respect of crimes by UN peacekeepers in Burundi. In a report of 2008, the UN Office of Internal Oversight Services recognized that there were substantiated allegations that members of a military contingent sexually exploited local women in Burundi. In an excerpt from the report, it is explained that:

In the former ONUB, OIOS substantiated allegations that members of a military contingent sexually exploited local women. Their conduct was aided by lax security at the military contingent's camp which facilitated unauthorized access by members of the local population into and out of the camp. OIOS also found that though allegations had been brought to the attention of the military contingent commander and the poor security situation was known,

²² See Busari S 'Charity: Aid workers raping, abusing children' available at <http://edition.cnn.com/2008-/WORLD/europe/05/27> [last accessed 19 December 2012].

²³ BBC News 'UN sex abuse sackings in Burundi: Two United Nations peacekeepers in Burundi have been sacked after having sex with prostitutes and minors', Published 2005/07/19, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4697465.stm> [last accessed 21 December 2012].

²⁴ Williams K 'SA exports a culture of sexual abuse' available at www.genderslinks.org.za/article/south-africa-exports-a-culture-of-sexual-abuse-2006-03-10 [last accessed 21 December 2012].

²⁵ Otto H 'SA Soldier Facing Murder Charge in Burundi' (27 February 2006) at www.iol.co.za/news-africa/sasoldier-facing-murder-charge-in-burundi-1.267660 [last accessed 21 December 2012].

²⁶ *Ibid.*

²⁷ The most significant problem is that a substantial proportion of all crime goes unreported to police. Unreported crimes represent the so-called 'dark figure' of crime because their nature and extent are unknown. See Luckenbill DF and Miller K 'Criminology' 2006 (39) *Bryant-45099 Part VIII.qxd* 391-398, 392; Nabi A 'The Enigma of the Crime of Cattle Theft in Colonial Sindh 1843 – 1947' 2011 (3) *Pakistan Journal of Criminology* 35-102, 59; Skogan WG 'Dimension of the Dark Figure of Unreported crimes' 1977 *Crime and Delinquency* 41-50, 42.

²⁸ Bastick M, Grimm K & Kunz R *Sexual Violence in Armed Conflict Global Overview and Implications for the Security Sector* (DCAF Geneva-Switzerland 2007) 51, 117; Amnesty International *Burundi: No protection from rape in war and peace* (AI Index: AFR 16/002/2007 London 2007) 7; Gilliard N 'Peacekeepers or Perpetrators? An analysis of Sexual Exploitation and Abuse (SEA) by UN personnel in the Democratic Republic of Congo' 2010-2011 (3) *Mapping Politics* 27-35, 34.

little or no action was taken by the commander to address the issue. OIOS recommended to the Department of Field Support that the case be referred to the concerned Troop-Contributing Country for appropriate action; however, to date, no response from the Troop-Contributing Country has been received.²⁹

From an analysis of the above excerpt, it would appear that, despite the existence of a code of conduct devised in response to reports of sexual exploitation of host populations by several peacekeeping missions in Africa, the situation is still not curbed. It is even considered that cases of sexual exploitation and abuse remain underreported.³⁰ This may be attributed to factors such as the fact that rape victims themselves do not always wish to come forward with a complaint, owing to fear, ignorance, or cultural barriers.³¹ It was hoped that the establishment of an ONUB Code of Conduct Unit and the appointment a gender adviser would reduce the problem of sexual exploitation and abuse as well as the effect of underreporting sexual criminal acts by peacekeepers in Burundi.³² Diop, the military spokesman of the UN Operation in Burundi, is quoted to have said that he has been in contact with the Burundian police chief from the area where the alleged crimes took place.³³ No other details are, however, available.³⁴

²⁹ Report on the activities of the OIOS - Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations - Report on the activities of the Office of Internal Oversight Services for the period from 1 January to 31 December 2007 (UN, Doc. A/62/281 (Part II) 25 February 2008) para 36.

³⁰ Dahrendorf N *Sexual Exploitation and Abuse: Lessons Learned Study - Addressing Sexual Exploitation and Abuse in MONUC DRC* (Department of Peacekeeping Operations or of the United Nations March 2006) para 36.

³¹ Van der Bijl C and Rumney P 'Attitudes, Rape and Law Reform in South Africa 2010 (73) *Journal of Criminal Law* 414-449, 420. Cases of abuse go unreported for fear of stigmatisation. Children fear their parents would beat them if they told them that they themselves had been abused. Children are afraid of physical retribution by the perpetrator or fear that the authorities would not believe them. Rape and other offences of a sexual nature are notoriously underreported in almost every society. This underreporting is 'exacerbated in direct proportion to the degree a society denigrates a victim for the offence perpetrated upon him or her', as violence of a sexual nature engenders multiple levels of shame to the victims, their families, and communities. Husbands and families reject the women as soiled after rape has occurred. See Csáky C *No One to Turn To: The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers* (London Save the Children UK 2008)12-14.

³² The number of the complaints relating to sexual behaviour totaled 536. There were 136 specific complaints related to charges of rape. Other incidents of sexual violence are surely not reported. See the report by Krasno J *External Study: Public Opinion Survey of ONUB's Work in Burundi* (City College of New York and Yale University New York 2006) 6.

³³ *Ibid* 23. The worst cases of rape and prostitution occurred in Gitega. See also UN 'UN conducts inquiry into alleged sexual abuse by peacekeepers in Burundi' available at www.un.org/apps/news/story.asp?NewsID=13623&Cr=burundi&Cr1 [last accessed 19 December 2012].

³⁴ *Ibid*.

2.2.3 Incidents reported in the DR Congo

Concerning the DRC, Human Rights Watch reported that MONUC personnel sexually exploited women, and girls as young as 12, where they were deployed.³⁵ This report revealed that six Moroccans and one French peacekeeper were repatriated owing to criminal conduct.³⁶ The French case alluded to is that of the MONUC logistics employee, Didier Bourguet, who video-taped himself abusing underage girls.³⁷ The practice of luring girls ‘as young as ten years old to have sex in exchange for a cup of milk, a few eggs, peanut butter or a dollar’³⁸ has come to be known in the war-torn eastern part of the country as *kidogo usharati*, i.e. little prostitution or prostitution where the client pays little or almost nothing.³⁹ One victim is reported as saying that she ‘negotiated to have sex with one Moroccan peacekeeper but then five other Moroccan peacekeepers raped her.’⁴⁰ It must be borne in mind, however, that having sex with a child for a reward is not prostitution. A child cannot give valid consent to sexual intercourse. In such circumstances, the conduct amounts to rape in Congolese criminal law.⁴¹

The above report by NGOs in 2004 was almost confirmed by the OIOS in 2005 when, at the end of an investigation, the UN found that certain UN peacekeepers in the DRC were having sex with women in exchange for food and money.⁴² According to one report, the Department of Peacekeeping Operations, in 2003, conducted an investigation into the allegations of sexual

³⁵ Human Rights Watch ‘MONUC: A Case for Peacekeeping Reform’ (Testimony of Anneke Van Woudenberg before the U.S. House Committee on International Relations, Subcommittee on Africa, Global Human Rights and International Operations 1 March 2004) www.hrw.org/english/docs/2005/03/01/congo10222.htm [last accessed 21 December 2012]; Hanlon H ‘Implications for Health Care Practice and Improved Policies for Victims of Sexual Violence in the Democratic Republic of Congo’ 2008 (10) *Journal of International Women’s Studies* 64-72, 65.

³⁶ Human Rights Watch *op cit* (n 35).

³⁷ Didier Bourguet is the name of a United Nations senior official from France accused of running an Internet paedophile ring in the Congo, where the U.N. was supposed to be protecting vulnerable people. See Malkin M ‘UN Sex Scandal: Heads Are Starting to Roll’ (12 February 2005) <http://michellemalkin.com/2005/02/12/who-is-didier-bourguet/> [last accessed 21 December 2012]. Bourguet has been sentenced to nine years in prison. See article entitled ‘RDC: Didier Bourguet condamné à 9 ans de prison’ of 12 September 2008 referring to the judgment of the preceding day. The article is available at www.laconscience.com/article.php?id_article=7787 [last accessed 21 December 2012].

³⁸ Notar SA ‘Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo’ 2006 (14) *American University of Gender, Social Policy and the Law* 413-429, 413.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ The age of consent to sexual intercourse is set at 18. Therefore any sexual intercourse with a minor who has not reached the age of consent is rape perpetrated with violence. See article 170 of the Congolese Penal Code.

⁴² UNGA *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in UN Peacekeeping Operations* by Prince Zeid Ra’ad Zeid Al-Husseini (UN. Doc. A/59/710 of 24 March 2005).

exploitation and abuse by peacekeeping personnel, military, and civilians.⁴³ Five staff and 19 military members were involved.⁴⁴ It is mentioned in the report that the allegations might not reflect the true extent of these deplorable incidents for lack of complaint procedures and victim support mechanisms.⁴⁵

In 2004, between May and September, MONUC received 72 allegations of sexual exploitation and abuse: 68 against military personnel and four against civilian MONUC employees.⁴⁶ After Prince Zeid's visit to the DRC in October 2004, and particularly to the town of Bunia, he wrote that he sensed the plight was *widespread* and involved civilian and military personnel.⁴⁷ Of a total of 105 allegations, 16 related to civilians, nine to civil police and 80 to military personnel.⁴⁸ All concerned sex with under-aged persons (under 18)⁴⁹; 31% of the cases were classified as sex with prostitutes, 13% as rape, and 5% as sexual assault.⁵⁰ Should the widespread term be accorded the same meaning as in the Rome statute?⁵¹ According to Miller, acts of sexual exploitation and abuse of Congolese women and girls by MONUC personnel in Bunia indicated a pattern of widespread sexual abuse in the sense contemplated in the Rome Statute of the International Criminal Court.⁵² She compares these acts to those that occurred in Rwanda, Somalia, and Srebrenica in the 1990s.⁵³

From the OIOS report of investigation relating to the period between January and December 2007, one can infer that, where allegations have not been substantiated, it does not mean the alleged crimes were not actually committed, but, perhaps, that the perpetrators

⁴³ UNGA *op cit* (n 42) para 7.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ UNGA *op cit* (n 42) para 8.

⁴⁷ UNGA *op cit* (n 42) paras 8-9.

⁴⁸ *Ibid.*

⁴⁹ It must be noted that not all countries have the age of consent to sex as high, at 18, as it is in the DRC. The fact that the age of consent differs from country to country, for instance in France age of consent is 15, in Canada it is 14 for sexual intercourse male-female or female-female but 18 for male-male. In Belgium and in South Africa the age of consent is 16. See Legal Search Site 'Legal Age of Consent' www.ageofconsent.com/indix.htm [last accessed 16 August 2012]. These variations in the setting of the age of consent in different country law systems do not give peacekeepers an excuse and cannot excuse their lack of accountability.

⁵⁰ *Ibid.*

⁵¹ In article 7 of the Rome Statute of the ICC, "widespread" is used to distinguish crimes against humanity from ordinary crimes. Widespread, therefore, means on a large-scale. Crimes are said to have been committed on widespread level if their perpetration involves large participation of perpetrators, large numbers of victims, or large numbers of similar criminal acts.

⁵² Miller SK 'Accountability for the Conduct of UN-Mandated Forces under International Human Rights Law: A Case Study Concerning Sexual Abuse of the UN Mission in the Democratic Republic of Congo (MONUC)' in Arnold R & Knoops GJA (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers Ardsley 2006) 261-286, 267.

⁵³ *Ibid.*

had been rotated or commanders and other responsible staff had decided to cover up the incident to maintain the image of the contingent. For instance, with respect to MONUC, the Office of Internal Oversight Services indicated that it substantiated an allegation of sexual exploitation and abuse of a 9-year-old boy.⁵⁴ Although the commanders of the national contingent made the offending peacekeeper pay compensation to the child's mother, local authorities, and others, they omitted to report the incident to the Head of Mission as required. The office found the attitude of the contingent commanders to be that of trying to cover up the abuse.⁵⁵ The office recommended that appropriate action be considered by the concerned Troop-Contributing Country for appropriate action against the peacekeeper and contingent commanders.⁵⁶ As late as 2008, MONUC troops have been accused of sexual exploitation and child abuse.⁵⁷ Despite these accusations, sexual conduct by UN peacekeepers remains very much underreported, and complaints are not well-documented. Contingent commanders are not eager to cooperate with investigating teams, and the victims, mostly women and young girls and children, do not report these crimes in fear of the negative perception publicity they can cause and reactions on the part of their community.⁵⁸ A survey of 2,620 adult residents conducted in the eastern DRC confirms this assertion.⁵⁹ The persons surveyed mentioned that they fear to talk openly about their experiences in the conflict even though they wish that justice would be done.⁶⁰ Allegations of rape by peacekeepers, therefore, are not only rare, but also their scarcity indicates that reports do not reflect the reality on the ground.⁶¹ Instances of rape, moreover, are disguised as prostitution or referred to only as sexual abuse without any further

⁵⁴ UNGA *Report of the OIOS on UN personnel conduct in the field* (A/62/281 (Part II) of 25 February 2008) para 38.

⁵⁵ UNGA *Report of the OIOS on UN personnel conduct in the field* (A/62/281 (Part II) of 25 February 2008) para 38.

⁵⁶ *Ibid.*

⁵⁷ Regarding crimes by peacekeepers, it is difficult to be more specific for the identities of perpetrators and the specifics of the cases are protected under the confidentiality policy of the UN. See Ilg GM *Few Governments Answer U.N. Queries on Peacekeeper* (United Nations Inter Press Service Thursday 5 August 2010); Bathia V 'DR Congo: Probe Ordered into Sexual Abuse against Indian Troops' *The Indian Express* Tuesday 7 June 2011.

⁵⁸ Spencer SW 'Making Peace: Preventing and Responding to Sexual Exploitation by United Nations Peacekeepers' 2005 (16) *Journal of Public and International Affairs* 167-181.

⁵⁹ Vinck P & Pham P 'Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC' 2008 (2) *International Journal of Transitional Justice* 398-411.

⁶⁰ *Ibid.*

⁶¹ *Supra* 2.2.2 Burundi. Also UN OIOS report seems to downplay incidents of crimes by peacekeepers, especially those not substantiated. See Report of the OIOS on UN personnel conduct in the field (A/62/281 (Part II) of 25 February 2008) para 38.

description.⁶² An example reported by Quénivet is that of ‘girls (that) claimed that a peacekeeper raped them and then provided them with money or food afterwards to give the appearance of a consensual transaction’.⁶³

The only reported case of pornography is that of Didier Bourguet.⁶⁴ The DR Congo police arrested Bourguet in the eastern city of Goma in October 2004 and turned him over to French authorities for prosecution.⁶⁵ Interrogated by the French police, Bourguet admitted to having had sex with more than 20 girls.⁶⁶ Bourguet, the MONUC logistician, was convicted of having raped almost 23 girls under the age of 18. The facts were supported by video pictures and records on his computer.⁶⁷ Despite the existence of cases similar to that of Bourguet, the reality remains that sexual crimes are in all instances underreported⁶⁸, and official reports do not necessarily reflect accurate data.⁶⁹ The existing UN reports on sexual exploitation and abuse, therefore, do not accurately reflect the actual extent of the problem in the countries hosting the currently ongoing peacekeeping operations.⁷⁰ Reports of NGOs operating in conflict zones have also reached the conclusion that sexual exploitation and abuse is significantly underreported.⁷¹ This underreporting is due to the fact that most of victims are

⁶² See Ilg GM *Fewop Governments Answer U.N. Queries on Peacekeeper* (United Nations Inter Press Service Thursday 5 August 2010).

⁶³ Quénivet N ‘The Dissonance between the UN Zero-Tolerance Policy and the Criminalization of Sexual Offences on the International Level’ 2007 (7) *International Criminal Law Review* 657-676, 669. She also noted that the expression ‘sexual abuse’ is conveniently used by the UN and is not used in International Criminal Law where ‘rape’ or ‘sexual violence’ are the preferred terms and are more specific.

⁶⁴ It is not mentioned in any of reports by the OIOS.

⁶⁵ RFI ‘Prosecutors Call for 12 Years Jail in ex-UN Worker Rape Case’ available at www.rfi.fr/actuen/articles/105/article_1578.asp [last accessed 21 December 2012].

⁶⁶ Ndulo M ‘The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions’ 2008 (27) *Berkeley journal of International Law* 126-160, 143-144.

⁶⁷ Amnesty International ‘Fin de l’impunité pour un ancien employé de l’ONU violeur d’enfants’ *La lettre de la Commission Enfants* (Sept./Octobre 2008 Public SF 08-ENF 29).

⁶⁸ Sexual violence was generally underreported. See Bastick M, Grimm K and Kunz R *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (DCAF Geneva 2007) 159.

⁶⁹ Official reports of rape may suggest that the crime is rare event. See Odem ME and Clay-Warner J (eds) *Confronting Rape and Sexual Assault - Worlds of Women’s* (SR Books Delaware 1998) xii.

⁷⁰ Chun S *Sexual Exploitation and Abuse by UN Peacekeepers* (International Peace Research Institute policy brief Oslo 2009). Since rape is often underreported and many women do not seek medical care after sexual violence, it is likely that these numbers underestimate the true incidence of sexual assault. See HHI ‘*Now, the World is Without Me’: An Investigation of Sexual Violence in the Eastern Democratic Republic of Congo* (Report Harvard Humanitarian Initiative April 2010) 6.

⁷¹ *Ibid.*

unaware of reporting mechanisms, and, where such mechanisms do in fact exist, victims may still refrain from reporting because of fearing the stigmatization their reporting might cause.⁷²

The United Nations has acknowledged this fear of stigmatization in one of its reports which reveals that ‘reports from other United Nations organizations, other than peacekeeping missions, suggest chronic underreporting of allegations of sexual exploitation and abuse, in particular of minors, by United Nations personnel, as well as personnel from the international community’.⁷³ A UN official has said that the underreporting issue is being addressed by training and monitoring especially of civilian staff.⁷⁴

As crimes by peacekeepers are not limited to sexual-related crimes, it must be noted, regarding the case of the DRC, that the media have reported that MONUC personnel looted natural resources.⁷⁵ Even though MONUC has been reluctant to acknowledge the facts, elephant tusks and rhinoceros horns, as well as lengths of wood ready for export, have been found stocked at MONUC Headquarters.⁷⁶

With respect to the arms-for-minerals trafficking, it is important to recall the existing embargo on arms in the restive DRC.⁷⁷ Although the embargo resolution is addressed to States, the alleged sale of guns by peacekeepers to armed groups and militia in return for precious stones

⁷² See supra 2.2.2; Fitzgerald K ‘Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law’ 1997 (8) *EJIL* 638-663, 658-659; Moffett H “‘These Women, They Force Us to Rape Them’: Rape as Narrative of Social Control in Post-Apartheid South Africa’ 2006 (32) *Journal of Southern African Studies* 129-144, 132; HHI ‘Now, the World is Without Me’: An Investigation of Sexual Violence in the Eastern Democratic Republic of Congo (Report Harvard Humanitarian Initiative April 2010).

⁷³ UNGA *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (A/62/890 25 June 2008) para 13; Ndulo M *op cit* (n 65) 142-143. Communities may hide perpetrators. This is the reason why Save the Children UK has published several reports about peacekeepers (and aid staff) who commit acts of sexual misconduct with children. Their reports show that the problem is continuous and, furthermore, underreported. The 2008 report found that a total of 23 organizations involved in peacekeeping activities and humanitarian aid were implicated in SEA against children and that local and international organizations, including religious ones, harboured perpetrators. The sexual abuse was most common among the PKOs and consisted of trading sex for food, forced sex, verbal sexual abuse, child prostitution, child pornography, indecent sexual assault, and child trafficking. See Nordic Africa Institute *Sexual Exploitation and Abuse by Peacekeeping Operations in Contemporary Africa* (Policy Notes 2009/2 March 2009); Csáky C *op cit* (n 31) 12-14. Sexual crimes are widely underreported for a variety of reasons, including stigmatization and fear on the part of victims. See The General Assembly Sixth Committee *Criminal Accountability of United Nations Officials and Experts on Mission 2009 Issues at AMUN*, 30.

⁷⁴ Shotton A ‘A Strategy to Address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel’ 2006 (39) *Cornell International Law Journal* 97-107, 104.

⁷⁵ L’International Magazine ‘Des Pointes d’ivoire découvertes au siège de la MONUC’ available at www.linternationalmagazine.com/article5576.html - France [last accessed 11 May 2011].

⁷⁶ *Ibid.*

⁷⁷ UN SC Res. 1493 of 28 July 2003; UN SC Res. 1533 of 12 March 2004 with respect to arms embargo on Ituri and the Kivus.

or minerals is in violation of the Security Council resolution that imposed an arms embargo on Ituri and the Kivus.⁷⁸ An embargo resolution on arms, however, is a prohibition which does not entail direct criminal responsibility against those who violate it. The UN does not have criminal jurisdiction over violators of embargoes.⁷⁹ If a UN peacekeeper trades weapons with armed groups, to which person can such conduct be attributed?⁸⁰ If the UN Organisation itself, through its deployed soldiers, violates the embargo, the conduct might go unpunished.⁸¹ Providing weapons to groups known to perpetrate atrocious acts would be considered to be an act of complicity entailing individual criminal liability.⁸²

2.2.4 Synopsis of the crimes allegedly committed by peacekeepers

From an analysis of the discussion above, it is evident that sexual crimes, in particular the crime of rape, are the most prevalent in the three host countries, although this kind of crime is greatly underreported. Murder and assault by peacekeepers have been reported in Somalia and Burundi, pillaging (looting) has occurred in Somalia and the Democratic Republic of Congo (although the object of pillage differs). Torture has been reported specifically in Somalia; weapons trafficking (infringement of Security Council Resolutions imposing embargoes) is specific to the Democratic Republic of Congo. Involvement with prostitutes has been reported in Burundi and DRC. The following section, therefore, investigates how the domestic law of

⁷⁸ Alusala N 'DRC: On the Road to Disarmament' in Alusala N and Thusi T A *Step towards Peace Disarmament in Africa* (Monograph No 98 February 2004) 56-73.

⁷⁹ In terms of Chapter VII of UN Charter, the Security Council has the power to impose embargoes on some practices, embargoes on the sale of weapons imposed against States or against non state-controlled actors, such as Al Qaida. Current in force embargoes on the sale of weapons are imposed on Al Qaida, the Taliban, the Democratic Republic of Congo, Sierra Leone, Sudan, Ivory Coast, North Korea, and Somalia. *The UN Security Council cannot prosecute those individuals who violate its imposed embargoes. Only States have the obligation of adopting national legislation to make it possible to prosecute individuals contravening embargoes measures.* See 'Rapport du Comité d'experts juridiques sur la complicité des entreprises dans les crimes internationaux' 2008 *Complicité des entreprises et Responsabilité juridique volume 2 - Droit pénal et crimes internationaux* (Commission internationale de juristes Éditions françaises Genève 2010) 57; Boivin A 'Complicity and beyond: International law and the transfer of small arms and light weapons' 2005 (87) *International Review of the Red Cross* 467-496, 478.

⁸⁰ Patterson M 'A Corporate Alternative to United Nations *ad hoc* Military Deployments' 2008 (13) *Journal of Conflict & Security Law* 215-232, 224.

⁸¹ No discussion is undertaken with respect to violations of embargoes and unlawful exploitation of natural resources, as the focus is on the more prevalent crimes related to the integrity of the person and the commonly perpetrated sexual crimes.

⁸² See *Van Anraat* trial and appeal discussed by van der Wilt HG 'Genocide: Complicity in Genocide and International v. Domestic Jurisdiction Reflections on the van Anraat Case' 2006 (4) *Journal of International Criminal Justice* 239-257; van der Wilt HG 'Genocide v. War Crimes in the Van Anraat Appeal' 2008 (6) *Journal of International Criminal Justice* 55-567; Huisman W and van Sliedregt E 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity' 2010 (8) *Journal of International Criminal Justice* 803-828.

each Host State deals with these crimes, the focus being on crimes allegedly committed in at least one of the three countries.⁸³

2.3 The law of the Host State with respect to the alleged crimes

From an analysis of the foregoing, the crimes of rape and other sexual acts of violence, murder, torture and assault, as well as looting and weapons trafficking have been allegedly committed by different peacekeepers in Africa. These acts constitute offences under Somali, Burundian, and Congolese (DRC) domestic criminal law.⁸⁴ The aim of this section is to discuss the crimes alleged to have been committed by peacekeepers to determine what provisions under the domestic law of the Host States are infringed. In each discussion, it will be mentioned what is understood by the specific crime and its elements. The defences with regard to the crimes will also be discussed where relevant and whether such defences may be applicable to peacekeepers.

2.3.1 Somali law

2.3.1.1 Rape

At the outset of the discussion of rape, it is important to note that, regarding the frequency of this crime in Somalia, most victims of rape refrain from reporting instances of rape because a woman who is raped is often forced to marry her attacker.⁸⁵ This is ostensibly so as to protect the woman's honour and serves to ensure full payment of her dowry by the attacker's clan to the victim's clan.⁸⁶ An unmarried and raped woman will, therefore, typically meet a demand from her own family and clan to marry the rapist as she will no longer have a chance to marry anyone else.⁸⁷ An unmarried woman who gets raped and refuses to marry the rapist may face severe consequences from her own family and clan, and she may be excluded from the clan.⁸⁸ A married woman who has been the victim of rape may also risk being divorced by her husband.⁸⁹ As a consequence many rapes go unreported by the women. Although instances of rape and killings constituted the majority of the reported human rights violations in Somalia

⁸³ Pillaging (looting) and weapon-trafficking are not part of the discussion that follows because the focus is on the most prevalent crimes.

⁸⁴ The concept 'domestic law' refers to the national law of a given country.

⁸⁵ See UK Border Agency *Country of Origin Information Report* (COI Report 24 February 2009) para 23.19.

⁸⁶ *Ibid.*

⁸⁷ UK Border Agency *op cit* (n 85) para 23.19.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

by peacekeepers, many rapes are unreported.⁹⁰ The fear of reporting has some bearing upon crimes perpetrated against women by foreign forces, even though the victims would not be asked to marry the perpetrators of the crime.⁹¹

(a) Definition of rape

Rape is not expressly defined in Somali law.⁹² The words used by the Somali penal Code, however, suggest that, as in any other jurisdiction, the crime of rape is generally construed as referring to non-consensual sexual intercourse. The words ‘with violence or threats’ cause one to think that the act is committed by physical force, threat of injury, or other acts of duress. Thus, rape includes all forms of coercive sex and any situation in which one person uses a position of power or authority to coerce another to have sex with him or her.⁹³ The code excludes same-sex rape from the ambit of the legislation owing to the fact that for the crime to be established, the act must have been perpetrated against ‘a person of the other sex.’⁹⁴ Regarding this limitation or exclusion, the concept of rape is narrow. It is not, however, possible to envisage that the Code should have brought into rape law all instances of non-consensual sex at the time the code was devised.⁹⁵ Paragraph 4 of Article 398 defines carnal intercourse as ‘penetration by the male sexual organ.’ As Ganzglass comments, however, ‘by the use of the word “whoever”, rape can theoretically be committed by a person of either sex, a man against a woman or a woman against a man.’⁹⁶

From the above definition constructed using Somali law, rape requires four elements, namely a material act of penetration, a lack of consent on the part of the other person, unlawfulness, and culpability in the form of intention. Although rape is nowadays construed as gender natural, the overwhelming majority of rape victims are still women, especially in armed

⁹⁰ UK Border Agency *op cit* (n 85) para 23.19.

⁹¹ Under Somali Customary Law, a ‘woman who is raped is often forced to marry her attacker’. See Le Sage A *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives* (Report for the Centre for Humanitarian Dialogue Geneva 2005) 38. The demand from the victim’s clan to marry her rapist occurs generally in peacetime. Thus, unmarried victims of rape by, for instance, militiamen are not asked to marry the rapist who may even not be known to the clan of the victim. See UK Border Agency *op cit* (n 85) para 23.19.

⁹² Article 398 (1) of the Somali Penal Code simply provides that ‘whoever, with violence or threats, has carnal intercourse with a person of the other sex, shall be punished with imprisonment from five to fifteen years.’ See Legislative Decree No.5 of 16 December 1962 -Penal Code.

⁹³ Cf. article 398 of the Somali Penal Code. See also Ganzglass MR *The Penal Code of the Somali Democratic Republic with Cases Commentary and Examples* (Rutgers University Press New Brunswick 1971) 443-444. Peacekeepers are UN officials in the host country; they may be considered as public authority.

⁹⁴ *Ibid.*

⁹⁵ The Somali Penal Code was enacted in December 1962.

⁹⁶ Ganzglass MR *op cit* (n 93) 444.

conflicts.⁹⁷ During the UN mission of peace in Somalia, all accusations were levelled against male peacekeepers.⁹⁸

(b) The material act of rape

The act of rape, as described by the Somali domestic criminal law, always requires sexual intercourse in the sense of some penetration, however slight, of the penis into the vagina.⁹⁹ A rape conviction requires proof that the sexual act was committed forcibly and against the victim's will. Thus, where the victim was unconscious, mentally disabled or a minor, forcible rape can still be established even in the absence of the use of force and the absence of any resistance on the part of the victim.¹⁰⁰ False pretences will also be sufficient to convict a person of rape. This will be the case where the perpetrator resorted to the ruse of impersonating another person, or where deception was used to accomplish the crime.¹⁰¹ Resistance on the part of the victim is, therefore, not a requirement in the same way as force. Indeed, the main material element of rape in Somali law, apart from sexual penetration by the male organ, consists of the use of force or threats of force by the perpetrator against the victim.¹⁰² The threat must convey the danger of immediate harm to the victim unless she submits to the offender.¹⁰³

In most cases of carnal violence before any court of law, the main defence on the part of the person accused of rape is that the victim consented and agreed to sexual intercourse. In the context of peacekeepers, their position and the coercive environment may suffice to exclude any possible consent, especially if the victim complained.¹⁰⁴ The prosecution, however, still has to show, beyond reasonable doubt, that the person charged resorted to violence or threats.¹⁰⁵ It is important to find some traces on the victim's or accused's body to show such

⁹⁷ Hendricks C and Hutton L *Defence Reform and Gender* (Centre for the Democratic Control of Armed Forces-DCAF and OSCE/ODIHR UN-INSTRAW Geneva 2008) 3; Bastick M, Grimm K and Kunz R *Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector* (DCAF Geneva 2007)33, 41, 63, 102 *et passim*; Ganzglass MR *op cit* (n 93) 444.

⁹⁸ *Supra* 2.2.1.

⁹⁹ Article 398 (4) of the Somali Penal Code.

¹⁰⁰ Article 398 Somali Penal Code.

¹⁰¹ Article 398 (2) (b).

¹⁰² Ganzglass MR *op cit* (n 93) 444. The victim is always a member of the opposite sex of the offender. This means that same sex with violence does not consummate the crime of 'carnal violence'. In the case of same sex acts of violence, article 400 of the Somali Penal Code applies.

¹⁰³ *Ibid.*

¹⁰⁴ A uniformed armed peacekeeper in a conflict area cannot be exculpated by invoking consent on the part of the victim.

¹⁰⁵ Ganzglass MR *op cit* (n 93) 445.

important elements of the crime.¹⁰⁶ So, if a prosecution is conducted a long time after the perpetration of the crimes, it may be difficult to establish such an element.

(c) Consent element.

A lack of consent is present whenever the perpetrator uses violence or threats, had carnal sex with persons incapable of giving valid consent, in circumstances of intoxication or where another person is impersonated in order to deceive the victim.¹⁰⁷ The provision is broad enough to extend to a ‘public officer who by abuse of his power has carnal intercourse with a person of the other sex who is under arrest or detained in custody under the said officer by reason of his office or entrusted to him in execution of an order of the competent authority’.¹⁰⁸

According to articles 50, 51, 57-59, a person who is mentally deficient, and a person under the influence of alcohol or under the influence of drugs, a deaf or dumb person, and an individual who has not reached the age of 14 are unable to give valid consent to sexual intercourse.¹⁰⁹ Any act of a sexual nature performed with one of these persons is rape and is deemed to have been perpetrated with violence.

(d) Unlawfulness

As to possible defences regarding anyone charged or prosecuted for any offence, the legislation has provided for possible defences. Under Somali law, these defences range from physical compulsion; mistake caused by deceit of another, consent of the injured party, private defence, and the state of necessity.¹¹⁰

With respect to rape or carnal intercourse, and in the context of peacekeepers, the defence most likely to be used is ‘consent’. Such defence tends to assert that the act is lawful, not that it is justified. Consent is not a ground of justification when it comes to rape, but a definitional element without which the crime of rape does not exist.

¹⁰⁶ Ganzglass MR *op cit* (n 93) 445. The author refers to a case in which the Supreme Court held that cases of carnal violence should not be based solely on the testimony of the woman injured: *Ibrahim Idris Saeed v. State* (Criminal Appeal No. 7 of 1965, Somali Law Reports 1964-65, 233).

¹⁰⁷ Article 398(2).

¹⁰⁸ Article 398(3).

¹⁰⁹ Articles 50-51, 57-59 of the Somali Penal Code.

¹¹⁰ Articles 27, 29, 32, 33, 34 and 36 of the Somali Penal Code.

With respect to Somali women raped by peacekeepers, it is unthinkable to assert that the victims might have consented to the sexual atrocities perpetrated against them taking into account the circumstances prevailing in Somalia at the time of commission.¹¹¹ In the dangerous and coercive environment of war that prevailed in Somalia, any consent extorted from the victim cannot be regarded as genuine. In any case, to establish this element the accused can invoke this defence in the course of the judicial proceedings launched against him. Where such proceedings have not been launched, lack of consent is presumed.¹¹²

Where a person applies either physical force or coercion to another and causes the latter to act contrary to his or her free choice or will, for instance to commit rape, the forced person acts without the required mental element.¹¹³ The application of such force must be of a certain severity or apprehension to deprive the person to whom it is inflicted of his or her free choice, or to destroy his or her volition.¹¹⁴ Duress of the circumstances or necessity, however, cannot justify rape.

Defendants who actually committed the crime of rape can be found ‘not guilty by reason of insanity’ because of the belief that people should be punished for their crimes only if they could control their behaviour and knew that what they were doing was wrong.¹¹⁵ Whenever it may be proven that an accused lacked capacity to appreciate or control his conduct, no criminal responsibility can attach.¹¹⁶ If an insane person raped a woman, he cannot be held responsible for the act.¹¹⁷ It is, therefore, recognized that an individual who is insane when the crime is committed is criminally irresponsible owing to his inability to distinguish right from wrong, or to appreciate the nature and quality of his conduct regardless of whether such conduct consists of act or omission.¹¹⁸ Thus, every person charged with an offence is

¹¹¹ Worster WT ‘Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement’ 2008 (47) *Military Law and the Law of War Review / Revue de droit militaire et de droit de la guerre* 277-376, 279.

¹¹² Cottier M ‘Rape and Other Forms of Sexual Violence: Article 8(2)(b)(xxii)’ in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (C. H. Beck Baden-Baden 2008) 431-454.

¹¹³ Article 27 Somali Penal Code.

¹¹⁴ *Ibid.*

¹¹⁵ A person is criminally capable if he or she has the mental ability to appreciate the wrongfulness of his act or omission and to act in accordance with such an appreciation of the wrongfulness of his act or omission. If one of these abilities lacks or both, the person concerned is not criminally responsible. Thus a person who could not control his acts owing to compulsion, cannot be held responsible of such acts. The Somali Penal Code calls the requirement ‘capacity to understand and of volition’. See Article 47 of the Somali Penal Code in this regard.

¹¹⁶ *Ibid.*

¹¹⁷ Articles 47, 50-51 of the Somali Penal Code.

¹¹⁸ Article 50 of the Somali Penal Code.

presumed to be of sound mind and to have been of sound mind at any relevant time until the contrary is proven.¹¹⁹ It is for the accused to establish insanity.¹²⁰ The defence of insanity relates to culpability.

(e) Culpability

From the legal perspective, culpability describes the degree of the accused's blameworthiness in the commission of the prohibited act. In Somali criminal law, it is expressly indicated that no person can be held criminally liable if it is not proven that such a person is capable of understanding and of volition to be blamed for his/her acts.¹²¹ Apart from cases of conditional liability,¹²² the type of severity of the punishment attached to an offence follows the degree of blameworthiness. Actually culpability encompasses criminal capacity and *mens rea* (intent and negligence). Intent is required for rape, not negligence.

- *Criminal capacity.*

Criminal capacity is understood as the state of being considered criminally responsible with respect to the mental state of the actor.¹²³ It is not the capacity or ability to commit crime, but the capacity to appreciate the wrongfulness of the conduct and the capacity to act in accordance with that appreciation. As Ganzglass points out, the question here relates to the actual capacity of the person accused to understand the consequences of the act when he or performed the said act.¹²⁴ The inquiry is whether at the time of his/her conduct he or she had any understanding of what he or she was doing.¹²⁵ If it is found that the accused did understand what he or she was actually doing, he or she will be considered criminally liable.

¹¹⁹ The Somali Penal Code excludes instances of self induced mental deficiency. See article 49 of the Somali Penal Code.

¹²⁰ It remains possible to suggest that before the number of troops from each contributing country is determined, there should be a test of psychological and mental screening. Such a test may minimize the possibility of mental disorder while on mission. It must be said that the situation of mental disease among peacekeepers will not usually present itself. The defence of insanity remains available to an accused peacekeeper.

¹²¹ Article 47(1) of the Somali Penal Code.

¹²² Article 22 of the Somali Penal Code provides for conditional criminal liability. It states that a person can be criminally responsible for the offence even though the consequence constituting the necessary condition for the act to be punishable was not desired by the offender.

¹²³ Ganzglass MR *op cit* (n 93) 68.

¹²⁴ Ganzglass MR *op cit* (n 93) 69.

¹²⁵ *Ibid.*

In Somali law, anyone over the age of 14 is presumed to be capable of committing a crime, but this presumption can be rebutted by proof of either mental or physical incapacity. This means that a minor between the age of 14 and 18 can be considered to have perpetrated a crime of ‘carnal violence’ if he or she has carnal intercourse with a person of the opposite sex against his or her consent or because such a person is minor.¹²⁶

Regarding rapes committed by peacekeepers, however, it is not possible to think of a single situation where peacekeepers could claim to have not reached the age of criminal capacity. For that reason, it is not relevant to discuss this aspect further. For a peacekeeper to be held guilty of a sexual crime, however, it must be shown that he or she had the required *mens rea* for such a crime.

- *Mens rea: Intention.*

Intention is the mental fault requirement of rape.¹²⁷ The defendant's state of mind at the time of the offence is sometimes called the *guilty mind* which is actually inferred from the means used to accomplish the act, i.e. violence or threats.¹²⁸ Indeed, the main element of the crime of carnal violent intercourse is actually the use of force or threat by the offender against the victim and without the victim's consent.¹²⁹ The crime of carnal violence or rape in the Somali Penal Code also requires intention in the sense that the offence exists if the offender resorts to violence or a threat of violence or abuses his power or authority.¹³⁰ This means that rape cannot be committed by negligence, save for situations of command responsibility¹³¹ and superior orders which is encountered under international criminal law.¹³²

¹²⁶ Articles 47-60 of the Somali Penal Code. A person of an age between 14 and 18 years old is criminally liable but the punishment is reduced. Before the age of 14, the person is considered to have not capacity of understanding and volition to be held liable.

¹²⁷ The *mens rea* of rape in form of intention is usually expressly mentioned in the statutory provision.

¹²⁸ See combined reading of articles 32 and 398(1) of the Somali Penal Code.

¹²⁹ Ganzglass MR *op cit* (n 93) 444.

¹³⁰ Article 398 of the Somali Penal Code.

¹³¹ A force commander is personally responsible for crimes committed by his subordinates for having disregarded information available that such crimes were about to be committed or neglected to act upon such information. Thus, Tomoyuki Yamashita, the Japanese commanding general in charge of the Philippines, was tried and convicted by a U.S. military tribunal for war crimes committed by troops under his command and ultimately executed. His troops were accused of starvation, execution or massacre without trial, torture, rape, murder and wanton destruction of property which were foremost among the outright violations of the laws of war and of the conscience of a civilized world. See *Yamashita v. Styer* 327 U.S. 1 (1946). The United States Supreme Court, in *In re Yamashita*, described command responsibility as "an affirmative duty to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." 327 U.S. 1, 16 (1946). See The Yale Law Journal Company, Inc. 'Command Responsibility for War Crimes' 1973 (82) *The Yale Law Journal* 1274-1304, 1275. See also, The American Society of

2.3.1.2 Other sexual acts and sexual offences involving children

Civilians in a conflict zone in Africa, such as Somalia, particularly women and children, are often vulnerable to sexual violence from state forces and non-state actors.¹³³ Some abuses appear to be opportunistic, owing to an overall breakdown in the rule of law and social order during conflicts.¹³⁴ Regarding armed groups, sexual violence has been employed by combatants as a tool of war, seemingly designed to wreak damage on entire communities.¹³⁵

As far as Somalia and the mission of peace deployed there in the 1990s are concerned, it is important to mention that sexual activities involving children have not been reported. This does not necessarily mean that they did not occur in Somalia.¹³⁶ Regarding sex with children, it has also been indicated that the Somali Penal Code considers it to be rape if the victim, at the time of the act, was not capable of giving a valid consent.¹³⁷

With respect to prostitution, it is important to note that there have not been allegations that peacekeepers have adopted such conduct.¹³⁸ It is also noteworthy to mention that the Somali penal code does not indicate that the client of a prostitute incurs criminal liability.¹³⁹ With respect to fraternisation with prostitutes or ‘engaging the services of a prostitute’, therefore, if a peacekeeper happens to be prosecuted back in his country on the charge of engaging the services of a prostitute, he can assert that the conduct alleged to have been committed is not

International law (ASIL) ‘Judicial Decisions in *re Yamashita* Supreme Court of The United States [February 4, 1946.]’ 1946 (40) *The American Journal of International Law* 432-480, 447.

¹³² In the *Akayesu* case for instance, the ICTR decided that the accused was guilty of crimes against humanity that included encouraging rapes of Tutsi women during the genocidal campaign while he was a communal leader, even if he himself was not charged with the act of rape (*The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, 2 September 1998). In the *Celebici* decision, the ICTY found Zdravko Mucic guilty, on the basis of command responsibility, of crimes of sexual violence committed by the guards at the Celebici prison camp (*The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, IT-96-21-T, 16 November 1998). In these two cases, the crime for which the superiors are prosecuted should be considered different. Encouraging rape in the former, and failure to prevent or punish in the latter, but not rape *per se*. It may actually appear absurd to consider a commander a rapist because one of his soldiers commits a rape. Where vicious, revengeful actions have been widespread and there has been no attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. See Parks WH ‘Command Responsibility for War Crimes’ 1973 (62) *Military Law Review* 1-104, 30.

¹³³ Arieff A *Sexual Violence in African Conflicts* (Congressional Research Service 25 November 2009).

¹³⁴ *Ibid.* 7 *et passim*.

¹³⁵ *Ibid.*

¹³⁶ Only discovered criminality is considered. Whenever there is no report alluding to such an occurrence, it is difficult to try to depict its occurrence.

¹³⁷ *Supra* 2.3.1.1. (c).

¹³⁸ There is no single report indicating that UNOSOM personnel fraternized with prostitutes in Somalia. The circumstances were not favourable for such conduct.

¹³⁹ See Articles 405-408 of the Somali Penal Code. These articles relate to practising prostitution, brothel keeping, and compulsion in prostitution.

an offence under the law of the host country.¹⁴⁰ Such a peacekeeper is asserting that he did observe his obligation to respect local laws.¹⁴¹

2.3.1.3 Murder

(a) Definition of murder

Murder is not defined by the Somali Penal Code as such. It provides solely that ‘whoever commits murder shall be punished with death.’¹⁴² It does not give the elements of the crime of this kind of homicide. When, however, one combines the interpretation of article 24 of the code which relates to the mental attitude of the offender and article 445 which provides for prosecution and punishment of homicide by negligence, the understanding is that murder is always a wilful killing.¹⁴³ In Somalia, this crime receives the death penalty.¹⁴⁴ In a situation where the accused intended to commit an assault or another crime against the deceased but had no intention to inflict death, the sentence varies from ten to fifteen years of imprisonment.¹⁴⁵ If homicide is brought about by negligence, the punishment is imprisonment of six months to five years.¹⁴⁶ With respect to peacekeepers, the findings of the *Italian Government Commission of Inquiry into Events in Somalia* indicate that instances of torturing and ill-treating of Somalis to death did actually occur.¹⁴⁷ Similar allegations were made by the

¹⁴⁰ The Somali law cannot prosecute a peacekeeper for visiting prostitutes. See articles 1 and 2 of the Somali Penal Code, which relate to the principle of legality.

¹⁴¹ Annex II - Standards of conduct for United Nations peacekeeping personnel (UN Doc. A/61/645 of 18 December 2006) para 5. See also Rule 2 of the Ten Rules - Code of Conduct for Blue Helmets; We Are United Nations Peacekeepers [Obligations].

¹⁴² Article 434 of the Somali Penal Code.

¹⁴³ *Ibid.*

¹⁴⁴ In the case of *Jama Hassan Wais v State* (Criminal Appeal No.2 of 1965), the Supreme Court held that where the homicide against Mohammed Aden was accidental was in that Wais did not shoot him from a distance but during a struggle as the presence of the powder of the rifle could be found on the corpse of the victim. The trial court erred to convict Wais of murder and sentence him to death. It set the conviction and sentence aside. See the discussion of the *Wais* by Ganzglass MR *op cit* (n 93) 481-482.

¹⁴⁵ Article 441, Somali Penal Code.

¹⁴⁶ Article 445, Somali Penal Code.

¹⁴⁷ There were also allegations that, around 23 October 1993, a child caught stealing food had been locked in a container, in stifling heat, without food or drink, for two days and two nights, and that its cries of distress were ignored; when the container was finally opened the child was found to be dead. See ‘Belgium-Alleged Human Rights Violations by Members of the Armed Forces in Somalia’, OSCE Human Dimension Implementation Meeting, Warsaw, November 1997: Human Rights Are an Essential Component of European Security, *Amnesty International September 1997AI Index: EUR 01/06/97*, 16.

Somalis and by Somali human rights monitors against Belgian, Canadian, and other contingent members.¹⁴⁸

(b) Definitional elements of murder

Although the Somali Penal Code in itself does not give information regarding the elements of the crime of murder, it is considered that the material act of murder consists in the intentional taking off a person's life.¹⁴⁹ As one author has put it, 'murder is a crime that is clearly understood and well defined in the domestic law of every state'¹⁵⁰ and the way the act of taking the victim's life takes place does not matter, 'the death may be caused by shooting, stabbing, poisoning, burning, starving, torturing, exploding, electrocuting, beating, running over, or any other method, so long as the act caused the death'.¹⁵¹

Murder is a materially defined crime; this means that the conduct ought to result in death.¹⁵² In fact murder can be perpetrated only against a living being, i.e. a person who has been born alive and who is still alive when the fatal conduct occurs, and the act must have been perpetrated deliberately and unlawfully.¹⁵³ This means that an intentional killing of a human being is not unlawful if done under circumstances where the perpetrator has available a defence excluding unlawfulness. The unlawfulness of the act must be established.¹⁵⁴

¹⁴⁸ Amnesty International 'Italy: A briefing for the UN Committee against Torture' *Amnesty International* (May 1999 AI Index: EUR 30/02/99) 9-14. For instance, reference is made to the alleged rape and murder of a 13-year-old Somali boy by an army major inside the former Italian Embassy in Mogadishu in March 1994, and to the allegations of Hashi Omar Hassan that in September 1993 he had been hooded, bound hand and foot, tortured and together with some 20 other male prisoners, all bound and hooded, thrown into the sea where all but he drowned. The Commission also indicated that members of the Italian armed forces had presented false documentation to investigators to cover up their involvement in the ill-treatment of Somalis. A case in point is the killing of Mr. Ahmed Afraraho Aruush, who was challenged, fled, and was subsequently fatally shot by Detachment 64A. See *Canadian Commission of Enquiry into events in Somalia*, available at www.dnd.ca/site-reports-rapports/som/vol5/index-eng.asp [last accessed 25 March 2012].

¹⁴⁹ Ganzglass MR *op cit* (n 93) 481.

¹⁵⁰ Zimmermann A 'Preliminary Remarks on para 2(c)-(f) and para 3 (of article 8 of the Rome Statute): War Crimes Committed in an Armed Conflict not of an International Character' in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes Article by Article* (C. H. Beck Baden-Baden 2008) 262-288.

¹⁵¹ Ganzglass *op cit* (n 93) 480.

¹⁵² Articles 435 and 437 of the Somali Penal Code use concepts 'infanticide and of suicide'. The 'cide' suffix used in those words means to kill or to cause death. Death is only possible with respect to a living being. Therefore, murder cannot be conceived of without the proof that the person was alive before the conduct of the accused. The death must have been the result of the conduct of the person accused.

¹⁵³ If the act was not deliberate, the accused may be found guilty of preintentional homicide or homicide by negligence. See articles 441 and 445 of the Somali Penal Code.

¹⁵⁴ The act must not be covered by the grounds listed in articles 32-36 of the Somali Penal Code.

(c) Unlawfulness

A criminal act is punishable only if it is not legally justifiable.¹⁵⁵ None of the circumstances excluding punishment ought to be present. In other words, victim's consent, performance of a duty imposed by law or executing superior orders, private defence, lawful use of a weapon by a public officer, the state of necessity and any mistake about any of the above circumstances must not be present for the offender to be punished.¹⁵⁶ The allegations of instances of murder by UNOSOM peacekeepers, therefore, fall under the Somali Penal Code and are punishable wherever no grounds for justification exist.

- *Consent of the victim*¹⁵⁷

It is important to mention from the outset that the general rule is that human beings are free to waive their available legal rights if they so choose.¹⁵⁸ This rule, however, is not applicable in all circumstances. In criminal acts, such as murder, it does not lie within the power of the victim to render the unlawful act lawful by consenting to suffer the harm.¹⁵⁹ Indeed, a person's consent to have his or her life taken is not a valid defence.¹⁶⁰ Consent as a ground of justification operates in specific crimes related to individual interests or rights at his or her disposal.¹⁶¹ For this reason, consent is not an available ground of justification for murder, even in Somali criminal law, though Somali law does not punish homicide perpetrated with the consent of the deceased with the death penalty as it does for murder, but with imprisonment from six to fifteen years, save where the victim was a person under the age of eighteen, an insane person, or if the consent was obtained by violence.¹⁶² The next issue to be considered is whether the performance of a right or of a legal duty may serve as justification for the crime of murder.

¹⁵⁵ *Ibid.*

¹⁵⁶ Articles 32-38 of the Somali Penal Code.

¹⁵⁷ Article 32 of the Somali Penal Code.

¹⁵⁸ By available rights one has to understand the rights that a person can legitimately dispose of. See article 32 of the Somali Penal Code.

¹⁵⁹ Ganzglass MR *op cit* (n 93) 43.

¹⁶⁰ In Somali law the person consenting to being killed can be prosecuted for attempting to commit suicide and the one who actually causes the death of the suicide is criminally liable for instigating or aiding the victim to commit suicide. See articles 437-438 of the Somali Penal Code.

¹⁶¹ Article 32 of the Somali Penal Code.

¹⁶² Article 436 of the Somali Penal Code.

- *Performance of a duty imposed by law or executing superior orders*¹⁶³

This ground of justification found in article 33 of the Somali Penal Code provides that a person who has acted in the circumstances contemplated by the provision can avail him/herself of the defence, provided that he or she did not exceed the limits imposed by law or by the order. The actor must have acted in pursuance of the duty, right, or order.¹⁶⁴ Where the order given by a superior was an unlawful one, the subordinate can still be exempt from his or her criminal liability if he or she could not question such an order or was mistaken in believing that the order was lawful.¹⁶⁵ One may, therefore, call into question the permission by a Canadian commander to fire at intruders or fugitives from the compound.¹⁶⁶ Whether such an order amounts to any defence is open to debate.¹⁶⁷ Rowe writes that the instruction led to the killing of a Somali called Ahmed Aruush on 4 March 1993 by a subordinate.¹⁶⁸ If the perpetrator is identified and prosecuted under Somali law, he can raise the defence of superior orders, and the prosecution will have to demonstrate that the order or permission was manifestly unlawful.¹⁶⁹ An accused person can also resort to the defence of private defence.¹⁷⁰

Private defence

The Somali Penal Code does not define or elaborate on this ground of justification. It provides only that ‘whoever has committed an act, having been compelled by the necessity of defending his own or another person’s right against the actual danger of an unlawful injury, shall not be punishable provided that the defence is proportionate to the injury.’¹⁷¹

¹⁶³ Article 33 of the Somali Penal Code.

¹⁶⁴ Ganzglass MR *op cit* (n 93) 44.

¹⁶⁵ Article 33 (2) of the Somali Penal Code.

¹⁶⁶ Rouillard LPF ‘Canada’s Prevention and Repression of War Crimes’ 2005 (2) *Miskolc Journal of International Law* 43-58, 50.

¹⁶⁷ Tittmore BD ‘Belligerents in Blue Helmets: Applying IHL to UN Peace Operations’ 1997 (33) *Stanford Journal of International Law* 6-117, 90; Committee Against Torture (UN) *Consideration of Reports Submitted By States Parties Under Article 19 of The Convention, Third periodic report of States parties due in 1996 – Addendum Canada [19 October 1999]*, CAT/C/34/Add.13 of 31 May 2000, para 33; Rouillard LPF ‘Canada’s Prevention and Repression of War Crimes’ 2005 (2) *Miskolc Journal of International Law* 43-58, 50.

¹⁶⁸ Rowe P ‘Maintaining Discipline in UN Peace Support Operations: The Legal Quagmire for Military Contingent’ 2000 (5) *Journal of Conflicts & Security Law* 45-62, 60.

¹⁶⁹ It is possible that the defence of superior orders can be raised but cannot stand. Also, under Somali law, the officer who has unlawfully given an order bears criminal liability for the execution of the order. See article 33(2) of the Somali Penal Code.

¹⁷⁰ Article 34 of the Somali Penal Code.

¹⁷¹ *Ibid.*

Since the Somali Penal Code does not define the ground of justification it establishes, it may simply be indicated that a person cannot be held criminally liable if he or she lawfully defends himself or herself against an attack by another.¹⁷² The limitations to such a principle are that firstly, the person invoking this ground must be defending herself against an actual danger of unlawful injury and that such a danger must actually exist, i.e. it must not be imagined or thought that it may happen in a far distant future.¹⁷³ Secondly, a person cannot defend himself or herself against a police officer lawfully using force to arrest her or him.¹⁷⁴ Thirdly, the force used to repel the threat or the attack must be proportionate to the interest threatened, and, finally, private defence may be used to protect or to defend another person.¹⁷⁵

As far as crimes committed by peacekeepers are concerned, it is important to note that a soldier is not deprived of the right to defend himself or another person, even by killing the aggressor.¹⁷⁶ Drawing on the information available, however, there are no indications that the alleged perpetrators acted in self-defence. The ground of justification called private defence is also available to a public officer who used the firearms in his possession in the absolute necessity of repelling violence or overcoming violent resistance to the authorities.¹⁷⁷

Since peacekeepers in Somalia may be considered to be public officers vested with the duty of creating conditions which would allow for the dispatching of humanitarian aid to a starving population, they might possibly invoke the defence. All the cases of murder as reported, however, did not show that such a defence would stand because in none of the instances did the victims seek to attack peacekeepers, nor were the latter killed as an act of self-defence nor in a state of necessity.

- *State of necessity*

In Somali criminal law, necessity is a defence available to a person who, at the time of the act he or she found himself/herself in actual danger of serious bodily injury, performed an otherwise unlawful act. The danger must not have been voluntary caused by the person

¹⁷² Ganzglass MR *op cit* (n 93) 46.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ This ground of justification is widely accepted regarding threats to life or to inflict grievous bodily harm. See Ganzglass MR *op cit* (n 93) 46.

¹⁷⁶ Private defence is available to each and every individual.

¹⁷⁷ In this case it is as if the public officer defended another person. See Article 35 of the Somali Penal Code.

invoking the defence and must not have been otherwise avoidable.¹⁷⁸ The other condition for the defence to stand is that of proportionality, and is also dependent on the proof that the person was not legally bound to expose himself to such danger.¹⁷⁹

It must be noted that, regarding the specific crimes committed by peacekeepers in Somalia, especially murder, necessity is not an available ground of justification by considering that the requirement of actual and imminent danger which is not preventable in any other way is not met.¹⁸⁰ In fact killing out of necessity is a very controversial issue, especially when it refers to military necessity¹⁸¹ which may be over-encompassing in that it may be sufficient to declare that the destruction of civilians were incidentally unavoidable in the armed contests of the war.¹⁸² This matter cannot be debated here because, when it comes to military operations, this defence is called ‘military necessity’,¹⁸³ which may be too all-encompassing to serve as a smoke screen to protect peacekeepers from any charge of war crimes.¹⁸⁴ Any military force may claim to have acted in order to win the war.¹⁸⁵ For instance, one rule pertaining to military necessity requires warning before launching a military operation.¹⁸⁶ Military necessity, however, will also require that the rule be flouted if compliance would result in annihilating, or at least seriously compromising, the chances of success of a military

¹⁷⁸ Article 36 of the Somali Penal Code.

¹⁷⁹ *Ibid.*

¹⁸⁰ Somali intruders did not injure any Canadian soldiers, and a medical officer has noted during the Inquiry that he did not know of any conflict-related Canadian casualties during the entire deployment. See Siver C ‘The Dark Side of Canadian Peacekeeping: The Canadian Airborne Regiment in Somalia’ (Paper presented at Politics, Philosophy and Economics Seminar Series University of Washington -Tacoma 23 November 2009) 10.

¹⁸¹ In pursuance of achieving military superiority over the enemy at the minimum cost, commanders must minimize civilian casualties. See Jaworski E “‘Military Necessity’ and ‘Civilian Immunity’: Where is the Balance?” 2003 (1) *Chinese Journal of International Law* 175-206, 175.

¹⁸² Carnahan BM ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’ 1998 (92) *ASIL* 213-231, 216.

¹⁸³ Referring to Article 14 of the Lieber Code, Carnahan defines ‘military necessity’, as understood by modern civilized nations, as consisting of the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war. See Carnahan BM *op cit* (n 182), 215; Military necessity admits of all direct destruction of life or of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war. See Jaworski E *op cit* (n 181) 179; Henckaerts J-M and Doswald-Beck L (eds) *Customary International Humanitarian Law Volume II: Practice* (Cambridge University Press for ICRC-Geneva Cambridge 2005) 17.

¹⁸⁴ Anderson M and Zukauskas E (eds) *Operational Law Handbook* (International and Operational Law Department The Judge Advocate General’s Legal Center & School U.S. Army Charlottesville 2008) 12.

¹⁸⁵ For full discussion of military necessity, see D’Amato A *Defences to War Crimes: a Conceptual Overview* (Public Law and Legal Theory Series No. 07-04 North-western University School of Law) 1-24. For the issue of whether peace operations are military operations or whether peacekeepers are military, see the discussion on ‘War crimes’ *infra* 4.2.1.3.

¹⁸⁶ Quéguiner JF ‘Precautions under the Law Governing the Conduct of Hostilities’ 2006 (88) *International Review of the Red Cross* 793-821, 807.

operation.¹⁸⁷ This means that every action may qualify as military necessity¹⁸⁸ whenever it may lead to some military advantage in waging the war.¹⁸⁹

- *Presumed circumstances excluding punishment*

The Somali Penal Code considers any putative justification as a mitigating circumstance if the mistake relates to crimes requiring intention. For crimes committed with *culpa*, any mistake as to the existence of circumstances excluding punishment does not exclude liability in favour of the perpetrator.¹⁹⁰ The rationale for this ground of exemption is that the accused's state of mind in such a situation is necessarily not the same mind as the mind of a person intending to commit an offence. This is so because the accused performed some acts knowing that, because of certain circumstances, he or she cannot be punished for such acts.¹⁹¹ Obviously the putative existence of a ground of justification is not in itself a justification but a ground excluding culpability.¹⁹²

(d) Culpability

Since deployed peacekeepers are adults, the issue of criminal capacity does not arise, except where the capacity issue includes the issue of lack or diminished capacity owing to mental illness or intoxication.¹⁹³ Issues pertaining to insanity and intoxication are usually studied together with the questions of justification and the mental element of the crime. The *mens rea* required for the crime of murder is intention, save for the case of culpable homicide where negligence is required.¹⁹⁴

¹⁸⁷ *Ibid.*

¹⁸⁸ Anderson M and Zukauskas E (eds) *Operational Law Handbook* (International and Operational Law Department The Judge Advocate General's Legal Center & School U.S. Army Charlottesville 2008) 12.

¹⁸⁹ Sassòli M 'State Responsibility for Violations of International Humanitarian Law' 2002 (84) *International Review of the Red Cross* 401-434, 417.

¹⁹⁰ Article 38 of the Somali Penal Code.

¹⁹¹ Ganzglass MR *op cit* (n 93) 51.

¹⁹² Article 38 of the Somali Penal Code provides that in cases of mistaken belief of grounds of justification, the circumstances which led to forming such a belief are taken into account and used in favour of the accused. Indeed, such a person did not intend the crime because of his belief. This is why article 38 does not apply to negligent crimes.

¹⁹³ Articles 50-51 of the Somali Penal Code.

¹⁹⁴ Article 445 of the Somali Penal Code.

2.3.1.4 Assault

The treatment of detained suspected criminals¹⁹⁵ by UNOSOM members, the use of telephone wire to inflict electric shocks to individuals while interrogating them,¹⁹⁶ beating,¹⁹⁷ threatening, and the holding of a person over a burning brazier,¹⁹⁸ as well as firing at unarmed civilians, constitute acts of serious injury to the physical integrity of the person or to his health. Under Somali law, such conduct amounts to assault or to hurt as the case may be.¹⁹⁹

The Somali Penal Code distinguishes between the offence of assault and the offence of hurt.²⁰⁰ Whereas the former is understood as consisting of any attack that does not result in physical or mental illness, the latter consists in a bodily harm that results in physical or mental illness.²⁰¹ The offence of hurt can also be perpetrated with aggravating circumstances as set

¹⁹⁵ Tittlemore BD 'Belligerents in Blue Helmets: Applying IHL to UN Peace Operations' 1997 (33) *Stanford Journal of International Law* 6-117, 89-90; Horn B 'An Absence of Honour: Somalia – The Spark that Started the Transformation of Canadian Forces Officer Corps' a paper presented at an International Seminar 'Leadership, Education & Multilateralism in Armed Forces: Challenges and Opportunities' (La Paz Bolivia 13-15 September 2004).

¹⁹⁶ Lupi N 'Report by the Inquiry Commission on the Behaviour of Italian Peacekeeping Troops in Somalia' 1998 (1) *Yearbook of International Humanitarian Law* 375-379; See UN Committee against Torture *Consideration of Reports Submitted by States Parties under Article 19 of the Convention - Fourth periodic reports of Italy* (CAT/C/SR.761 of 11 May 2007) para 45.

¹⁹⁷ See de Waal A 'US War crimes in Somalia' 1998 (30) *New Left Review* 131-144.

¹⁹⁸ De Waal A *op cit* 136 of the 1998 *New Left Review*.

¹⁹⁹ It is important to mention that acts of assault may also amount to torture. 'Torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 1(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter UNCAT). See also Ferdinandusse W '*Prosecutor v. N. Case No. AO7178*' 2005 (99) *American Journal of International Law* 686-690). Before a country criminalises torture as a crime *sui generis*, it usually punishes acts of torture as assault. Despite the fact that the definition of torture is now considered as *jus cogens*, i.e. to be accepted and enforced by each and every state (Sweetser CE 'Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel' 2008 (83) *New York University Law Review* 1643-1677, 657), States that have not ratified or acceded to the UN Convention against torture continue to punish acts of torture as assault. Thus Somalia before accession to the UNCAT in January 1990 (Somalia accessed the UNCAT on 24 January 1990. See 'International Human Rights Treaties and the Somali Republic (1960-1991)' <http://wfirt.net/humanrts/research/ratification-somalia.html> [accessed 8 November 2012]; IRCT 'States Which Have Ratified or Acceded to the UN Convention against Torture and Other Inhuman or Degrading Treatment or Punishment' www.irct.org [last accessed 8 November 2012]).

²⁰⁰ Hurt is an aggravated assault. See articles 439-440 of the Somali Penal Code.

²⁰¹ Mental illness refers to a pathological lasting disturbance of mental faculties (disease of mind). Temporary clouding of the mental faculties ascribed to mere external stimuli such as alcohol, drugs or provocation does not amount to mental disease. Physical illness is understood as a medical condition that results in pathological symptoms but is not the direct result of physical injury. Temporary suffering is excluded. Compare articles 431, with 439-440.

out in the code.²⁰² Where the consequence of the offence is the unintended death of the victim, the crime becomes one of manslaughter.²⁰³ The perpetrators or the acts indicated under 2.2.1, other than sexual crimes, can be prosecuted under Somali law, provided that no justification is available to the perpetrators. It must also be established that the alleged peacekeeper perpetrators performed their acts intentionally.

(a) Assault

From the provision of article 439 of the Somali Penal Code, assault may be defined as any physical aggression which does not result in any illness or any long lasting consequences.²⁰⁴ Ganzglass gives the example of a punch in the arm, spitting on a person, or grabbing his or her clothes.²⁰⁵ This offence can be prosecuted only upon a complaint of the victim.²⁰⁶ This is certainly because any consent to physical aggression which does not result in illness constitutes a ground negating the unlawfulness of the conduct. Where the offence was the means utilised to perpetrate another crime, it is that end-result crime which will be punished. For instance if a person X pulls another person Y who he has just purchased as a slave, X cannot be prosecuted for assault but only for purchasing a slave, a crime under article 457 of the Somali penal Code.²⁰⁷ In any instance, assault requires intention as *mens rea*. However, aggravating assault by negligence does exist in the Somali Penal Code; it is called ‘hurt by negligence’, i.e. an unintended assault resulting in illness.²⁰⁸ As it transpires, hurt is in itself an aggravated assault.

*(b) Hurt*²⁰⁹

As distinguished from assault which does not require any injury or harm to result from any conduct, ‘hurt’ is a crime which results in those consequences. Indeed, ‘hurt’ is the act of

²⁰² Article 440 of the Somali Penal Code. An example of this is where a person spits in the face of the victim with menace. There is no physical harm but a kind of contempt against the victim. Another example may be that of spraying dirty water to the victim.

²⁰³ Where the accused intended only to inflict physical pain but the act resulted in death, he or she may be considered to have committed manslaughter punished with imprisonment from ten to fifteen years. See articles 24 & 441 of the Somali Penal Code.

²⁰⁴ Article 439 (1) of the Somali Penal Code uses the verb ‘strike’ and refers to the absence of physical or mental illness. See note 201 above.

²⁰⁵ Ganzglass MR *op cit* (n 93) 490.

²⁰⁶ Article 439 (1) of the Somali Penal Code.

²⁰⁷ Article 439(2) of the Somali Penal Code.

²⁰⁸ See article 446 of the Somali Penal Code.

²⁰⁹ Article 440 of the Somali Penal Code. Its prosecution does not require the complaint of the victim.

causing physical or mentally injury to a human being of minor intensity.²¹⁰ If the injury or illness is serious, the gravity of the conduct may amount either to ‘grievous hurt’ or to ‘very grievous hurt’. Simple hurt is punished with three months to three years imprisonment.²¹¹

In the case of grievous hurt,²¹² the gravity of injuries or illness is considered with regard to the danger they pose to the life of the victim. Thus, if the injury or illness keeps the victim away from attending to his or her ordinary occupation for a maximum period of forty days, or the conduct weakens any sense or organ of the victim permanently or accelerates premature birth if the victim was a pregnant woman,²¹³ the sentence incurred by the accused, if found guilty, will be three to seven years imprisonment.

On the other hand, hurt is considered to be very grievous hurt²¹⁴ whenever the illness or injury it causes is certainly or probably incurable, or it results in the loss of sense, a limb, or in mutilation that renders the limb useless. In a case where the injury results in the loss of an organ or provokes a permanent incapacity to procreate or serious difficulty in speech, it is also considered as grievous hurt. Deformities or permanent disfigurements of the face of the victim, as well as miscarriage to the person injured, also amount to very grievous hurt. In all these circumstances, the sentence imposed on the accused, if found guilty, is six to twelve years imprisonment.

Whatever the degree of hurt caused, the prosecution must establish that the conduct was performed wilfully. This means that hurt requires intention as *mens rea* but, as already indicated with respect to assault; causing negligent hurt does exist in the Somali Penal Code. Causing negligent hurt is punished with a maximum imprisonment term of three months or with a fine upon the complaint of the victim,²¹⁵ where the sentence for grievous hurt is one to six months imprisonment or a fine, and where it amounts to very grievous hurt the incurred sanction is imprisonment from three months to two years.²¹⁶ Where such a negligent act has

²¹⁰ Article 440 (1) of the Somali Penal Code refers to physical or mental illness (wounds and burns being physical illnesses).

²¹¹ *Ibid.*

²¹² Article 440 (2) of the Somali Penal Code.

²¹³ The five senses which may be weakened are sight, hearing, smell, touch, and taste. Organs are usually internal parts of the body.

²¹⁴ Article 440 (3) of the Somali Penal Code.

²¹⁵ Articles 446 (1) and 446 (4) of the Somali Penal Code.

²¹⁶ Article 446 (2) of the Somali Penal Code.

injured more than one person, the court shall aggregate punishments pronounced with respect to each hurt, but the total sum should not exceed five years imprisonment.²¹⁷

2.3.1.5 Synopsis of the findings on Somali criminal law

With respect to Somali law regarding crimes committed by peacekeepers, it is sufficient to mention that Somali law as the territorial law is applicable to the conduct of peacekeepers²¹⁸ on the grounds of territoriality principle and of the fact that the victims are Somali citizens.²¹⁹ If it cannot, therefore, be suggested that members of the UN mission of peace to Somalia be prosecuted before Somali jurisdictions, it is because of an agreement which might have existed between the UN and Somalia or the model Status-of-Forces Agreement which is applicable until a proper Status-of-Forces Agreement is reached with the Host State.²²⁰ By the model Status-of-Forces Agreement, peacekeepers are immune from the jurisdiction of the courts of the Host State, but subject to the justice of their nationality.²²¹ Their immunity is, therefore, not absolute but dependent on the willingness of each contributing country to prosecute any offences committed by their nationals while serving under the UN flag.

2.3.2 Burundian law

Among the reported allegations of crimes by peacekeepers in Burundi, there are sexual offences and one case of murder.²²² It may be assumed that a certain percentage of the misconduct was never reported, whether it constituted violations of international law or of domestic legislation.²²³

²¹⁷ Article 446 (3) of the Somali Penal Code.

²¹⁸ Built on the concept of sovereignty, criminal jurisdiction follows the law of the state where a crime was committed. See Musselman GS (ed) *Law of War Deskbook* (International and Operational Law Department U.S. Army Charlottesville 2011) 198; Cahillane A 'International Law, Sexual Violence and Peacekeepers' 2010 (17) *Irish Student Law Review* 1-16, 15. The principle of territoriality is not an absolute principle to preclude from observing engagements under SOFA for instance. See PCIJ *Collection of Judgments the Case of the S.S. "Lotus"* (Publications of the Permanent Court of International Justice Series A -No.70 of 7 September 1927) 20.

²¹⁹ Zappala S 'Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC' 2003 (1) *Journal of International Criminal Justice* 671-678, 673.

²²⁰ Para 47(b) of the Model Status of Forces Agreement (SOFA) UN. Doc. A/45/594 of 9 October 1990. No country has been willing to subject its military contingents to the jurisdiction of a foreign nation. See Defeis EF 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' 2008 (7) *Washington University Global Studies Law Review* 185-214, 206.

²²¹ If not prosecuted back home, their immunity amounts to impunity with the effect of future repetition. See O'Brien M 'The Ascension of Blue Beret Accountability: International Criminal Court Command and Superior Responsibility in Peace Operations' 2010 (15) *Journal of Conflict & Security Law* 533-555, 553-554.

²²² *Supra* 2.2.2.

²²³ *Ibid.*

2.3.2.1 Rape

(a) Definition of rape

Burundian law defines rape as ‘any act of sexual penetration, whatever the nature of such an act, committed by an adult person against another person without the consent of the latter’.²²⁴

The Burundian Criminal Code not only defines what is understood by the term ‘rape’, but also who the perpetrator or the victim of such a crime may be, the punishment incurred, and aggravating circumstances.²²⁵ In Burundian criminal law, the crime of rape is established if its material elements, unlawfulness, and the culpability of its perpetrator have been established. These elements will be discussed below in more depth.

(b) Definitional and Consent elements of rape

According to the Burundian criminal code, rape is an act of sexual penetration, regardless of its nature or the means used to perpetrate the act. It must be perpetrated against a person who did not give an informed consent. Thus any act of sexual penetration by an adult person against a person who has not celebrated his or her eighteenth birthday, even if such a person has consented is regarded as rape.²²⁶ Rape is also committed in the circumstances indicated in article 555 of the Burundian Penal Code, and the perpetrator may be male or female.²²⁷ The

²²⁴ Loi N°1 / 05 du 22 avril 2009 portant révision du code pénal burundais. This Code will be referred to as the Burundian Penal Code. Article 554 equates the minority of the victim to lack of consent. Therefore sex with a person below the age of 18 is considered rape even if such a person consented to the act.

²²⁵ Articles 554-562 of the Burundian Penal Code.

²²⁶ Article 554 of the Burundian Penal Code. This article deals specifically with sex with minors. The following articles then describe what acts between adults also constitute rape. The age of consent to sexual intercourse is 18 under Burundian Law.

²²⁷ Article 555 : Commet un viol, soit à l’aide de violences ou menaces graves ou par contrainte à l’encontre d’une personne, directement ou par l’intermédiaire d’un tiers, soit par surprise, par pression psychologique, soit à l’occasion d’un environnement coercitif, soit en abusant d’une personne qui, par le fait d’une maladie, par l’altération de ses facultés ou par toute autre cause accidentelle aurait perdu l’usage de ses sens ou en aurait été privé par quelques artifices, et même si la victime est l’époux de cette personne : 1°. Tout homme, quel que soit son âge, qui introduit son organe sexuel, même superficiellement dans celui d’une femme ou toute femme, quel que soit son âge, qui a obligé un homme à introduire, même superficiellement, son organe sexuel dans le sien ; 2°. Tout homme qui a fait pénétrer, même superficiellement, par la voie anale, la bouche ou tout autre orifice du corps d’une femme ou d’un homme son organe sexuel, toute autre partie du corps ou tout autre objet quelconque ; 3°. Toute personne qui introduit, même superficiellement, toute autre partie du corps ou un objet quelconque dans le sexe féminin ; 4°. Toute personne qui oblige à un homme ou une femme de pénétrer, même superficiellement, son orifice anal, sa bouche par un organe sexuel ; Est puni de cinq ans à quinze ans de servitude pénale et d’une amende de cinquante mille francs à cent mille francs. (Below this author’s non official translation in English).

A rape is committed, either by means of violence or serious threats or by duress against a person, directly or through the intermediary of a third person, either by surprise, by psychological pressure, on the occasion of a coercive environment, either while abusing a person who, by the fact of an illness, by the change of his/her

absence of consent is critical for the crime to be committed,²²⁸ and official capacity is not a defence.²²⁹ Penetration is still an element of the crime but it is no longer limited to the vagina.²³⁰ Penetration of the vagina, anus, or mouth whether by the male genital organ or by an object or by any part of the body is sufficient.²³¹ The *actus reus* of rape includes the action of sexual intercourse and the circumstances in which such action occurred. The circumstances may be connected to the victim, to the perpetrator, or to the presence of the public. They all constitute aggravating facts that elevate the punishment incurred by the perpetrator if found guilty.²³² Rape against a person under the age of 18 is always considered to have been committed with violence.²³³

The criminal act of rape has to fulfil the following requirements:

(1) The sexual penetration must be committed by means of a sexual organ, other body parts, and objects. The body parts concerned by penetration are the vagina, anus, mouth, and other bodily orifices.²³⁴ When the vagina is the target to invade the victim's body, the crime is performed by the perpetrator's penis, or by means of other parts of the body or objects. The perpetrator can be a man or a woman.²³⁵ Resorting to the anus or mouth as the place to perpetrate rape, the penetration is deemed to be by means of the male sexual organ.²³⁶ Otherwise, the act is not of a sexual character. This will be the case, for example, where the actor intended to inflict serious bodily harm. With respect to any other opening of the body, the means used must be the male sexual organ.

faculties or by all other accidental reasons would have lost the use of his/her senses or would have been deprived of such by some artifices, and even though the victim is this person's spouse:

1. *by any man, whatever his age, who introduces his sexual organ, even superficially into that of a woman or any woman, whatever her age, who obliged a man to introduce, even superficially, his sexual organ into hers;*
2. *by any man who did penetrate, even superficially, the anus, the mouth or any other opening of the body of a woman or a man with his sexual organ, or any other part of the body or any other any object;*
3. *by any person who introduces, even superficially, any other part of the body or any object in the woman's sexual organ;*
4. *by any person who obliges a man or a woman to penetrate, even superficially, his/her anal opening, his/her mouth by a sexual organ;*

Rape is punished by five years to fifteen years of penal servitude and a fine worth fifty thousand francs to hundred thousand francs.

²²⁸ Articles 554 and 555 combined.

²²⁹ Article 560 of the Burundian Penal Code.

²³⁰ Penetration of anus and mouth has been added.

²³¹ Article 555 of the Burundian Penal Code.

²³² Articles 556-558 of the Burundian Penal Code.

²³³ Article 554 of the Burundian Penal Code. Thus the case of raping Therese Nkeshimana, 14-year-old.

²³⁴ Articles 555 of the Burundian Penal Code.

²³⁵ *Ibid.*

²³⁶ Articles 555 of the Burundian Penal Code.

(2) Violence with respect to rape is inferred from the means resorted to by the perpetrator, *viz* violence or serious threats or duress (either directly or through the intermediary of a third person), surprise, psychological pressure, coercive environment, exploiting the victim's weaknesses (physical or psychological weaknesses).²³⁷ Spousal status is not an excuse,²³⁸ and the Code itself indicates that the official position of a person accused of offences of sexual violence cannot, on any account, exonerate him or her from his or her criminal liability of rape or constitute a reason to reduce the punishment.²³⁹ What is important to note is that the *defence of superior orders or the command of a civil or military legitimate authority* is not available to the perpetrator of a crime of sexual violence.²⁴⁰

(c) Unlawfulness

Articles 27, 28 and 31 of the Burundian Penal Code recognise that, if some circumstances are present, the perpetrator may be exonerated from criminal liability. These circumstances include any situation in which sexual violence does not amount to international crimes.²⁴¹ The Code should have also excluded any possibility of exemption regarding ordinary sexual crimes. No defence should be available to a perpetrator of rape,²⁴² except where it may be shown that he or she was mentally disordered at the time of the act, and where it has been shown that the mental disorder actually suppressed his or her capacity to understand what he or she was doing.²⁴³ Indeed, the defence of mental illness relates to culpability, even though the distinction is not of any practical avail since the accused who asserts insanity and the one asserting any ground of justification at the time of the act incurs no punishment.²⁴⁴

With respect to the specific case of the UN peacekeepers in Burundi, it must be indicated that the defence of superior orders cannot be available to UN soldiers because it does not seem possible to imagine a UN force commander or one commander of a national contingent involved in peacekeeping to threaten the life of a soldier if the latter does not perform an

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ Article 560 of the Burundian Penal Code.

²⁴⁰ Article 561 of the Burundian Penal Code.

²⁴¹ The said circumstances are duress, minority of age (under 15), legal authorisation and lawful superior order, necessity, and private defence. See articles 27-28 and 31 of the Burundian Penal Code.

²⁴² The situation where the accused was deceived as to the age of the victim, a defence to culpability should be considered available.

²⁴³ Article 25 of the Burundian Penal Code.

²⁴⁴ Article 25 considers acts of persons who are mentally ill as not prosecutable. It does not provide that the person has to be assigned to psychiatric facilities.

illegal act. If this happens, the order given is manifestly and palpably unlawful, and in such a situation the subordinate is under no duty to obey such an order, and, therefore, the defence cannot stand.²⁴⁵

(d) Culpability: capacity and mens rea

As indicated earlier, criminal capacity refers to the question whether the perpetrator possessed the mental ability to realise the nature of his/her conduct and to the ability to act in accordance with this realisation of unlawfulness.²⁴⁶ Thus, a person who lacks the mental ability to appreciate the nature of his or her actions or to align such actions to the appreciation she or he has made, cannot be held criminally responsible for his or her conduct.²⁴⁷ A person, therefore, who has not reached a given age, or a mentally ill person at the moment of action, is considered to lack criminal capacity.²⁴⁸ Mental illness is considered as a defence. It is never presumed.

Regarding lack of criminal capacity, the United Nations General Assembly adopted the UN Convention on the Rights of the Child in December 1989. One of its provisions recommends that States enact laws setting up the minimum age under which a child shall be presumed criminally irresponsible for lack of criminal capacity.²⁴⁹ In fulfilment of this requirement, Burundi set the minimum age of criminal capacity at 15. Before an individual has reached such an age, his or her ‘would be criminal’ actions can entail only civil responsibility, but not criminal responsibility since any person under the age of fifteen is presumed totally incapable of giving a thorough thought to criminal activity.²⁵⁰

Since the question here is that of crimes committed by peacekeepers in Burundi, one needs to take cognisance of the fact that UN forces are made up of adult soldiers.²⁵¹ Rape is an

²⁴⁵ See Burundian Penal Code, article 27.

²⁴⁶ *Ibid.*

²⁴⁷ To stand as a defence, the privation of the capacity to understand or to make one’s conduct conform to legal norms must not be the fault of the performer of the criminal act. See article 26 of the Burundian Penal Code.

²⁴⁸ A person who has not reached his/her 15th birthday is considered criminally incapable. See article 28 of the Burundian Penal Code.

²⁴⁹ Article 40 (3) *Convention on the Rights of the Child*, U.N. Doc. A/RES/44/25 (12 December 1989).

²⁵⁰ Article 28 of the Burundian Penal Code reads (in French): Les mineurs de moins de quinze ans sont pénalement irresponsables. Les infractions commises par ces derniers ne donnent lieu qu’à des réparations civiles.

²⁵¹ States are not allowed to recruit children under the age of fifteen into their armed forces, nor implicate them in hostilities. See articles 38 of the Convention of the Right of the Child: States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. And 38 (3) provides that States Parties shall refrain from recruiting any person who has not attained

intentional offence in Burundian law. The prosecution must demonstrate that the *mens rea* in the form of intent did exist. This can easily be inferred from the means used by the perpetrator. Since the age of consent to sexual activities is 18 in Burundian criminal law, any sexual intercourse consented to by a person under the above age is considered not to be valid.²⁵² Any sexual contact with a person under that age, even consenting, is considered rape. Whether the child-victim consented and received money to make the act appear as prostitution is irrelevant.

2.3.2.2 Other sexual acts and sexual offences involving children

As far as ONUB is concerned, it is important to mention that sexual activities involving children, other than the case of rape aforementioned, have not been reported. This does not necessarily mean that they did not occur in Burundi. Sex with children is rape if the victim, at the time of the act, was not capable of giving a valid consent.²⁵³ Therefore, prostitution is the remaining sexual offence relevant to the present discussion.

The Burundian Penal Code defines prostitution as ‘the fact of submitting his/her body to the pleasure of others and to make a profession of it.’²⁵⁴ Prostitution *per se* is not a crime in Burundian law, with the exception of soliciting, which consists of any acts tending to attract some customers.²⁵⁵ Living upon the earnings of another person’s prostitution, either by brothel-keeping or by inciting, procuring, or facilitating prostitution, is criminalised.²⁵⁶ All these offences are characterised as offences against good *mores* and do not qualify as enforced prostitution.²⁵⁷ Enforced prostitution falls under Burundian provisions regarding domesticated international law, namely under crimes against humanity and war crimes.²⁵⁸ It is within the latter category that peacekeepers may be considered to commit prostitution, since the ‘client or customer’ of voluntary prostitution does not infringe any domestic law.²⁵⁹ But keeping a brothel or coercing a person into prostitution suffices to qualify as enforced

the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

²⁵² Article 554 of the Burundian Penal Code.

²⁵³ *Ibid.*

²⁵⁴ Article 538. Present author’s translation from French.

²⁵⁵ Article 548.

²⁵⁶ Articles 539, 542-547 of the Burundian Penal Code.

²⁵⁷ Articles 538-548 of the Burundian Penal Code.

²⁵⁸ Article 196, 7° for crimes against humanity and Articles 198 (2) (v) and 198 (5) (f) of the Burundian Penal Code.

²⁵⁹ Prostitution *per se* and visiting a prostitute is not an offence under the Burundian Penal Code.

prostitution. Although it is reported that some peacekeepers had acted with sexually promiscuous behaviour and, by so doing, had contributed to the encouragement of prostitution among young girls in Burundi,²⁶⁰ their conduct did not amount to enforced prostitution²⁶¹ or to pimping or brothel-keeping.²⁶²

2.3.2.3 Murder

(a) Definition of murder

In Burundian criminal law, murder is ‘any act by which a person voluntarily inflicts death upon another person.’²⁶³ This definition does not differ from any other definition found in other legal systems. For the crime of murder to be established, the following elements must be present, material elements, unlawfulness of the conduct, and culpability.

(b) Definitional elements of murder

The definitional act of murder consists in a positive act that causes the death of a human being.²⁶⁴ Although the provisions of the code do not specify the means by which murder can be perpetrated,²⁶⁵ article 211 is formulated in a manner that indicates that murder is brought about by an act of direct commission, therefore excluding omissions.²⁶⁶ An abstention can indeed be considered as a positive by inference from the conduct of the accused in the material circumstances under which death occurred.²⁶⁷ The relationship between the perpetrator and the victim,²⁶⁸ as well as the reason why the perpetrator killed the victim, is irrelevant.²⁶⁹

²⁶⁰ Krasno J *External Study: Public Opinion Survey of ONUB's Work in Burundi* (City College of New York and Yale University New York 2006) 6.

²⁶¹ Enforced prostitution is a crime against humanity in the Burundian Penal Code [article 196(7)] and it may amount to war crime [article 198 (v)].

²⁶² Articles 542-547 of the Burundian Penal Code.

²⁶³ Article 211 of the Burundian Penal Code.

²⁶⁴ *Ibid.* Positive act refers to action, contrary to inaction or omission.

²⁶⁵ Poisoning the victim or inflicting barbaric acts to the victim constitutes murder. See articles 214 and 216 of the Burundian Penal code,

²⁶⁶ The act by which a person causes death of another person is qualified as murder. See article 211 of the Burundian Penal Code.

²⁶⁷ Article 212 para 3 of the Burundian Penal Code is fulfilled where for instance a parent withdraws any food and abstains from breastfeeding a newborn. He or she can be prosecuted for having killed his/her child.

²⁶⁸ Article 212 of the Burundian Penal Code.

²⁶⁹ Article 211 para 2 of the Burundian Penal Code.

Reports regarding the case of murder against Therese Nkeshimana²⁷⁰ for instance do not inform about whether this victim died as a consequence of rape, i.e. such as bleeding after being raped, or whether she was killed to silence her, as she might have denounced the perpetrator. The only knowledge gleaned from the report regarding the incident is that she was raped and then killed. The positive material element of murder is, therefore, present.²⁷¹ Although the act was so grave, it must be noted that it did not meet the requirement of the Burundian criminal provision on war crimes because, for an act to fall under the category of war crimes under the Burundian law, it must fit in a plan, a policy, or form part of widespread conduct.²⁷² The case is still, however, an unlawful murder that falls under ordinary crimes of the same Burundian criminal law.²⁷³

(c) Unlawfulness

In Burundian criminal law, intentional homicides are excluded from the benefit of necessity.²⁷⁴ An accused person cannot, therefore, assert necessity where he is charged with murder. In the situation where the accused was under obligation to obey superior orders of a legitimate civil or military authority, he can assert the defence of superior orders, except where the offence falls under international crimes such as genocide, crimes against humanity, and war crimes.²⁷⁵ In cases of exclusion of the defence of superior orders, however, the existence of such an order regarding an international crime may still count with respect to sentencing in that the sentence of the accused may be reduced.²⁷⁶ With respect to murder, the defence of private defence remains available to any accused.²⁷⁷ *In specie*, i.e. in the incident of the killing of Therese Nkeshimana, however, it does not seem that the 14-year-old girl attacked Sergeant Phillipus Jacobus Venter for this accused person to assert self-defence. No other defence exists for the murder perpetrated horrendously after raping the victim.²⁷⁸ Perhaps the remaining possible defence may be that of mental illness, a defence which actually relates to culpability.

²⁷⁰ *Supra* 2.2.2.

²⁷¹ The trial court found the perpetrator guilty and sentenced him to 24 years imprisonment. See United States Department of State 2008 *Country Reports on Human Rights Practices - South Africa* (25 February 2009) available at www.state.gov/j/drl/rls/hrrpt/2008/af/119025.htm [last accessed 21 December 2012].

²⁷² Article 198 of the Burundian Penal Code. The provisions of this article actually come from the Rome Statute.

²⁷³ Article 211 of the Burundian Penal Code.

²⁷⁴ Article 31 of the Burundian Penal Code.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ Williams K *op cit* (n 24) and *supra* footnote 270.

(d) Culpability

The accused peacekeeper did not lack culpability upon the ground of youth.²⁷⁹ The accused may still convince a court before which he is arraigned that, at the time of the act, he lacked culpability because he was mentally ill.²⁸⁰

Apart from capacity, the prosecution has to establish that the murder was a wilful act of the perpetrator. The intentional element of murder may be inferred from the killing of the victim. The intentional element of the crime of murder can first be established by considering the means used by the perpetrator. For instance, if the weapon the perpetrator used had an intrinsic power to inflict death, the intentional element is proven.²⁸¹ The part of the body targeted may constitute signs of intent to inflict death.²⁸² Why the perpetrator resolved to kill the victim is irrelevant.

2.3.2.4 Assault

Whoever has voluntarily caused injuries or has assaulted others is punished with imprisonment from two months to eight months and with a fine of fifty thousand to two hundred thousand francs, or with one of these two sentences.

In the case of premeditation the person found guilty is punished with a term of imprisonment from one month to two years and with a fine of two hundred thousand francs.²⁸³

For assault to be present in Burundian Criminal Law, the conduct must meet the definitional elements, be unlawful and be perpetrated wilfully. However, in case of premeditation, the situation may be aggravated.²⁸⁴ For example, It has been reported that a guesthouse employee

²⁷⁹ The perpetrator was 33-year-old when he committed the act. See *DPP: Transvaal v Venter* (430/2007) [2008] ZASCA 76 (30 May 2008) para [13].

²⁸⁰ Mental illness may exclude capacity. If, at the time of the commission of the act, the accused could not know the nature and quality of the act he was doing, or he did not know what he was doing was wrong, he cannot be held criminally responsible. Article 25 of the Burundian Penal Code excludes responsibility in such a situation. It reads: « N'est pas punissable, celui qui souffrait d'une maladie ou d'une déficience mentale qui le privait de la faculté de comprendre le caractère délictueux ou la nature de son comportement, ou de maîtriser celui-ci pour le conformer aux exigences de la loi. » The provisions of this Burundian law expressly exclude criminal liability for mentally ill persons.

²⁸¹ Compare Fay TA 'Responsibility and the Requirement of *Mens rea*' (Reason Papers No. 14 Spring 1989) 59-69.

²⁸² Elis. 11 janvier 1916 (*Jur. Col.*, 1926, p. 305).

²⁸³ Article 219 of the Burundian Penal Code.

²⁸⁴ Articles 219-221 of the Burundian Penal Code.

was assaulted by a peacekeeper in Burundi, for allegedly having refused to rent him a room for a night.²⁸⁵ Such conduct infringes article 219 of the Burundian penal code.

(a) Definitional elements of assault

For the crime of assault to be present, the conduct must have caused injuries which were inflicted directly or indirectly to the body of the victim. It is sufficient to prove that the victim's injuries stem from the perpetrator's conduct. This may be the case in a situation where the perpetrator sets a dog on a victim who falls down or who is bitten by the dog. The requirement is met by establishing the causal link between the conduct of the perpetrator and the injuries caused to the victim.²⁸⁶ Mere threats which cause no injuries to the victim are not considered as assault in Burundian Criminal Law.²⁸⁷ Assault is only possible against a human being who is alive at the moment of the conduct.²⁸⁸ The act must have been perpetrated unlawfully and voluntarily.

(b) Unlawfulness

Causing injuries to the victim must have been unlawful to entail criminal liability. This means that there must be no ground of justification for the perpetrator's act. Indeed, where the perpetrator assaulted the victim out of private defence, or in an official capacity, or with the victim's consent, such in surgery activities or in sports, the performer of the assault cannot be held criminally liable.²⁸⁹ This has not been reported to be the case with respect to the assault inflicted to the guesthouse keeper in Burundi in the illustration above.²⁹⁰ Where the alleged perpetrator suffered from a sudden mental illness at the time of the conduct, he may plead the lack of the required culpability.

²⁸⁵ *Supra* 2.2.2.

²⁸⁶ Nyabirungu mwene Songa *Droit pénal général zaïrois* (DES Kinshasa 1989) 269-287.

²⁸⁷ Whoever has ... caused injuries. Indeed the French version of assault is the phrase 'coups et blessures'. See article 219 of the Burundian Penal Code.

²⁸⁸ Injuries to a dead body of a person is punished according to article 234 of the Burundian Penal Code.

²⁸⁹ Article 31 of the Burundian Penal Code.

²⁹⁰ To refuse to rent a room cannot be considered as an attack against the peacekeeper.

(c) Culpability

The required *mens rea* for assault in Burundian Criminal Law is intention. This is clear cut by the use of the concept ‘voluntarily’ in the provisions of the code.²⁹¹ If the perpetrator did not intend to cause harm to the victim or erroneously believed the act fell within the ambit of one of the grounds of justification, he or she lacks the required *mens rea* for the crime of assault to be established.²⁹²

(d) Aggravating circumstances

Three different sets of aggravating circumstances exist with respect to assault in Burundian Criminal Law. Firstly, premeditation amounts to an aggravating circumstance in that it elevates the punishment incurred for simple assault. If the prosecution establishes beyond reasonable doubt that the perpetrator thought about and planned the assault beforehand, *viz* he did not act on impulse in a moment of passion or mindlessness, the punishment incurred will be one month to two years in jail in *lieu* of two to eight months.²⁹³

If the consequences of the assault result in an illness, permanent inability to work, severe impairment of any body organ or serious mutilation, or if the victim of the crime is a pregnant woman and the perpetrator knew or should have know of such a state of pregnancy, he may incur a punishment ranging from two years to ten years imprisonment and a fine.²⁹⁴ In the case of a special relationship between the perpetrator and the victim, the latter being a parent or a grandparent, a spouse or a child or grandchild or any other relative of the perpetrator, as well as an in-law of or any person living with the perpetrator, the punishment incurred will be double the punishment provided for in articles 219 and 220 of the Code.²⁹⁵

2.3.2.5 Synopsis of the findings on Burundian Criminal Law

With respect to the Burundian Criminal Law regarding crimes committed by peacekeepers, it is sufficient to mention that Burundian Criminal Law as the territorial law is applicable to the conduct of peacekeepers on the grounds of the territoriality principle and due to the fact that the two victims were Burundian citizens. Therefore, the lack of prosecution of the

²⁹¹ Article 219 of the Burundian Penal Code uses ‘... *voluntarily* ...’ Indeed negligently causing injuries to a person is punished according to articles 227-228 of the same code.

²⁹² In such situation the act is no longer *voluntarily* performed. Article 219 of the Burundian Penal Code.

²⁹³ Article 219 of the Burundian Penal Code.

²⁹⁴ Article 220 of the Burundian Penal Code.

²⁹⁵ Article 221 of the Burundian Penal Code.

peacekeeper alleged to have committed the crime of rape, murder and assault against Burundian civilians, may be attributable to the provisions of a specific Status-of-Forces Agreement.²⁹⁶ By the model Status-of-Forces Agreement, peacekeepers are immune from the jurisdiction of the courts of the Host State, but subject to the justice of their nationality.²⁹⁷

2.3.3 DR Congolese law

Under this heading the discussion deals essentially with crimes of sexual violence, but it also presents substantive issues with respect to murder, assault, and torture. In the discussion of each crime, the elements are examined. With respect to the non-sexual crimes such murder, assault or torture, it must be noted from the outset that no allegations exist against MONUC personnel.

2.3.3.1 Rape

(a) Definition of rape

The act constituting rape,²⁹⁸ the person who may perpetrate rape, and the individuals who may be victims of rape are provided for in article 170 of the Congolese penal code which reads as follows:²⁹⁹

A person commits a rape, either by means of violence or serious threats or by duress against a person, directly or through the intermediary of a third person, either by surprise, by psychological pressure, on the occasion of a coercive environment, either while abusing a person that, by the fact of an illness, by the change of his/her faculties or by all other accidental reason would have lost the use of his/her senses or would have been deprived of such by some artifices:

- a) Any man, whatever his age, who introduces his sexual organ, even superficially into that of a woman or any woman, whatever her age, who coerces a man to introduce, even superficially, his sexual organ in hers;

²⁹⁶ Para 47(b) of the Model Status of Forces Agreement (SOFA) UN. Doc. A/45/594 of 9 October 1990. No country has been willing to subject its military contingents to the jurisdiction of a foreign nation. See Defeis EF 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' 2008 (7) *Washington University Global Studies Law Review* 185-214, 206. See infra 6.2 more details in this context.

²⁹⁷ If not prosecuted back home, their immunity amounts to impunity with the effect of future repetition. See O'Brien M 'The Ascension of Blue Beret Accountability: International Criminal Court Command and Superior Responsibility in Peace Operations' 2010 (15) *Journal of Conflict & Security Law* 533-555, 553-554.

²⁹⁸ See Mutata L *Protection du droit à la sexualité responsable* (Editions du service de documentation et d'étude du ministère de la justice Kinshasa 2009) 128.

²⁹⁹ This author's own translation from French. See article 170 de la Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais *Journal Officiel de la RDC* 1^{er} aout 2006.

- b) Any man who did penetrate, even superficially, the anus, the mouth, or any other opening of the body of a woman or of a man with his sexual organ, with any other part of the body or with any other object;
- c) Any person who introduces, even superficially, any other part of the body or any object into the woman's sexual organ;
- d) Any person who coerces a man or a woman to penetrate, even superficially, his/her anal opening, his/her mouth or any other opening of the body with a sexual organ, with any object or with any part of the body.

Any person convicted of rape shall be punished with penal servitude from five to twenty years and a fine of not less than one hundred thousand Congolese constant francs.

Sexual intercourse with a person who has not reached the age of 18, regardless of the consent of such a person, is considered rape committed by means of violence.

The Congolese Penal Code lists who may commit rape and under which circumstances the crime of rape is committed. From an analysis of the different acts which may constitute rape, however, this crime must be understood as the act by which a person of the one or the other sex imposes sexual intercourse on another person, against such a person's will.

Compared to the previous definition of rape in Congolese criminal law which recognised rape as a crime that could only be perpetrated by men against female victims, the new formulation of the provisions regarding this offence is wide enough to capture any instance of non-consensual sex.³⁰⁰ The lack of consent may be the result of physical or psychological weaknesses such as illness, psychological pressure, coercive environment, impaired senses or faculties owing to illness or any accidental cause, or may result from any other means of duress or surprise.

A distinction between two enacted laws prior to and after 2006 needs to be drawn with respect to the age of consent in Congolese criminal law. Prior to 1 August 2006, a girl who has attained the age of 14 could consent to sexual intercourse.³⁰¹

³⁰⁰ Likulia Bolongo *Droit pénal spécial zaïrois* (LGDJ Paris 1985) 329.

³⁰¹ See Articles 167 and 170 of the Congolese Penal Code prior to August 2006. By Law No. 06/018 of 20 July 2006 (Loi n° 06/018 du 20 juillet 2006), the age of consent to sexual activities was shifted from 14 to 18.

(b) Definitional elements of rape in DRC law

Prior to August 2006, the material element of rape was characterized by sexual intercourse, an act of penile penetration into a woman's vagina.³⁰² Penetration of the vagina or of the anus by other means such as objects and digital rape (by fingers), other than male genital organs, was not considered an act of rape.³⁰³ The new law defines rape in a way that includes any means of penetration or invasion of the victim's body. Thus, acts of penetration whether with a sexual organ or with another part of the body such as fingers, tongue, or the insertion of any other object into an orifice of the body constitute the material element of rape, as well as compelling a person to perform such an act of penetration.³⁰⁴

Regarding the perpetrator and the victim of rape, it must be noted that either a man or a woman can commit rape.³⁰⁵ Rape is construed nowadays as gender-neutral. The victim can also be a man or a woman although the majority of victims of rape remain women (and children of either sex).³⁰⁶

The means of bodily invasion are considered material elements to the crime of rape: the perpetrator resorts to force; or to threat of force or coercion, such as that caused by fear of violence; duress; detention;³⁰⁷ psychological oppression; or abuse of power, against such person or another person.³⁰⁸

(c) Absence of consent on the part of the victim

For rape to be established, it must be shown that the victim did not consent to the invasion of his or her body, or that he or she was in a situation that precluded her/him from giving valid and informed genuine consent.³⁰⁹ A person may be incapable of giving genuine consent if

³⁰² Own interpretation of article 170 of the Congolese Penal Code prior to 1 August 2006. See also Likulia Bolongo *op cit* (n 300) 329.

³⁰³ *Ibid.*

³⁰⁴ Any invasion of the victim's body by either sexual organ or body parts or objects amounts to rape. See Article 170 of the Loi n° 06/018 du 20 juillet 2006.

³⁰⁵ *Ibid.*

³⁰⁶ Lutz C, Gutmann M and Brown K *Conduct and Discipline in UN Peacekeeping Operations: Culture, Political Economy and Gender Report submitted to the Conduct and Discipline Unit Department of Peacekeeping Operations United Nations* (Watson Institute for International Studies 19 October 2009) 7; Compare Jewkes R *et alii* 'Why, When and How Men Rape: Understanding Rape Perpetration in South Africa' 2010 (34) *South Africa Crime Quarterly* 23-31, 27.

³⁰⁷ The situation of a detainee or a person awaiting trial but held in custody.

³⁰⁸ Article 170 of the Loi n° 06/018 du 20 juillet 2006 modifying the D.R. Congolese Criminal Code.

³⁰⁹ The DRC Penal Code places the age of consent to sex at 18 as from 2006. Before, a person could give consent to sex at the age of 14. The so-called child prostitution falls under the lack of genuine consent owing to age-

affected by natural incapacity,³¹⁰ induced or age-related incapacity.³¹¹ Whenever a perpetrator resorted to threat, violence, ruse, or abused a person whose senses and faculties have been affected by illness,³¹² or who has lost the use of his/her senses or has been deprived of such senses and faculties, any consent given by such a victim cannot be deemed genuine.³¹³ The age of consent is 18.³¹⁴ Thus, child prostitution exposed by media and other reporters must be classified as rape and not as prostitution because persons must be considered adults (or individuals who have reached the age of consent) in order to consent to the nature of acts to be performed validly.³¹⁵ Thus the person engaging the services of a prostitute who has not reached the age of consent is committing rape, whether such person paid for such sexual services or not. Indeed paying for sex with children is no different from raping a person incapable of giving valid consent.³¹⁶

(d) Unlawfulness

In Congolese criminal law, grounds of justification are considered to have their basis in general principles of law, which are not necessarily enacted in written law.³¹⁷ The DRC Constitution, however, provides that a public agent is relieved of the duty to obey and to execute superior orders when the received order constitutes either a manifest attack on human rights and public liberties, or an attack on good mores.³¹⁸ Superior orders, therefore, self-

related incapacity. A distinction is, therefore, crucial as to acts prosecuted today but committed before August 2006 in DRC.

³¹⁰ Congenital deafness and dumbness are considered natural impairment conditions which render the person concerned incapable.

³¹¹ Thus a person under 18 years old as from 2006, a person who has impaired senses and faculties whether such condition proceeds from accidental cause or from illness. See Article 170 of the DRC Penal Code.

³¹² Meningitis can leave a sequel of deafness.

³¹³ *Ibid.*

³¹⁴ See articles 167-168 of DR Congolese Criminal Code as modified and supplemented by the Law n° 06/018 of 20 July 2006.

³¹⁵ See Kakala T and Clifford L (AR No. 186, 12-Sep-08) 'UN Sexual Misconduct Allegations Won't Go Away' available at www.iwpr.net/?apc_state=hfrfacr346657&l=en&s=f&o=346697 [last accessed 19 December 2012].

³¹⁶ Holt K and Hughes S 'South Africa: Army silent on sex scandal in DRC' available at www.iol.co.za/news-1.216984 [last accessed 21 December 2012]. For numbers of victims of sexual misconduct by peacekeepers in DRC in 2004, and comments by investigative team, see Report on DRC A/59/661 paras 7-11.

³¹⁷ Nyabirungu mwene Songa *Traité de droit pénal général congolais* 2^e éd. (Éditions Universitaires Africaines Kinshasa 2007) section sur les causes de justification.

³¹⁸ Constitution de la République démocratique du Congo 18 février 2006 *Journal Officiel de la RDC* 18 février 2006. Article 28 : *Nul n'est tenu d'exécuter un ordre manifestement illégal. Tout individu, tout agent de l'État est délié du devoir d'obéissance, lorsque l'ordre reçu constitue une atteinte manifeste au respect des droits de l'homme et des libertés publiques et des bonnes mœurs.* Translation: The defence of superior orders or the command of a legitimate civil or military authority does not exonerate the perpetrator of his/her responsibility with respect to a crime of sexual violence. See article 42 (ter) of the DR Congolese Criminal Code as modified and supplemented by Law N° 06/018 of 20 July 2006.

defence and necessity are not applicable defences to crimes of rape because any of the requirements for asserting those defences actually exist.³¹⁹ Where consent may be asserted and the victim was an adult not deprived of any of her or his faculties, who was able to give a genuine consent, the crime is not committed. It is rare, however, especially in the case of Congolese culture, for a victim, especially a woman, to pretend to have been raped when no such an act occurred. It gives her no advantage at all, only tremendous social shame in addition to the harm already done. The only possible defence that may be raised by the perpetrator of the crime of rape may be based on a lack of criminal capacity owing to mental illness.

(e) Culpability

With respect to criminal capacity in DR Congolese criminal law, it must be indicated that only between the ages of 14 and 18 is the minor criminally liable as a perpetrator.³²⁰ A person of an age less than 14 years incurs no criminal liability. An adult person with an impaired mental state, however, has not the required culpability to be held criminally liable.³²¹

The crime of rape requires intention, and this intention is established by inference from the circumstances of perpetration, from the means used by the perpetrator and from the element of lack of consent.³²² With regard to the young victims (under the age of 18), the perpetrator's intention to commit the crime is always presumed, except where he was deceived by the victim as to the latter's age and could not foresee that the victim was a minor.³²³ With regard to peacekeepers, the intentional element can be established by inference from the peacekeeper's knowledge that he or she has been deployed in the host country to protect

³¹⁹ Consent is not a defence for rape but a definitional element. Official capacity cannot justify rape. See article 42 (bis) of the DR Congolese Criminal Code as modified and supplemented by Law N° 06/018 of 20 July 2006. Self-defence and necessity cannot be upheld as valid defences to rape.

³²⁰ Article 2(9) of Law No. 09/001 of 10 January 2009 on the protection of children *DRC Official Journal* of 12 January 2009. Youth as ground excluding culpability does not apply to peacekeepers.

³²¹ If a person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, such a person cannot be held criminally responsible. See Article 31(1) (a) Rome Statute of the International Criminal Court. See Nyabirungu mwene Songa *Droit pénal général zairois* (DES Kinshasa 1989) 240 *et seq.*

³²² Likulia Bolongo *op cit* (n 300) 336.

³²³ *Ibid.*

vulnerable civilians and the knowledge that he or she is all the times under the obligation to observe local laws and UN standards.³²⁴

2.3.3.2 Other sexual acts and offences involving children

With respect to Congolese Criminal Law, two conducts are discussed and relate to prostitution and child pornography. It is also important to take note of the fact that any conduct involving children into sexual activities, whether prostitutional or not amount to rape as indicated above, due to the absence of genuine consent.³²⁵

Prostitution *per se* is not a crime in the DRC.³²⁶ Where the parties to such a transaction are consenting adults, they can, therefore, not be prosecuted under Congolese criminal law. The fact that it is no violation of any local law to be involved with prostitutes constitutes one of the reasons why peacekeepers in the DRC have gained their particular reputation for fraternisation with local women.³²⁷ A Norwegian researcher who conducted an interview with MONUC personnel was told by his interviewees that fraternisation with prostitutes was a positive intervention, since girls and women get money from them.³²⁸ The interview did not reveal, however, the ages of the girls involved, although one should not lose sight of the fact that engaging the services of a prostitute as young as 12 or 13 years old remains punishable as rape.³²⁹ Despite the unjust economic power imbalances between local women and UN personnel, instances in which the latter may have paid for the services of adult prostitutes are not considered unlawful conduct³³⁰ under Congolese Criminal Law.³³¹ In fact prostitution *per se* is not criminalised in DRC as well as in most of the countries who have contributed MONUC personnel. It is probably, therefore, difficult for peacekeepers to see how they are violating the law.³³² If peacekeepers, however, were accused of running brothels of one kind or another, playing the role of intermediaries between prostitutes and their clients, then they

³²⁴ Article 7 ter of the Revised Draft Model Memorandum of Understanding (UN. Doc. A/61/494 of 3 October 2006).

³²⁵ *Supra* 2.3.3.1.

³²⁶ As prostitution *per se* is not criminalised, the Penal Code does not deal with the issue. No legal definition exists.

³²⁷ Higate PR 'Men, Masculinities and Peacekeeping in Sub-Saharan Africa' in Karamé K (ed) *Gender and Peace-building in Africa* (Training for Peace – NUPI (Norsk Utenriskpolitik Institutt) Oslo 2004) 67-90, 75.

³²⁸ *Ibid.* 76.

³²⁹ Article 170 of the Congolese Penal Code.

³³⁰ Quenivet N 'The Dissonance between the UN Zero-Tolerance Policy and the Criminalization of Sexual Offences on the International Level' 2007 (7) *International Criminal Law Review* 657-676, 668.

³³¹ See *supra* (n 326).

³³² *Ibid.*

might be found to be in the situation of enforced prostitution.³³³ These aspects are criminalised in Congolese criminal law.³³⁴

(a) *Enforced prostitution:*³³⁵ *Article 174 c*

Whoever compels one or several persons to perform an act or several acts of a sexual nature, by force, by threat of force or coercion or by taking advantage of their inability to give an informed consent, in order to obtain a pecuniary advantage or other benefit, shall be punished with a penal servitude of three months to five years.³³⁶

The elements of the crime of enforced prostitution under the above article are the same as under article 8 (2) (b) (xxii) of the Rome Statute of the International Criminal Court in that the preamble to the law that criminalises enforced prostitution under the DR Congolese Penal Code expressly indicates that the aim of enacting that law was to keep up with international law.³³⁷ It is, however, not apparent from the reading of the preamble how the requirement of connection to an armed conflict can actually be fulfilled. For this crime, therefore, to be established, the prosecution must prove that (1) the perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent; (2) the perpetrator, or another person, obtained or expected to obtain pecuniary or other advantage in exchange for, or in connection with, the acts of a sexual nature; and (3) the perpetrator knew that he was compelling the victim to engage in or to remain in, prostitution. With respect to the grounds of justification, one sees none excluding the unlawfulness of the crime of enforced prostitution as consent forms part of the definitional elements.

Where the perpetrator can establish that the victim was a willing party in engaging in prostitution, the crime cannot be proved, but the perpetrator can still be prosecuted for 'pimping' or brothel keeping.

³³³ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by UN.G.A. Res. 317 (IV) of December 2, 1949 entered into force July 25, 1951.

³³⁴ Articles 174 b and 174 c of the Loi n° 06/018 du 20 juillet 2006 *JORDC* du 1^{er} aout 2006, or article 174 bis avant ladite modification. The crime of enforced prostitution may overlap with the crime of rape in that the victim is compelled to perform a sexual act.

³³⁵ The term 'Enforced prostitution' used in Congolese Penal Code is the same as the one used in Articles 7-8 of the Rome Statute of the ICC.

³³⁶ Article 174 c of the DR Congolese Penal Code.

³³⁷ See para 4 of the preamble to the the Loi n° 06/018 du 20 juillet 2006 *JORDC* du 1^{er} aout 2006.

*(b) Pimping and brothel keeping: Article 174 b*³³⁸

Shall be punished with a penal servitude of three months to five years and with a fine of fifty thousand to one hundred thousand Congolese constant Francs:

1. Whoever, in order to satisfy someone else's passions, hires, drives or causes a person of eighteen years of age or older to engage in prostitution, even with the consent of such a person; where the age of the person cannot be determined, this will be determined by medical expertise;
2. Whoever owns or keeps a house of prostitution;
3. The pimp: a pimp is someone who lives wholly or in part on the earnings of the prostitution of another person, at the expense of the person whose prostitution the pimp is exploiting;
4. Whoever exploits habitually, whatever the strategy used, the prostitution of others.

Shall be punished with the same sentence as in the previous paragraph of this article:

1. Whoever distributes a document or pornographic movie to children under 18 years of age;
2. Whoever broadcasts on television obscene dances or indecent clothes, susceptible of corrupting good morals.

When the victim is a child who has not reached 18 years of age, the sentence will be five to twenty years.

From an analysis of the above provisions, it appears that the perpetrator may be a male or a female person. The prohibition deals with the fact that a person earns a living from the proceeds of the prostitution of others.³³⁹ The conduct consists of a number of acts, such as recruiting prostitutes, owning or keeping a house of prostitution, and living on the earnings of the prostitution of another person.³⁴⁰

A person can also be punished with the sentence incurred by a pimp where such a person distributes documents or movies, broadcasts lewd dances, or indecent clothes to children under the age of 18. The legislator considers such conduct as a way of enticing young people into obscene behaviour since the conduct is susceptible of corrupting good morals.

³³⁸ The provisions of this article have not been changed by the law supplementing the DR Congolese Penal Code.

³³⁹ See also Kakule Kalwahali *The Criminalisation of Prostitution in South African Criminal Law* (unpublished LLM thesis UNISA 2005) 30.

³⁴⁰ Living on ... refers to the habitual exploitation of prostitution of another person. The prosecution has to show an element of repetition to constitute the habit which is actually punishable but a single act of pimping or receiving money from a prostitute is not.

From an analysis of the crime of displaying pornographic material to children, it is obvious that, for such crime to be established, the prosecution has to show that the persons to whom the document was distributed or the viewers to whom the broadcast was directed are actually children under the age of 18. If the movie or document was produced using children or adults disguised as children, the perpetrator can be charged with child pornography.

(c) Child pornography: Article 174 m

Shall be punished with a penal servitude of five to ten years and a fine of one hundred fifty thousand constant Congolese Francs, whoever makes any representation, by whatever means, of a child taking explicit part in sexual activities, whether real or simulated, or any representation of the sexual organs of a child, mainly for sexual ends.

With respect to the specific case of child pornography, Congolese law explicitly criminalizes the depiction of images or representations involving child pornography, even if such depiction is simulated.³⁴¹ The crime consists of the possession of pornographic materials even if such material was actually produced using consenting adults. A person who is found in possession of such material, and it is discovered subsequently that he or she produced them using children, may be charged with crimes such as rape, or with the crime of being found in possession of pornographic material involving children.³⁴²

2.3.3.3 Murder

Although there are no reported instances of unlawful killing of civilians by peacekeepers in the DRC, it remains necessary to discuss the specific elements of the crime of wilful killing or murder in the DR Congolese criminal law for the purposes of comparative analysis.

(a) Definition of murder

Murder is defined as a homicide perpetrated wilfully, with the intention of causing the death of a human being.³⁴³ Where the killing has been premeditated, it is subsumed under the term

³⁴¹ Article 174 m of the Congolese Penal Code.

³⁴² *Ibid.*

³⁴³ Homicide intentionally committed to cause death is called murder. Murder committed with premeditation is assassination. They are both punished with death. See Articles 44-45 of the D.R. Congolese Penal Code. See also *Avocats Sans Frontières Étude de jurisprudence : l'application du statut de Rome de la cour pénale internationale par les juridictions de la République démocratique du Congo* (Francesca Boniotti Bruxelles 2009) 40.

‘assassination’.³⁴⁴ They are both punished by the death penalty.³⁴⁵ There is no practical interest, therefore, regarding the distinction between murder and assassination.³⁴⁶

(b) Definitional elements

The definitional element of murder consists in the act which causes the death of human being.³⁴⁷ The said act must be not only material to the death of the victim, it must also be both the factual and the legal cause of the death of the victim,³⁴⁸ although, and generally the act consists in a commission, an omission in specific circumstances can cause the death of a human being. Thus, where a person has voluntarily omitted to execute a legal duty to act positively and a link can be established between such an omission and the death of the victim, the perpetrator can be held criminally accountable for the death of the victim.³⁴⁹ Indeed, there is no difference between causing death of a victim by assaulting the victim and reaching the same result (death of the victim) by refraining from executing a legal duty. This would be the case where a mother, without justification or just cause, refuses to breastfeed a newborn defenceless child or in a situation where a prison custodian does not give food to the inmates.³⁵⁰ The omission is in such a case an act of commission by omission.³⁵¹

Since murder can exist only in respect of a living human being, murder must be committed against a person who has been born alive and was still alive at the moment of the act.³⁵² There is, therefore, no such a thing as murder on a corpse, nor on an unborn foetus not yet separated

³⁴⁴ Articles 44-45 of the D.R. Congolese Penal Code. Although the term ‘assassination’ is usually linked to the murder of political figures, in penal codes of French-speaking countries the term is used to mean any murder perpetrated with premeditation, even if the victim is not a political leader. See for instance article 394 of the Belgium Penal Code; article 144 of the Burundian Penal Code; 221-3 of the French Penal Code. See also Article 3(a) of the ICTR French version which uses the term *assassinat* ‘assassination’ where the English version uses the term ‘murder’ [Statute of the International Criminal Tribunal for Rwanda U N Doc. S/RES/955 (1994)].

³⁴⁵ Boma 10 décembre 1907 (*Jur. Etat*, II, p. 204).

³⁴⁶ See Likulia Bolongo *op cit* (n 300) 49.

³⁴⁷ *Avocats Sans Frontières Étude de jurisprudence : l’application du statut de Rome de la cour pénale internationale par les juridictions de la République démocratique du Congo* (Francesca Boniotti Bruxelles 2009) 40.

³⁴⁸ *Ibid.*

³⁴⁹ I^{er} inst. Stan. 23 décembre 1952 (*J.T.O.* 1954, 360); Kakule Kalwahali *Droit Penal Special* (unpublished course ULPGL-Goma 2011) 14.

³⁵⁰ For comparison, see English cases *R v Gibbins and Proctor* [1918] CCA where failure to feed a 7-year-old child constituted the required *mens rea* for murder for the accused to be found guilty of murder; *R v Instan* [1893] CCR where similar failure to feed a person constituted manslaughter.

³⁵¹ Kakule Kalwahali *op cit* (n 349) 14.

³⁵² Likulia Bolongo *op cit* (n 300) 61.

from its mother.³⁵³ Murder can be established and its perpetrator convicted only if no ground of justification exists.

(c) Unlawfulness

It is an element of murder that the crime must be unlawful. Grounds of justification such as performance of a duty imposed by law or executing superior orders, private defence, lawful use of arm by public officer, and a state of necessity may have some bearing on the criminal liability of the perpetrator.

- *Performance of a duty imposed by law and the lawful use of arms by a public officer*

This ground of justification applies when it has been legally enacted as such. The individual who has, for instance, overseen the process and execution of a person sentenced to death, in observance of the required procedure, cannot be considered to have committed murder.³⁵⁴ Likewise, policemen who make use of firearms to disperse demonstrators or to repress riots cannot be found guilty of murder if death to some victims results from their conduct; no condemnation can be pronounced against them because they are justified.³⁵⁵ This would apply to peacekeepers prosecuted to have caused the death of a person during a rampage directed at UN peace mission headquarters.

- *Private defence*

Under DR Congolese criminal law, private defence is not a written principle. This explains the absence of any reference to enacted legislation. It has been decided by courts that private defence should be resorted to only if one finds one's self in imminent unavoidable grave danger, without any other way out.³⁵⁶ The reaction must be proportionate to the aggression.³⁵⁷

- *State of necessity*

Necessity is an available defence to any person accused of having committed a crime under Congolese criminal law. It remains, however, an unwritten general principle of criminal law.

³⁵³ Killing a foetus in the womb is treated as an abortion.

³⁵⁴ For instance a pregnant woman cannot be executed if it has been proven that she is an expecting mother. The execution has to be suspended until the child is born. See article 3 of the *Arrêté du gouverneur général – Exécutions capitales*. (R.M., 1898, p. 59; *Rec. Us.*, III, p. 46) du 9 avril 1898.

³⁵⁵ Likulia Bolongo *op cit* (n 300) 74.

³⁵⁶ Boma 30 septembre 1902 (*Jur. Etat* I. 216).

³⁵⁷ Elis. 30 décembre 1915 (*Jur. Col.* 1926, 225); Léo. 13 mai 1954 (*R.J.C.B.* 1954, 246).

Indeed, when a person acting under a threat of severe and irreparable harm to his life or limb, or to the life or limb of another person, perpetrates an offence, the person under such a threat cannot be punished. To stand as defence and justify the would-be-perpetrator, four requirements have to be met: (1) the act which would constitute the offence must be performed under an immediate threat of severe and irreparable harm to life or limb; (2) there must be no other adequate way of averting the evil; (3) the crime committed is not disproportionate to the evil threatened, i.e. the violation of the law is a lesser evil than the evil avoided; and (4) sometimes the threatening situation must not have been created by the person asserting the justification.³⁵⁸ Since there has been no allegation of murder against MONUC personnel, it suffices to refer to the discussion under Somali and Burundian law regarding the issue of whether necessity can justify murder.³⁵⁹

- *Presumed circumstances excluding punishment*

The envisioned instances here are those in which a person attacked viewed the attack as unlawful whereas it was lawful. The defence of self-defence cannot, therefore, stand. This will be the same where a person mistakenly believed himself or herself to be in danger and to avoid the danger such a person committed a crime. It cannot be said he or she has committed the crime wilfully. Intention cannot be established for he or she presumed he or she was acting in circumstances excluding liability. In such situations the accused lacks culpability.

(d) *Culpability*

As it has been argued above, peacekeepers are adults; the issue of criminal capacity, therefore, does not arise, except where the capacity issue includes that of mental illness and intoxication.³⁶⁰ The latter defences, however, are usually discussed together with the issue of the mental element of the crime. The *mens rea* required for the crime of murder is intention. This requirement is clear from the formulation of the provisions on murder and assassination which reads that a homicide must be ‘intentionally committed to cause death’.³⁶¹

³⁵⁸ Nyabirungu mwene Songa *Traité du droit pénal général congolais* 2^e éd. (Editions Universitaires Africaines Kinshasa 2007) 168-175. If a person put himself into a situation of necessity to be able to perpetrate a prohibited act, such a person cannot be justified. See *Ibid.* 175.

³⁵⁹ See supra 2.3.1.3 and 2.3.2.3.

³⁶⁰ See supra 2.3.1.3.

³⁶¹ Article 44-45 of the DR Congolese Penal Code.

2.3.3.4 Assault

The provision of the DR Congolese Criminal Code which criminalises assault defines this crime in terms of voluntarily causing injuries to another human being.³⁶² Premeditation, *viz* the planning of the perpetration of such a crime is not only a psychological element of *mens rea* but also an aggravating circumstance.³⁶³ Therefore, for assault to be present, the prosecution must prove that there was a voluntary conduct which resulted in a human being suffering and such act produced unlawful consequences.

(a) *Definitional elements of assault*

For the crime of assault to be present, the conduct must have caused injuries to the body of the victim.³⁶⁴ The injuries may be inflicted by direct contact with the body of the victim or indirectly. It is sufficient to prove that the victim's injuries stem from the perpetrator conduct.³⁶⁵ Whenever a causal link may be established between the conduct of the perpetrator and the injury to the victim, this requirement is met.³⁶⁶ Mere threats which cause no injuries to the victim are not considered as assault in DR Congolese Criminal Law. Assault is only possible against a human being who is alive at the moment of the conduct.³⁶⁷

(b) *Unlawfulness*

Causing injuries to the victim must have been unlawful to hold the perpetrator criminally liable. This means that there must be no ground of justification for the perpetrator's act. Indeed, where the perpetrator assaulted the victim out of private defence, in a duty of carrying out superior orders,³⁶⁸ or with the victim's consent, such is the case with surgery activities or in sports, the performer of the assault cannot be held criminally liable. If the alleged

³⁶² Article 46 para 1 of the DR Congolese Penal Code.

³⁶³ Article 46 para 2 of the DR Congolese Penal Code.

³⁶⁴ Article 46 of the DR Congolese Penal Code.

³⁶⁵ In instances of negligent injuries to the victim, the provisions will apply are those of article 54 of the DR Congolese Penal Code.

³⁶⁶ Comparison between voluntary assault of article 46 with assault which resulted in death of the victim (article 48). With respect to the latter instance, old court decisions allude to the requirement of causal link. See Léo, 23 février 1928 (*R.J.C.B.*, p. 153); Léo, 23 mai 1941 (*R.J.C.B.*, p. 187); I^{re} inst. Usa, 22 octobre 1946 (*R.J.C.B.*, 1947, p. 71).

³⁶⁷ Assault and any barbaric acts against a corpse are punished according to articles 61-62 of the DR Congolese penal Code.

³⁶⁸ Carrying out obvious illegal orders entails no defence to the accused. See article 28 of the DR Congolese Constitution of 18 February 2006.

perpetrator suffered from a sudden mental illness at the time of the conduct, he may however plead a lack of culpability.³⁶⁹

(c) Culpability

The required *mens rea* for assault in DR Congolese Criminal Law is intention. This is clear as the legislation uses the concept ‘voluntarily’ in the provisions of the code. Negligence is not sufficient *mens rea* for the crime of voluntary assault. Premeditation and other enumerated situations linked especially to the consequences of the conduct constitute aggravating circumstances of assault.³⁷⁰

(d) Aggravating circumstances

Unlike the Burundian Penal Code which provides aggravating circumstances where the victim is a pregnant woman or where a special relationship exists between the victim and the perpetrator, the DRC Criminal Code only recognizes premeditation³⁷¹ and consequences as illness, permanent inability to work, severe impairment of any body organ or serious mutilation,³⁷² as aggravating circumstances to assault.

With respect to premeditation, and in order to elevate the punishment incurred for simple assault, the onus of proof rests with the prosecution to establish that this aggravating circumstance actually exists. It must be shown beyond reasonable doubt that the perpetrator thought about and planned the assault beforehand. If the trial court is satisfied that the prosecution has discharge the onus of proof, the punishment incurred is one month to two years in jail in *lieu* of eight days to six months.³⁷³

With respect to illness, which is not otherwise explained or defined in the code, it has been decided that such an illness ought to be of certain seriousness to warrant the difference between the punishment for simple assault and that of aggravated assault by the circumstance of illness.³⁷⁴ Regarding the inability to work, this circumstance exists whenever the victim has been kept from work for a considerable period³⁷⁵ or can no longer work the way he or she

³⁶⁹ 1^{er} inst. Kas., 22 mars 1950 (*J.T.O.*, 1950-1951, 44).

³⁷⁰ Articles 46-48 of the DR Congolese Penal Code.

³⁷¹ Article 46 para 2 of the DR Congoles Penal Code.

³⁷² Article 47 of the DR Congolese Penal Code.

³⁷³ Article 46 para 2 of the DR Congoles Penal Code.

³⁷⁴ Boma, 26 mai 1908 (*Jur. Etat*, II, p. 239).

³⁷⁵ For example two months away from work. See Boma, 15 janvier 1909 (*Jur. Etat*, II, p. 239).

used to,³⁷⁶ or where there is a reduction in efficiency of carrying out the worker's assignment.³⁷⁷ By severe impairment of any body organ or serious mutilation, it is understood for example the loss of an eye,³⁷⁸ a hand but not a finger,³⁷⁹ or the tearing of an eardrum.³⁸⁰ Where these circumstances are present, the perpetrator incurs a punishment ranging from two to five years imprisonment and a fine. Intended assault which results in the death of the victim without such result being intended, the perpetrator may be punished with an imprisonment of five to twenty years.³⁸¹ If the perpetrator is a state agent or a person acting at the instigation of a state agent or with the acquiescence of such state agent, the crime is no longer one of assault but the crime of torture.

Before the criminalisation of torture *per se*,³⁸² wilful causing of severe pain and suffering to an individual was prosecuted as assault or as an aggravating circumstance. This was the case even where the public official element existed to qualify as torture.³⁸³ The definition of torture under the new provisions is verbatim the definition of torture under the UNCAT.³⁸⁴ For the crime of torture to be established, the prosecution must prove the following elements:³⁸⁵

1. The victim was a person in the custody or under the control of the perpetrator;
2. The perpetrator inflicted severe physical or mental pain or suffering upon the victim;
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
4. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession; punishment; intimidation; or coercion or for any reason based on discrimination of any kind.
5. The perpetrator must be a public official or a person who performed the act at the instigation of such a public official.

³⁷⁶ Boma, 26 mai 1908 (*Jur. Etat*, II, p. 258).

³⁷⁷ I^{er} inst. Stan., 24 mars 1953 (*J.T.O.*, 1955, p. 43, n^o. 19).

³⁷⁸ Boma, 13 octobre 1908 (*Jur. Etat*, II, p. 269).

³⁷⁹ I^{er} inst. Stan., 19 avril 1955 (*J.T.O.*, 1956, p.14).

³⁸⁰ I^{er} inst. Eq., 15 avril 1955 (*J.T.O.*, 1956, p. 43, n^o. 19).

³⁸¹ Article 48 of the DR Congolese Penal Code.

³⁸² Articles 48bis, 48ter and 48quater of the DR Congolese Penal Code introduced by article 1 of the Law No. 11/008 of 9 July 2011. DRC accessed the UNCAT on 18 May 1996.

³⁸³ See articles 46-48 and 67 of the DR Congolese Penal Code.

³⁸⁴ UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (S. Treaty Doc. No.100-20, 1465 U.N.T.S. 85).

³⁸⁵ Article 48bis of the DR Congolese Penal Code.

From an analysis of the provisions criminalizing torture in DR Congolese law, no defence such as a defence of superior orders is available for the crime of torture because such an order would be manifestly unlawful.³⁸⁶ Prosecution *vis-à-vis* the person who committed acts of torture cannot be barred by the passing of time.³⁸⁷ It has also been indicated that no case of torture or assault has been reported regarding peacekeepers deployed in the RD Congo.³⁸⁸

2.3.3.5 Synopsis of the findings on DR Congolese Criminal Law

With respect to the DR Congolese regarding crimes committed by peacekeepers, it is evident that the position is the same as that of Burundian law, in that the territorial law is also applicable to the conduct of peacekeepers on the grounds of territoriality principle. DR Congolese law is further applicable to the conduct of peacekeepers on the ground of the passive nationality principle. Therefore, the lack of prosecution of the peacekeeper alleged to have especially committed crimes of rape and sexual crimes such as pornography with children may be explained upon other grounds than issues of substantive law. One could therefore infer that peacekeepers are immune from the jurisdiction of the courts of the Host State.³⁸⁹ The reasons for this will be investigated later in this thesis.³⁹⁰

2.4 Conclusion

This chapter has examined the relevant allegations of crimes by peacekeepers in Somalia, Burundi, and the Democratic Republic of the Congo. It has shown that the different allegations of crimes presented in the chapter, especially sexual offences and murder, as well as torture and assault, are provided for in the domestic law of the selected host countries. In the Congolese criminal code, the provisions on rape are similar to those of the Burundian code, save for the distinction that must be drawn with respect to the age of consent prior to August 1, 2006 and thereafter.³⁹¹ Indeed, before the coming into force of the law on sexual

³⁸⁶ Article 28 of the 2006 DRC Constitution.

³⁸⁷ No statute of limitation applies to acts of torture. See Article 48quater of the DR Congolese Penal Code.

³⁸⁸ See supra 2.2.4.

³⁸⁹ Para 47(b) of the Model Status of Forces Agreement (SOFA) UN. Doc. A/45/594 of 9 October 1990. No country has been willing to subject its military contingents to the jurisdiction of a foreign nation. See Defeis EF 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' 2008 (7) *Washington University Global Studies Law Review* 185-214, 206.

³⁹⁰ *Infra* 4.4.

³⁹¹ Apart from the distinction relating to the sentence to be inflicted on any convicted person, rape requires, in both criminal systems, sexual penetration of the victim without her or his consent; that persons who have not reached their 18th birthday be considered incapable of giving an informed consent to sex; the means used by the perpetrator be violence, threats or menaces, coercion, surprise, psychological pressure, and abusing persons

violence in the DRC,³⁹² the age of consent was fourteen.³⁹³ The new law elevated this age to eighteen.³⁹⁴ In Burundian criminal law, the age of consent did not change with the new penal code.³⁹⁵ In both criminal systems, as in most other domestic criminal law, for sexual intercourse to amount to a crime, the prosecution has to prove that there had been a material act of a sexual nature against the will of the victim.³⁹⁶ Prior to the revision of the above-mentioned laws, the victim was always a female and the perpetrator a male.³⁹⁷ In Somali criminal law, rape can theoretically be committed by a person of either sex, *vis-à-vis* a man against a woman or a woman against a man.³⁹⁸

In these three criminal systems as they appear today, the criminalization of rape and the use of violence, threats, deceptive means or ruse to carry out this crime are common to all. From an analysis, it is evident that the crime of rape has almost the same comparable elements in all these legal systems. This chapter has shown that rape and other sexual offences, murder, torture, and assault constitute crimes under domestic criminal law.³⁹⁹ These crimes have been allegedly committed by peacekeepers in Somalia.⁴⁰⁰ Regarding Burundi, the reported allegations of crimes by peacekeepers are sexual offences and murder.

With respect to the crime of rape, and in all three of the domestic law criminal systems, consent is never a ground of justification, but a definitional element of the crime itself. That is why the perpetrators, and in the case of peace mission personnel, the defence available to them is that of proving the act was consensual. Any person charged with an offence has indeed the right to assert any defence. It is the duty of the court to assess and appreciate the

weakened by illnesses or by any accidental cause that deprived them of the use of their faculties. See Articles 554-555 of the Burundian Criminal Code, 171 of the Congolese Criminal Code.

³⁹² Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais *Journal Officiel de la RDC*, 1^{er} aout 2006.

³⁹³ Article 167 of the Congolese Penal Code prior to the law on sexual violence August 1, 2006.

³⁹⁴ Articles 167 et 168, Loi n° 06/018 du 20 juillet 2006 modifiant et complétant le Décret du 30 janvier 1940 portant Code pénal congolais, *Journal Officiel de la RDC*, 1^{er} aout 2006.

³⁹⁵ In Burundian law the age of consent to sexual acts is 18. See Article 382 du Décret-loi n°1/6 du 4 avril 1981 portant réforme du Code pénal ; Article 554 Loi N°1 / 05 du 22 avril 2009 portant révision du Code pénal burundais.

³⁹⁶ No crime exists where two adult consenting persons engage in sexual activity.

³⁹⁷ See Likulia Bolongo *op cit* (n 300).

³⁹⁸ Article 398 of the Somali Penal Code: whoever with violence or threats has carnal intercourse ‘with a person of the other sex...’

³⁹⁹ Criminalisation of torture is an obligation that binds each State party to the UNCAT.

⁴⁰⁰ The human right ‘not be subjected to arbitrary deprivation of life’ Exists. The violation of such a right constitutes murder, whoever the culprit may be. Members of the UN forces cannot be excused if they violate such an important right on the basis that the perpetrator is allowed by the UN to use force. See McLaughlin R ‘The Legal Regime Applicable to Use of Lethal Force When Operating Under a UN Security Council Chapter VII Mandate Authorizing “All Necessary Means”’ 2008 (12) *Journal of Conflict & Security Law* 389-417.

pertinence of the defence raised. Sex between two consenting adults for reward is not a crime in Burundian and Congolese Criminal Law; peacekeepers who may have engaged the services of prostitutes infringed no law of the Host State. Prostitution is punished in Somali law with imprisonment and a fine.⁴⁰¹ Both sanctions have to be inflicted.⁴⁰²

Instances where it may be established that UN soldiers helped militia to keep on perpetrating criminal acts, armed groups to carry on their fight against government forces, and on the way to that end killed or raped civilians, should be held accountable for their criminal participation.⁴⁰³ Indeed, the involvement of MONUC soldiers with rebels may render any individual found guilty as an accomplice to all the atrocities committed by the armed groups in the eastern part of the DRC.⁴⁰⁴

Regarding grounds of justification, it is recognized that anyone accused and prosecuted before a court of law for having committed a crime has the right to raise any circumstance that may avail him or her as defence. It is, therefore, during proceedings that one may absolutely conclude the absence or assertion of any ground of justification. It was noted that insanity may exculpate a person where it is shown sufficiently that the perpetrator, at the time of the commission of the offence, suffered a sudden fit.⁴⁰⁵ A peacekeeper can also assert insanity as a defence to culpability. In that case the burden of proof rests with the peacekeeper raising the

⁴⁰¹ Article 405 of the Somali Penal Code.

⁴⁰² *Ibid.*

⁴⁰³ Where participants in a crime did not perform the *actus reus* of the said crime, they are accomplices in that they willingly sought to further the crime. Compare with a Dutch case *Van Anraat* trial and appeal, discussed by van der Wilt HG 'Genocide, Complicity in Genocide and International v. Domestic Jurisdiction Reflections on the van Anraat Case' 2006 (4) *Journal of International Criminal Justice* 239-257; van der Wilt HG 'Genocide v. War Crimes in the Van Anraat Appeal' 2008 (6) *Journal of International Criminal Justice* 55-567: On 23 December 2005, the District Court of The Hague delivered its judgment in the van Anraat case. During the 1980s, the Dutch businessman Frans van Anraat sold huge quantities of the chemical thiodiglycol (TDG) to the regime of Saddam Hussein to serve as a raw material for the production of mustard gas. The court sentenced the accused to 15 years in jail. On appeal, the Court of Appeal concluded that the appellant was guilty of aiding and abetting war crimes; the evidence at the trial demonstrated that Van Anraat knew that the chemical weapons for which he provided the basic materials could and indeed would be used against Iraq's enemies. The Court of Appeal sentenced Van Anraat to a term of imprisonment of 17 years, thus increasing by two years the sentence imposed by the District Court. In explaining the severity of the sentence, the Court of Appeal referred to the seriousness of the offences, the considerable contribution made by the defendant, and his lack of remorse or compassion for the victims.

⁴⁰⁴ Articles 21-22 for the different modes of participation in a criminal act and article 23 for the incurred punishment according to each degree of participation.

⁴⁰⁵ *Supra* culpability discussion.

mental illness defence.⁴⁰⁶ The intervention of expertise during the investigation of such instances must be recommended.⁴⁰⁷

The analysis has shown that the law of the Host States is competent with respect to the prosecution of any conduct within the boundaries of the said states. It is clear that the lack of accountability of peacekeepers is not one relating to substantive definition or defences in the domestic Criminal Law of the Host States. The issue is then if peacekeepers may fall within the ambit of substantive definition, why are they not being held accountable? This problem of lack of accountability will next be investigated in the context of the law of Troop-Contributing Country as an attempt to answer this question.

The next chapter will, therefore, examine how the domestic law of troop- contributing countries deals with crimes committed by peacekeepers. Since the discussion of all states that sent troops in Africa on UN mission cannot be undertaken,⁴⁰⁸ South Africa is taken as an example of an African country to illustrate whether or not the country of origin of the alleged perpetrator has enacted adequate laws to deal with the crimes committed abroad.

⁴⁰⁶ Article 50 of the Somali Penal Code and Article 25 of the Burundian Penal Code. Mental illness applies in DR Congolese Criminal Law as a general principle of Criminal Law; it is not expressly provided for by specific legislation.

⁴⁰⁷ Strong evidence is necessary criminal matters that may lead to privation of liberty of the accused.

⁴⁰⁸ Supra 1.6.

CHAPTER III

PEACEKEEPERS AND THE DOMESTIC CRIMINAL LAW OF SOUTH AFRICA AS A TROOP-CONTRIBUTING COUNTRY

3.1 Introduction

Chapter two of this thesis discussed the incidence and prevalence of crimes perpetrated by peacekeepers against civilians. The manner and extent to which the criminal law of the Host States - Somalia, Burundi and the Democratic Republic of Congo - is applicable to crimes committed by peacekeepers was also investigated in order to ascertain whether problems exist with the substantive definitions which result in peacekeepers not being held liable. It was clear that the problem does not rest with substantive definitions in the host country.

This chapter seeks to establish whether the lack of accountability relates to the domestic criminal law of an African *Troop-Contributing Country*, such as South Africa, with respect to the crimes committed by peacekeepers while on mission. South Africa is selected as the example by reason of the fact that South Africa is actively involved in two of the three UN missions of peace, is an African state, and that there have been allegations of crimes by South African troops.¹ At this juncture, it is critical to note that criminal conduct by a peacekeeper may fall under the domestic law of the state where it took place (i.e. the host country), but it may simultaneously constitute a violation of the laws of the perpetrator's State of nationality (i.e. the Troop-Contributing Country).²

In the present chapter, the crimes alleged to have been committed by South African peacekeepers will be analysed. These include the crimes of rape, engaging the services of a prostitute, murder, and assault. The elements of each crime will be discussed, and possible defences examined. It will also be shown that sexual crimes committed outside the Republic of South Africa can be prosecuted before South Africa courts in the same manner as if they

¹ It should be noted that the selection of South Africa is dictated by the fact that South Africa is an African state which has contributed troops to peacekeeping missions in Burundi and in the DRC. South Africa is also selected to keep in line with the theme of the thesis.

² Troop-Contributing Countries (hereinafter TCC) have exclusive criminal jurisdiction over crimes committed by peacekeeping soldiers. The TCC must apply their national law, which must have integrated International Humanitarian Law. See para 47 (b) of the UN Model SOFA (UN Doc A/45/594 of 9 October 1990); O'Brien M 'The Ascension of Blue Beret Accountability: International Criminal Court Command and Superior Responsibility in Peace Operations' 2010 (15) *Journal of Conflict & Security Law* 533-555, 553-554; UNGA *Report of the Special Committee on Peacekeeping Operations 2012 substantive session: New York 21 February-16 March and 11 September 2012* (UN Doc. A/66/19 of September 2012) para 53; Ladley A 'Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations' 2005 (1) *Politics and Ethics Review* 81-90.

have occurred within the Republic. It will further be explored, with reference to case law, whether state liability for omissions or for failure to protect citizens from crimes can properly fit situations of crimes committed by peacekeepers. The chapter will also look at how the vicarious liability of a state may be relevant in the context of alleged crimes committed by peacekeepers.

3.2 Law of South Africa as a Troop-Contributing Country

It is important to mention at the outset that sexual crimes committed outside the Republic of South Africa can be prosecuted before South Africa courts in the same manner as if they have occurred within the Republic.³ South African soldiers have been accused of involvement in various crimes⁴, including a massive sex abuse scandal in the DRC.⁵ Although the said sex scandal abuse involved many other contingents of peacekeepers, including the one from South Africa, the allegations include a staggering 50 cases of sexual attacks on minors in the form of prostitution in Bunia throughout 2003.⁶ South African soldiers were among peacekeepers involved in those cases.⁷ It has been reported that a South African colonel had to be sent home after investigations substantiated that he had molested his young male interpreter.⁸ Other allegations of sexual crimes relate to South African MONUC troops stationed in Kindu.⁹

One case of murder and one case of assault are reported to have been committed by a South African soldier deployed in Burundi.¹⁰ This section, therefore, explores rape, prostitution with respect to the client, murder, and assault in the light of South African law since South African MONUC and ONUB personnel have been accused of sexual crimes, murder and assault.

³ S 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter Sexual Offences Act 32 of 2007). The perpetrator may a South African citizen, a person residing with the Republic of South Africa, or any other person currently found or arrested in the RSA.

⁴ Examples of such crimes are essentially rape. The discussion, however, also covers the crimes of prostitution, murder, culpable homicide, and other crimes.

⁵ Holt K and Hughes S 'South Africa: Army silent on sex scandal in DRC' available at www.iol.co.za/news/south-africa/army-silent-on-sex-scandal-1.216984 [last accessed 21 December 2012].

⁶ *Ibid*; Rasmussen J 'MONUC: Sexual Exploitation and Abuse -End of Assignment Report' 25 February 2005, 2. Child prostitution is rape since a minor cannot give a valid consent to sex. See *supra* 2.3.3.1

⁷ *Ibid*

⁸ 'Investigation by the Office of Internal Oversight Services into Allegations of Sexual exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo' UN. Doc. A/59/661; Du Plessis M & Pete S 'Who Guards the Guards? The ICC and serious crimes committed by United Nations Peacekeepers in Africa' 2004 (13) *African Security Review* 5-17, 8.

⁹ Du Plessis M & Pete S *Who Guards the Guards? The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No 121 Pretoria February 2006) 6.

¹⁰ Otto H 'SA soldier facing murder charge in Burundi' <http://www.iol.co.za/news/africa/sa-soldier-facing-murder-charge-in-burundi-1.267660> [last accessed 21 December 2012]; *DPP Transvaal v Venter* (430/2007) [2008] ZASCA 76 (30 May 2008) paras [5] [10]-[15].

3.2.1 Rape

Under South African law, rape is no longer a common law crime.¹¹ Each and every analysis of the crime must, therefore, refer to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007¹² that defines, categorises, and indicates elements deemed to constitute rape.¹³ The Act prohibits sexual activities that occur without mutual consent.¹⁴ It distinguishes between rape and compelled rape.¹⁵ With regard to other non-consensual sexual activities,¹⁶ the Act differentiates between sexual assault,¹⁷ compelled sexual assault, and compelled self-sexual assault.¹⁸

Although the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 has provided for a range of non-consensual prohibited activities, this statute will be discussed only in the context of rape. Indeed, the sources used to support the allegations of sexual crimes by peacekeepers deployed on the African continent as part of UN peace operations do not reveal the existence of compelled rape, sexual assault, compelled sexual assault, and compelled self-sexual assault. The discussion will, therefore, essentially cover the elements of the crime of rape in South African law. For rape to be present, four elements must be established: sexual penetration of another person, a lack of consent on the part of the latter person, unlawfulness, and intention.¹⁹

¹¹ Preamble to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereinafter the Sexual Offences Act 32 of 2007). Before the enactment of this act, rape was defined as ‘the intentional unlawful sexual intercourse with a woman without her consent.’ This meant that only men could commit the crime and only females could be victims of rape. See Snyman CR *Criminal Law* 5 ed (LexisNexis Durban 2008) 355-6; Van der Bijl C ‘Rape as a materially-defined crime: Could ‘any act which causes sexual penetration’ include omissions?’ 2010 (2) *SACJ* 224-238, 224; See also *Fanuel Sitakeni Masiya v DPP and Minister of Justice and Constitutional Development*, Constitutional Court of South Africa, Case CCT 54/06 [2007] ZACC 9, 10 May 2007 para [26].

¹² The Sexual Offences Act 32 of 2007.

¹³ *Ibid.*

¹⁴ See ss 3-7 of the Sexual Offences Act 32 of 2007.

¹⁵ Ss 3-4 of the Sexual Offences Act 32 of 2007.

¹⁶ This consent, provided it be free, and fairly obtained, is the best proof that can be produced, that, to the person who gives it, no mischief, at least no immediate mischief, upon the whole, is done. For no man can be so good a judge as the man himself and what it is that gives him pleasure or displeasure. See Bentham J *An Introduction to the Principles of Morals and Legislation* 1781 (Batoche Books Kitchener 2000)135.

¹⁷ Sexual assault, which encompasses all forms of sexual violation without consent, replaces the common law crime of indecent assault.

¹⁸ Ss 5-7 of the Sexual Offences Act 32 of 2007.

¹⁹ Snyman CR *op cit* (n 11) 355.

(a) The conduct requirement

The meaning of ‘sexual penetration’ is defined in the Sexual Offences Act,²⁰ in section 1(1) as including any act which causes penetration to any extent whatsoever by:

- (a) The genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) Any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) The genital organs of an animal, into or beyond the mouth of another person, and “sexually penetrates” has a corresponding meaning.

From the analysis of the above meaning of ‘sexual penetration’ it appears that rape actually includes oral sex and male rape. These two instances were inadequately addressed by the common law since the definition of rape referred only to the sexual penile invasion of the vagina.²¹ The definition of rape as it stood before the enactment of the Sexual Offences Act was gender-specific²² and a forceful act of sodomy could not amount to rape.²³ Thus, the South African colonel who was sent home on allegations that he had been molesting his young male interpreter could not be prosecuted of rape under South African law since the incident took place before the enactment of the gender-neutral Sexual Offences.²⁴ The conduct remained prosecutable as the common law offence of indecent assault.²⁵

The *Masiya* case serves as the *locus classicus* in this regard and relates to the issue regarding ‘the manner in which the definition of rape has been understood, developed and interpreted in South African law.’²⁶ In this case, the accused, Mr Masiya, at the time 44 years of age, was initially brought before the District Court at Sabie on a charge of rape. The state alleged that on or about 16 March 2004 at or near Sabie he wrongfully and unlawfully had sexual

²⁰ S 1 of the Sexual Offences Act 32 of 2007.

²¹ Snyman CR *op cit* (n 11) 355-356.

²² *Fanuel Sitakeni Masiya v DPP and Minister of Justice and Constitutional Development*, Constitutional Court of South Africa, Case CCT 54/06 [2007] ZACC 9, 10 May 2007 paras [27], [30].

²³ para [92].

²⁴ National Assembly *Allegations of Abuse by Members of SANDF in DRC: Question No.14 For Oral Reply* Question time: 08 September 2004 - Written question No. 390 Transferred for Oral Reply (Published in The Internal Question Paper No 8 of 06 August 2004) available at www.dfa.gov.za/docs/2004pq/pq14.htm [last accessed 21 December 2012]; Du Plessis M & Pete ‘Who Guards the Guards? The ICC and serious crimes committed by United Nations Peacekeepers in Africa’ 2004 (13) *African Security Review* 5-17, 8; *Fanuel Sitakeni Masiya v DPP and Minister of Justice and Constitutional Development*, Constitutional Court of South Africa, Case CCT 54/06 [2007] ZACC 9, 10 May 2007 para [7].

²⁵ S 69 (3) of the Sexual Offences Act 32 of 2007.

²⁶ *Masiya v DPP and Minister of Justice and Constitutional Development* para [1].

intercourse with a nine-year old girl (the complainant), without her consent. The case was transferred to the Regional Court at Graskop where he was tried on that charge. At the trial Mr Masiya, represented by an attorney from the Nelspruit Justice Centre, pleaded not guilty. The evidence established that the complainant was penetrated anally.²⁷

The Regional Court remarked that:

In terms of the existing common law definitions of crime, the non-consensual anal penetration of a girl (or a boy) amounts only to the (lesser) common law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse is regarded as rape. One's initial feelings of righteousness would however immediately rebel against such thought. Why must the unconsensual sexual penetration of a girl (or a boy) *per anum* be regarded as less injurious, less humiliating and less serious than the unconsensual sexual penetration of a girl *per vaginam*? The distinction appears on face value to be irrational and totally senseless, because the anal orifice is no less private, no less subject to injury and abuse, and its sexual penetration no less humiliating than the vaginal orifice. It therefore appears that the common law definition of rape is not only archaic, but irrational and amounts to arbitrary discrimination with reference to which kind of sexual penetration is to be regarded as the most serious, and then only in respect of women.²⁸

The Regional Court held that the common law definition of rape as it currently stood was unconstitutional, and it extended it to include acts of non-consensual sexual penetration of the male penis of the perpetrator into the vagina or anus of another person.²⁹ This order was upheld by the High Court on Appeal³⁰ and the Constitutional Court.³¹ It was noted, however, that the development of the common law definition of rape, to include anal penetration, should only be done prospectively, not retrospectively to apply to the applicant Fanuel Sitakeni Masiya, because retrospective application would offend the constitutional principle of legality.³²

The current definition of rape 'refers to a widened notion of sexual penetration.'³³ It is an inclusive provision which prohibits any unlawful invasion of the body of a person with any

²⁷ *Masiya v DPP and Minister of Justice and Constitutional Development* para [6].

²⁸ Para [9].

²⁹ Paras [2], [11].

³⁰ Para [15].

³¹ Para [93].

³² Para [51].

³³ Van der Bijl C and Rumney PNS 'Attitudes, rape and law reform in South Africa' 2010 (73) *Journal of Criminal Law* 414-449, 417; *S and Minister for Justice and Constitutional Development v Acting Regional Magistrate, Boksburg: Mr Phillip Venter and Lucas van der Merwe*, Case CCT 109/10 [2011] ZACC 22, para [3].

part of the body or any object.³⁴ It must be noted that if the invasion of the body is performed by a part of the body or object (other than the genital organ of a human or an animal), and the targeted body orifice is the mouth of the victim, the crime of rape is not committed, but the conduct will qualify as sexual assault where such conduct amounts to a sexual violation.³⁵ What needs to be proven is the issue of whether the victim consented or not, as non-consent forms part of definitional element of the crime of rape.

(b) Definitional elements

It is clear that a lack of consent still forms part of the definitional elements of sexual crimes such as rape. The crime of rape, therefore, does not exist if the actors were two consenting adults. What is meant by the notion of consent? According to section 1(2) ‘consent’ means voluntary, uncoerced agreement.³⁶ Whatsoever the offence, a complainant ‘B’ does not voluntarily or without coercion agree to an act of sexual penetration whenever the following circumstances are present, although this list is not exhaustive:³⁷

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of —
 - (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—
 - (i) asleep;³⁸
 - (ii) unconscious;

³⁴ The slightest or ineffective penetration by whatever means consummates the crime of rape. See the utilization of the words ‘into or beyond the genital organs or anus of another person’ in the definition of ‘penetration’ in S 1 of the Sexual Offences Act 32 of 2007.

³⁵ S 5 read with S 1(1) of the Sexual Offences Act 32 of 2007. See also Snyman CR *op cit* (n 12) 371-378.

³⁶ See also Van der Bijl C ‘Rape as a Materially-Defined Crime: Could “Any Act which Causes Sexual Penetration” Include Omissions?’ 2010 (2) SACJ 224-238, 225.

³⁷ S 1(3) of the Sexual Offences Act 32 of 2007.

³⁸ *S v Mangokoane and Others* (CC49/05) [2006] ZA HC (TPD 4 January 2006) para [5].

- (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgment is adversely affected;
- (iv) a child below the age of 12 years; or
- (v) a person who is mentally disabled.

From an analysis of the above provisions, therefore, even under the new Act, rape can be committed only if the penetration takes place without conscious consent.³⁹ Lack of consent is established whenever it is shown that force or intimidation have been resorted to.⁴⁰ The question may, however, arise as to how to ascertain the agreement of 'B' with respect to an act of penetration. If 'B' manifested physical resistance or verbally proclaimed his or her opposition to the proposed sexual act, there is no problem in concluding that the absence of consent was present.⁴¹

Where force, intimidation, abuse of power,⁴² fraudulent means, unconsciousness, or altered consciousness, and threats, as well as where 'B' was surprised while asleep or is intoxicated, valid consent is negated.⁴³ Generally the allegations of rape by peacekeepers can be established with regard to lack of consent in that the victims can assert that they consented to sexual acts out of intimidation, abuse of power or authority, and the fact that the victim was below a certain age.

(i) The use of force or intimidation by alleged perpetrator⁴⁴

Whenever a person submitted to an act of sexual penetration as a result of force, intimidation, or threats, the ostensible consent by such a person cannot be considered as a valid consent for the purposes of rape.⁴⁵ It is important to note that the intimidation may stem not only from the actual use of force, but also from the fact that the perpetrator is a specific person or from the surrounding circumstances. Thus, the fact that peacekeepers wear uniforms and carry weapons and are not deployed in peacetime can cause a victim to feel intimidated. Indeed, peacekeepers are deployed in areas where civilians have experienced intimidation from

³⁹ See Snyman CR *op cit* (n 11) 363-367.

⁴⁰ *Ibid.*

⁴¹ S 56 (1) of the Sexual Offences Act 32 of 2007.

⁴² Since peacekeepers are deployed in war-torn societies, consent may not be genuine owing to the coercive environment. But it may also be said that peacekeepers in military uniform overpowered the victim.

⁴³ For further discussion of the requirement of consent and example in South African law, see Snyman CR *op cit* (n 11) 363-367.

⁴⁴ S 1(3) (a) of the Sexual Offences Act 32 of 2007.

⁴⁵ *Ibid*; *Notito v The State* (123/11) [2011] ZASCA 198 (23 November 2011) paras [7]-[8].

individuals in uniform belonging to warring parties. This does not, however, preclude the possibility of consensual sexual contact in certain circumstances. In situations of armed conflict, autonomous relationships between individuals remain possible. Nonetheless, it should not be overlooked that such a possibility does not preclude the possibility of victims being intimidated and, therefore, submitting themselves to a sexual act without consent.⁴⁶ Whenever a victim has come forth and averred that the sexual conduct was not consensual, the course of justice should be triggered and the issue investigated until the suspect is proven guilty or is acquitted. Indeed, it could be argued that while a civilian may resist a person in civilian clothes, he or she may more easily succumb and submit to individuals in uniform or those carrying a weapon. It is not inconceivable that peacekeepers might abuse their position as it has been indicated in chapter two of this thesis.⁴⁷

(ii) Abuse of power or authority

Where there is an abuse of power or authority by perpetrators to the extent that the victim is not in a position to indicate that he or she is unwilling or not, it is impossible to consider the absence of resistance to sexual act as genuine consent.⁴⁸ The hypothesis refers to cases where the victim is not threatened by physical violence, but the perpetrator expressly or tacitly uses the position of power which he or she exercises over such victim to influence her/his consent.⁴⁹ An example of such abuse of power or authority is the situation where a policeman threatens to lay a charge against the victim that she has committed a crime if she does not consent to intercourse, and, owing to the threat, the victim does consent. Such consent is invalid.⁵⁰ In a situation of the absence of consent which is not so obvious, it can still be held that the victim did not consent. Thus, it has been held that a policeman committed rape when he had intercourse with the victim in circumstances in which he had not threatened such a victim with some or other form of harm, but where the victim believed that the policeman had the power to harm her. The perpetrator was aware of this fear.⁵¹ Indeed, in the case of

⁴⁶ In circumstances of armed conflict, and where accoutrement is associated with those who have perpetrated atrocities or acts of rape, consent cannot exist.

⁴⁷ See supra 2.3.1.1; UN *Criminal Accountability of United Nations and Experts on Mission: Current Situation*, available at www.gtmun.org/documents/2008/GA6Topic3currentSituation.pdf [last accessed 30 July 2011]. There is an imbalance of power between members of the military or the police and the civilian population. See Ross J 'Blaming the Victim: "Consent" Within the Fourth Amendment and Rape Law' 2010 (26) *Harvard Journal Racial & Ethnic Justice* 1-74, 6.

⁴⁸ S 1 (3) (b) of the Sexual Offences Act 32 of 2007.

⁴⁹ Snyman CR *op cit* (n 11) 365.

⁵⁰ *Volschenck* 1968 2 PH H283 (D); *Botha* 1982 2 PH H112 (E) referred to by Snyman CR *op cit* (n 11) 365.

⁵¹ S 1971 (1) SA 591 (A) referred to by Snyman CR *op cit* (n 11) 365.

somebody like a policeman who is in a position of power over Y, Y's 'consent' will not be regarded as valid if the evidence reveals that she apprehended some form of harm other than physical assault upon her. This may well be the case regarding peacekeepers since abuse of power or authority refers to cases where the perpetrator exercises power or authority over the victim, for example over a detained person. The victim's consent would in any event not be considered as valid where the apprehension caused by such perpetrator's position includes the possibility that the victim may be harmed. Victims may have such an apprehension from the fact that peacekeepers wear military uniforms.

(iii) The age of consent

A person can be considered unable to give valid consent because of his or her age. Indeed a child under a certain age is incapable in law of appreciating the nature of the sexual act he engages in. Thus, paragraph (iv) of subsection (3)(d) of section 1 of the Sexual Offences Act 2007 provides that if, at the time of the commission of the sexual penetration, the victim was a child under the age of 12 years, any consent given by such a child is invalid in law. Such a child is irrefutably presumed to be incapable of consenting to the act of sexual penetration.⁵² What is critical to note is that the allegations with respect to peacekeepers were perpetrated in countries where the age of consent is different from those of a Troop-Contributing Country such as South Africa.⁵³ If the prosecution, therefore, had to be led according to the laws of the latter State, the appreciation of the age of consent must be done according to the age of consent of the Host State. If this is not the approach adopted, the crime may go unpunished for not meeting the requirement of double criminalisation. Double criminalisation means that the given conduct must amount to a crime both in the law of the country where it was committed and in the law of the country where the conduct is actually being prosecuted.⁵⁴

⁵² S 1 (3) (d) (iv) of the Sexual Offences Act 32 of 2007.

⁵³ The age of consent is 14 in Somali law, articles 398(2) and 433; 18 in Burundian and Congolese criminal codes, articles 554 and 167, 170 respectively and 16 under South African criminal law.

⁵⁴ The United Nations has urged all States to consider establishing, to the extent that they have not yet done so, jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, at least where the conduct as defined in the law of the State establishing jurisdiction also constitutes a crime under the laws of the Host State. See UN. Doc. A/RES/62/63, para3. See also, in connection extraditable offences, United Nations Office on Drugs and Crime (UNODC) Revised Manuals on the Model Treaties on Extradition and Mutual Assistance in Criminal Matters (Group of Experts Siracusa - Italy 6 to 8 December 2002) paras 15, 20-21; Dugard J and Van den Wyngaert C 'Reconciling Extradition with Human Rights' 1998 (92) *American Journal of International Law* 187-212, 188; Carlisle JJ 'Extradition of Government Agents as a Municipal Law Remedy for State-Sponsored Kidnapping' 1993 (86) *California Law Review* 1541-1586, 1576-1577.

The difference in the age of consent should, therefore, not lead to the conclusion that the double criminalisation requirement is not met to exculpate a peacekeeper from a troop-contributing country where the age of consent to sexual intercourse is low, for instance 14. Indeed, a peacekeeper from such a country who indulges in sex with a girl of 16 may not see that he is committing an offence according to a local law where the age of sexual consent is 18. For rape to be established and prosecuted, the conduct must have been perpetrated unlawfully and with intention.

(c) Unlawfulness

As indicated earlier, consent is not a ground of justification in the crime of rape as it forms part of the definitional elements of the crime itself. The implication or reason for this is that if it were otherwise, the only element of the crime of rape would consist in sexual penetration.⁵⁵ The Sexual Offences Act 2007 enumerates the categories of defences which can be raised to a charge of sexual offence,⁵⁶ including when such alleged offences are committed abroad. With respect to rape, two defences are available; *viz* the belief in the victim's being mature enough to consent legally to acts of sexual penetration,⁵⁷ and the minority of the offender.⁵⁸

As far as a belief in the victim's maturity to consent is concerned, section 56 (2) (a) states that whenever an accused person is charged with statutory rape under section 15 or statutory assault under section 16, it is a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and that the accused person reasonably believed that the child was 16 years or older.⁵⁹ For the defence to succeed, the accused must demonstrate the deception and the physical appearance of the complainant that led the accused to believe the minor's allegation regarding age.⁶⁰ If such a belief is unreasonable, the defence has to be

⁵⁵ Snyman CR *op cit* (n 11) 367.

⁵⁶ S 56 of the Sexual Offences Act 32 of 2007.

⁵⁷ S 56 (2) (a) of the Sexual Offences Act 32 of 2007.

⁵⁸ Ss 56 (2) (b), 56 (4) and 56 (5) of the Sexual Offences Act 32 of 2007.

⁵⁹ S 56 (2) (a) of the Sexual Offences Act 32 of 2007. Thus in *Bongi Biyela v the State* (859/10) [2011] ZASCA 43 (29 March 2011) a plea of apparent age situated between 28-20 was accepted even though the real age was 15 and the victim consented. Injuries to the victim were considered not conclusive. Referring to *R v V* 1957 (2) SA 10 (O); *S v F & others* 1967 (4) SA 639 (W) para [29]. The Court indicated that an accused may escape liability for engaging in sexual intercourse with a girl under the age of 16 years if he can prove that he was deceived as to the age of the girl.

⁶⁰ *Bongi Biyela v The State* (859/10) [2011] ZASCA 43 (29 March 2011) para [29].

rejected and the accused convicted as charged.⁶¹ The defence of deception in the belief that the victim consented can be asserted where the accused is charged with rape. This may be the sole defence available to peacekeepers when prosecuted for sexual misconduct under South African law and before South African courts. Sexual crimes committed outside the Republic of South Africa can be prosecuted before South African courts in the same manner as if they had occurred within the Republic in terms of section 61 which provides that:

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

(a) is a citizen of the Republic;

(b) is ordinarily resident in the Republic;

(c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;

(d) is a company, incorporated or registered as such under any law, in the Republic; or

(e) anybody of persons, corporate or unincorporated, in the Republic.

(2) Subject to subsections (4) and (5), any act alleged to constitute a sexual offence or other offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), is, whether or not the act constitutes an offence at the place of its commission, deemed to have been committed in the Republic if that—

(a) act was committed against a person referred to in paragraphs (a) or (b) of subsection (1);

(b) person is found in the Republic; and

(c) person is, for any reason, not extradited by the Republic or if there is no application to extradite that person.

(3) Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for purposes of determining the jurisdiction of a court to try the offence, deemed to have been committed—

(a) at the place where the complainant is ordinarily resident; or

(b) at the accused person's principal place of business.

(4) ...

(5) The institution of a prosecution in terms of this section must be authorized in writing by the National Director of Public Prosecutions.⁶²

⁶¹ The State bears the burden of establishing beyond reasonable doubt that the belief of the accused is unreasonable. See *Mapule v The State* (817/11) [2012] ZASCA 80 (30 May 2012) para [7].

⁶² S 61 of the Sexual Offences Act 32 of 2007.

Based on the above section, an analysis of these provisions reveals that, even though the criminal jurisprudence of a good number of States has traditionally embraced a territorial conception of legislative power, no rule of international law prohibits nations from effecting an extraterritorial application of penal legislation.⁶³ International law contains no general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property, and acts 'outside their territory.'⁶⁴ Consequently, South Africa has chosen to apply its criminal law to sexual acts committed by its own nationals abroad as if they have occurred within the Republic.⁶⁵ Although there may still be a legal hurdle with respect to sexual acts committed by peacekeepers serving with any UN mission of peace outside the Republic of South Africa, for instance with respect to investigating their crimes, the defence that the crime occurred outside the jurisdiction of South Africa cannot stand. It is, therefore, clear that peacekeepers can be prosecuted in South Africa for crimes they are alleged to have committed outside the Republic of South Africa while on a mission of peace.

The remaining defence of the minority of the offender⁶⁶ cannot apply to peacekeepers for the reason that most, if not all, of Troop-Contributing Countries are parties to the UN Convention on the Rights of the Child.⁶⁷ The implication of this is that States party to the latter convention must refrain from recruiting children into their armies.⁶⁸ It is thus sufficient for the prosecution to show that the allegations are substantiated, and the alleged acts have been committed intentionally.⁶⁹

(d) Culpability

Sexual offences require intention as part of their *mens rea* element.⁷⁰ Regarding rape, it has been held that 'the element of intention is vital because rape can only be committed

⁶³ In applying and interpreting domestic legislation, courts are sometimes required to refer to, or to be enlightened by, international law or foreign law. See S 39 of the South African Constitution Act 108 of 1996.

⁶⁴ Case of the S.S. "Lotus", P.C.I.J., ser. A, No. 10, 7 Sept. 1927, 19.

⁶⁵ S 61 of the Sexual Offences Act 32 of 2007.

⁶⁶ Whenever an accused person is charged with an offence under section 16, it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence. See S 56 (2) (b) of the Sexual Offences Act 32 of 2007.

⁶⁷ Article 38 of the UN *Convention on the Rights of the Child* (U.N. Doc. A/RES/44/25 of 12 December 1989).

⁶⁸ *Ibid.*

⁶⁹ Intention is expressly included in the definition of the crime of rape. The expression 'intentionally' is used in S 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, Act 32 of 2007.

⁷⁰ Ss 3-24 of the Sexual Offences Act 32 of 2007 use 'intentionally' or 'with intention' to underline that the *mens rea* required for a sexual offence is intention.

intentionally.⁷¹ Indeed, one of the most important principles of most criminal justice systems lies in the maxim *actus non facit reum nisi mens sit rea* which means ‘the act is not wrongful unless the mind is guilty.’⁷² Since the burden of proving the intentional element rests with the prosecution, any reasonable doubt should favour the person accused of rape - *in dubio pro reo*.⁷³ Whenever there is any reasonable doubt about the intention of the accused, he must be acquitted,⁷⁴ for the intentional element is not proved, and it cannot be presumed that the accused intended the consequences of his/her acts.⁷⁵ The establishment of the intentional element beyond a reasonable doubt, especially with respect to rape, may prove difficult. The intention element of rape is usually inferred from the absence of consent.⁷⁶ The description of the situation in which the sexual act took place must clearly indicate to the court that consent was not given.⁷⁷ Ascertaining that consent was lacking, however, does not mean that it has been proven beyond reasonable doubt that the accused is guilty. He or she may still assert that the penetration was consensual, because he or she may have believed that the victim consented.⁷⁸ The intention at the time of the crime cannot be inferred from either the conduct or the lack of consent where this was not expressed.⁷⁹ The former merely shows that sexual penetration occurred, and the latter merely shows that the victim was forced into this. Whether the accused believed that the victim had consented or not is a separate issue. This raises the question of how exactly the court considers intent to be proven beyond ‘reasonable doubt’? To prove intent beyond ‘reasonable doubt’ is synonymous with proving that there is

⁷¹ *S v Zuma* 2006 (7) BCLR 790 (W) at 828.

⁷² *Ibid.*

⁷³ *In dubio pro reo* is a principle of criminal procedure which provides that if there are reasonable doubts remaining after an assessment of the evidence, the accused has to be acquitted. See Langbein JH *Comparative Criminal Procedure: Germany* (American Casebook Series West Publishing Co. Chicago 1977) 53; Diesen C *Beyond Reasonable Doubt Standard of Proof and Evaluation of Evidence in Criminal Cases* (Stockholm Institute for Scandianvian Law 1957-2009) 178. One other author has warned that Judges may be tempted to convert a pre-trial period of incarceration into a sentence to avoid for instance any compensation to the person acquitted. See Michels JD ‘Compensating Acquitted Defendants for Detention before International Criminal Courts’ 2010 (8) *Journal of International Criminal Justice* 407-424, 419. For reference to the principle with respect to international crimes, see *Prosecutor v. Mathieu Ngudjolo chui* ICC-01/04-02/12-4 18-12-2012 3/34 SL T Concurring Opinion of Judge Christine Van den Wyngaert para [18]. She indicates that the *in dubio pro reo* is a principle of paramount importance.

⁷⁴ The imposition of criminal liability in the absence of a criminal intention is regarded as an abhorrent concept in South African law. See *S v Coetzee* 1997 (1) SACR 379 (CC) para [94].

⁷⁵ Burchell J *South African Criminal Law and Procedure -Volume I: General Principles of Criminal Law* (Juta Cape Town 2011) 386-387.

⁷⁶ Burchell J *Principles of Criminal Law* (Juta Lansdowne 2005) 712-713. Further references to this author will be followed by the year of the edition after the name.

⁷⁷ *Ibid.* 708-712.

⁷⁸ Even where a belief is manifestly unreasonable, an accused can still be acquitted for lack of fault element on the ground of a genuine belief that the plaintiff consented. See *Bongi Biyela v The State* (859/10) [2011] ZASCA 43 (29 March 2011) para [29].

⁷⁹ *G Smit v The State* (144/08) [2010] ZASCA 84 (31 May 2010) paras [13], [16].

no ‘reasonable doubt’ in the mind of a reasonable person that the defendant had the intention in question.⁸⁰ Thus, in the light of denial of the necessary intention, such proof is reached by declaring the accused as untrustworthy, interpreting his or her testimony as a lie, or actually believing the accused when he or she claims that he or she did believe the victim wanted to have sex with him or her and that he or she had consented.⁸¹ However, where the victim was less than 12 years of age,⁸² the prosecution must establish that the perpetrator was aware of the age of the victim at the time of the act; otherwise, the perpetrator’s mistake could avail him or her of an exemption.⁸³

3.2.2 Other sexual act and sexual offences involving children

The only issue discussed under this rubric relates to fraternisation with prostitute. Such a conduct falls under the South African provisions on *engaging the services of a prostitute*.

(a) Definition

Prostitution *per se* may be defined as the act of a person offering his/her body for promiscuous sexual intercourse for reward, whether in money or in kind.⁸⁴ As one author puts it, the briefest definition of prostitution is ‘sex for reward’.⁸⁵ This definition aims at the conduct of the person receiving the reward.⁸⁶ On the part of the person giving the reward, whether in money or in kind, his or her involvement in the sexual activity is well captured by the penalization of the conduct of ‘engaging the sexual services of persons 18 years or older’

⁸⁰ If the prosecution succeeds in establishing the accused’s guilt beyond reasonable doubt, it must also have proved the *mens rea* of the accused because a court must always be satisfied not merely that the exculpatory evidence of the accused is not true but also that every element of the offence has been established by evidence that is truthful and reliable beyond reasonable doubt. See *Vilakazi v The State* (576/07) [2008] ZASCA 87 (2 September 2008) para [47]; *Notito v The State* (123/11) [2011] ZASCA 198 (23 November 2011) para [17].

⁸¹ para [16], [20]-[21].

⁸² Snyman CR *op cit* (n 11) 367.

⁸³ In South African law, the age of consent to any sexual act is 16 years. *Bongi Biyela v The State* (859/10) [2011] ZASCA 43 (29 March 2011). See also preamble to the Sexual Offences Act 32 of 2007: Among other objectives of the Sexual Offences Amendment Act was the elimination of the differentiation drawn between the age of consent for different consensual sexual acts and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years.

⁸⁴ D’Cunha J ‘Prostitution Laws: Ideological Dimensions and Enforcement Practices’ 1992 (27) *Economic and Political Weekly* WS34-WS44, WS35. See also Kalwahali K *The Criminalization of Prostitution in South African Criminal Law* (LLM dissertation UNISA November 2005) 5-6.

⁸⁵ Snyman CR *op cit* (n 11) 383.

⁸⁶ Before the amendment of the South African Sexual Offences Act 1957, the section did not specifically penalise the person who gives the reward in return of sexual intercourse. See Burchell J (2005) *op cit* (n 75) 886.

under South African law.⁸⁷ Article 11 of the Sexual Offences Act 2007, which criminalises ‘engaging the services of a prostitute’, reads as follows:

A person (“A”) who unlawfully and intentionally engages the services of a person 18 years or older (“B”), for financial or other reward, favour or compensation to B or to a third person (“C”)

(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or

(b) by committing a sexual act with B, is guilty of engaging the sexual services of a person 18 years or older.⁸⁸

An analysis of the aforesaid provision requires five definitional elements, namely an act of engaging, the services engaged, a person 18 years or older who offer the said services, the reason for the transaction, and the requirement of a reward. These different components of this crime will be discussed under the definitional elements of the crime.

(b) Definitional elements of the crime

The offence of prostitution on the part of the client requires five material elements: (aa) engaging (bb) the services (cc) of a person 18 years or older (dd) in order to commit a sexual act (ee) for reward.

- *Act of engaging*

As Snyman puts it, ‘the act of ‘engaging’ may consist of an express request by X to Y to commit a sexual act with him or her, or in tacit conduct on the part of X.’⁸⁹ He gives the example of the conduct of a person ‘who makes certain suggestive movements with her (or his) body in public, sending out a ‘message’ or ‘code’ to somebody else that she or he is available for sex for reward.’⁹⁰ The person committing the offence is the one proposing a reward to the other person who will render to him/her some kind of sexual services. Such a person can be prosecuted only for being on the side of the demand of prostitution if the

⁸⁷ Engaging the services of a prostitute is a different offence from prostitution *per se*.

⁸⁸ The genuine interpretation of these provisions is that only the person giving the reward commits the crime. Indeed the demand of prostitution is constituted generally by males and criminalising the demand is thought to be the response to the evils associated with prostitution. See Raymond JG ‘Prostitution on Demand Legalizing the Buyers as Sexual Consumers’ 2004(10) *Violence against Women* 1156-1186, 1158. The prostitute himself or herself can still be prosecuted on the basis of S 20 (1) of the Sexual Offences Act 23 of 1957 as amended in the Schedule to the Sexual Offences Act 32 of 2007.

⁸⁹ Snyman CR *op cit* (n 11) 385.

⁹⁰ Snyman CR *op cit* (n 11) 386.

conduct is criminalised.⁹¹ For the act of ‘engaging’ to be truly present, the prostitute and his or her client must have gone farther. The sexual services must have been performed or at least promised to be performed, and the prostitute must have received the reward.⁹² Most of the persons paying the reward are men and those receiving the reward are women.⁹³ The latter are also the persons offering the sexual services.

- *Sexual services*

The law refers to sexual services without further elaboration.⁹⁴ The acts or conduct constituting sexual services are not determined by the law. It may, however, be assumed that sexual services relate to a sexual act, i.e. sexual intercourse, penetration, or other related activities, performed between two consenting adults.⁹⁵ The offence is deemed to exist from the moment the parties agree to perform the sexual act. Whether the sexual act actually takes place is immaterial.⁹⁶

- *A person 18 years or older*

The parties to sexual activities for reward must be consenting adults, older than 18. Where Y is below the age of 18, the other party X will be contravening the law by committing the crime of sexual exploitation of children.⁹⁷ Whether Y consented to the sexual activity or not is irrelevant.⁹⁸

- *The purpose of the sexual act*

The perpetrator A is considered to have committed the crime if she or he engages the services of another person B, ‘for the purpose of engaging in a sexual act with B, irrespective of

⁹¹ Rather than sanctioning prostitution, states could address the demand. Without male demand, there would be a much-decreased female supply. See Raymond JG *op cit* (n 87) 1158.

⁹² S 11(1) (a) of the Sexual Offences Act 32 of 2007.

⁹³ Raymond JG *op cit* (n 88) 1157.

⁹⁴ Snyman CR *op cit* (n 11) 386.

⁹⁵ S 1 of the Sexual Offences Act 32 of 2007 defines a sexual act as ‘an act of sexual penetration or an act of sexual violation.’ Although penetrative sexual activities refer to rape, the definition extends to prostitution where the act is performed for reward.

⁹⁶ S. 11(a) of the Sexual Offences 32 of 2007.

⁹⁷ Where the victim is a child below the age of 12 years, the perpetrator has committed rape for such a child is incapable in law of appreciating the nature of the sexual act. See section 1(3)(d)(iv) of the Sexual Offences Act 32 of 2007.

⁹⁸ S 17 of the Sexual Offences Act 32 of 2007; Snyman CR *op cit* (n 12) 386.

whether the sexual act is committed or not.⁹⁹ This must be understood as meaning that the crime exists from the moment A and B agree to the performance of the sexual act, even if arrested before actually performing the act they have agreed upon.¹⁰⁰ This may be difficult to prove, especially where the reward was not yet given.

- *Reward*

The term ‘reward’ denotes any financial favour or compensation or other reward. Thus, the reward is not limited to patrimonial or monetary gain. It may consist in rendering a service other than a sexual act.¹⁰¹ The reward is either received by the person rendering sexual services or by a third person. The perpetrator is the person giving the reward. These elements, which are part of the act, must have been performed unlawfully and intentionally.

(c) *Unlawfulness*

It has been demonstrated, in the discussion of unlawfulness with respect to rape, that not many defences are available to sexual crimes.¹⁰² Regarding prostitution, it does not appear possible that coercion or duress can be an available defence to a charge of engaging the services of a prostitute.¹⁰³ If a person, X, is prosecuted for having committed sexual acts with another person, Y, and had given a reward to Y as contemplated in the provision under analysis, X does not have any available ground for justification.¹⁰⁴ A South African peacekeeper who is prosecuted on the charge of engaging the services of a prostitute can still assert that the conduct alleged to have been committed is not an offence under the law of the host country. Such a peacekeeper is asserting that he did observe his obligation to respect local laws. The military prosecution will certainly engage proceedings against such a

⁹⁹ S 11 (a) of the Sexual Offences Act 32 of 2007. This section specifically penalises the person giving the reward in return for sexual intercourse. The receiver of the reward, i.e. the prostitute, is still penalised under the provisions of section 20 of the Sexual Offences Act 23 of 1957 which has not been repealed. See S 68 of the Sexual Offences Act 32 of 2007.

¹⁰⁰ The fact that ‘A’ commits the offence, but not ‘B’ is interesting. See S 11 of the Sexual Offences Act 32 of 2007. Professor Snyman points to the possibility of prosecuting B as an accomplice of A. This would be misinterpreting the provision determining ‘A’ ... is guilty of an offence, not ‘B’. Snyman CR *op cit* (n 11) 387.

¹⁰¹ Snyman CR *op cit* (n 11) 387. Snyman gives the following example: ‘X, a female, agrees to have sex with Y, a male, on condition that Y moves certain heavy furniture for her in her apartment or takes her dog for a walk in the park.’

¹⁰² Supra 3.2.1(c).

¹⁰³ From the perspective of the prostitute, coercion can exculpate her or him, and she or he has to indicate the person enforcing her/him into prostitution.

¹⁰⁴ Defences available to sexual crimes as provided for in South African law do not include section 11 as concerned under those defences. See Section 56 of the Sexual Offences Amendment Act 32 of 2007.

peacekeeper if the conduct is considered as constituting an act of indiscipline in the ranks of the contingent.¹⁰⁵ Where the alleged perpetrator is a member of the civilian personnel not subjected to the military code of discipline, engaging the services of a prostitute can still be prosecuted in conformity with the Sexual Offences Act 2007 if the National Director of Public Prosecutions so decides.¹⁰⁶

(d) Culpability

The section which provides for the crime of engaging sexual services of persons 18 years or older expressly mentions intention as the *mens rea* required for this crime by using the expression ‘intentionally’. Therefore, X must be voluntarily engaging the sexual services of another person Y, and Y must have agreed to the act for reward.¹⁰⁷ Where Y agrees to the act for the sake of it, without expecting any reward, X has not committed the offence. By accepting the reward, however, Y also commits an act of prostitution punishable under South African law.¹⁰⁸

The difference between prostitution and rape lies in the issue of consent. Prostitution is a consensual sexual activity whereas the crime of rape is not.¹⁰⁹ Some jurisdictions have prohibited prostitution in order to outlaw commercial sexual activities and to prevent the social maladies prostitution is capable of creating.¹¹⁰ Sexual activities between two consenting adults for reward does not amount to a crime in Burundian and Congolese criminal law, as shown above, but remains a crime in South African law.¹¹¹ It is important to note that

¹⁰⁵ S 3(1) of Act No. 16 of 1999 - Military Discipline Supplementary Measures Act of 23 April 1999. According to S 3(3) of the same Act No. 16 of 1999, if a person who is subject to the Military Discipline Code is suspected of having committed murder, treason, rape, or culpable homicide in the Republic, the matter will be dealt with in accordance with section 27 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), and any ensuing trial shall take place in a civilian court. This implies that ordinary crimes of murder, treason, rape, or culpable homicide can only be prosecuted by military courts if such acts occurred outside the RSA. The other non-grave offences to military discipline fall under the jurisdiction of military courts, whether they were perpetrated in or outside the Republic.

¹⁰⁶ S 61 of the Sexual Offences Act 32 of 2007.

¹⁰⁷ S 11 of the Sexual Offences Act 32 of 2007.

¹⁰⁸ See the schedule to the Sexual Offences Act 32 of 2007 amending section 20 of the Sexual Offences Act 23 of 1957.

¹⁰⁹ Children under 12 years and persons who are mentally disabled cannot consent to sexual acts. Any involvement of a person of these two categories in prostitution, therefore, is rape, not prostitution. See SS 1 (3) (d)(iv); 1(3)(d)(v); 57 of the Sexual Offences Act 32 of 2007.

¹¹⁰ Snyman CR *op cit* (n 11) 385.

¹¹¹ Regarding the prostitute, S 20 (1) of the Sexual Offences Act 23 of 1957 as amended in the Schedule to the Sexual Offences Act 32 of 2007 reads 20 (1) Any person who— (a) knowingly lives wholly or in part on the earnings of prostitution; or (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward ... shall be guilty of an offence. Regarding the client of the prostitute, he or she may be

peacekeepers are under an obligation to observe both the law of the Host State as well as the law of the State of origin. Thus, if it is established that members of SANDF deployed with UN missions of peace in the above two countries visited prostitutes, had consensual sexual intercourse with girls who had already reached the age of consent,¹¹² such peacekeepers can be prosecuted in terms of South African criminal law.¹¹³ It is upon such possibility that the discussion under the domestic law of South Africa remains pertinent.¹¹⁴ According to the current law regarding prostitution, a person can be prosecuted for having engaged the services of a person 18 years or older.¹¹⁵ The conduct which is criminalised here is that of the purchase of sexual services, the conduct of the prostitute partner, her customer or client.¹¹⁶

3.2.3 Murder

With regard to the criminal conduct of the South African peacekeeper accused of killing a person in Burundi,¹¹⁷ a United States Department on human rights reported that the trial military court had prosecuted the alleged perpetrator (Phillipus Jacobus Venter) and sentenced him to 24 years of imprisonment.¹¹⁸ It is also reported that the accused is challenging the decision on appeal on the grounds of the violation of his constitutional right to a fair trial.¹¹⁹

Although there have been limited allegations of murder by peacekeepers, it remains important to discuss whether a soldier can be prosecuted under the law of his/her home country for this crime committed abroad.¹²⁰ For instance, can the South African sergeant that murdered a

prosecuted either under S 11 of the Sexual Offences Act 32 of 2007 or under S 20(1A) of the Sexual Offences Act 23 of 1957 as amended.

¹¹² UN OIOS report on DRC, A/59/661 of 5 January 2005 paras 12-18: cases A, B, C, E and F are instances in which peacekeepers engaged the services of prostitutes.

¹¹³ S 61 of the Sexual Offences Act 32 of 2007.

¹¹⁴ Actually there will be no complaints as to acts of prostitution from Burundian and Congolese citizens regarding the conduct of peacekeepers, but the contingent commander of South Africa can still launch an action before South African court, or a disciplinary action regarding soldiers frequenting prostitutes while serving outside as peacekeepers.

¹¹⁵ S 11 of the Sexual Offences Act 32 of 2007.

¹¹⁶ Raymond JG *op cit* (n 88) 1158.

¹¹⁷ *Supra* 2.2.2.

¹¹⁸ United States Department of State *2008 Country Reports on Human Rights Practices - South Africa* (25 February 2009) available at www.state.gov/j/drl/rls/hrrpt/2008/af/119025.htm [last accessed 21 December 2012].

¹¹⁹ *Ibid.* Unfortunately the trial court decision is not available for a proper discussion.

¹²⁰ It has already been indicated that cases of murder were committed against Somali civilians, and that only one case of murder was reported regarding South African peacekeepers. See *supra* chapter II and *infra* chapter VI.

Burundian teenager in the host country be prosecuted under South African law (the Troop-Contributing Country)?¹²¹

In South African criminal law, murder is ‘the unlawful and intentional causing of the death of another human being.’¹²² The number of crimes committed, of course, is not relevant as far as substantial issues are concerned. Suffice it to say that murder cannot be considered to be an act violating only military discipline; it amounts also to an offence under common law. On the other hand, it is important to note that not every criminal act committed by a soldier is a military offence to be tried by a military court.¹²³ For instance, murder, treason, rape, and culpable homicide which are both military and ordinary crimes, when committed within the Republic of South Africa by a person subject to the Military Discipline Code of South Africa, will be tried in a civilian court.¹²⁴ When committed outside the Republic, they fall under military jurisdiction.¹²⁵ The only requirement is that the elements of the crime of murder must be present and the elements of murder committed by a person subject to military discipline are not different from the elements of murder committed by a civilian. The said elements are the following: the action of causing the death (a) of another person (b) unlawfully (c) and intentionally (d).

(a) Conduct

Inflicting death results from the act, i.e. the physical motions or movements either taken by the perpetrator or attributable to him or her. Since acting often takes thought and planning, inflicting death is necessarily and closely tied to the mental element.¹²⁶ As Burchell puts it,

¹²¹ Kent V ‘Protecting Civilians From UN Peacekeepers and Humanitarian Workers: Sexual Exploitation and Abuse’ in Aoi C, de Coning C & Thakur R (eds) *Unintended Consequences of Peacekeeping Operations* (United Nations University Press Tokyo 2007) 44-66

¹²² See Snyman CR *op cit* (n 11) 447 and the case law referred to in footnote 1.

¹²³ Rowe P ‘Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents’ 2000 (5) *Journal of Conflict and Security Law* 45-62.

¹²⁴ ‘When a person who is subject to the Code is suspected of having committed murder, treason, rape, or culpable homicide in the Republic, the matter will be dealt with in accordance with section 27 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), and any ensuing trial shall take place in a civilian court.’ S 3(3) of Act No. 16 of 1999 - Military Discipline Supplementary Measures Act of 23 April 1999.

¹²⁵ S 7 (1) (a) of Act No. 16 of 1999 - Military Discipline Supplementary Measures Act of 23 April 1999 provides that ‘The Minister shall appoint a Court of Military Appeals - in matters where treason, murder, rape, or culpable homicide is committed outside the Republic, or ...’

¹²⁶ Snyman refers the concept of voluntary act or omission to show how the act relates to the subjective element of the crime. Snyman CR *op cit* (n 11) 448. See also *S v Nivathi* (57/2003) [2003] ZAHC (Bisho 11 August 2003) para [98].

‘since every person must die sooner or later’,¹²⁷ it must be proved that without the conduct of the perpetrator, the deceased would still be alive.¹²⁸

(b) Definitional elements of murder

Murder, as any other homicide, can be committed only against a living human being.¹²⁹ By human being is understood a person who has been born alive and who is still alive when the conduct took place.¹³⁰ The conduct of the perpetrator must qualify as the cause of the victim’s death, in that the death of the victim actually stems from the action of the person being prosecuted.¹³¹ This leads to the question of a causal link.¹³² Indeed, the causal link is an important element in all crimes that consist in a result.¹³³ For such crimes it is the result of some conduct that is actually prohibited. This is the case regarding murder.¹³⁴ For this crime to be established there must have been an act of a person X which brought about the death of the victim Y. It must be shown that the conduct of X caused the death of Y.¹³⁵ The relationship between X’s act and Y’s death constitutes a causal link. There must be a physical connection between X’s conduct and Y’s death. X cannot be criminally liable if his conduct is not shown to have caused the death of the victim.¹³⁶

Applied to the case of murder of a Burundian teenager, the causal link can be established only by irrefutable evidence; the prosecution must prove that the conduct of the accused contributed to the death of the victim.¹³⁷

¹²⁷ Burchell J *Principles of Criminal Law* (Juta Lansdowne 2005) 668.

¹²⁸ The definition of murder incorporates a reference to a ‘living person’. See *S v Ndlovu* 1984 (3) SA 23 (A) at 26.

¹²⁹ Milton JRL *South African Criminal and Procedure Volume II: Common-Law Crimes* 3 ed (Juta Cape Town 1996) 357.

¹³⁰ *Ibid.* Killing of an unborn child is not murder. See *S v Mshumpa* 2008 (1) SACR 126 (EC) para [71].

¹³¹ Snyman CR *op cit* (n 11) 83 *et seq.* See also Colvin E ‘Causation in Criminal Law’ 1989 (1) *Bond Law Review* 253-271, 258.

¹³² *Motaung and Others v State* (190/88) [1990] ZASC (AD) at 99.

¹³³ Burchell J (2005) *op cit* (n 75) 209.

¹³⁴ *Ibid.*

¹³⁵ Burchell J (2011) *op cit* (n 75) 110-111.

¹³⁶ Snyman CR *op cit* (n 11) 448 *et passim*; Reinach A ‘On the Concept of Causality in the Criminal Law’ 2009 (1) *Libertarian Papers* 1-40, 8-10 *et passim*. For extensive discussion of the issue of causation, see Snyman CR *op cit* (n 11) 79-94

¹³⁷ Burchell J (2005) *op cit* (n 75) 225.

(c) Unlawfulness

Generally, the discussion of unlawfulness relates to grounds of justification.¹³⁸ An accused who has committed a criminal act can still escape liability by raising a defence susceptible of excluding the unlawfulness of his or her conduct.¹³⁹ With respect to an attack on vital interest such as life and limb, private defence is a universally accepted justification¹⁴⁰ available to a person charged with the crime of murder.¹⁴¹ It is important to mention that, under South African law, necessity has been recognised as a defence available to a person charged with murder, leading evidence that he or she was compelled or coerced by another person and had no other way to escape the life-threatening danger.¹⁴² It remains a debatable issue whether the defence of necessity in the form of compulsion or coercion actually excludes unlawfulness as such or culpability.¹⁴³ During prosecution, the South African sergeant alleged to have killed a Burundian teenager girl is not deprived of his right to assert one of those defences to exculpate him if the court is convinced of the validity of the defence presented and the prosecution is not in position to prove beyond reasonable doubt the non existence of such a defence.

(d) Culpability

For murder to be established, the prosecution must prove that the accused acted wilfully.¹⁴⁴ If his or her wilful action is doubted, the crime of murder is not established.¹⁴⁵ It may be

¹³⁸ The presence of a ground of justification removes the social need to punish the conduct. See Burchell (2011) *op cit* (n 75) 114.

¹³⁹ *Ibid.*

¹⁴⁰ The maxim *naturalis ratio permittit se defendere* ('natural reason allows a person to defend himself or herself against danger') reveals the universality of the defence. See Snyman CR 'The two reasons for the existence of private defence and their effect on the rules relating to the defence in South Africa' 2004 (17) *SACJ* 178-192, 179.

¹⁴¹ Burchell (2011) *op cit* (n 75) 124.

¹⁴² *S v Goliath* 1972 (3) SA 1 (A). The reason is considered to have been that 'the law does not expect persons who find themselves in an emergency situation to value the lives of others higher than their own.' See Van der Walt J 'Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance to Neo-Colonialism' 2003 (2) *TSAR* 311-331,325.

¹⁴³ Burchell (2011) *op cit* (n 75) 160-161.

¹⁴⁴ The *mens rea* required for murder is intention. If such element is not established, if the prosecution cannot prove beyond reasonable doubt a wilful action, the accused cannot be convicted of murder but of culpable homicide if it he or she acted negligently. See *S v Norbert Glenn Agliotti* - Case No: SS 154/2009: South Gauteng High Court-Johannesburg, date: 25/11/2010, para 10.1; *Zaibonisha Herman v. S* - Case No. A679/2009/South Gauteng High Court-Johannesburg Date: 6 May 2010, para [20]; *Naidoo and Two Others v. The State* ZASCA- Case no. 321/2001 (14 November 2002) para [2]; *Whitehead v The State* [2007] SCA 171 (RSA) para [37].

¹⁴⁵ The appreciation of culpability is by reference to the commission of the crime. See *Van der Westhuizen v S* (266/10) [2011] ZASCA 36 (28 March 2011) para [52].

culpable homicide where the accused did not take the necessary care to avoid the death that stemmed from his actions.¹⁴⁶ The requirement of intention is satisfied whether the *mens rea* resides within *dolus directus* or within *dolus eventualis*.¹⁴⁷ It must be noted that the proof of each and every element must be brought before a court.

3.2.4 Assault

It is important to discuss assault here since the same South African peacekeeper in Burundi, referred to above, also assaulted a guesthouse employee for allegedly having refused to rent a room to Venter and the girl for the night.¹⁴⁸ Such conduct infringes the fundamental principle of everyone's right to bodily integrity.¹⁴⁹ The requirement of assault will now be examined.

(a) *Definitional elements of the crime of assault*

Assault consists of unlawfully and intentionally applying force to the person of another or inspiring a belief in that other person that force is immediately to be applied to him or her.¹⁵⁰ The above definition has its origin in case law. In *Mostert* the court defined assault as consisting of 'unlawfully and intentionally applying force to the person of another directly or indirectly; or threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends or has the power to carry out such threat.'¹⁵¹

The above definition gives enough description of the prohibited conduct of assault, from which description some requirements need to be met for the crime of assault to be established.¹⁵² Since the conduct of assault consists of the application of force against the

¹⁴⁶ *Crossberg v S* [2008] 3 All SA 329 (SCA) 346.

¹⁴⁷ *Radebe v State* (case no. 45/2009 A178/10) [2011] ZA HC (Bloemfontein 28 July 2011) para [15]. *Dolus directus* refers to the aim and object of the accused to perpetrate the unlawful act. With respect to *dolus eventualis*, a perpetrator acts with *dolus eventualis* if two conditions are fulfilled. Firstly he or she must consider the prohibited result (e.g., a death) as a possible but not certain effect of his or her conduct. Secondly he or she must accept or approve of the forbidden result. See Snyman CR *op cit* (n 11) 419; Burchell J (2005) *op cit* (n 75) 152.

¹⁴⁸ See Bureau of Democracy, Human Rights, and Labor 2009 *Country Reports on Human Rights Practices South Africa* 11 March 2010, available at www.state.gov/j/drl/rls/hrrpt/2009/af/135977.htm [last accessed 21 December 2012].

¹⁴⁹ S 12 (2) of the Constitution of South Africa, Act 108 of 1996; Burchell J (2005) *op cit* (n 76) 680.

¹⁵⁰ See Burchell J (2005) *op cit* (n 75) 161, 680; Snyman CR *op cit* (n 11) 455; Van Der Bijl C "'Psychological" Assault: The Crime of Assault Revisited' 2012 (25) *SACJ* 1-23, 2.

¹⁵¹ *Mostert v S* [2006] 4 All SA 83 (N), at 90.

¹⁵² Snyman CR *op cit* (n 11) 455.

victim, whether directly and indirectly,¹⁵³ or in inspiring fear of immediate application of force against the victim, the law punishes not only the actual infliction of force upon the person of another but also the mere inducement in the mind of the victim of an apprehension that he or she is to be assaulted.¹⁵⁴ Thus, in a situation where a perpetrator punches or kicks or slaps the victim, the crime of direct assault is committed.¹⁵⁵ A perpetrator commits indirect assault against a given victim in the situation where the latter's physical integrity is infringed by the fault of the former, but without direct physical contact between the perpetrator and the victim. This is the case where the perpetrator frightens the victim who falls down and injures himself or herself or if the perpetrator causes the victim to take a poison or noxious substance.¹⁵⁶

The difference between indirect assault and assault which is caused by inspiring fear or a belief in the victim he or she will be assaulted, resides in the fact that assault by inspiring fear is performed with no impact on the victim's body.¹⁵⁷ The assault by inspiring fear consists of a threat, which threat must be one of violence to the physical integrity of the victim.¹⁵⁸ This is why a threat to damage property cannot be considered sufficient. Such a threat must be immediate, unlawful, and serious so that the victim believes that the perpetrator can actually carry out the said threat.

(b) Unlawfulness

The use of force or the inspiring of fear must be unlawful in order to entail criminal liability. There must be no ground of justification for the perpetrator's act.¹⁵⁹ Indeed, where the perpetrator assaulted the victim out of private defence,¹⁶⁰ in an official capacity,¹⁶¹ or with the

¹⁵³ *Ibid* 456-458.

¹⁵⁴ Burchell J (2005) *op cit* (n 76) 680.

¹⁵⁵ Van Der Bijl C *op cit* (n 150), 4.

¹⁵⁶ Milton JRL *op cit* (n 129) 407-409; Burchell J (2005) *op cit* (n 76) 684.

¹⁵⁷ Burchell J (2005) *op cit* (n 76) 685.

¹⁵⁸ *Ibid*.

¹⁵⁹ Grounds of justification are the legal convictions of the community, now as informed by the values in the Constitution. See Grant J 'The Double Life of Unlawfulness: Fact and Law' 2007 (20) *SACJ* 1-16, 2.

¹⁶⁰ For discussion, see Burchell J (2011) *op cit* (n 75) 121-141.

¹⁶¹ Burchell J (2011) *op cit* (n 75) 198-201.

victim's consent, in surgery activities or in sports,¹⁶² the performer of the assault cannot be held criminally liable.¹⁶³

*(c) Culpability*¹⁶⁴

For the physical or verbal attack or the inspiring of fear of the application of force to another person to be present, the perpetrator must have acted with the required *mens rea*.¹⁶⁵ The required *mens rea* for assault is intention.¹⁶⁶ With respect to assault by inspiring fear, it is important to note that the perpetrator must know that his/her conduct will actually inspire fear in the victim. Where he or she cannot believe that the conduct will inspire such a feeling, the required intention is not present. Intention incorporates knowledge of the unlawfulness of the conduct.¹⁶⁷ Thus, where the perpetrator believed his conduct to be covered by any ground of justification, he lacks the necessary intention to assault.¹⁶⁸

3.2.5 Synopsis of the findings on South African criminal law as a TCC

Under South African law as an example of a Troop-Contributing Country, the discussion of crimes committed by peacekeepers during UN missions of peace focuses on rape, engaging the services of a prostitute, murder and assault. Other crimes such as pillaging and weapon trafficking have not been discussed since no allegations of crimes of that kind have been levelled against South African soldiers.

In the presentation of the elements of crimes, especially those alleged to have been committed by members of the South African contingent in Burundi and DRC, no ground of justification was found to be available to peacekeepers with respect to sexual crimes, save in the instance where a South African soldier might have been prosecuted before a South African court for 'engaging the sexual services of persons 18 years or order' since visiting a prostitute is not criminalized in Burundian and Congolese (DRC) law. With respect to other crimes, such as

¹⁶² Burchell J (2011) *op cit* (n 75) 228-231.

¹⁶³ Grounds of justification are criminal defences that ratify the conduct of the defendant as acceptable under the circumstances, despite fulfilling all the elements of the criminal offence. See Schopp RF 'Justification Defenses and Just Convictions' 1993 (24) *Pacific Law Journal* 1233-1321, 1235.

¹⁶⁴ *S v Coetzee* 1997 (1) SACR 379 (CC) para [162]. Mental illness or mental defect negates criminal responsibility. See S 78 (1) of Criminal Procedure Act 51 of 1977.

¹⁶⁵ *Mens rea* is a requirement of each and every criminal offence without which no criminal liability can attach. See *Mbatha v State* (Case No. AR 265/11) [2011] KZN HC (sine die) paras [45], [62].

¹⁶⁶ *S v Sikakane* (Supreme Court Ref. No. 26/09, Review No. B/DH3625/08) [2009] ZA HC (Johannesburg 14 April 2009) para [6].

¹⁶⁷ *S v Mangokoane and Others* (CC49/05) [2006] ZA HC (TPD 4 January 2006) para [24].

¹⁶⁸ See for putative grounds of justification, Burchell J (2011) *op cit* (n 75) 416-422.

murder and assault, since a defence can be raised only during prosecution, it suffices to mention that private defence, necessity in the form of compulsion or coercion as well as obedience to superior orders are available to any accused. During prosecution, an accused can also lead evidence tending to negate culpability, namely the defence of mental illness. It is therefore evident from the above that the problem lies not so much with substantive definition but lies elsewhere. Since prosecutions have not, however, been conducted with respect to so many allegations, the following section investigates the possibility of invoking state liability where a state fails to prosecute peacekeepers crimes.

3.3 State liability for failure to prosecute the crimes of peacekeepers

South African courts have adjudicated cases where State liability has been invoked regarding prejudice inflicted even by a party not related to the State.¹⁶⁹ Indeed, even if courts refrain from imposing the so-called punitive damages¹⁷⁰ on States,¹⁷¹ judges have frequently allowed complaints of the victim against the State, especially those which relate to the protection of human rights.¹⁷² In circumstances where the life or dignity of the victim is in danger and the State is aware of such a danger but fails to act to prevent the harm, where it has the authority and the ability to intervene, it must be held liable for not intervening.¹⁷³ The reason for this is that a state may be held liable for the consequential damage if it fails to comply with its duty to protect.¹⁷⁴ In such a situation, the proceedings seek to establish the civil liability of the accused State. It is important to investigate vicarious state liability for the failure to protect or to prosecute with reference to South African law in order to ascertain whether the issue of state liability is applicable to South Africa as a Troop-Contributing Country.

¹⁶⁹ *Carmichele v Minister of Safety and Security and another* [2000] 4 All SA 537 (A), *Van Duivenboden v Minister of Safety and Security* [2001] 4 All SA 127 (C).

¹⁷⁰ Punitive damages refer to 'an amount of money paid to the aggrieved party, not only to compensate the latter for harm suffered, but also to punish the wrongdoer and discourage future violations.' See von Bonde JC *Redress for victims of crime in South Africa: A comparison with selected Commonwealth jurisdictions* (Unpublished doctoral thesis Nelson Mandela Metropolitan University 2006) 56.

¹⁷¹ Application of punitive damages to State or municipalities would unjustifiably burden the taxpayer. See *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC) paras [29] [52] [84].

¹⁷² von Bonde JC 'State Liability *Vis-à-vis* Victims of Crime in Post-1994 South African Case Law - Something New or a Reinvented Wheel?' 2009 *Obiter* 211-223.

¹⁷³ Van Dam C 'The Netherlands Found Liable for Srebrenica Deaths' 2011 (15) *ASIL: Insights* 1-5, 3.

¹⁷⁴ Compare Burchell J 'A Saga of Snitches and Whistleblowers: the Boundaries of Criminal Liability for Breach of Statutorily-imposed Duties Especially in the Context of Organised Crime' in Joubert JJ (ed) *Essays in Honour to CR Snyman* (University of South Africa 2008) 10-30.

3.3.1 Vicarious liability of the State for crimes committed by peacekeepers

In principle, criminal liability is personal in that, for an individual to be prosecuted for a criminal act, it has to be established that such an individual participated in its commission.¹⁷⁵ As a device to ensure the implementation of public welfare legislation, however, a statute can expressly impose vicarious liability upon an employer, who may be a corporate body, for the act of another individual, the employee.¹⁷⁶ Thus, under public welfare legislation and for its proper enforcement, the act may provide that a specific person will be held liable in case of a violation of the provisions of the Act.¹⁷⁷ Vicarious liability, therefore, depends on the existence of the relationship between the parties.¹⁷⁸ The same should be said where the employer is the State. Under the law of most jurisdictions where criminal liability of corporate bodies has been recognized, however, such liability does not extend to the State.¹⁷⁹ State criminal liability is thus excluded.¹⁸⁰ The exclusion of criminal liability of the State is more cogently explained by the role played by the State in the criminal system of each and every State.¹⁸¹ Since the State alone exercises the right to punish, it does not seem possible for the State to inflict criminal sanctions on itself.¹⁸² It must be indicated from the aforementioned that State liability which is discussed with respect to criminal conduct of peacekeepers is State civil liability.¹⁸³ Indeed vicarious liability of the State can be envisioned only as civil liability.¹⁸⁴

¹⁷⁵ Burchell J (2011) *op cit* (n 75) 459.

¹⁷⁶ *S v Coetzee* 1997 (1) SACR 379 (CC) para [85].

¹⁷⁷ Pantazis A 'Criminal Law: Case Law' 2001 *Annual Survey of South African Law* 685-697, 691.

¹⁷⁸ Burchell J (2011) *op cit* (n 75) 462, 465.

¹⁷⁹ Desportes F et Le Gunehec F *Droit pénal général* 10^e éd (Economica Paris 2003) para 579; Article 109 of the Burundian Criminal Code.

¹⁸⁰ The existence of a remedy for compensation from the State in delict, based on a broad form of vicarious liability, would be a further reason for not making concessions to any criminal form of vicarious liability, whether in a limited or expanded form, whether under statute or in the common law. See Burchell J (2011) *op cit* (n 74) 465.

¹⁸¹ Desportes F et Le Gunehec F *op cit* (n 179) 536.

¹⁸² *Ibid.*

¹⁸³ S 1 of the State Liability Act 20 of 1957 (State Liability Amendment Act, 2011): Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

¹⁸⁴ With respect to civil liability, the rules of vicarious liability apply to the State as they do to any employer. See von Bonde JC *Redress for victims of crime in South Africa: A comparison with selected Commonwealth jurisdictions* (unpublished LLD thesis Nelson Mandela Metropolitan University 2006) 169.

The notion of vicarious civil liability refers generally to the strict civil liability of one person for the damage caused by another.¹⁸⁵ It usually applies in certain conditions amongst which it is important to cite the relationship between the wrongdoer and the person held liable.¹⁸⁶ Thus, an employer is civilly liable for the damage caused by his employee, especially where such damage came about in the course of the employer's employment. The State stands in the place of employer when it comes to military personnel as well as members of the police, even when these people are deployed abroad.¹⁸⁷ When soldiers and members of the police are deployed outside the country, they cannot be said to be working outside of their employment even when they perform an act off-duty.¹⁸⁸ The responsibility of the State for such personnel can be engaged for isolated acts that do not amount to war crimes.¹⁸⁹ It is noteworthy to mention that, under the domestic law of South Africa, the State can be held liable where the act performed was even obviously detached from the actual employment of the public servant.¹⁹⁰ Indeed, the Republic of South Africa has been held vicariously liable for rape perpetrated by policemen.¹⁹¹

In *F v Minister of Safety and Security*,¹⁹² a policeman on standby duty brutally raped a thirteen year old girl¹⁹³ to whom he had offered a lift home.¹⁹⁴ While on their way to the home

¹⁸⁵ See Neethling J, Potgieter JM, Visser JP and JC Knobel *Law of Delict* 4 ed.(LexisNexis Durban 2001) 373; Roederer CJ 'The Constitutionally Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the police: One Small Step in Restoring the Public's Trust in the South African Police Services' 2005(21) *SAJHR* 575-606, 578; Loots BE 'Sexual Harassment and Vicarious Liability: A Warning to Political Parties' 2008(1) *STELL LR* 143-169, 145-6; Manamela ME 'Vicarious Liability: "Paying for the Sins of Others"' 2004(16) *SA Merc LJ* 125-132; *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 (judgment of 15 December 2011) para [40].

¹⁸⁶ The relationship is present when one person in terms of an agreement makes his working capacity or energy available to another for remuneration in such a way that the latter may exercise *control* (authority) over the former. See Neethling J, Potgieter JM, Visser JP and Knobel JC *op cit* (n 185) 374. The concept of control here meets with the criterion of attribution of responsibility to a State as indicated above. One author has opined that the risk doctrine should have been espoused by South African courts as the basis for vicarious liability. See Calitz K 'Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability' 2005(3) *TSAR* 215-235. Even if it is not strictly speaking of a risk as basis for vicarious liability, the close connection test may be viewed as the risk created by the employment itself. See *Grobler v Naspers Bpk En 'N Ander* 2004 (4) SA 220 (C) ; *Minister of Defence v Von Benecke* (115/12) [2012] ZASCA 158 [24]-[26].

¹⁸⁷ See *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 118.

¹⁸⁸ Even though the sexual offences of peacekeepers have been performed for their sole purpose, the State of nationality can still be considered vicariously liable if it may be established that there was nevertheless a sufficiently close link between the peacekeepers' acts for their own interests and the purposes of the State they represent within the UN mission of peace. See for comparison *NK v Minister of Safety and Security* ZACC (13 June 2005) para [32].

¹⁸⁹ Military and police members are state personnel empowered by the State.

¹⁹⁰ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

¹⁹¹ *Ibid.*

¹⁹² *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 (15 December 2011) para [82].

of the victim, the policeman unexpectedly turned off the road near Kraaibos. The victim attempted to escape but the policeman prevented her from fleeing. He then assaulted and raped her. Thereafter, he took her to her home. He threatened to harm or even kill her should she report the attack to anybody.¹⁹⁵ Despite the threats, the young victim laid criminal charges against the policeman. He was convicted of assault and rape and sentenced to 12 years' imprisonment, of which five years were suspended.¹⁹⁶ The victim waited to reach the age of majority to institute an action for damages against the two respondents (the Minister and the policeman himself, Mr. van Wyk).¹⁹⁷

The Cape Town High Court found the Minister vicariously liable for the delictual damages suffered by Ms F as a result of Mr van Wyk's conduct.¹⁹⁸ It applied the test laid down in *K v Minister of Safety and Security*¹⁹⁹ which is resorted to in 'deviation' cases. The said test, commonly referred to as the 'standard test', consists of ascertaining whether the employee was pursuing the business of the employer at the moment of the act.²⁰⁰

Where there is a deviation, the inquiry, in short, is whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or her employer. If the answer is positive, the employer will be liable no matter how badly or

¹⁹³ para 1 raised the issue of 'whether the Minister of Safety and Security (Minister) should be held vicariously liable for damages arising from the brutal rape of a thirteen year old girl by a policeman who was on standby duty.'

¹⁹⁴ para [8].

¹⁹⁵ para [14].

¹⁹⁶ para [15].

¹⁹⁷ para [16].

¹⁹⁸ para [18]. There was a sufficiently strong link between Mr van Wyk's actions and his employer's business to justify the imposition of vicarious liability, because of three factors:

- a. Mr van Wyk was in possession of a police vehicle. This provided him with the means to commit the offences and was the single most important connection between the business of the employer and the commission of the crime.
- b. The fact that Ms F understood Mr van Wyk to be a policeman to some extent operated to lull her suspicions that he might be a danger to her. In other words, it gave her some basis for trusting Mr van Wyk, in spite of her suspicions.
- c. The coincidence between the nature of the assistance that Mr van Wyk pretended to offer and the normal obligations of members of the police service, which is, in particular, to protect vulnerable groups such as women and children.

¹⁹⁹ For the discussion of case *K*, see *infra* 3.3.2.4.

²⁰⁰ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [9]; *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 (15 December 2011) paras [16]-[17].

dishonestly or negligently those functions or instructions were being exercised by the employee.²⁰¹

Applying the above test, the Court held that there was a sufficiently strong link between Mr van Wyk's actions and his employer's business to justify the imposition of vicarious liability.²⁰² In the Supreme Court of Appeal, the High Court decision was set aside.²⁰³ The Supreme Court of Appeal held that the state was not liable because the state would be liable only for the delictual omission of the on-duty policemen.²⁰⁴ The court indicated that an intentional criminal act of rape cannot attract the vicarious liability of the state, that an off-duty police official has no duty to protect members of the public, and cannot, therefore, be held personally liable for his or her failure to protect a victim of crime from the harm that occurs in his or her presence.²⁰⁵ Ms F sought leave to appeal the decision of the Supreme Court of Appeal before the Constitutional Court.

The requirements for granting leave to appeal to this Court are that the application must raise a constitutional issue, and that it must be in the interests of justice to grant leave. Factors to be considered in determining whether it would be in the interests of justice to grant leave to appeal include the public interest in the matter, the importance of the constitutional issue raised, and the prospects of success.²⁰⁶ Other important factors to grant leave to appeal was the constitutional importance of the right of a citizen to be protected by the state, the victim's right to claim damages based on the state's liability for delictual conduct of its employees, and the need to develop the common law, including the delictual principle of vicarious liability, in accordance with the spirit, purport, and objects of the Bill of Rights.²⁰⁷

The substantive issue before the Constitutional Court is whether the state is vicariously liable for damages arising from the rape of a young girl committed by a policeman who was on

²⁰¹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [4].

²⁰² *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 para [18].

²⁰³ Paras [20-22].

²⁰⁴ Para [20].

²⁰⁵ *Ibid.*

²⁰⁶ *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37, para [35].

²⁰⁷ Para [36].

standby duty.²⁰⁸ It has already been indicated that the Constitutional Court concluded that the State was actually liable.²⁰⁹

To reach that decision, the Court revisited and interpreted the applicable *K* test to determine State's vicarious liability. The test lies in enquiring about whether there is a connection between the wrongful conduct of the policemen and the nature of their employment.²¹⁰ Applied to the case before it, the Court noted that Mr van Wyk did not rape Ms F in the furtherance of the constitutional mandate of his employer; he acted in pursuit of his own selfish interests.²¹¹ The application of the first leg of the *K* test, therefore, did not establish State liability.²¹² The second leg of the enquiry, however, is also of equal importance. This second leg involves issues pertaining to the constitutional obligations of the state to protect the public, the trust that the public is entitled to place in the police, the role of the simultaneous act of the policeman's commission of rape and his omission to protect the victim, and the existence of an intimate link between the policeman's employment and the act he committed.²¹³

The court indicated that the State's constitutional obligations, and the constitutional rights of Ms F, are the prism through which this enquiry had to be conducted.²¹⁴ Rape of women and children violates a cluster of interlinked fundamental rights treasured by the Constitution.²¹⁵ These rights include the constitutional right to the freedom and security of the person,²¹⁶ but also the constitutional right to have the inherent dignity of a person respected and protected.²¹⁷ The latter and the former rights are infringed by the assault and rape which were perpetrated against the person of Ms F.²¹⁸ These are rights the state is under a constitutional obligation to respect, protect, promote, and fulfil. The vital mechanism through which this is to be done is the police service.²¹⁹ The state, therefore, through its foremost agency against crime, the

²⁰⁸ *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 (15 December 2011) para [27].

²⁰⁹ Para [82].

²¹⁰ Para [50].

²¹¹ Para [51].

²¹² *Ibid.*

²¹³ Para [52].

²¹⁴ Para [53].

²¹⁵ The right to the inherent dignity of the person (S 10), the right to be free from violence from public or private source (S 12(1)(c)), the right to security in and control over one's body (S 12(2)(b)) and the right to privacy (S 14).

²¹⁶ S 12 (1) of the Constitution of South Africa Act 108 of 1996.

²¹⁷ S 10 of the Constitution of South Africa Act 108 of 1996.

²¹⁸ *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 para [54].

²¹⁹ Para [58].

police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. It is also the duty of courts to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. When they perform their functions, they must acknowledge the policy-drenched nature of the common law rules of vicarious liability.²²⁰ The constitutional duties resting upon the state, and more specifically the police, are significant in that they suggest a normative basis for holding the state liable for the wrongful conduct of even a policeman on standby duty, provided a sufficiently close connection can be determined between his misdeed and his employment.²²¹ A further factor connecting the wrongful act at issue here with the policeman's employment is trust. This factor operates both normatively, in laying the basis for holding the state liable for the misdeed of even an off-duty policeman, provided there is a sufficient connection with his employment, and factually, in that it creates the connection between the employment and the wrongful conduct.²²²

In the context of vicarious liability, when a policeman rapes a woman instead of protecting her, his failure to protect the victim who has placed her trust in him is inseparable from the act of commission. They are two sides of the same coin and both stem from and revolve around the same incident. In this case they are both about the employer and the employee's constitutional obligations to safeguard the well-being of members of the public.²²³ The Minister's vicarious liability will arise only if a sufficiently close connection exists between the policeman's delictual conduct and his employment.²²⁴ The connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.²²⁵ In keeping with an apparent appreciation of the police service's obligation to protect her, Ms F looked to Mr van Wyk for protection. She did so as a result of his employment as a policeman, which placed him in a position of trust. It is this trust that is necessary for the fulfilment of the constitutional mandate of the police service.²²⁶

²²⁰ *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 para [57].

²²¹ Para [61].

²²² Para [62].

²²³ Para [72].

²²⁴ *F v Minister of Safety and Security* (CCT 30/11) [2011] ZACC 37 para [74].

²²⁵ Para [76].

²²⁶ Para [78].

As the Constitutional Court concluded, the police vehicle, which was issued to him precisely because he was on standby duty, enabled Mr van Wyk to commit the rape.²²⁷ It enhanced his mobility and enabled him to give a lift to Ms F. Further, when Ms F re-entered the vehicle, she understood Mr van Wyk to be a policeman. She made this deduction from the dockets and the police radio in the vehicle. In other words, he was identifiable as a policeman. And, in fact, he was a policeman. Beyond her subjective trust in Mr van Wyk is the fact that any member of the public, and, in particular one who requires assistance from the police, is entitled to turn to and to repose trust in a police official.²²⁸ For these reasons the Minister was held vicariously liable.²²⁹

As with the analogy above, there would appear to exist no reason precluding holding the State vicariously liable for damages with respect to similar acts perpetrated by SANDF who are members of a UN mission of peace in Burundi or in DRC. The grounds supporting such analogy are that (1) peacekeeping military personnel represent South Africa as their State of origin; (2) they wear the SANDF uniform to identify themselves as such.²³⁰ The problem that may arise will certainly be that of the jurisdiction or the court before which to invoke state liability and the person who will be vested with the power to invoke such responsibility of the State.²³¹ Where prosecution has been initiated against the alleged perpetrator, individual victims should be authorized to bring an action against the State of nationality of the said perpetrators. In the case where no prosecution was brought against the alleged perpetrator, the State of origin of the victims should institute proceedings on their behalf, and, in the case of a failure to do so, the victim can possibly bring an action against their State of the nationality. Although South African peacekeepers are considered as being employed both by the UN and South Africa, they remain under the disciplinary and effective control of their respective Troop-Contributing Countries.²³² Where a peacekeeper commits a crime, it is the responsibility of the TCC to prosecute, and, if it fails to do so, it must engage its responsibility

²²⁷ Para [81].

²²⁸ Para [81].

²²⁹ Para [82].

²³⁰ Uniformed troops of a national contingent are agents of their state of origin. See Kraus D 'Acquiring a Fire Engine before the Fire Breaks Out: A proposal for a UN Emergency Peacekeeping Service' 2006 (2) *Journal of International Peace Operations* 7; Schenkel CM 'Finding Suitable Peacekeepers: Who Do You Want to Keep Your Peace?' 2006 (2) *Journal of International Peace Operations* 8.

²³¹ Victims cannot be allowed to bring proceeding before the courts of the State of the nationality, because international law as it stands today does not allow such an action. See Rau M 'State Liability for Violations of International Humanitarian Law - The *Distomo* Case before the German Federal Constitutional Court' 2005 (7) *German Law Journal* 701-720, 706.

²³² Based on the criterion of effective controle, South Africa as a TCC is therefore the effective employer.

in the same way as it does when its agent causes prejudice to any of its citizen under domestic law.²³³

3.3.2 State liability for failure to protect

This paragraph critically examines a number of South African situations related to policemen who are employees of the State in a similar way to the South African soldiers deployed with UN missions as peacekeepers. Four cases will be discussed with respect to state liability to establish whether they can be applicable to the crimes committed by South African peacekeepers during UN missions. The first case, *Ewels*,²³⁴ relates to an instance of assault inflicted on an individual in police custody. Other policemen were present but never tried to stop the assault. The second and third cases relate to state liability for failure to protect the victims. The fourth and last case concerns State liability for a crime committed by state agents, policemen on-duty, in furtherance of their own selfish interests.

3.3.2.1 *Minister van Polisie v Ewels (1975) 3 SA 590 (A)*

In *Minister van Polisie v Ewels* the respondent, who was an ordinary citizen of South Africa, was assaulted by an off-duty police sergeant on the premises of a police station in the presence of policemen on duty, for whom it was, as the court put it, reasonably possible and easy to prevent the attack or to put an end to such an attack.²³⁵ The respondent, who was in the court *a quo* the plaintiff, claimed damages from Barnard, the off-duty policeman who assaulted him and the Minister of Police on the ground that on 20 December 1971 he was assaulted twice by the well-identified policeman, Barnard.²³⁶ The Minister of Police excepted to the plaintiff's claim that the provision relied on did not place a duty on policemen to protect the plaintiff and that it created no civil liability, and that the mere presence of the policemen when Barnard assaulted the plaintiff did not create a legal duty to protect him.²³⁷

²³³ Most times it is omissions on part of individuals that are considered as offences in domestic law. See Burchell J 'A Saga of Snitches and Whistleblowers: the Boundaries of Criminal Liability for Breach of Statutorily-imposed Duties Especially in the Context of Organised Crime' in Joubert JJ (ed) *Essays in Honour to C.R. Snyman* (University of South Africa 2008)10-30, 11, 12.

²³⁴ *Minister van Polisie v Ewels* (1975) 3 SA 590 (A).

²³⁵ *Minister van Polisie v Ewels* (1975) 3 SA 590 (A) [translation published in South African Law Report 1974 (3) 680-685].

²³⁶ *Minister van Polisie v Ewels* 594 [681].

²³⁷ *Minister van Polisie v Ewels* (1975) 3 SA 590 (A) 594 [681]. The exception to the general rule that a person is not under legal duty to protect another person from harm is certainly that the exception does not include a policeman. See Burchell J and Milton J *Principles of Criminal Law* (Juta Lansdowne 2005) 189, 196.

The trial court dismissed the exception brought by the appellant but granted leave to appeal. The appellate division confirmed the trial court decision. It held that the duty which rested on the policemen was to come to the assistance of the respondent. This was a legal duty and, because it constituted a failure which took place in the course of the policemen's duty, the appellant was liable for the damages claimed by the respondent.²³⁸

Minister van Polisie v Ewels is, as Von Bonde puts it, the *locus classicus* of a victim of a crime successfully to hold the State liable for the prejudice suffered.²³⁹ Liability of the State is significant on a number of grounds, namely the role services of the State have to play, the failure to prevent the assault and the relationship between the individual who actually inflicted the damage and the State. Furthermore, not all failure on the part of the police, for instance, would attract State liability.²⁴⁰ Failure to investigate or to prosecute, however, is an actionable State liability.²⁴¹

3.3.2.2 *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA).

The respondent Van Duivenboden was the neighbour of Brooks, who lived in Bothasig on the Cape peninsula with his wife and their two children. Brooks had a drinking problem and was inclined to become aggressive and to abuse his family when under the influence of alcohol. He possessed two legally licensed firearms.²⁴² On the 21 October 1995 in the late afternoon, Brooks, who was drunk again, threatened his wife and his two children.²⁴³ A domestic squabble erupted. Brooks loaded his firearms and placed a holster and more ammunition around his waist.²⁴⁴ His wife, who also possessed a firearm, sought Van Duivenboden's help, and gave her pistol to him. While Brooks' wife was looking for help, Brooks killed his daughter, and then followed his wife and son to shoot and kill them.²⁴⁵ In the process of trying to help, Van Duivenboden was shot in the ankle and then in the shoulder, but managed to ward off Brooks by firing the pistol he had been given by Brooks' wife.²⁴⁶ The respondent

²³⁸ *Minister van Polisie v Ewels* 597-598 [684].

²³⁹ von Bonde JC 'State Liability *Vis-à-vis* Victims of Crime in Post-1994 South African Case Law - Something New or a Reinvented Wheel?' 2009 *Obiter* 211-223, 213.

²⁴⁰ An instance could be the failure to arrest a fugitive despite the effort to do so unless police complicity in the escaping of the suspect is shown.

²⁴¹ See *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA) para [22].

²⁴² *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA) para [1].

²⁴³ *Ibid.*

²⁴⁴ *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA) para [1].

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

sought to recover damages from the appellant for injuries he sustained on the following grounds:²⁴⁷ (1) in spite of the existence of an easy procedure to declare an individual unfit to be in possession of a firearm; and (2) despite the police being aware of Brooks' history of threatening to kill his family when under the influence of alcohol, the police failed to repossess the firearm from Brooks before the tragedy occurred.²⁴⁸ It was also averred that the appellant's negligence was the cause of the respondent's being shot.²⁴⁹ The action was tried in the High Court at Cape Town before Desai J who ordered, by agreement, that the question of liability should be decided separately from the question of damages.²⁵⁰ At the conclusion of the trial on that issue the respondent's claim was dismissed with costs but on appeal the decision was reversed.²⁵¹ A further appeal was launched before the Supreme Court of Appeal.²⁵²

The Supreme Court of Appeal pointed out that the claim of the respondent was based on the omission on the part of the police to deprive Brooks of his licensed firearms.²⁵³ It, however, indicated that a negligent omission is unlawful only if it occurs under circumstances where the law recognises a legal duty to avoid negligently causing harm.²⁵⁴ The court attenuated this position by pointing out that even though the law might have recognised the existence of a legal duty, it does not follow that an omission will necessarily attract liability.²⁵⁵ It will attract liability only if the omission was also culpable. Negligence is present whenever it may be ascertained that a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.²⁵⁶ The court held the State liable owing to the failure of the police to prevent Van Duivenboden from being shot.²⁵⁷ In reaching the decision, the court referred to the *Carmichele* case which also relates to State liability.²⁵⁸

²⁴⁷ Para [2].

²⁴⁸ *Ibid*

²⁴⁹ *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA) para [2].

²⁵⁰ *Ibid*.

²⁵¹ *Van Duivenboden v Minister of Safety and Security* [2001] 4 All SA 127 (C).

²⁵² *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA) para [2].

²⁵³ Para [11].

²⁵⁴ Para [12].

²⁵⁵ *Ibid*

²⁵⁶ *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA) para [12]. See also reference to *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-F.

²⁵⁷ *Minister of Safety and Security v Van Duivenboden* (2002) 6 SA 431 (SCA) paras [29]-[30].

²⁵⁸ paras [17], [18] & [20].

3.3.2.3 *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC)

In the present case, the applicant Carmichele was brutally attacked by a certain Coetzee.²⁵⁹ The applicant instituted a claim of damages against the State on the ground that the police and prosecutors failed to protect her against the aggressor. It was argued on her behalf that members of the police and prosecutors negligently failed to comply with a legal duty they owed to her to take steps to prevent Coetzee from causing her harm.²⁶⁰

The trial court held, and its decision was confirmed by the Supreme Court of Appeal, that the arraigned parties did not owe the applicant *in casu* the alleged legal duty, and, therefore, did not act wrongfully against her.²⁶¹ However, the Constitutional Court referred the matter back to the trial court mainly because the court of first instance, as well as the Supreme Court of Appeal, misdirected themselves regarding the demands of the Constitution to develop the common law. Courts are required to develop the common law with due regard to the spirit, purport, and objects of the Bill of Rights.²⁶² Even where the pleading parties did not assert that State's immunity from being sued infringes their constitutional rights, courts are under the obligation to hold that to invoke State immunity against civil actions from the public is not in line with the fundamental rights entrenched in the South African Constitution.²⁶³

Carmichele is a landmark Court ruling regarding State liability for failure to protect its citizens since it is the state's constitutional duty to respect, to *protect*, to promote, and to fulfil the rights in the Bill of Rights.²⁶⁴ This State liability stems not only from the obligations imposed by the Constitution, but also from the fact that South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms.²⁶⁵ It has also the obligation to take reasonable and appropriate measures to prevent the violation of those

²⁵⁹ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para [1].

²⁶⁰ Para [2].

²⁶¹ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para [3].

²⁶² S 39 (2) of the Constitution provides that 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

²⁶³ Van der Walt J 'Blixen's difference: horizontal application of fundamental rights and the resistance to neo-colonialism' 2003 (2) *TSAR* 311-331.

²⁶⁴ See S 7(2) of the Constitution.

²⁶⁵ Article 9 (3) of the Constitution proscribes any discrimination from the State. The state may not unfairly discriminate directly or indirectly against anyone...

rights.²⁶⁶ With respect to discrimination, the State is under an obligation to enact law in this regard.²⁶⁷ The members of the police constitute one of the primary agencies of the State responsible for the protection of the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of violent crime.²⁶⁸ It is also important to note that even prosecutors are under a general duty or an obligation to ensure that by their action constitutionally-protected values are not infringed.²⁶⁹ Prosecutors have to place before the court any information relevant to the refusal or grant of a bail, and, if they fail to fulfil such an obligation, they may be held liable.²⁷⁰ By reference to prosecutors failing to fulfil their duty, one scholar has stated that state liability should, in these kinds of instances, no longer be viewed in terms of the traditional vicarious liability, but construed *à la* civilian systems, as a form of direct liability arising from an organizational failure or *faute de service*.²⁷¹

Before one can attempt to discuss whether or not these cases are applicable to the situation of peacekeepers, it is prudent to mention one further case in this regard. It is indeed a case where the State was again held to be liable for the actions of members of the police.

3.3.2.4 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC)

The applicant in this case was a woman who was raped by three policemen she encountered at a petrol station where she was stranded in the early hours of the morning of 27 March 1999.²⁷² The policemen were in uniform and on duty at the time and were in a marked police vehicle. They offered to take her home, and she readily accepted. Instead she was driven to a quiet place where she was raped.²⁷³ She sued the respondent and the three policemen for damages in the Johannesburg High Court but subsequently abandoned her claim against the policemen, each of whom was sentenced to life imprisonment for rape and 10 years' imprisonment for kidnapping. The sole question in issue in the trial court below was whether the respondent

²⁶⁶ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para [62].

²⁶⁷ National legislation must be enacted to prevent or prohibit unfair discrimination. See S 9 (4) of the Constitution.

²⁶⁸ *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) para [62].

²⁶⁹ S 8(1) and S 179 (1) (b) of the Constitution read together.

²⁷⁰ *Carmichele v Minister of Safety and Security and another* [2000] 4 All SA 537 (A) para [15].

²⁷¹ Du Bois F 'State Liability in South Africa: A Constitutional Remix' *Tulane European & Civil Law Forum* (2010) 139 quoted in *Minister of Safety and Security v F* (592/09) [2011] ZASCA 3 (22 February 2011) para [34].

²⁷² *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA) para [1].

²⁷³ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [2].

was vicariously liable for the conduct of the rapists.²⁷⁴ The High Court ordered absolution from the instance, but granted leave to appeal to the Supreme Court of Appeal.²⁷⁵ The issue was whether or not the State, represented by the Minister of Safety and Security, was vicariously liable for the conduct of the three policemen who raped the Appellant.²⁷⁶ The Supreme Court of Appeal dismissed the Appeal, thus upholding the trial Court decision of absolution of the State on the grounds that, on the existing principles of vicarious liability, the respondent was not liable for the damages suffered by Ms K.²⁷⁷ The other ground of absolution of the minister regarding vicarious liability was to hold the Minister of State vicariously liable for the delict of an employee, and in this case it has to be shown that the delict was committed by the employee in the course and scope of his or her employment.²⁷⁸ Where there is a deviation from the course of employment, the inquiry is whether, despite the deviation, the employee was still exercising the functions to which he or she was appointed.²⁷⁹ At the time of the employee's conduct, was she or he still carrying out some instruction of his or her employer? If the answer is in the affirmative, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee.²⁸⁰ The Supreme Court of Appeal held, however, that the Minister could not be held liable for the rape of the applicant.²⁸¹ It rejected arguments relating the development of the common-law in the light of the spirit, purport, and objects of the Constitution.²⁸²

The Applicant applied to the Constitutional Court which granted her application for leave and set aside the orders of the Supreme Court of Appeal and the High Court.²⁸³ The Constitutional Court declared that the respondent was liable²⁸⁴ to the applicant for the damages suffered by the applicant as a result of the wrongful conduct of Sergeants Rammutle, Gabaatlholwe and

²⁷⁴ Para [1].

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [9].

²⁷⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [9].

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [60].

²⁸⁴ Grounds supporting the decisions: the need to develop the common law of vicarious liability in light of the spirit, purport, and objects of the Constitution [see para 15] and the argument that the general principle of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment para [24]

Nqandela in the early morning of 27 March 1999, and referred the case back to the Johannesburg High Court to determine the quantum of damages in the light of its judgment.²⁸⁵

To reverse the ruling of the courts below, the Constitutional Court referred to its decision in *Carmichele* with respect to developing the common law to promote the spirit, purport, and objects of the Constitution.²⁸⁶ It restated the general principle of vicarious liability which holds an employer responsible for the wrongs committed by an employee during the course of employment. It further elucidated the practice of the courts to hold an employer liable in cases where the employee acted ‘within the course and scope of his or her duty’ or was ‘engaged with the affairs of his master’.²⁸⁷ Where the damage caused by the employee was done while deviating from the normal performance of the employee’s duties, the questions the courts need to answer are whether the employee is still acting within the course and scope of his or her duty, or whether such an employee is still engaged with the affairs of the employer.²⁸⁸ The answers to these questions are not easy to find, especially when the deviation itself is intentional and constitutes an intentional wrong.²⁸⁹ An intentional deviation from duty, however, does not automatically mean that an employer will not be liable²⁹⁰ even where such deviation may have been done solely for the purposes of the employee.²⁹¹ Here the adjudicating judicial authority will have to analyze whether there can be a sufficiently close link between the employee’s acts for his own interests and the purposes and the business of the employer.²⁹² Indeed, when committing an offence such as rape, the State servant is simultaneously omitting to perform his/her duties as required.²⁹³ Employees committing a rape cannot be said to be furthering the employer’s purposes or obligations.²⁹⁴ This is effectively the same situation for the three policemen who raped the applicant. They were indeed, subjectively viewed, acting in pursuit of entirely their own objectives and not those of

²⁸⁵ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [60].

²⁸⁶ Para [15, 18-19].

²⁸⁷ Para [24].

²⁸⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [25].

²⁸⁹ *Ibid.*

²⁹⁰ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [26].

²⁹¹ Para [32].

²⁹² *Ibid.*

²⁹³ Para [48].

²⁹⁴ The policemen in *K* not only breached their duty to protect a citizen from rape, but their own opportunity to rape the victim was linked to their official exercise of authority to act as public protectors. See Burchell J (2011) *op cit* (n 74) 465. See also *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para [16].

their employer but yet the State was found vicariously liable.²⁹⁵ The decision of the court was based on the sufficiently close nexus between their employment and the wrongful conduct.²⁹⁶

As to the sufficient closeness of the conduct of the three policemen to their employer's business, it must be noted that several facts point to a connection between the conduct of policemen and their employment. First, the policemen all bore a statutory²⁹⁷ and constitutional duty to prevent crime and protect the members of the public.²⁹⁸ That duty is a duty which also rests on their employer, and they were employed by their employer to perform that obligation. Secondly, in addition to the general duty to protect the public, the police here had offered to assist the applicant, and she had accepted their offer. In so doing, she placed her trust in the policemen although she did not know them personally. One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance.²⁹⁹ The constitutional rights of the applicant, the constitutional obligations of the respondent, and the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable.³⁰⁰ Whether such a situation is applicable to peacekeepers is something that requires further scrutiny.

3.3.2.5 The relevance of State liability cases to peacekeeping forces (if any)

All four of the cases discussed above involve State liability for the conduct of police personnel *vis-à-vis* the citizens of the Republic of South Africa. Indeed, the Constitution of the Republic of South Africa provides that 'the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'³⁰¹ It cannot, therefore, *a priori* be appropriate to argue that the rulings from the above cases apply to victims of the

²⁹⁵ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras [32] [50-51][60].

²⁹⁶ Burchell J (2011) *op cit* (n 74) 465.

²⁹⁷ The South African Police Service Act 68 of 1995.

²⁹⁸ Section 205(3) of the Constitution provides that 'The objects of the police service are to prevent, combat, and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

²⁹⁹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) paras [51]-[52].

³⁰⁰ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [53].

³⁰¹ S 205(3) of the *Constitution of the Republic of South Africa*, Act 108 of 1996, also quoted in *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para [16].

conduct of peacekeepers.³⁰² The constitutional protection invoked does not necessarily extend to non-South African citizens living outside the country.³⁰³ It is on grounds of constitutional imperatives and the control the police had over the borders of the Republic that a domestic court of South Africa can hold the State vicariously liable for the failure of the police to protect a victim from harm.³⁰⁴ Indeed, since section 12(1)(c) of the South Africa Constitution avails the citizens protection from all forms of violence whether from public³⁰⁵ or private sources, and section 7(2) of the same supreme law provides that the State must respect, protect, promote, and fulfil the rights in the Bill of Rights, the Constitution places a duty on the State to protect individuals, both by refraining from invasions of their individual rights itself and by taking active steps to prevent the violation of their rights.³⁰⁶ This constitutes a positive duty on the State to protect everyone from violent crime.³⁰⁷

In the case of *K v Minister of Safety and Security* presented above, in which the Constitutional Court of South Africa held that the common law provisions relative to vicarious liability must be applied by the courts in a way consistent with the terms of the Constitution as well as the spirit, purport, and objects of the Bill of Rights,³⁰⁸ the Minister was found to be vicariously liable for the conduct of the state employee, despite the fact that the rape in the instance was a deviation from the employment duties of the policemen.³⁰⁹ It can, therefore, be concluded in this regard that there is an obligation on the State to observe the constitutional provisions and to ensure that it fulfils the constitutional duty of protection of everyone within its jurisdiction. It is, however, obvious that ‘everyone’ does not include individuals who are not citizens of a State and who live outside the boundaries of the State. However, nationals of a given State who have the status of public servants of that State can engage their State of origin liability on an international level.

³⁰² Although even outside the boundaries of the RSA, members of the SANDF and the SAPS remain agents of the State, the failure on the part of the RSA actually to prosecute its agents for crimes committed while serving with a UN mission of peace does not amount to a violation of any citizen’s right entrenched under the SA constitution.

³⁰³ With respect to fulfilling the purposes of the South African Constitution, peacekeepers outside the RSA remain representatives of South Africa. Compare S 199(5) of the Constitution.

³⁰⁴ *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para [24].

³⁰⁵ Any violence inflicted by a public servant, such as a member of the police, is violence from public source.

³⁰⁶ Constitution of South Africa Act NO. 108 of 1996.

³⁰⁷ Everyone must be any person within the RSA, not outside. See *S v Baloyi* 2000 (2) SA 425 (CC) para [11].

³⁰⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

³⁰⁹ *Ibid.*

In this context it is crucial to take cognisance of the fact that, under International Law, a State is under an obligation to bear responsibility for the acts of persons serving such State.³¹⁰ Peacekeeping forces fall under the scope of the Draft Articles on State Responsibility, especially article 8 which provides that ‘the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’³¹¹ Members of a contingent from a specific country act on the instructions of, or under the direction or control of, that State. Even when the conduct does not actually fit within the scope of instruction, direction or control, it can still be attributed to the State if the person or group of persons who have performed such an act were exerting elements of governmental authority.³¹² The military component of a contingent from a specific country, therefore, identifiable by the military uniform and flag of that country should be considered as exercising governmental authority of the State which clothed them. Indeed, acts of empowered individuals are attributable to the State or government that empowered them.³¹³

Apart from State liability, which can arise where a duty is imposed by international law and when there is a failure to adhere to such a duty,³¹⁴ the duty to protect, to promote, and fulfil the rights in the Bill of Rights has been imposed on the Republic of South Africa by the Constitution.³¹⁵ Indeed, if the liability of a state can be activated for failure to prevent an action by its juristic persons who violate Human Rights, whether within or outside that State’s territory, then it can be activated *a fortiori* when such rights are violated by its troops serving outside the State, on UN mission of peace.³¹⁶ This should not be solely limited to failure to

³¹⁰ Article 8 of the Draft articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). The report appears in the *Yearbook of the International Law Commission* 2001, vol. II, Part Two.

³¹¹ *Ibid.*

³¹² Article 9 of the Draft articles on the Responsibility of States *op cit* (n 309).

³¹³ Sassòli M ‘State responsibility for violations of international humanitarian law’ 2002 (84) *IRRC* 401-434, 402.

³¹⁴ *Van Eeden v Minister of Safety and Security* case No. 176/2001 Supreme Court of Appeal of South Africa, judgment of 27 September 2002 para [15] and *Carmichele* para [62].

³¹⁵ See S 12 read with S 7(2) of the Constitution of the South Africa, Act No. 108 of 1996.

³¹⁶ McCorquodale R and Simons P ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ 2007 (70) *Modern Law Review* 598-625, 599.

prevent or to protect, but state liability for omissions also arises when a State fails to prosecute.³¹⁷

3.4 Conclusion

This chapter has examined how the domestic law of South Africa as a Troop-Contributing Country deals with the allegations of the crimes of rape, prostitution in its form of engaging the services of a prostitute, murder, and assault committed by peacekeepers in Somalia, Burundi, and the Democratic Republic of the Congo. It has been shown that the different allegations, especially sexual offences and murder, are provided for in terms of South African domestic law. The analysis reveals that the substantive law and defences are not the reasons behind why peacekeepers escape liability for crimes they commit where they are deployed as they may in fact be held accountable under substantive law. One therefore suspects that the problem may lie in procedural issues which will be investigated later in this thesis.³¹⁸

The example of South Africa as a Troop-Contributing Country has shown that the liability of a State is actionable whenever organs of State fail to prevent or to protect a citizen against harm, especially where a duty rests on the State. The finding under domestic law, however, was that such a duty to protect citizens or to prevent harm does not actually extend to citizens of other countries who live outside the boundaries of South Africa.³¹⁹ As it is in South African law, the law may allow for the prosecution of crimes committed outside the jurisdiction of the country, thus for sexual offences committed outside the South Africa, but it does not provide for an actionable remedy to victims of such sexual offences who are not within the Republic. It must be noted that the discussion regarding State liability relates only to South Africa because it has deployed peacekeepers in Africa, and it is not the aim of this thesis, nor is it its purpose, to undertake an analysis of all domestic countries which have contributed troops to the UN missions of peace to the above mentioned countries, as this would merit the discourse of an entire thesis on its own.

³¹⁷ It is obvious that State civil liability for failure to protect or to prevent does exist, and in the case of South African law the State has in several situations been held liable for a failure to protect. See *K v Minister of Safety and Security* 2005 6 SA 419 (CC), and other numeral cases. See also Neethling J 'Delictual Protection of the Right to Bodily Integrity and Security of the Person against Omissions by the State' 2005 *SALJ* 572-590.

³¹⁸ The issue of procedural law with respect to crimes committed by peacekeepers will be looked at in chapters 5-7 where the problems related to investigation and jurisdiction are discussed, and an analysis of a UN Draft on accountability of personnel involved in peacekeeping operations is undertaken.

³¹⁹ South African law and the Constitution apply to members of SANDF deployed as peacekeepers outside the Republic. They may invoke the protection the Constitution avails them. Non South African citizens cannot invoke such protection, unless they live within South Africa.

It was also indicated that conduct by a peacekeeper may constitute a violation of domestic law of the Host State or constitute a crime under the domestic law of the Troop-Contributing Country. The violated provision may have been incorporated within the domestic law in fulfilment of an international convention to which the State is a party.³²⁰ Indeed, crimes dealt with at a domestic level may have proceeded from international law, founded upon treaties or conventions. The criminalization of certain conduct is dictated to a State in terms of its obligations under international law.³²¹ Such a State incorporates the treaty into its domestic law by enacting a law implementing the international convention, or the courts may have been allowed to apply any ratified treaty immediately.³²² South Africa, for instance, has passed a law with respect to the Rome Statute implementation.³²³ Whereas some treaties may not explicitly require that legislation be passed to implement it at the domestic level of a State party to such treaties, some conventions and treaties are explicit thereto. Thus, the Genocide Convention³²⁴ and the Geneva Conventions³²⁵ explicitly require that the State Parties enact the necessary legislation in order to implement them.³²⁶ States may adopt implementing legislation, such as is the case with South Africa³²⁷; others rely upon direct application of international law in their domestic system, for example the Democratic Republic of the Congo.³²⁸

The next chapter examines the issue of criminal conduct by peacekeepers under International Criminal Law. It analyses the different allegations of crimes by peacekeepers in the light of international law, their elements and defences thereto, in order to ascertain whether it is still a problem of substantive law for peacekeepers to escape liability with respect to crimes committed during a UN mission of peace.

³²⁰ Davidson MJ *A Guide to Military Criminal Law* (Naval Institute Press Annapolis 1999) 149.

³²¹ *Ibid.*

³²² Katz A 'An Act of Transformation: The Incorporation of the Rome Statute of the ICC into national Law in South Africa' 2003 (12) *African Security Review* 25-30, 26.

³²³ Act No. 27 of 2002 (18 July 2002): Implementation of the Rome Statute of the International Criminal Court Act, 2002 (hereinafter South African Rome Statute Implementation Act 27 of 2002).

³²⁴ Article V Genocide Convention: *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951.

³²⁵ Articles 49 of GC I; 50 of GC II; 129 of GC III & 146 of GC IV.

³²⁶ It also considered that Geneva Conventions have reached the status of international customary law which binds all States. If a given State, therefore, did not expressly enact implementing law, its courts can still consider the Geneva Convention as applicable as international customary law.

³²⁷ South African Rome Statute Implementation Act 27 of 2002.

³²⁸ Article 153 of the DRC Constitution (2006) gives primacy to the rules to be applied by the different jurisdictions of the countries that ratified the International Convention, so there is no need for a special law of implementation, even though domestic law may still have to be harmonised in cases where disparities exist between the law and the duly ratified treaties.

CHAPTER IV

THE CRIMES COMMITTED BY PEACEKEEPERS IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW

4.1 Introduction

This chapter investigates how International Criminal Law deals with crimes committed by peacekeepers. The criminal conduct by a peacekeeper may fall under the domestic law of the State where it took place, i.e. the 'host' State; it may also constitute a violation of the laws of the State of nationality of the perpetrator, i.e. the Troop-Contributing Country, and, in addition, contravene the provisions of international law.¹ In fact, it will be shown that peacekeepers are not exempt from observing international law, especially in the context of humanitarian and human rights law.² Their crimes may fall under international law, where they constitute violations of international norms and fulfil the requirements of an international crime.³

Many of the allegations of crimes committed by peacekeepers are of a sexual character as alluded to earlier. One needs, therefore, to investigate under which category of international crimes they fall. Do crimes allegedly committed by peacekeepers amount to genocide, to crimes against humanity, or war crimes? Do all three categories of core international crimes include sexual crimes and abuses such as rape? Further discussion relates to the sexual crime of prostitution from the point of view of the prostitute, client, murder, assault, and torture. It is, therefore, important to define and discuss first of all the core international crimes. Thereafter, the different allegations of crimes committed by peacekeepers will be examined to determine in which category they actually fall.

¹ The issue regarding the manner in which a peacekeeper's conduct fits into the domestic law of the Host State and the Troop-Contributing Country has been the object of chapters II and III of this thesis. How this same conduct infringes international law is the focus of this chapter IV.

² The discussion will also be concerned whether the recognition by the SOFA that jurisdiction over peacekeepers lies with TCC applies when the conduct falls under international criminal law.

³ For the definition of an international crime and a complete discussion of core international crimes, see Damgaard C *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer Berlin 2008); Gaeta P 'International Criminalisation of Prohibited Conduct' in Cassese A (ed) *The Oxford Companion to International Criminal Justice* (OUP New York 2009) 63-73. It may also be indicated that the phenomena of genocide, crimes against humanity, and war crimes may be as old as mankind, though their recognition as crimes punishable under international law is a fairly recent occurrence. See Matanga FK 'The Challenges Facing the ICC in Prosecuting Cases of Genocide, Crimes Against Humanity and War Crimes' 2009 (39) *Africa Insight* 103-113, 103.

The aim of the discussion under this heading is to investigate whether the crimes alleged to have been committed by peacekeepers, namely rape, prostitution, and sexual offences involving children, murder⁴, and wilfully causing of serious injury to body or health (torture and assault) are dealt with under any international law applicable to peacekeepers.⁵ The discussion further investigates whether or not international jurisdiction can assert competence with respect to such crimes, especially when they have not been prosecuted at domestic level? It must be borne in mind that acts criminalised under domestic law may also be found to be criminalised under international law.

4.2 The core international crimes categories

4.2.1 Definition of the core international crimes

If the crime of aggression is not taken into account, the core international crimes are genocide, crimes against humanity, and war crimes.⁶ Each of these crimes will now be examined to ascertain whether the allegations discussed in chapter II of this thesis, regarding the conduct of peacekeepers, may fall under any of these categories and thus qualify as international crimes which can be prosecuted in both national and international courts.⁷

⁴ There exists the human right ‘not be subjected to arbitrary deprivation of life.’ The violation of such a right constitutes murder, whoever the culprit may be. Members of the UN forces cannot be excused if they violate such an important right on the basis that the perpetrator is allowed by the UN to use force. See McLaughlin ‘The Legal Regime Applicable to Use of Lethal Force When Operating Under a UN Security Council Chapter VII Mandate Authorizing ‘All Necessary Means’’ 2008 (12) *Journal of Conflict & Security Law* 389-417.

⁵ Rape is a war crime and a crime against humanity. See UN Doc. S/2004/616 *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (Report of the Secretary-General 23 August 2004) para 41. It has been used as a method of war. See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Foca case, IT-96-23 and IT-96-23/1, 22 February 2001)*. In connection with the trial of Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Trial Chamber II announced in a press release on 22 February 2002 that the three accused had been found guilty of crimes against humanity in that rape had been ‘used by members of the Bosnian Serb armed forces as an instrument of terror’ (ICTY, Press Release, The Hague, 22 February, 2001JL/P.I.S./566-e). See Olsson L, Skjelsbæk I, Barth EF & Hostens K *Gender Aspects of Conflict Interventions: Intended and Unintended Consequences: Case Studies on the United Nations Mission in Eritrea/Ethiopia (UNMEE), the NATO Stabilization Force in Bosnia and Herzegovina (SFOR) and the Tempo-ray International Presence in Hebron (TIPH)* (Final Report to the Norwegian Ministry of Foreign Affairs International Peace Research Institute Oslo 2004) 33.

⁶ Articles 6, 7 and 8 of the Rome Statute for the International Criminal Court; Damgaard C *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer Berlin 2008). Whereas crimes against humanity can be committed in both times of peace and times of war, war crimes can be perpetrated only in relation to an armed conflict. War crimes consist in violations of the *jus in bello*, i.e. violations of international humanitarian law. See Kemp G *Individual criminal liability for the international crime of aggression* (unpublished doctoral thesis Stellenbosch University 2008) 4.

⁷ Violations of the rules of international humanitarian law are treated as war crimes and can lead to individual criminal liability.

4.2.1.1 Genocide

The term genocide was coined as such only after 1944, when a Polish-Jewish lawyer named Raphael Lemkin used the concept for the first time to describe the Nazi's policy of systematic murder, including the destruction of the European Jews.⁸ Thus, acts directed against members of a specific group in a way that threatens the existence of the group as a whole fall under the ambit of the crime of genocide.⁹ Although the concept was thus formulated after the Second World War, genocide denotes conduct that is centuries old.¹⁰

⁸ Lemkin R *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for Peace Washington 1944) 79, referred to by Schabas WA *Genocide in International Law: The Crime of Crimes* 2nd ed (Cambridge University Press New York 2009) 120.

⁹ Quigly J *The Genocide Convention: An International Law Analysis* (Ashgate Publishing Company Burlington 2006) 3.

¹⁰ Nersessian DL *Genocide and Political Groups* (Oxford University Press New York 2010) 7. It is recognised that genocide is as old as humanity. See Sartre J-P 'On Genocide' in Falk RA, Kolko G and Lifton RJ (eds) *Crimes of War* (Random House New York 1971) 534-549, 534 referred to by Schabas WA *Genocide in International Law: The Crime of Crimes* 2 ed (Cambridge University Press Cambridge (UK) 2009) 1. The historical example dated almost one and half century BCE (before the Common Era) and relates to the sacking of Carthage by the Romans (Nersessian DL *op cit* (n 10) 7). However, the massacre of Armenians is sometimes considered to be the first example of this type of atrocity and threat to the existence of a group, especially of the twentieth century. The Armenians, not more than two million, were deported *en masse* to Syria and Mesopotamia by the Turkish regime. The deportation that began in 1915 was carried out with brutality, included mass executions which caused several hundred thousand Armenians to perish *en route*. See Quigly J *op cit* (n 9) 3. Whereas violence targeting groups have occurred throughout history, the crime was never been prosecuted prior to the implementation of the 1948 Genocide Convention. In the 1990s, the international outcry with respect to the situations in the former Federal Republic of Yugoslavia and the Republic of Rwanda inspired the UN to establish international criminal tribunals to prosecute the crime of genocide. See UN SC Res 827 (1993) of 25 May 1993 the ICTY was established and by UN SC Res 955(1994) of 8 November 1994 the ICTR. See also *Yearbook of the International Law Commission 1996*, Volume II, Part II: *Report of the Commission to the General Assembly on the work of its forty-eighth session* (A/CN.4/SER. A/1996/Add. 1 (Part 2))19; Maison R 'La décision de la Chambre de première instance n° I du Tribunal pénal international pour l'ex-Yougoslavie dans l' affaire *Nikolic*' 1996 *EJIL* 284-299, 288; Darcy S 'Prosecuting the War Crime of Collective Punishment Is It Time to Amend the Rome Statute?' 2010(8) *Journal of International Criminal Justice* 29-51, 34; Clark JN 'The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina' 2009 (7) *Journal Of International Criminal Justice* 463-487; Møse E 'Main Achievements of the ICTR' 2005 (3) *Journal Of International Criminal Justice* 920-943. The killings during the conflicts in Yugoslavia and Rwanda reveal the difficulty of relying on the obligation put upon states to prevent genocide, and this major obligation of the Convention is a continuing challenge for nations and individuals. The Srebrenica Massacre, July 1995: it is estimated that 7,000 to 8,000 Bosnian males were killed, ranging in age from young teens to the elderly, in the region of Srebrenica in Bosnia and Herzegovina by units of the Army of Republika Srpska (VRS) under the command of General Ratko Mladic. See Abudu NG *et al.* 'Human Rights' 2008 (42) *The International Lawyer* 755-795, 765. Rwanda atrocities are estimated at 800,000.- deaths in the a period of 90 days: see Lee S 'Unintended Consequences of Peace Operations on Humanitarian Action' in Aoi C, de Coning C and Thakur R(eds) *Unintended Consequences of Peacekeeping Operations* (United Nations University Press Tokyo 2007) 90-108; Aning K 'Keeping the Peace in Africa: Challenges and Opportunities' 2005 (14) *African Security Review* 1-3; Fortna VP 'Does Peacekeeping Keep Peace? International Intervention and the Duration of Peace after Civil War' 2004 (48) *International Studies Quarterly* 269-292. Nevertheless, prosecutions do serve a preventative function, a fact acknowledged by the UN when the ICTY was established: 'that the prosecution and punishment of the guilty would contribute to preventing future human rights violations.' See UN. Doc. S/RES/827 (1993) referred to by Werle G *et al.* *Principles of International Criminal Law* (T.M.C. Asser Press The Hague 2005) No. 86.

All threats to the existence of a group, such as extermination and deportation, amount to genocide as contemplated in the Genocide Convention, adopted after the Holocaust.¹¹ The preamble of the Genocide Convention refers to the fact that throughout all periods of history genocide has inflicted great losses on humanity, implying certainly that the Holocaust is not the first occurrence of genocide.¹² On 9 December 1948, in the shadow of the Holocaust, the United Nations approved the Convention on the Prevention and Punishment of the Crime of Genocide.¹³ This convention establishes ‘genocide’ as an international crime, and State parties ‘undertake to prevent and punish’ acts of genocide.¹⁴ It defines genocide by its elements.¹⁵ According to the Convention, genocide means any acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.¹⁶ Included acts are: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group¹⁷; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.¹⁸

To infer that genocide occurred, the perpetrator must have performed one of the acts listed in the Genocide Convention. The prosecutor has to establish that such an act has been performed with the required intentional element that lies in the aim or objective pursued, namely the destruction in whole or in part of the group to which the victims belonged. The latter must

¹¹ Dumont H ‘Le crime de génocide : construction d’un paradigme pluridisciplinaire’ 2006 (39) *Criminologie* 3-22, 8 *et passim*; Kemp G *Individual criminal liability for the international crime of aggression* (unpublished doctoral Thesis Stellenbosch University 2008) 7; Lemasson AT *La victime devant la justice pénale internationale* (Thèse doctorale Université de Limoges 2010) 397 *et passim*.

¹² Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948. Entry into force: 12 January 1951 (hereinafter, Genocide Convention).

¹³ See preamble to the Genocide Convention *op cit* (n 12).

¹⁴ Cassese A ‘On the Use of Criminal Law Notions in Determining State Responsibility for Genocide’ 2007 (5) *Journal of International Criminal Justice* 875-887. The law on genocide is younger than the conduct itself. See Schabas WA *Genocide in International Law: The Crime of Crimes* 2 ed (Cambridge University Press Cambridge (UK) 2009) 1.

¹⁵ The elements legally enumerated may also constitute other international crimes such as war crimes and crimes against humanity, but genocide also typically occurs in the context of war and is often composed of specific acts that can also be qualified as war crimes. The most prominent element of genocide, therefore, in contrast to the other two categories of international crimes, is the mental element embodied in the intent to destroy, as a goal to be attained, in whole or in part, a particular group of people. See Alvarez A *Genocidal Crimes* (Routledge London 2010) 8-13.

¹⁶ Article II of the Genocide Convention.

¹⁷ Acts of murder, rape, assault can be committed by peacekeepers. Because of the intent element requirement for genocide, it is, however, unlikely that such conduct would be associated with peacekeepers. They are never deployed to a country to destroy any of the four mentioned groups. The conduct lacks the state policy or organisational element. See Schabas WA ‘State policy as an Element of International Crimes’ 2008 (98) *Journal of Criminal Law & Criminology* 953-982.

¹⁸ Article II of the Genocide Convention.

have been members of a protected group, *a national, ethnic, racial, or religious group*.¹⁹ Any acts perpetrated against members of groups that do not belong to the four categories above, for instance a political group, cannot be classified as the crime of genocide.²⁰ Likewise, gender is not mentioned as constituting a separate protected group.²¹

The elements of the crime of genocide are, as for every crime, an *actus reus* and a mental element.²² When it comes to genocide, the mental element is of great importance. The element of intent appears in the definition of genocide itself.²³ The listed acts directed against the protected group must be committed ‘with intent to destroy in whole or in part’ the said group.²⁴ This specific intent or *dolus specialis* consists of the specific purposes motivating the commission of the crime.²⁵ The *dolus specialis* requirement with respect to genocide distinguishes this crime from that of ordinary murder.²⁶ Indeed, as it transpires from the *Musema* judgment,²⁷ the special intent requires that the perpetrator ‘clearly intended the result’, the existence of ‘a psychological nexus between the physical result and the mental state of the perpetrator’.²⁸ This distinguishing aspect of the crime of genocide applies to all acts of genocide and must be formed prior to the commission of the genocidal acts, but the individual acts themselves do not require premeditation.²⁹

Since article IV indicates that private individuals can commit genocide, the prosecutor’s difficult task is to demonstrate beyond reasonable doubt that the accused possessed the necessary intent to destroy, completely or in part, the group to which the victim or victims

¹⁹ Genocide is a denial of the right to existence of an entire human group, just as homicide is the denial of the right to life of an individual human being. See Schabas WA *Genocide in International Law: The Crime of Crimes* 2 ed (Cambridge University Press Cambridge (UK) 2009) 55.

²⁰ The definition of ‘ethnic group’ has evolved to include a group which distinguishes itself as a group (self-identification), or a group identified as such by others, including perpetrators of the crimes (identification by others) [*Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T (21 May 1999) para [98]. This definition cannot be construed as making gender a protected group as described in the Genocide Convention.

²¹ *Ibid.*

²² Ratner SR, Abrams JS & Bischoff JL *Accountability for Human Rights Atrocities in International Law* 2^d ed (OUP Oxford 2001) 135.

²³ Article II of the Genocide Convention.

²⁴ *Ibid.*

²⁵ Olásolo H *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oregon Oxford 2009) 73.

²⁶ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T (21 May 1999), para 91; *Prosecutor v. Akayesu Case No. ICTR-96-4-T* (2 September 1998), para 498-499; Martinez JS ‘Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond’ 2007 (5) *Journal of International Criminal Justice* 638-664, 644.

²⁷ *Prosecutor v. Musema*, case No. ICTR-96-13-A (27 January 2000).

²⁸ *Prosecutor v. Musema*, Case No. ICTR-96-13-A (27 January 2000) para 166.

²⁹ *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T (21 May 1999), para 91.

belong.³⁰ Even if an individual has the intent to destroy a group, his single, isolated act of killing one or two members of the targeted group cannot amount to genocide.³¹ For such an act to be punished as genocide it must be part of widespread violence or in furtherance of a policy at the state or organisational level.³² The accused must have seen his act as part of that state or organisational plan.³³ Otherwise, a single act by an individual, even with the required intent, can be considered only to be an ordinary crime of murder.³⁴ Moreover, ‘many of those who participate in a genocide may well fall outside this definition ... they may lack the requisite intent to destroy, in whole or in part, the targeted group.’³⁵ Indeed, the crime of genocide, by its very nature has a quantitative dimension in that this gravest of crimes will be prosecuted only when it has been shown that it was planned or committed on a large scale.³⁶ It has, for example, been disputed whether the Khmer Rouge committed genocide against Khmer people of Cambodia because it cannot easily be established whether the Khmer Rouge had the intent of destroying the Khmer people³⁷ in whole or in part.³⁸ It is indubitable,

³⁰ See Paust JJ *et al. International Criminal Law: Cases and Materials* (Carolina Academic Press Durham 2007) No. 781 referring to the ICTY decision in *Prosecutor v. Jelisic*, IT-95-10-T (Trial Chamber, December 14, 1998 and Appeal Chamber, July 5, 2001).

³¹ There must be an intention to destroy in whole, or a considerable number of, individuals who are part of the group targeted. The numerical factor is, therefore, important. See Aksar Y *Implementing International Humanitarian law: From the Ad Hoc Tribunal to a Permanent International Criminal Court* (Routledge London 2004) 215.

³² Zahar A & Sluiter G *International Criminal Law: A Critical Introduction* (Oxford University Press New York 2008) 175: The intent to commit genocide will be difficult to prove against an individual acting alone, the evidence tending to establish mental instability rather than the necessary resolve. At the same time, the present position is that a plan or policy, even on a small scale, is not a legal ingredient of genocide. If a plan can be demonstrated, it will of course be given pride of place.

³³ Compare *Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T* (2 September 1998) para [100] where executors were goaded to ‘destroy’ the RPF infiltrators and attack and kill their neighbours (Tutsi). The crime of genocide, owing to its nature, is almost impossible to commit without some direct or indirect involvement on the part of the State given the magnitude of this crime. Aksar Y *op cit* (n 31) 216.

³⁴ See Schabas WA ‘State Policy as an Element of International Crimes’ 2008 (98) *The Journal of Criminal Law & Criminology* 953-982.

³⁵ Du Plessis M & Peté S ‘Who Guards the Guards? The ICC and Serious Crimes Committed by United Nations Peacekeepers in Africa’ 2004 (13) *African Security Review* 5-17, 10.

³⁶ *Ibid.*

³⁷ Khmer people are the greatest ethnic group in Cambodia (94%). Khmer rouge refers to the movement that took power from King Norodom Shihanouk in 1970. In 1975, the Khmer Rouge leader Pol Pot instituted a regime of terror which controlled Cambodia till 1979. The regime deported people from towns to rural areas and separated families. Intellectuals were mostly targeted. The atrocities against Khmer people may well fit into the concept of ‘auto-genocide’. What is sometimes called ‘auto-genocide’, which is the mass killing of members of the group to which the perpetrators themselves belong, has been presented under the rubric of national group. The expression appears to have been coined by a UN rapporteur referring to the Khmer Rouge atrocities in Cambodia... While agreeing that the Khmer people of Cambodia constituted a national group within the meaning of the Convention, the Group of Experts, in its 1999 report, said that ‘whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on complex interpretative issues, especially concerning the Khmer Rouge’s intent with respect to its non-minority group victims’. The group declined to take a position, leaving the question to the Extraordinary Chambers of the Courts of Cambodia in the trials of former

however, that they committed genocide against the Buddhist monks as an entire religious group.³⁹

The crucial issue for the present study is the question whether peacekeepers can commit genocide as defined by the Convention, especially if they have been deployed to restore or keep the peace on behalf of the UN. Can their performance of criminal acts be analysed as genocide, endeavouring to destroy one or other of the protected groups in a host country? The answer is that peacekeepers cannot be held responsible for genocide, individually or collectively, because their acts cannot amount to genocide.⁴⁰ Indeed, if it may be possible to identify the required intent for genocide with respect to leaders or decision-makers, this will not necessarily be the case when it comes to proving genocidal intent with respect to material perpetrators of this heinous crime.⁴¹ Furthermore, leaders and decision-makers in the case of peacekeeping missions are essentially the UN and its State members. It is, therefore, inconceivable that the United Nations Security Council would resolve to deploy armed forces to ‘destroy in whole or in part’ some group.⁴² The conclusion, therefore, is that peacekeepers cannot commit genocide, nor may they be prosecuted for acts of genocide whether individually or collectively. The next issue is to investigate whether peacekeepers can be held criminally responsible for perpetrating crimes against humanity.

4.2.1.2 Crimes against humanity

Crimes against humanity are serious criminal acts committed during peacetime as well as during armed conflict.⁴³ They consist of a widespread or systematic attack against a specific

Khmer Rouge leaders. See Schabas WA *Genocide in International Law: The Crime of Crimes* 2 ed (Cambridge University Press Cambridge (UK) 2009) 138-139.

³⁸ Ratner SR, Abrams JS & Bischoff JL *Accountability for Human Rights Atrocities in International Law* 3rd ed. (OUP New York 2009) 320-322.

³⁹ *Ibid.*

⁴⁰ The analysis of the genocide convention makes it clear that isolated sexual offences against members of different ethnic groups or religions cannot be defined as acts of genocide, even where the perpetrators believe that their conduct will destroy the women in whole or in part, and intend the destruction that takes place on a psychological level as well. As to what constitutes the destruction of a group, the ICTR in the *Akayesu* case held, among other things, that rape may constitute an act of genocide by preventing births in the group when the person raped refuses subsequently to procreate or is forced to bear the children of the enemy, and, in the same way, members of a group can be led, through threats or trauma, not to procreate. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (2 September 1998) para [508]. *Akayesu* referred also to physical and mental harm as act of genocide which rape actually meets. See para [113].

⁴¹ Paust JJ *et al. International Criminal Law: Cases and Materials* (Carolina Academic Press Durham 2007) No. 772.

⁴² Du Plessis M & Peté S *op cit* (n 35) 10.

⁴³ Human Rights Watch *World Report 2010* (Human Rights Watch 2010) 31.

civilian population.⁴⁴ Paust has noted that ‘defining crimes against humanity presented one of the most difficult challenges at Rome, for no accepted definition existed, either as a matter of treaty or customary international law.’⁴⁵ According to Gaeta, the absence of a definition is understandable as, before this category of crimes came into legal existence, atrocities by state authorities against their own nationals were considered a sovereign matter of no concern to third states.⁴⁶ In fact crimes against humanity were unheard of prior to the two World Wars. In order to extend the protection that the laws of war reserve to persons affected by an armed conflict, therefore, it became necessary to criminalise atrocities committed by a State against its own nationals.⁴⁷ Crimes against humanity were, therefore, linked to the situation of war that prevailed.⁴⁸ The prevailing situation of crimes against humanity will often involve the havoc of civil strife,⁴⁹ though of key importance is that the Rome Statute of the ICC⁵⁰ indicates that such crimes may occur in peacetime since the *chapeau* element⁵¹ does not

⁴⁴ Human Rights Watch *World Report 2010* (Human Rights Watch 2010) 31.

⁴⁵ Paust JJ *et al. International Criminal Law: Cases and Materials* (Carolina Academic Press Durham 2007) No. 767.

⁴⁶ Gaeta P ‘International Criminalisation of Prohibited Conduct’ in Cassese A (ed) *The Oxford Companion to International Criminal Justice* (OUP New York 2009) 63-73, 66.

⁴⁷ Akhavan P ‘Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence’ 2008 (6) *Journal of International Criminal Justice* 21-37; Ratner SR, Abrams JS & Bischoff JL *Accountability for Human Rights Atrocities in International Law* 2^d ed. (OUP Oxford 2001) 10.

⁴⁸ *Ibid.*

⁴⁹ Osiel M *Making Sense of Mass Atrocity* (Cambridge University Press New York 2009) vii.

⁵⁰ *Rome Statute of the International Criminal Court 17 July 1998* (Entry into force 2 July 2002) - 2187 U.N.T.S. 38544.

⁵¹ By *chapeau element* must be understood a specific requirement that must be met or otherwise it must be considered that the crimes are not proved. The concept ‘chapeau’ is widely used in international law, especially international criminal law, even when applied by domestic courts. With respect to war crimes in the Rome Statute (Article 8), it means all war crimes do not fall within the jurisdiction of the ICC, which deals only with the gravest of those crimes. Some other crimes, therefore, that exist in customary international law or those of Geneva Conventions not incorporated in the Rome Statute are still war crimes but not of ICC competence. For general and other use of the concept ‘chapeau’ in international legal discourse, see Report of the International Law Commission on the work of its forty-eighth session, *Yearbook of the International Law Commission* (UN. Doc. A/CN.4/SER. A/1996/Add. 1 (Part 2)); Stahn C ‘Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court’ 2005 (3) *Journal of International Criminal Justice* 695-720, 713; Jia BB ‘The Doctrine of Command Responsibility in International Law 2004(3) *Chinese JIL* 1-42, 30-31; Akhavan P *op cit* (n 47) 29; Cullen A ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)’ 2008 (12) *Journal of Conflict & Security Law* 419-445, 424 *et passim*; Beruto GL (ed) *International Humanitarian Law Human Rights and Peace Operations, 31st Round Table on Current Problems of International Humanitarian Law Sanremo, 4-6 September 2008* (The International Institute of Humanitarian Law In collaboration with the International Committee of the Red Cross); Cryer R ‘The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision’ 2009 (7) *JICJ* 283-296, 289; Akhavan P ‘The Crime of Genocide in the ICTR Jurisprudence’ 2005(3) *JICJ* 989-1006, 992; Hilderling A ‘International criminal responsibility for abuse of power?’ 2007 (3) *ISYP Journal on Science and World Affairs* 15-28; Darcy S ‘Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?’ 2010(8) *JICJ* 29-51, 46; Huisman W and van Sliedregt E ‘Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity’ 2010(8) *JICJ* 803-828, 808; van den Herik L ‘A Quest for Jurisdiction and an

require a nexus between this category of crimes and an armed conflict.⁵² Article 7 of the Rome Statute of the ICC codified the existing customary law of crimes against humanity. The elements of a crime against humanity are the following:⁵³

- (a) One of the prohibited acts listed in paragraph 1 of the article;
- (b) Committed as part of a widespread or systematic attack;
- (c) Pursuant to or in furtherance of a state or organisational policy⁵⁴;
- (d) Directed against any civilian population; and
- (e) With knowledge of the attack.

It is obvious from the definition of a crime against humanity that this category of crime encompasses acts that are inhumane in nature and character, that cause great suffering or serious injury to body or to mental or physical health.⁵⁵ Such acts are committed as part of a widespread or systematic attack against members of the civilian population, on one or more discriminatory grounds, namely, national, political, ethnic, racial, or religious grounds.⁵⁶ Acts not proven to fulfil such features cannot be considered as crimes against humanity.⁵⁷ Clarifying the term ‘attack’, the ICC Statute refers to the multiple commissions of acts referred to in Article 7(1) of the Statute and stresses the pursuance to a state or organisational policy.⁵⁸ It must, however, be borne in mind that the requirement that the attack must have a widespread or systematic nature does not mean that a crime against humanity cannot be perpetrated by an individual who commits only one or two of the designated acts (murder, extermination, torture, rape, political, racial, or religious persecution, and other inhumane acts), or who engages in only one such offence against only one or a few civilians. What is important to note is that as long as the individual’s act or acts are part of a consistent pattern

Appropriate Definition of Crime Mpambara before the Dutch Courts’ 2009(7) *JICJ* 1117-1132,1123. Article 7 of the Rome Statute of the International Criminal Court lists acts that constitute crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population.

⁵² Paust JJ *et al. International Criminal Law: Cases and Materials* (Carolina Academic Press Durham 2007) No. 767; Quéniwet NNR *Sexual Offenses in Armed Conflict & International Law* (Transnational Publishers New York 2005)113. See also Seibert-Fohr A *Prosecuting Serious Human Rights Violations* (OUP Oxford 2009) 3.

⁵³ Rome Statute -Addendum: *Finalized Draft Text of the Elements of Crimes* (U.N. Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000).

⁵⁴ Article 7 (2) (a) ICC Statute.

⁵⁵ Article 7(1) (k) of the Rome Statute.

⁵⁶ Articles 7(1) (h) of the Rome Statute.

⁵⁷ Du Plessis M & Peté S ‘Who Guards the Guards? The ICC and Serious Crimes Committed by United Nations Peacekeepers in Africa’ 2004 (13) *African Security Review* 5-17, 10.

⁵⁸ Article 7(2) (a).

of offences by a number of persons linked to that offender, he or she may be properly charged with crimes against humanity.⁵⁹

In striving towards understanding whether these crimes can be committed by peacekeepers, and whether their criminal acts can qualify as crimes against humanity, it is important to try to analyse briefly some of the elements mentioned above, especially the *chapeau* element.

For an act to qualify as a crime against humanity, the act must have been committed as part of a widespread or systematic attack.⁶⁰ This means that the conduct targets a multiplicity of victims but also the existence of some kind of preconceived plan or policy by government, an organisation or a group whose members execute the plan or policy.⁶¹ The victim of the crime is understood as a group⁶² – a civilian population independently of the particular members who directly bear the brunt.⁶³ The group becomes the victim of acts flowing from an organised group of perpetrators. When the Rome Statute requires the existence of acts pursuant to, or in furtherance of, a state or organisational policy, it means that, even though executors are individuals, the crime is perpetrated by a collective, by a group (with a State or organisational element).⁶⁴

As has been shown in the study of the alleged crimes by peacekeepers in the domestic law, most of their misconduct consists of sexual crimes, although they may be found guilty of other crimes as well, such as assault or killing. The question is whether these crimes can

⁵⁹ Zwanenburg M 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire' 1999(10) *EJIL* 124-143, 135, footnote 61 where it is pointed out that the investigations against peacekeepers (for instance the investigation into the behaviour of Italian peacekeeping troops in Somalia) routinely underline the isolated nature of peacekeepers' criminal conduct.

⁶⁰ Akhavan P *op cit* (n 47) 24-25.

⁶¹ See commentary on Article 18 of the Draft Code of Crimes against the Peace and Security of Mankind: Report of the International Law Commission on the work of its forty-eighth session (6 May-26 July 1996) *Yearbook of the International Law Commission 1996* vol. II (part two) U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part. 2). In the Rome Statute this contextual element is not insisted upon, certainly to differentiate from genocide and to ensure that not any multiplicity of victims would entail a charge for crime against humanity. Thus, 'Instead of insisting upon a State plan or policy, the contextual element for crimes against humanity comes to depend solely on their "widespread or systematic" nature, but this has the potential to make crimes against humanity applicable to serial killers, mafias, motorcycle gangs, and small terrorist bands.' See Schabas WA 'State Policy as an Element of International Crimes' 2008 (98) *The Journal Of Criminal Law & Criminology* 953-982, 960.

⁶² The notion of group victims should not lead to confusing crimes against humanity with acts of genocide. Whereas the former necessitate a large-scale or systematic pattern, the latter necessitate a special intent to destroy a protected group. See Seibert-Fohr A *Prosecuting Serious Human Rights Violations* (OUP Oxford 2009) 293.

⁶³ Osiel M *op cit* (n 49) 5.

⁶⁴ *Ibid.* 6.

constitute crimes against humanity.⁶⁵ To explain the scope of the widespread and systematic element of the crime, Quénivet writes that for a given act, such as rape, to qualify as a crime against humanity, it should be committed or approved of by the government [or a *de facto* or organisational authority] and be of a mass, widespread and/or systematic nature.⁶⁶ She effectively explains ‘widespread’ to mean criminal acts directed against a multiplicity of victims and ‘systematic’ to mean that the same criminal acts are performed pursuant to a preconceived plan or policy of the state or of the organisation.⁶⁷

The requirement of policy is not an element *per se* of the crime, but highly relevant to establishing the materiality of the crime.⁶⁸ It is evidentially relevant, especially in regard to rape as a crime against humanity.⁶⁹ If rape is perpetrated in a certain context of crimes against humanity, however, for instance ‘ethnic cleansing’ pursuant to a plan or policy, then the requirement is met accordingly in respect of rape.⁷⁰ The lack of such a policy or contextual element may imply that the act is treated as an ‘ordinary’ crime. In the *Akayesu* case it was stressed that this policy must not necessarily be adopted formally as the policy of a state. There must, however, be some kind of preconceived plan or policy.⁷¹ This will obviously not hold true for peacekeepers.

It must be noted, therefore, that crimes committed by peacekeepers can rarely amount to crimes against humanity. Article 7 of the Rome Statute of the International Criminal Court lists the requirements needed to be met for each and every crime against humanity of sexual violence:⁷²

- (1) the perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent;

⁶⁵ Article 7(1) (g) of the ICC St.

⁶⁶ Quénivet NNR *Sexual Offenses in Armed Conflict & International Law* (Transnational Publishers New York 2005) 129.

⁶⁷ *Ibid.*

⁶⁸ *Ibid* 133 and *Prosecutor v. Kunarac, Kovac and Vukovic*, ICTY, A.C., IT-96-23 and IT-96-23/1 (June 12, 2002) para [98].

⁶⁹ *Ibid.*

⁷⁰ Quénivet NNR *Sexual Offenses in Armed Conflict & International Law* (Transnational Publishers New York 2005) 136.

⁷¹ *The Prosecutor v. Jean-Paul Akayesu*, case No. ICTR-96-4-T (2 September 1998) para [580].

⁷² The Rome Statute of the International Criminal Court (17 July 1998, 2187 U.N.T.S. 3).

- (2) Such conduct was of gravity comparable to other offences in article 7(1) (g);
- (3) The perpetrator was aware of the factual circumstances that established the gravity of the conduct;
- (4) The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (5) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The latter element will not be easily be established regarding peacekeepers because, for a conduct to meet such a requirement, a state or organizational involvement must be proved, or it must be established that the individual perpetrator acted in furtherance of a state or organizational policy.⁷³ It is difficult to believe that the UN, as an organization in command of the UN forces, would devise a policy that would allow its forces to commit crimes against humanity. It is actually absurd to imagine that a State may send its troops on a peace mission and instruct them to commit offences, whether such offences amount to crimes against humanity or not.⁷⁴ As was noted with respect to the crime of genocide, therefore, criminal acts by peacekeepers cannot be construed to be crimes against humanity owing to the lack of state or organizational policy.⁷⁵ The last possibility relating to core international crimes which needs to be considered in true context is the category of war crimes.

⁷³ See Elements of the Crimes, Introduction to Article 7 of the Rome Statute, ICC-ASP/1/3; Schabas WA 'State policy as an Element of International Crimes' 2008 (98) *Journal of Criminal Law & Criminology* 953-982, 965. See also O'Brien M *National and International Criminal Jurisdiction over United Nations Peacekeeping Personnel for Gender-Based Crimes Against Women* (unpublished doctoral thesis University of Nottingham, July 2010) 240 *et seq.*; Sweetser C *Ensuring Accountability of Peacekeeping Personnel for Human Rights Violations* (Center for Human Rights and Global Justice Working Paper No. 16) 2007, 6.

⁷⁴ Du Plessis M & Peté S *op cit* (n 35) 11.

⁷⁵ Under the Rome Statute provisions, for peacekeepers to be prosecuted they need to be found 'to have been part of a concerted and organized effort to rape or otherwise sexually abuse the local population with the goal of harming the population as a whole.' See Harrington AR *Victims of Peace: Current Abuse Allegations against U.N. Peacekeepers and the Role of Law in Preventing them in the Future* (The Berkeley Electronic Press Paper 630- 2005) 22, <http://law.bepress.com/expresso/eps/630> [last accessed 26 October 2012]. Even if some allegations have been considered widespread (see Zeid Report *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* (UN. Doc. A/59/710 of 24 March 2005) para 8, therefore, there is not a UN protocol or plan to perpetrate such crimes against the local populations in the mission areas (Harrington AR *op cit* (n 75) 22). For contra argument, see Hyde HJ *United Nations Organization Mission in the Democratic Republic of Congo: A Case for Peacekeeping Reform* (House of Representatives, Subcommittee on Africa Global Human Rights and International Operations- Committee on International Relations Washington DC March 1, 2005) 7: A summary of the report of the OIOS, released this past January, mentioned that interviews with women and girls in the Congo provided descriptions of some of the sexually explicit encounters with peacekeepers, which included sex in exchange for food or small amounts of money. This is terrible. This kind of behaviour is deplorable and morally reprehensible for the very people who are supposed to protect civilians – particularly women and children, the most vulnerable among us – actually to actually their responsibilities and become the actual perpetrators of crimes against humanity itself.

4.2.1.3 War crimes

A war crime is defined as ‘any act constituting a violation of the laws and customs of war, that is, any violation of International Humanitarian Law.’⁷⁶ Serious violations of international humanitarian law such as firing at civilians, torturing unarmed persons, raping defenceless women, and pillaging houses ... do not need to be part of any organizational policy or be committed to a widespread degree to qualify as war crimes.⁷⁷

Simply put, a war crime is any act constituting a violation of the laws and customs of war, which is any violation of International Humanitarian Law.⁷⁸ This law is found in the Hague Convention (IV) and in the Geneva Conventions and their additional protocols. Both bodies of law (The Hague and Geneva Conventions) have been re-enacted in the Rome Statute of the ICC.⁷⁹ Article 8(2) of the Rome Statute gives the meaning of ‘war crimes’ by listing acts constituting such crimes whether pertaining to international armed conflict or to non-international armed conflict. In the latter form of armed conflict, the Statute excludes certain internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature.

⁷⁶ Article 6(b) of the Nuremberg Charter; Article 5(2) (b) of the Tokyo Charter. See Cassese A ‘The Italian Court of Cassation Misapprehends the Notion of War Crimes: The Lozano Case’ 2008 (6) *Journal of International Criminal Justice* 1077-1089, 1085.

⁷⁷ Cassese A ‘The Italian Court of Cassation Misapprehends the Notion of War Crimes: The Lozano Case’ 2008(6) *Journal of International Criminal Justice* 1077-1089,1089; Karagiannakis M and Shemberg A *Complicité des entreprises et Responsabilité juridique volume2: Droit pénal et crimes internationaux : Un rapport de la Commission internationale de juristes Comité d’experts juridiques sur la complicité des entreprises dans les crimes internationaux* (Commission internationale de juristes Genève 2010) 4.

⁷⁸ Damgaard C *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer Berlin 2008) 65.

⁷⁹ Hague Convention (IV) - Respecting the Laws and Customs of War on Land with its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999. ; No. 970 - Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949; No. 971 - Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949; No. 972 - Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949; No. 973 - Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. These four Geneva Convention came into force on 21 October 1950, six months after the deposit with the Swiss Federal Council of the second instrument of Ratification; No. 17512 - Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (with annexes, Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session). Adopted at Geneva on 8 June 1977; No. 17513 - Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (with the Final Act of the Diplomatic Conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts dated 10 June 1977 and resolutions adopted at the fourth session 1)- Adopted at Geneva on 8 June 1977.

War crimes include grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in international armed conflict. This also includes serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or for any other cause.⁸⁰ It is clear, therefore, that those victims of criminal acts committed by peacekeepers fall under the category of persons taking no part in the hostilities, whether the armed conflict is considered international or non-international.

An international armed conflict opposes ‘High Contracting Parties’, i.e. States.⁸¹ It is in this perspective that Byron writes that an international conflict is the one that takes place between two States.⁸² He also observes that ‘a conflict taking place on the territory of one State may be internationalized by the intervention of the military forces of a second State’ or by the fact that some of the participants in an internal armed conflict act on behalf of another (second) State.⁸³ The Commentary of the Geneva Conventions confirms that ‘any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.’⁸⁴ It makes no difference how long the conflict lasts, or how much slaughter takes place.⁸⁵ Of crucial importance is that an international organisation which is not, and cannot become, party to the Geneva Conventions cannot be considered as a party to an international armed conflict although its armed forces may be engaged in hostilities against one of the ‘High Contracting Parties’.⁸⁶ This is why it is sometimes considered difficult to qualify an armed conflict in which the UN forces have become involved as an international armed conflict. As Kolb and Vité have noted, a UN force is by its nature an international force bound by rules relating to

⁸⁰ Article 8 of the Rome Statute.

⁸¹ Article 2 GC.

⁸² Byron C *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court* (Manchester University Press Manchester 2009) 17.

⁸³ *Ibid.*

⁸⁴ Pictet J *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC Geneva 1952) 32 quoted by ICRC *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (International Committee of the Red Cross Opinion Paper March 2008) 2.

⁸⁵ *Ibid.*

⁸⁶ See ‘Memorandum to the Under Secretary-General for Special Political Affairs’ *United Nations Yearbook*, 1972, 153-154.

the conduct of an armed conflict.⁸⁷ Furthermore, even if the UN as such cannot become party to the Geneva Convention, only armed forces of State members of the organisation, parties to the Geneva Conventions or capable of becoming parties thereto, are visible in the field and actively engaged in the armed conflict as combatant.⁸⁸ They are involved in the conflict through an organisation; they cannot deny their obligations to observe the laws of war.⁸⁹ The latter body of law provides for rules which must be observed by individuals involved in the hostilities. Criminal responsibility for failure to abide by the said law may be incurred by anybody considered a combatant.⁹⁰ The State of nationality of a combatant, who has infringed the rules to be observed in the conduct of war, as well as an organisation such the UN, can incur international civil liability.⁹¹ Indeed, the UN has paid damages in the past, pursuant to its international civil liability.⁹²

War criminal acts that may occur in an international armed conflict are listed by Articles 147 Geneva Convention IV and 85 Additional Protocol I. These articles deal with the so-called ‘grave breaches’. All grave breaches are synonymous with war crimes. Article 147 refers to Article 146 which evokes Article 2 defining an international armed conflict. It reads:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial

⁸⁷ Kolb R et Vité S *Le droit de l'occupation Militaire : Perspectives historiques et enjeux juridiques actuels* (Bruylant Bruxelles 2009) 99-100; Kolb R ‘Applicability of international humanitarian law to forces under the command of an international organization’ in Faite A and Labbé Grenier J (eds) *Report Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces, Geneva, 11-12 December 2003* (ICRC Geneva 2004) 61-69.

⁸⁸ *Ibid.*

⁸⁹ Article 2(2) of the Convention on the Safety of United Nations and Associated Personnel (New York 9 December 1994) clearly mentions that UN forces can be considered as combatant under chapter VII of the UN Charter Operations.

⁹⁰ The presence of an international force should internationalise the conflict, but because of the fact that the force acts as facilitating the solution of the conflict, it is difficult to consider it as party to such armed conflict. Whenever engaged as combatants, the conflict is international.

⁹¹ Zwanenburg MC *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers Leiden 2005) 229. Regarding conduct of Belgian troops in Somali and the prejudice caused to civilian population, a sum of US\$ 2,800,000.00 was paid by the UN, after consultation with the Belgian Ministry of Defence.

⁹² Payment to Belgian nationals for prejudice incurred during ONUC in the 1960s. It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. See Zwanenburg MC *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Thesis Leiden 2004) 87.

prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Article 85 insists on the repression of breaches of the protocol and tells when acts violating the Geneva Convention and its Additional Protocol 1 are considered to be grave breaches. A grave breach occurs when a violation of the laws and customs of war is committed against protected persons: combatants who are prisoners of war,⁹³ refugees, and stateless persons.⁹⁴ Grave breaches also include crimes against the wounded, sick, and shipwrecked of the adversary power, or against those medical or religious personnel, medical units, or medical transports which are under the control of the adverse Party and are protected by this Protocol.⁹⁵ They further include six listed wilful acts against civilians or damage to civilian objects, against persons *hors de combat*, undefended zones or perfidious use of the Red Cross emblem.⁹⁶

During a civil war or armed conflict not of an international character, violations of laws and customs of war considered as crimes are essentially violations of common article 3 to the Geneva Convention. This article reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, 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;

(b) taking of hostages;

⁹³ Articles 44-45 GC IV. Spies and mercenaries are not protected persons nor prisoners of war: Articles 46, 47 GC AP I

⁹⁴ Article 73 GC AP I.

⁹⁵ Article 85 GC AP I.

⁹⁶ *Ibid.*

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Although the UN as such cannot be a party to the conflict, its forces may be engaged as combatants. States contributing such forces must ensure that the law of armed forces is observed by their troops.⁹⁷ By parties to an armed conflict it must be understood to refer to two States where the conflict is of international character, one State waging war against an armed group⁹⁸ and vice-versa.⁹⁹ The individuals participating directly in hostilities and who belong to one party to the armed conflict are considered combatants.¹⁰⁰ They enjoy combatant privilege, i.e. an excuse for engaging in hostilities which could otherwise be considered violations of domestic criminal law of the country where hostilities are being conducted.¹⁰¹ Acts of murder or assault by a combatant against an enemy combatant does not constitute a crime where such an act is actually connected to the armed conflict, and the victim was not yet placed *hors de combat*.¹⁰² These same acts of murder, assault, or anything else in violation

⁹⁷ See 'Memorandum to the Under Secretary-General for Special Political Affairs' *United Nations Yearbook* (1972) 153-154.

⁹⁸ State parties to Geneva Conventions and its Additional Protocols are bound by the law of conducting hostilities. When waging war against a non-party to the Geneva, a State still has to observe such law. See Article 2 common to the four 1949 Geneva Conventions.

⁹⁹ The armed group which is not a State as such may be considered to be a power not party to the Geneva Conventions. See Article 2 common to the four 1949 Geneva Conventions.

¹⁰⁰ A combatant is a person who engages in hostile acts in an armed conflict on behalf of a party to the conflict. He may be lawfully targeted and murdered by the enemy without such an act constituting a war crime. See Bialke J 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict' 2001 (50) *Air Force Law Review* 1-63, 21.

¹⁰¹ Worster WT 'Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement' 2008 (47) *Military Law and the Law of War Review* 277-376, 310.

¹⁰² Bialke J 'United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict' 2001 (50) *Air Force Law Review* 1-63, 21. In an international armed conflict, an "enemy combatant" is not a criminal *per se*, even if that person has killed soldiers during the war. When he is captured, the only point

of the law applicable to the conduct of armed conflict, perpetrated by a combatant against persons no longer taking part in hostilities, however, constitute war crimes. The crucial issue may be whether peacekeepers¹⁰³ are considered combatants, i.e. members of a party to an armed conflict, to be able to account for war crimes.¹⁰⁴ The conclusion is affirmative in that international humanitarian law applies to peace operations whenever peacekeepers are engaged as combatants.¹⁰⁵

Combatants are members of armed forces who have the right to participate directly in hostilities.¹⁰⁶ Even if article 2(1) of the Geneva Conventions of 1949 refers specifically to international conflict between two States as an international armed conflict, where the UN forces are engaged as combatants they are under an obligation to observe the law applicable to an international armed conflict.¹⁰⁷ Since they operate under the responsible command of the organisation, they use the fixed and distinctly recognisable emblem of the UN and are called 'blue helmets', they carry their arms openly, they meet the requirements of the 1907 Hague Regulations providing for the laws, rights, and duties of war applicable to 'armies' and to 'militia and volunteers corps.'¹⁰⁸ They have to comply with the laws and customs of war.¹⁰⁹ Peacekeepers are, thus, under the obligation to observe the laws and customs of armed conflict, and, where they violate the prescribed laws, they commit a prosecutable war crime.

of his "prisoner of war" status is simply to keep him away from the conflict and from helping his own country; capturing him/her is not meant to "punish" him. In non international armed conflict, a combatant who is a member of a rebel group is not entitled to the status of prisoner of war. See Saura J 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' 2006-2007 (58) *Hastings Law Journal* 479-531, 492.

¹⁰³ In peace operations, UN forces have been involved in fighting against rebels. For instance MONUC forces supported the DRC government against rebels. See Saura J 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' 2006-2007(58) *Hastings Law Journal* 479-531, 483.

¹⁰⁴ Violations of Article 3 common to the Geneva Conventions (threshold of protection afforded to non combatants) constitute war crimes. Peacekeepers can be suspected of such crimes. See Saura J *op cit* (n 102) 486 with reference to paragraph 47 of the Model SOFA. The presence of peacekeepers in an armed conflict, even if helping governmental forces against rebels, internationalises the conflict. See Article 2(2) of the *Convention on the Safety of United Nations and Associated Personnel*; Porretto G & Vité S 'The Application of International Humanitarian Law and Human Rights Law to International Organizations' 2006 (1) *Research Paper Series/Collection des travaux de recherche* (CUDH/UCHL 2006)1-105,33-34.

¹⁰⁵ *Convention on the Safety of United Nations and Associated Personnel* (UN GA res. 49/59 of 9 December 1994, 49 U.N. GAOR Supp. No. 49 U.N. Doc. A/49/49 (entered into force 15 January 1999)). Article 2(2) reads: 'This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as *combatants against organized armed forces* and to which the *law of international armed conflict applies*'.

¹⁰⁶ Article 43 GC AP I.

¹⁰⁷ Rowe P 'Maintaining Discipline in United Nations Peace Support Operations: The Legal Quagmire for Military Contingents' 2000(5) *Journal of Conflict and Security Law* 45-62.

¹⁰⁸ Melzer N *Targeted Killing in International Law* (Oxford Monographs in International Law 2008) 304.

¹⁰⁹ *Ibid.*

Section 1 of the Secretary-General's Bulletin uses the concept of 'combatants.'¹¹⁰ It states that the fundamental principles and rules of International Humanitarian Law set out in the Bulletin are applicable to the UN forces whenever, in situations of armed conflict, they are actively engaged therein as 'combatants' to the extent and for the duration of their engagement. The said rules accordingly apply in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence.

Individuals not directly fulfilling the conditions of a combatant can be held responsible for war crimes if they are persons who, by virtue of their authority, are responsible for the outbreak of hostilities. Public officials, administrators, and agents or persons legitimately mandated or otherwise holding public authority, or *de facto* representing the Government to support or fulfil the efforts of war, are, therefore, considered as perpetrators of war crimes.¹¹¹

The conduct of peacekeepers, such as rape and assault, may therefore fall within the ambit of the war crimes. This forms the conduct of inflicting great suffering, serious injury to the body or to the health of victim. Health cannot be construed as physical, but also as includes psychological aspects. Indeed, whereas murder and assault are criminal acts of violence to life and to the person, rape constitutes a humiliating and degrading treatment imposed on the victim.¹¹²

Regarding peacekeepers, their criminal acts of rape, even if not part of a government policy or the furtherance of any state business, should not be excused on the ground of being criminal activities of a few rogue officers or "bad apples".¹¹³ Under international law, the state has

¹¹⁰ UN Doc. ST/SGB/1999/13 of 6 August 1999.

¹¹¹ *The Prosecutor v. Jean-Paul Akayesu* paras [630- 631].

¹¹² Pearce H 'An Examination of the International Understanding of Rape and the Significance of Labeling it Torture' 2003 (14) *International Journal of Refugee Law* 534 referred to by Edwards A 'The 'Feminizing' of Torture under International Human Rights Law' 2006 (19) *Leiden Journal of International Law* 349-391, 351.

¹¹³ Horn B (ed) *From the Outside Looking In: Media and Defence Analyst Perspectives on Canadian Military Leadership* (Canadian Defence Academy Press Kingston 2005) 134; Razack S 'From the "Clean Snows of Petawawa": The Violence of Canadian Peacekeepers in Somalia' 2000 (15) *Cultural Anthropology* 127-163, 158; Sepinwall AJ 'Failures to Punish: Command Responsibility in Domestic and International Law' 2009 (30) *Michigan Journal of International Law* 251-303; Gallagher K 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture' 2009 (7) *Journal of International Criminal Justice* 1087-1116, 1097. In, for instance, the case of *Aydin v. Turkey*, the plaintiff, a Kurdish girl, was tortured and raped by security forces. See *Aydin v. Turkey* 1997-VI Eur. Ct. H.R. 1866, 25 Eur. H.R. Rep. 251 (1997). The European Court of Human Rights held that the state was responsible for the violation of article 3 of the European Charter on Human Rights (para 87). In this case, rape in detention by state officials was described as being an especially grave and abhorrent form of ill-treatment, causing deep psychological scars (para 83). The accumulation of physical and mental violence suffered and 'the especially cruel act of rape to which she was subjected' constituted torture (paras 84, 86).

responsibility for its officials, even when they act in violation of their prescribed roles and orders.¹¹⁴ Indeed, peacekeepers outside their country have to be considered their State's representatives at all times.

Violations of common article 3 of the four Geneva Conventions constitute war crimes, but are not grave breaches. A war crime is prosecutable, however, whether it constitutes a grave breach of the laws and customs of war or another breach.¹¹⁵ The ICC Statute in its Article 8 distinguishes between 'grave breaches of the Geneva Convention of 12 August 1949'¹¹⁶ and 'other serious violations of the laws and customs applicable in international armed conflict...'¹¹⁷ Concerning non-international armed conflict, the ICC Statute presents four instances of violations of article 3, common to the four Geneva Conventions,¹¹⁸ which constitute obviously grave breaches, and 12 instances of 'other serious violations of the laws and customs applicable in armed conflict not of an international character within the framework of international law ...'¹¹⁹

For a person to commit grave breaches to the Geneva Conventions during an armed conflict, she or he must have some specific features. He or she must be a person susceptible of violating the laws and customs of war and be a combatant. Indeed, for a combatant to be prosecuted as having violated the law of armed conflict, such an individual must have belonged to the armed forces of a party to the conflict as provided for in Article 43 of the Additional Protocol I to the Geneva Conventions which gives the characteristics of a combatant:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

¹¹⁴ Edwards A 'The 'Feminizing' of Torture under International Human Rights Law' 2006 (19) *Leiden Journal of International Law* 349-391, 365.

¹¹⁵ Article 1 of GC AP I; Ambos K 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C. H. Beck Oxford 2008) 743-770, referring to the Tadic case of the ICTY in respect to violations of Common Article 3 to the four Geneva Conventions.

¹¹⁶ Article 8(2) (a).

¹¹⁷ Article 8(2) (b).

¹¹⁸ Article 8(2) (c).

¹¹⁹ Article 8(2) (2).

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict

Members of a party to an armed conflict, combatants, or others in another capacity may commit war crimes.¹²⁰ Thus, Ruzindana, who was neither an administrative official nor a member of the army, police, or gendarmerie,¹²¹ was indicted for having violated Common Article 3 of the Geneva Convention.¹²² If X kills his neighbour Y because of an old dispute over a farm strip¹²³, however, X may be convicted of murder but not of the war crime of wilful killing even if the murder took place during a time of armed conflict, since X and Y were not taking part in the hostilities and did not belong to any of the opposing parties in the armed conflict nor was such a murder connected to the armed conflict.¹²⁴

It could be argued, therefore, that individuals who do not take part in a conflict cannot be prosecuted for war crimes, save where such individuals belong to one party to the armed conflict and their conduct was connected to the said armed conflict.¹²⁵ Even though the United Nations as an organisation is not a party to the Geneva law,¹²⁶ the law of armed conflicts applies to its peace operations.¹²⁷ State members of the United Nations and their different

¹²⁰ The expression ‘Members of a party to an armed conflict’ does not mean combatants. Officials in civilian territorial administration may adopt conduct that amounts to a war crime. See *Prosecutor v. Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T (21-05-1999) para [22].

¹²¹ Obed Ruzindana was a commercial trader in Rwanda during the time period in which the crimes alleged in the indictment occurred.

¹²² Count 23 of the indictment.

¹²³ Innocent people can be imprisoned, for instance for being involved in a land dispute. See Hintjens H ‘Post-Genocide Identity Politics in Rwanda’ 2008 (8) *Ethnicities* - Institute of Social Studies 5-41, 17.

¹²⁴ Cassese A ‘The Italian Court of Cassation Misapprehends the Notion of War Crimes: The Lozano Case’ 2008 (6) *Journal of International Criminal Justice* 1077-1089, 1082, 1086 *et seq.*

¹²⁵ In most military manuals Geneva Conventions have been incorporated into the national law in order to apply to service members of those individuals subject to military law. Military members and persons bound by military law are, therefore, aware of the laws and customs applicable to armed conflict. See Davidson MJ *A Guide to Military Criminal Law* (Naval Institute Press Annapolis 1999) 138.

¹²⁶ Knoops G-J *Defenses in Contemporary International Criminal Law* (Transnational Publishers Ardsley 2001) 132.

¹²⁷ *Convention on the Safety of United Nations and Associated Personnel* (UN GA res. 49/59 of 9 December 1994, 49 U.N. GAOR Supp. No. 49 U.N. Doc. A/49/49 [entered into force 15 January 1999]). Article 2(2) reads: ‘This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as *combatants against organized armed forces* and to which the *law of international armed conflict applies*’.

armed forces are not exempt from the obligations under the laws and customs of war.¹²⁸ Although, multilateral conventions applicable to the conduct of armed conflicts are established by States, they are primarily addressed to individuals; they provide for individual liability of persons who are involved in the hostilities. The category of persons to be held accountable in this respect would in most cases, therefore, be limited to commanders, combatants, and other members of the armed forces.¹²⁹ Where the UN forces are engaged as combatants, the laws to be observed during times of war will apply to them, with the exception of their medical and religious personnel.¹³⁰ Approached by the International Committee of the Red Cross to become party to the Geneva Conventions by accession, the UN maintained that it was unable to become party to such treaties. It, however, insisted that governments which contribute troops to UN operations have the obligation to ensure their contingents observe the law related to armed conflicts.¹³¹

The aforementioned discussion shows that peacekeepers can commit war crimes where they are engaged as combatants. What is problematic, however, is that an international crime does not necessarily call for prosecution before an international tribunal or court.¹³² Most international conventions indicate that it is the duty of the States to take all measures to prosecute acts criminalised within the treaty.¹³³ To this end, each State party is obliged to enact domestic legislation to empower national courts to deal with such crimes.¹³⁴ Since national criminal jurisdictions can function as ‘organs of the international community’, the integration of international criminal norms in domestic systems is of great importance.¹³⁵

¹²⁸ UN forces can be engaged in a conflict as combatants. See UN Secretary-General Bulletin, *Observance by United Nations Forces of International Humanitarian Law* (U.N. Doc. ST/SGB/1999/13 August 6, 1999); Convention on the Safety of United Nations and Associated Personnel (Dec. 9, 1994, S. Treaty Doc. 107-I, 34 I.L.M. 482 (1995)) (into force January 15, 1999).

¹²⁹ *The Prosecutor v. Jean-Paul Akayesu*, case No. ICTR-96-4-T (2 September 1998) para [630]. The head of State is the supreme commander of the army of that state.

¹³⁰ Melzer N *Targeted Killing in International Law* (Oxford Monographs in International Law Oxford 2008) 309. Medical personnel and chaplains are not considered to be combatants.

¹³¹ UN ‘Memorandum to the Under Secretary-General for Special Political Affairs’ *United Nations Yearbook*, 1972, 153-154.

¹³² Davidson MJ *A Guide to Military Criminal Law* (Naval Institute Press Annapolis 1999) 149.

¹³³ *Ibid.*

¹³⁴ Du Plessis M ‘Bringing the International Criminal Court home: The Implementation of the Rome Statute of the International Criminal Court Act 2002’ 2003(16) *SACJ* 1-16.

¹³⁵ Kleffner J *Complementarity in the Rome Statute and National Criminal Jurisdiction* (Doctoral thesis University of Amsterdam 2007) 29-31 referred to by Kemp G *Individual criminal liability for the international crime of aggression* (unpublished doctoral thesis Stellenbosch University 2008) 173. A State that ratifies international conventions, especially those related to human rights, may directly have provided in its legal system that such international norms are directly applicable at the national level. Thus, the constitutions of some Francophone African countries provide that international treaties apply directly within domestic law. They are monist legal systems. An example of this is article 153 of the Constitution of the DRC. In other states,

Thus, State parties to the Geneva Conventions undertake to respect and to ensure respect for the present Convention in all circumstances.¹³⁶

In an internal bulletin promulgated on 6 August 1999, the Secretary-General outlined the fundamental principles and rules of international humanitarian law that are applicable to United Nations forces conducting operations under UN command and control, and he reminded all personnel that peacekeepers are bound by international humanitarian law.¹³⁷ The crimes presented in the following section, therefore, constitute war crimes¹³⁸ and are punishable according to the provisions of international humanitarian law.¹³⁹

4.3. Alleged specific crimes committed by peacekeepers under international law

4.3.1 Rape, prostitution, and sexual offences involving children

Even though the crime of rape and many other forms of sexual violence were not expressly indicated as grave breaches in the Geneva Conventions or in the Common Article 3 to the four Geneva Convention,¹⁴⁰ there is no doubt that rape and any other forms of sexual violence are prohibited under international humanitarian law.¹⁴¹

Although there are a number of cases where boys have been sexually abused, most of the cases have affected women.¹⁴² The prohibition states that, ‘Women shall be especially

international law is not necessarily part of domestic law. In such a system, it may be necessary to incorporate international law into domestic law, by, for example, a domestic legislative act. Such systems are said to apply the dualist theory. In South Africa, for example, the dualist approach is followed when it comes to the incorporation of international instruments as treaties were negotiated, signed, ratified and acceded to by the executive. According to section 231 of the 1996 Constitution, parliamentary ratification of treaties is required.

¹³⁶ Article 1 is common to all the four Geneva Conventions of 1949. Ensuring respect for a given law should imply prosecution of its violations. See the function of intimidation and prevention recognised to criminal sanctions.

¹³⁷ Secretary-General’s Bulletin: *Observance by United Nations Forces of International Humanitarian Law* - United Nations ST/SGB/1999/13 Of 6 August 1999; Kolb R and Vité S *Le droit de l’occupation militaire : perspectives historiques et enjeux juridiques actuels* (Bruylant Bruxelles 2009) 100.

¹³⁸ War crimes consist of violations of international humanitarian law and constitute one category of international core crimes. See supra 4.2.1.3.

¹³⁹ Every alleged crime will be covered by invoking the applicable provisions, where possible.

¹⁴⁰ Rape is the most commonly committed act of sexual violence, which strikes at the very core of human dignity and physical integrity. It is not considered as a grave breach under Geneva law. See Sellers PV ‘The Cultural Value of Sexual Violence’ 1999 *American Society of International Law (ASIL)* 312-324, 322-3224.

¹⁴¹ For instance, in the seventeenth century Sweden humanitarian rules made rape a war crime. Seven of the 150 *Articles of War* decreed in 1621 by the King Gustavus II Adolphus of Sweden provided that the rape of women was punishable by death. see Beigbeder Y *Judging War Criminals: The Politics of International Justice* (MacMillan Press London 1999) 5. Article 44 of the Lieber Code (promulgated in 1863) punished rape as war crime with death penalty. See Bill BJ (ed) *Law of War Deskbook* (General Legal Centre and School Charlottesville January 2010) 93.

¹⁴² This refers to the alleged rape and murder of a 13-year-old Somali boy by an Italian army major inside the former Italian Embassy in Mogadishu in March 1994 – see Amnesty International, ‘Italy...’ *op cit* ; for instance,

protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.’¹⁴³ Despite the existence of this prohibition, instances of rape and gang-rape, and beating women victims to semi-consciousness, have been reported regarding the UN mission of peace to Somalia. These allegations, if confirmed, constitute violations of the laws and customs of war as indicated at the beginning of this paragraph. Pornography involving children may also be considered as falling under the same provisions. The case of Didier Bourguet which involved the possession of pornographic material showing the perpetrator having sex with the victims constitutes an example.¹⁴⁴

Though no specific provision in the law of conducting armed conflicts uses the term ‘pornography’, this conduct may be construed as fitting those provisions proscribing cruel treatment, outrages upon personal dignity, humiliating and degrading treatment, and serious injury to health.¹⁴⁵ The involvement of children in the production of pornographic material complies with the prohibition. The provisions invoked above and below, therefore, apply *mutatis mutandis* here.¹⁴⁶ The pornographic acts of Bourguet, however, should also be treated as rape.¹⁴⁷

What is important to note is that the Rome Statute has codified the crime of rape as a war crime when committed in connection with, and in the context of, war. Such rape is defined in neutral terms with reference to victims as well as to perpetrators.¹⁴⁸ The formulation of the provision encompasses the traditional elements of the crime of rape and adds a contextual element and awareness of the circumstances establishing the context of armed conflict. Consent, however, is not expressly mentioned in the provision. The Elements of the Crimes¹⁴⁹ under the jurisdiction of the ICC allude to the lack of consent by giving the circumstances

in a recent case, a South African colonel in Goma was allegedly found to have sexually molested his young male interpreter, see Plessis M & Pete S ‘Who Guards the Guards? The ICC and serious crimes committed by United Nations peacekeepers in Africa’ 2004 (13) *African Security Review* 5-17, 8. See also Chinkin C ‘Rape and Sexual Abuse of Women in International Law’ 1994 (5) *European Journal of International Law (EJIL)* 326-341.

¹⁴³ Art. 27 (2) of GC IV, Art. 76 (1) of AP I, Article 4 (2) (e) of AP II and Art. 75 (2) (b) of AP I.

¹⁴⁴ Amnesty International *Fin de l’impunité pour un ancien employé de l’ONU violeur d’enfants* (Amnesty International n°. 10 La lettre de la Commission Enfants, Sept./Octobre 2008) Public SF 08-ENF 29.

¹⁴⁵ Article 3 GC I, II, III and IV; MacKinnon CA ‘Women’s September 11th: Rethinking the International Law of Conflict’ 2006 (47) *Harvard International Law Journal* 1-31, 8.

¹⁴⁶ Art. 50/ 51/130/147 of GC I-IV respectively and Common Article 3 (1)(a) & (c) of GC I-IV.

¹⁴⁷ Sex with persons who cannot consciously consent is rape. Askin KD ‘Gender Crimes Jurisprudence in the ICTR: Positive Developments’ 2005 (3) *Journal of International Criminal Justice* 1007-1018, 1009.

¹⁴⁸ Article 8(2) (b)(xxii) of the Rome Statute.

¹⁴⁹ Rome Statute: The Elements of Crimes, available at www.acicc.org/part_ii_b_e.pdf [last accessed 30 November 2012]. {Hereinafter Rome Statute - Elements of Crimes}.

under which the war crime of rape must be perpetrated.¹⁵⁰ Indeed, under the Rome Statute the elements of the crimes of rape are found at Article 8 (2) (b) (xxii)-1 of the Elements of the Crimes which reads as following:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁵¹

Since allegations of rape by peacekeepers may fall¹⁵² under the war crime provisions of the Rome Statute, the possible defence a perpetrator can assert would consist of a reasonable belief that the victim consented.¹⁵³ Such a defence, if not rejected by the court, negates the *mens rea* element of rape. The other defence to a charge of rape is that of a mental disease or defect.¹⁵⁴ If ‘the person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control

¹⁵⁰ Consent is not considered a ground of justification to a charge of rape under international law, but its absence forms part of the definitional elements of the crime which must be established by the prosecution. See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* - Case No.: IT-96-23-T & IT-96-23/1-T, 22 February 2001, paras 461-464. See also Fitzgerald K ‘Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law’ 1997(8) *EJIL* 638-663, 640.

¹⁵¹ Article 8 (2) (b) (xxii)-1, Rome Statute-Elements of Crimes.

¹⁵² Secretary-General’s Bulletin *Observance by United Nations Forces of International Humanitarian Law* (U.N. Doc. ST/SGB/1999/13 of 6 August 1999). The Bulletin applies to ‘United Nations forces when in situations of armed conflict they are actively engaged therein as combatants.’ Both enforcement operations and peacekeeping operations with the possibility of the use of force for self-defence are field of application. See para 1.1.

¹⁵³ ‘...sexual activity with children (persons under 18) is prohibited regardless of the local age of majority or consent, and that mistaken belief in the age of the child is not a defence.’ See section 3.2 of the Secretary-General’s Bulletin *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* (U.N. Doc. ST/SGB/2003/13 of 9 October 2003). See also the UN OIOS report on DRC (U.N. A/59/661 of 5 January 2005) para 19.

¹⁵⁴ A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. See Fingarette H ‘The Concept of Mental Disease in Criminal Law Insanity Tests’ 1966 (33) *The University of Chicago Law Review* 229-248, 231.

his or her conduct to conform to the requirements of law', such a person is not criminally responsible.¹⁵⁵

4.3.2 Murder

Many provisions of the Geneva Conventions proscribe any violation of the individual right to life.¹⁵⁶ There have been allegations that, during the UN peacekeeping mission to Somalia, Canadian, Belgian, Italian soldiers and other peacekeepers committed acts of murder¹⁵⁷ by directly firing at civilians,¹⁵⁸ by throwing children and other civilians into a river or into the sea, and allegations of instances of murder by suffocation or by any other means.¹⁵⁹ It is important to enquire whether such conduct falls under the Geneva Convention on war crimes, and, furthermore, to establish whether the case of murder of a Burundian teenager also falls under the provisions relative to grave breaches or under article 3 common to the four Geneva Conventions.

Persons not involved in military operations, especially civilians, must be afforded humane treatment in all circumstances with regard to their status as victims of war.¹⁶⁰ Acts of violence to life, for instance murder of all kinds, are prohibited in all circumstances against such persons.¹⁶¹ Persons engaged in the hostilities as combatants are under an obligation to observe this rule relative to the treatment of civilians. Peacekeepers, in enforcement operations and peacekeeping operations in which the use of force is allowed by the UN Security Resolution establishing the force, are considered combatants, i.e. under the obligation of observing international humanitarian law, including the rule on treatment of civilians.¹⁶² Instances of murder as aforementioned violate rules of international humanitarian law. They constitute war

¹⁵⁵ Article 31(1) (a) Rome Statute.

¹⁵⁶ Articles 50/ 51/130/147 of GC I-IV respectively, and Common Article 3 (1)(a) of GC I-IV.

¹⁵⁷ Amnesty International *Belgium-Alleged Human Rights Violations by Members of the Armed Forces in Somalia* (OSCE Human Dimension Implementation Meeting Warsaw November 1997): Human Rights Are an Essential Component of European Security *Amnesty International September 1997*, 16.

¹⁵⁸ De Waal A 'US War Crimes in Somalia' 1998 (30) *New Left Review* 131-144, 136-137. On 6 April 1993, Gunnery Sergeant Harry Conde was convicted of using excessive force in an incident where he shot and killed a Somali youth who tried to steal his sunglasses.

¹⁵⁹ Amnesty International *Italy: A briefing for the UN Committee against Torture* (Amnesty International May 1999 AI Index: EUR 30/02/99); de Waal A 'US War Crimes in Somalia' 1998 (30) *New Left Review* 131-144, 137.

¹⁶⁰ Article 3 common to the four Geneva Conventions.

¹⁶¹ *Ibid.*

¹⁶² Ss. 1.1 and 7.1 of the Secretary-General Bulletin on the *Observance by United Nations forces of international humanitarian law* (UN. Doc. ST/SGB/1999/13 of 6 August 1999).

crimes of murder whenever committed by members of armed forces of the parties to an armed conflict, or by peacekeepers engaged as combatants.¹⁶³

4.3.3 Causing serious injury to body or health: torture and assaults

Since the High Contracting Parties to the four Geneva Conventions undertake to respect and to ensure respect in all circumstances,¹⁶⁴ incidents such as assaults on hospital staff¹⁶⁵ by peacekeepers would constitute a violation of the said Conventions with regard to the obligation to ensure respect and protection *vis-à-vis* persons engaged in the operation and administration of civilian hospitals.¹⁶⁶ Medical personnel in civilian hospitals, as well as civilians not taking part in hostilities, are protected persons. The assaults on medical personnel, therefore, and assaults inflicted on three Somali men, including Abdullhai Sheik Abdulkadir,¹⁶⁷ may constitute violations of the law and customs of war and amount to torture or cruel treatment if all the requirements for these crimes are present.¹⁶⁸

Articles 50, 51, 130 and 147 of the Geneva Conventions I-IV respectively and article 4 (2) (a) of Additional Protocol II to these Conventions have provided that torture and outrages upon personal dignity are war crimes whenever such acts are inflicted against protected persons. The war crime of torture, however, must have a connection with an armed conflict and be inflicted by a public official or at his/her instigation or with the consent of such public official. Where such official capacity of the torturer cannot be established, the act constitutes isolated conduct that amounts to assault.

For a person to be prosecuted for having performed acts of torture, the following four elements have to be present:¹⁶⁹

- (1) Inflicting severe pain or suffering which may be physical or mental;
- (2) A person (human being);

¹⁶³ The nature of the armed conflict in which peacekeepers are engaged does not matter since article 3, common to Geneva Conventions, applies in both international and internal armed conflict. See Cassese A *International Criminal Law* 2nd ed (Oxford University Press New York 2008) 86.

¹⁶⁴ Article 1 GC IV.

¹⁶⁵ De Waal A 'US War Crimes in Somalia' 1998 (30) *New Left Review* 131-144, 138.

¹⁶⁶ Articles 20 (1) and (2) of GC IV, Articles 15 (1) and (5) of AP I and Article 9 (1) of AP II.

¹⁶⁷ TV footage corroborates the occurrence of the incidents. See Amnesty International *Italy: A briefing for the UN Committee against Torture* (Amnesty International May 1999 AI Index: EUR 30/02/99).

¹⁶⁸ *Supra* 2.2.1.

¹⁶⁹ Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984)) (hereinafter CAT).

- (3) The purposes of such conduct; obtaining from the victim or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind;
- (4) The instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Whenever the third element enumerated is lacking, the crime that has to be prosecuted is that of inflicting cruel or inhuman treatment.¹⁷⁰ Indeed this crime consists of acts which cause serious mental pain or suffering, or which constitute a serious outrage upon individual dignity.¹⁷¹ Cruel or inhuman treatment distinguishes itself from torture by the absence of the purpose of obtaining information or confession.¹⁷² It is important to mention that peace-keepers can inflict cruel and inhuman treatment in that they perform such an act in a situation that cannot be linked to their official presence in the host country. For example, when the perpetrators were in plain clothes without any insignia linking them to the mission of peace, they must be considered as not acting in official capacity.¹⁷³

Generally torture occurs when the victim is in detention or in instances of deprivation of liberty. There may, however, be situations, as the ICRC has indicated, where people are not actually deprived of their liberty but the conduct of officials amounts to a certain form of conduct that could be considered as constituting an outrage upon the dignity of the person, as an act of torture.¹⁷⁴ Thus, any kind of discrimination, limitation to access to medical care, illegal destruction of homes, and sexual assault committed in connection with military or

¹⁷⁰ ICRC 'International Committee of the Red Cross policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty, Policy adopted by the Assembly Council of the ICRC on 9 June 2011' 2011 (93) *International Review of the Red Cross* 5547-562, 548.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Fletcher GP 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' 2002 (111) *The Yale Law Journal* 1499-1573, 1521. The acts of a state officer within the ambit of his personal pursuits are not acts which may trigger that state's liability; they remain personal.

¹⁷⁴ ICRC 'International Committee of the Red Cross policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty, Policy adopted by the Assembly Council of the ICRC on 9 June 2011' 2011 (93) *International Review of the Red Cross* 5547-562, 549.

police operations¹⁷⁵ may be described as cruel, inhuman or degrading treatment, or even as torture.¹⁷⁶ There cannot be a situation where these acts can be tolerated.¹⁷⁷

Torture is prohibited and criminalized by the laws and customs of war.¹⁷⁸ Peacekeepers deployed in Somali in the 1990s and who are alleged to have electrically shocked a detained Somali man,¹⁷⁹ to have tortured a garage proprietor to the point of his becoming blind in one eye, and other reported instances such as hooding and tying people to a lorry to drag them along the ground and other similar treatments of Somali civilians should, therefore, qualify as acts of torture.¹⁸⁰ Consequently it is submitted that the peacekeepers who have committed these war crimes should be prosecuted. Can the peacekeepers invoke the immunity recognised to them under the Status-of-Forces Agreement and the Memorandum of Understanding?¹⁸¹ This issue will now be explored.

4.4 Issue of immunity of UN peace operations personnel

4.4.1 Rationale of immunities in general

The rationale of immunity of heads of States and high-level government officials from the jurisdiction of other States is that one state's judiciary should not sit in judgment over another sovereign state,¹⁸² but also the fact that if there were no respect for the representatives of a foreign government, this could lead not only to political tensions between states but also such

¹⁷⁵ ICRC 'International Committee of the Red Cross policy on torture and cruel, inhuman or degrading treatment inflicted on persons deprived of their liberty, Policy adopted by the Assembly Council of the ICRC on 9 June 2011' 2011 (93) *International Review of the Red Cross* 5547-562, 549.

¹⁷⁶ Torture is a cruel and inhuman treatment to which is attached a special stigma. See Schechter RB 'Intentional Starvation as Torture: Exploring the Gray Area between Ill-Treatment and Torture' 2003 (18) *American University International Review* 1233-1270, 1245-1246.

¹⁷⁷ Droege C "'In Truth the Leitmotiv'": The Prohibition of Torture and Other Forms of Ill-treatment in International Humanitarian Law' 2007 (89) *International Review of the Red Cross* 515-541, 517.

¹⁷⁸ Articles 50/ 51/130/147 of GC I-IV respectively; Common Article 3 (1) (c) of GC I-IV.

¹⁷⁹ McCormack T 'Their Atrocities and Our Misdemeanours: The Reticence of States to Try "Own Nationals" for International Crimes' in Lattimer M and Sands P *Justice for Crimes against Humanity* (Hart Publishing Oxford 2003) 107-142, 139.

¹⁸⁰ Amnesty International *Italy: A briefing for the UN Committee against Torture* (Amnesty International May 1999 AI Index: EUR 30/02/99) 9-14.

¹⁸¹ Peacekeepers and the whole UN operation of peace undertake to respect their obligations under SOFA amongst which is the respect of local law. See para 6 of the Model SOFA (UN Doc A/45/594 of 9 October 1990).

¹⁸² Ratner SR, Abrams JS & Bischoff JL *Accountability for Human Rights Atrocities in International Law* 3^d ed. (Oxford University Press Oxford 2009) 156; Kemp G *et al. Criminal Law in South Africa* (Oxford University Press Cape Town 2012) 579; Worster WT 'Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement' 2008 (47) *Military Law and the Law of War Review* 277-375, 285.

a state of affairs that could endanger international peace and security.¹⁸³ Does immunity apply where the intervening court is not a domestic one but an international court? For instance, can a peacekeeper invoke the fact that he or she is only subjected to the jurisdiction of his/her country to escape prosecution before an international criminal court?¹⁸⁴

The *raison d'être* of immunity under the agreements between the UN and Host State and the UN and a Troop-Contributing Country is to afford UN personnel and peacekeepers a status that allows them necessary privileges and immunities for the fulfilment of the purposes of the Organization and for the independent exercise of their functions in connection with the Organization.¹⁸⁵ The purpose of recognizing privileges and immunities granted to peacekeepers is to ensure that these personnel can perform their tasks without undue and uncoordinated interference by domestic courts of the host individual states.¹⁸⁶ The scope of such immunities, therefore, could not extend to acts not actually connected to the tasks the organisation endeavours to accomplish.

4.4.2 Scope of peace operations personnel immunity

The immunity protections are particularly important when it comes to the personnel of peacekeeping missions who are sent into politically unstable environments which lack functioning judicial institutions. For the operation and its personnel to carry out their mandate, they need some guarantees that they will be exempt from legal prosecution. This does not mean peacekeepers are free to commit crimes under the cover of immunity. The purpose of the privileges and immunities granted to peacekeeping personnel is essentially functional immunity in that it is meant to allow them to perform their functions without interference and in order to safeguard the independent exercise of their functions in

¹⁸³ See Boister N 'The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law' 2002 (7) *Journal of Conflict and Security Law* 293-314, 313-314.

¹⁸⁴ If the crimes allegedly committed by peacekeepers fall under the jurisdiction of the ICC, for example, does the principle of exclusive criminal jurisdiction set up in the SOFA cease to apply owing to the fact that, as Miller puts it, 'the only exception to the exclusive jurisdiction of the TCC in the Host State with respect to criminal offences over their contingent members would be if the International Criminal Court asserted jurisdiction over crimes falling within its Statute'. See Miller AJ 'Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations' 2006 (39) *Cornell International Law Journal* 71-96, 80.

¹⁸⁵ Preamble to the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946, evoking article 105 of the UN Charter. See para 3 of the UN Model SOFA (UN Doc A/45/594 of 9 October 1990).

¹⁸⁶ Kwai Hong Ip 'Peace Support Operations: Establishing the Rule of Law Through Security and Law Enforcement Operations' in Arnold R and Knoops GJA(eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers Ardsley 2006) 3-34, 14.

connection with the United Nations.¹⁸⁷ It is, therefore, a functional immunity, not personal immunity¹⁸⁸ and it does not extend to purely civilian issues, although for such issues the Special Representative of the Secretary-General has some power to allow the proceedings to continue or not, depending on whether the proceedings relate to official duties of the peacekeeper concerned or not.¹⁸⁹

The personnel of UN peace operations are not absolutely immune from legal criminal liability since their immunity is functional, i.e. immunity *ratione materiae*, which is not meant to protect private interests.¹⁹⁰ Peacekeepers, therefore, cannot actually assert immunity protections when they commit serious violations of human rights which fall outside the scope of their official duties,¹⁹¹ and most crimes by peacekeepers undoubtedly constitute, in one way or another, violations of human rights. ‘The purpose of the privileges and immunities [recognized to peacekeepers and the force] is to ensure that the force can perform its tasks without undue and uncoordinated interference by courts from individual states ...’¹⁹² It should not mean that even due legal process towards private acts of peacekeepers are barred by the use of privileges and immunities. It does not, therefore, appear that peacekeepers are completely shielded from criminal liability by privileges and immunities contained in Status-of-Forces Agreements and Memoranda of Understanding to the point that, as one scholar has considered, any effort to regulate conduct by peacekeepers appears to have been rendered totally ineffective.¹⁹³ The absence of prosecution is actually the consequence of unwillingness on the part of the home countries of the peacekeepers to prosecute their crimes, as well as the

¹⁸⁷ Ss 14 and 20 of the 1946 Convention on the Privileges and Immunities of the United Nations (1 *U.N.T.S.* 15 adopted by the UNGA 13 February 1946).

¹⁸⁸ Personal immunity or ‘immunity *ratione personae*’ are immunities conferred as long as the official beneficiary remains in office. See Akande D and Shah S ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ 2011 (21) *EJIL* 815-852, 818; Murungu C & Biegon J (eds) *Prosecuting international crimes in Africa* (Pretoria University Law Press Pretoria 2011) 42. With respect to the distinction between functional and personal immunities whether before domestic or international courts, see Kemp G *et al. Criminal Law in South Africa* (Oxford University Press Cape Town 2012) 579-590.

¹⁸⁹ Para 49 of the Model SOFA (UN Doc A/45/594 of 9 October 1990).

¹⁹⁰ Wickremasinghe C and Verdirame G ‘Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations’ in Scott C (ed) *Torture as Tort: Comparative Perspectives on the Development of Transitional Human Rights Litigation*, 2001, 465, 488 referred to by Murray J ‘Who Will Police the Peace-builders? The failure to ESTABLISH Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina’ 2003 (34) *Columbia Human Rights Law Review* 475-527, 507; Zahar A and Sluiter G *International Criminal Law: A Critical Introduction* (Oxford University Press Oxford 2008) 25-27.

¹⁹¹ Murray J *op cit* (n 193) 507.

¹⁹² Kwai Hong Ip *op cit* (n 189) 14.

¹⁹³ With respect to sexual offences committed by peacekeepers, agreements seem to have rendered any effort to outlaw such conduct by UN peace personnel ineffective. See Simm G ‘International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers’ 2012 *Journal of Conflict & Security Law* 1-34, 9.

fact that the UN Secretary General's office does not promptly waive the immunity of civilian personnel.¹⁹⁴ The possibility of waiving immunity concerns only peacekeepers and employees other than members of military contingents over whom 'the UN usually has little powers and refers complaints to the government in question and sends the officers home for further prosecution.'¹⁹⁵ The UN Status-of-Forces Agreement and Memorandum of Understanding recognise exclusive criminal jurisdiction over military personnel of a UN force to the Troop-Contributing Countries, with the exception of experts on mission.¹⁹⁶ As Fleck has observed:

legal immunities in the receiving state should by no means be misunderstood as offering impunity for any crimes or inhibiting claims in the event of wrongful acts committed by members of a mission. Crimes must be brought to national courts of the sending state or to a competent international court.¹⁹⁷

The recurrent problem is that Troop-Contributing Countries are loath to prosecute or to execute their undertaken obligation to do so by actually giving assurance to the UN that, in the case of criminal conduct by their troops, prosecution will follow.¹⁹⁸ The responsibility of UN personnel and respect for their special protected status should be mutual, observes Engdahl.¹⁹⁹ Since a Status-of-Forces Agreement applies only in the territory of the Host State,²⁰⁰ immunity should not actually lead to impunity. Where the conduct of a peacekeeper amounts to an international crime, the defence of immunity lapses because a third state²⁰¹, as well as an international criminal tribunal or court, would not be defeated by such a defence.²⁰²

¹⁹⁴ Hampson FJ and Kihara-Hunt A 'The Accountability of Personnel Associated with Peacekeeping Operations' in Aoi C, de Coning C and Thakur R (eds) *Unintended Consequences of Peacekeeping Operations* (United Nations University Press Tokyo 2007)195-220, 202; S 20 of the 1946 Convention on the Privileges and Immunities of the United Nations; Bongiorno C 'A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor' 2001-2002 (33) *Columbia Human Rights Law Review* 623-692, 662.

¹⁹⁵ *Ibid.*

¹⁹⁶ Para 46 of the UN Model SOFA; Bothe M and Dörschel T 'The UN Peacekeeping Experience' in Fleck D (ed) *The Handbook of the Law of Visiting Forces* (Oxford University Press Oxford 2001) 487-506, 496 and 498; Saura J *op cit* (n 102) 485-486.

¹⁹⁷ Fleck D 'Securing Status and Protection of Peacekeepers' in Operations' in Arnold R and Knoops GJA (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers Ardsley 2006) 148; Fleck D (ed) *The Handbook of the Law of Visiting Forces* (Oxford University Press 2001) 5; Klappe BF 'International Peace Operations' in Fleck D (ed) *The Handbook of International Humanitarian Law* 2 ed. (Oxford University Press Oxford 2008) 635-673, 640.

¹⁹⁸ Para 48 of the Model SOFA.

¹⁹⁹ Engdahl O *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law* (Martinus Nijhoff Publishers Leiden 2007) x.

²⁰⁰ Para 2 of the model SOFA.

²⁰¹ Compare Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch/DFAIT_rport.doc [last accessed 29 September 2011].

²⁰² See UN-ICC Agreement: Negotiated Relationship Agreement between the International Criminal Court and the United Nations. Its Article 19 on the Rules concerning United Nations privileges and immunities excludes to

Indeed, no principle of international law provides for non-competency of international jurisdiction over peacekeepers; otherwise, any efforts in prosecuting most serious crimes would be negated.²⁰³ Can peacekeepers fall under the jurisdiction of the International Criminal Court or can they assert the privilege of being prosecuted only before their national courts?

It is common knowledge that the ICC statute is applicable to all individuals without any distinction based on official capacity.²⁰⁴ The ICC, therefore, does have jurisdiction over war crimes committed by peacekeepers while on UN missions of peace. When States refuse to prosecute those who commit heinous crimes such as war crimes, the ICC has to step in and prosecute.²⁰⁵ Where the prosecution of a given state concludes that there is no basis upon which to prosecute, the ICC must still determine whether such a conclusion is seeking to shield the accused or not. If the ICC finding is that the state has sought to shield its soldier, it must resort to article 17 of the Rome Statute to ascertain the unwillingness of such a state to prosecute.²⁰⁶

Since an international criminal court is not party to agreements concluded between the UN and a Host State as well between the UN and the Troop-Contributing Countries, if the conduct of peacekeepers has reached such a degree of seriousness as to amount to international crimes, a third state can assert its criminal jurisdiction,²⁰⁷ especially if the individual peacekeeper is actually within the boundaries of the said third State on the ground of universal jurisdiction.²⁰⁸

invoke any immunity before to hamper the ICC in its work. See also Cassese A *International Criminal Law* 2 ed. (Oxford University Press New York 2008) 312.

²⁰³ Glueck S 'By What Tribunal Shall War Offender be Tried?' 1943 (56) *Harvard Law Review* 1059-1089, 1059 *et seq*; Gaeta P 'International and Mixed Jurisdictions: Means and Achievements of Mechanisms established by States and United Nations' (Communication at the ICC-Assembly of States Parties Sixth Session New York 30 November to 14 December 2007) *ICC ASP/6/INF.2A. Foundation of International Criminal Justice* 8:8-9, 1-11.

²⁰⁴ Blattmann R 'The Establishment of a Permanent International Criminal Court: Consequences and Role of the ICC' (Communication at the ICC-Assembly of States Parties Sixth Session New York 30 November to 14 December 2007) *ICC ASP/6/INF.2A. Foundation of International Criminal Justice*, 14-15.

²⁰⁵ El Zeidy MM *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers Leiden 2008) 157-158.

²⁰⁶ *Ibid.* 163-170.

²⁰⁷ O'Keefe R 'Universal Jurisdiction: Clarifying the Concept' 2004 (2) *Journal of International Criminal Justice* 735-760, 737.

²⁰⁸ The term *universal jurisdiction* itself refers to a form of jurisdiction in international law which grants the courts of any state, the ability to bring proceedings with respect to certain internationally defined crimes, without regard to the location of the crime, the nationality of the offender, or the nationality of the victim. This form of jurisdiction in effect opens up certain international crimes for prosecution within domestic national courts anywhere in the world. See Baker RB 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment' 2009 (16) *ILSA Journal of International and Comparative Law* 141-167, 142; Morrison D and Weiner JR 'Curbing Enthusiasm for Universal Jurisdiction' 2010 (4) *Berkeley Journal of International Law* 1-11, 4.

It must be noted, however, that most States will actually refrain from prosecuting a national of another state for crimes committed while serving on a UN operation. No case exists at this stage where such prosecution has come before international tribunals or any courts of a third State with respect to war crimes committed by peacekeepers.²⁰⁹

4.5 Conclusion

This chapter on international law regarding the crimes allegedly committed by peacekeepers has endeavoured to ascertain whether such crimes amount to any category of the core international crimes, i.e. genocide, crimes against humanity, and war crimes. It has shown that rape and other sexual offences, murder, and other violent acts constitute crimes under international law.²¹⁰ It is, therefore, evident that conduct by a peacekeeper might amount to a war crime under international criminal law.²¹¹ Not all categories of core international crimes include sexual crimes and abuses such as rape. It was shown that it is difficult for rape to amount to an act of genocide, and even when committed by a UN peacekeeper, sexual offences do not also amount to crimes against humanity because the policy element of the state or an organisation cannot be established.²¹² It was further shown that the alleged criminal acts by peacekeepers could fall with the category of war crimes.

From the definition of a ‘war crime’ as ‘any act constituting a violation of the laws and customs of war, that is, any violation of International Humanitarian Law’, considering the fact that this definition is not dependent on the nature of armed conflict, *viz* whether the conflict is an international armed conflict or a non-international armed conflict, and the fact that the requirement of widespread or of policy is not part of the definition of war crime, a criminal act by a peacekeeper can well fall within the ambit of war crimes.²¹³ This is so on the ground that peacekeepers are considered combatants where the UN forces are engaged as combatants and are under an obligation to observe the law applicable to an international armed conflict.

²⁰⁹ Extraterritorial conduct seems not to get attention of national or regional authorities and courts. See Roxstrom E, Gibney M and Einarsen T ‘The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection’ 2005 (23) *Boston University International Law Journal* 55-136, 58 *et seq.*

²¹⁰ Davidson MJ *A Guide to Military Criminal Law* (Naval Institute Press Annapolis 1999) 149.

²¹¹ There exists the human right ‘not be subjected to arbitrary deprivation of life.’ The violation of such a right constitutes murder, whoever the culprit may be. Members of the UN forces cannot be excused if they violate such an important right on the basis that the perpetrator is allowed by the UN to use force. See McLaughlin R ‘The Legal Regime Applicable to Use of Lethal Force When Operating Under a UN Security Council Chapter VII Mandate Authorizing ‘All Necessary Means’’ 2008 (12) *Journal of Conflict & Security Law* 389-417.

²¹² *Supra* 4.2.1.1 and 4.2.1.2.

²¹³ *Supra* 4.2.1.3.

Instances of murder as aforementioned violate rules of international humanitarian law. They constitute war crimes of murder whenever committed by members of armed forces of the parties to an armed conflict, or by peacekeepers engaged as combatants. Consequently it is submitted that the peacekeepers who have committed war crimes should be prosecuted.

The discussion sought to determine whether the absence of prosecution of peacekeepers' crimes by an international criminal court, or by the courts of a third State, was owing to the privilege to be tried by the courts of nationality of the alleged perpetrator or not. The finding was that, in principle, immunities and privileges under Status-of-Forces Agreement and Memorandum of Understanding do not extend to an international jurisdiction or to the jurisdiction of a non party to such agreements. There is, however, not a single case of the prosecution of peacekeeper reported either before the jurisdiction of an international tribunal or before the court of a third State. The next chapter will therefore discuss the problems related to investigating crimes by peacekeepers to try to establish what the root cause behind the lack of prosecution of peacekeepers.

CHAPTER V

THE LACK OF ACCOUNTABILITY RELATED TO PROBLEMS WITH CRIMINAL INVESTIGATION

5.1 Introduction

...if a crime is committed in a Host State and that State is unable to prosecute an alleged offender or hold an offender accountable, there is a need to rely on other States to do so. If other States have not extended the operation of their criminal laws to apply to crimes committed in a Host State - then there is a jurisdictional gap and the alleged offender is likely to escape prosecution. In order to close the jurisdictional gap, it is important that as many Member States as possible are able to assert and exercise criminal jurisdiction.¹

This chapter will analyse and identify the authorities who may investigate crimes committed by peacekeepers. The chapter will then discuss the problems that may arise during the investigation phase when the competent investigating team is deployed.² The criminal jurisdiction over crimes committed by peacekeepers rests with the sending State, especially with respect to military contingent members.³ The investigating authority of the foreign country concerned will be required to travel in order to collect evidence where the crime took place. The exertion of such competence abroad would, however, pose a number of practical problems *inter alia* access to victims and witnesses, the communication medium with each individual source of information (victims or witnesses), the cost of investigating abroad or of getting victims and witnesses flown to the country that has affirmed criminal jurisdiction, and various other practical hurdles.

Since UN forces are sent to a country in order to protect human rights and democratic values, it must be considered part of their job to set an example for those societies where these human

¹ UNGA *Criminal accountability of United Nations Officials and Experts on Mission: Note by the Secretariat* (UN. Doc. A/62/329 of 11 September 2007) para 1.

² 'Investigation is necessary to determine if a crime or wrong has been committed. It is the essential first step in any judicial or quasi-judicial proceeding which may result in a prosecution.' See *R. v. Wijesinha*, [1995] 3 S.C.R. 422, para [27].

³ Para 47 (b) of the Model SOFA (UN. Doc. A/45/594 of 9 October 1990); Article 7 *quinquies* of the Revised Model Memorandum of Understanding Annex to UN. Doc. A/61/19(Part III) of 12 June 2007- *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session*; Section 4 of the Secretary-General Bulletin *Observance by the United Nations Forces of International Humanitarian Law* (UN. Doc. ST/SGB/1999/13 of 6 August 1999); Burke R 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' 2011 (16) *Journal of Conflict & Security Law* 63-104, 67.

rights and values are violated. The UN can do so by ensuring that crimes committed by its forces do not go unpunished.⁴ It is not far-fetched to argue that peace operations, whether by the United Nations or by other international coalition, may ‘add serious international insult to existing local injury.’⁵ It would appear contradictory for an international organisation such as the UN to strive to rebuild peace and security in any given country if its personnel on the ground can be seen as ‘enjoying effective impunity for their own criminal actions.’⁶ As Miller rightly says, devising good rules against sexual exploitation and abuse cannot achieve anything if there is no strategic mechanism to enforce the standards of conduct for peace-keeping operations and effective investigation into all allegations, with the cooperation of all deployed personnel.⁷ With respect to the conduct of military personnel, the Troop-Contributing Country has to be satisfied that charges against its military members are properly established before it can permit the commencement of the prosecution of a military member.⁸ For that reason, effective investigation is crucial to ending impunity, but investigators and prosecuting authorities must bear in mind that the majority of crimes committed by peacekeepers relate to sexual offences.⁹ This poses the difficulty of obtaining conclusive evidence. Furthermore, there is no sanction when a State fails in its duty actively to exercise its criminal jurisdiction over peacekeepers who have committed sexual crimes against women and children. A situation in which peacekeepers are seen as being above the law cannot encourage domestic authorities to prosecute members of the Host State forces who commit similar acts because ‘the UN and its peacekeepers ... compromise their ability to legitimately advise on human rights standards and rule of law issues when their own personnel do not abide by the same standards.’¹⁰ Furthermore, the UN cannot effectively

⁴ Heide RL ‘Obligation of the Home Front: The Necessity of Cultural Awareness Training for Interventions in the New World Order’- *Ethical Leadership: Ethical Behaviour in Environments of Chaos and Complexity* (Paper presented at 7th Canadian Conference Kingston-Ontario 29 November 2006).

⁵ Ladley A ‘Peacekeeper Abuse-Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations’ 2005 (1) *Politics & Ethics Review* 81-90.

⁶ *Ibid* 82.

⁷ Miller AJ ‘Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations’ 2006 (39) *Cornell International Law Journal* 71-96, 83.

⁸ *Ibid*.

⁹ Ladley A *op cit* (n 5) 84.

¹⁰ Kent V ‘Peacekeepers as Perpetrators of Abuse: Examining the UN’s Plans to Eliminate and Address Cases of Sexual Exploitation and Abuse in Peacekeeping Operations’ 2005 (14) *African Security Review* 85-92, 87.

compel a Troop-Contributing Country, which has criminal jurisdiction over contingent members of the UN force, to prosecute.¹¹

5.2 The investigative authority over crimes committed by peacekeepers

The investigative authority of crimes by UN peacekeepers may come from any entity that has an interest in establishing the truth. Such an entity may be the UN itself, in which case its Office of Internal Oversight Services will conduct the investigation.¹² For its investigating mandate to succeed, the office needs not only the cooperation of the force commander, but also the cooperation of the individuals being investigated.¹³ The organs investigating may also come from the Troop-Contributing Country,¹⁴ or from the Host State.¹⁵ The question can also be raised as to whether a third State has investigative jurisdiction over crimes committed by peacekeepers.¹⁶ This section critically analyses whether cooperation between the Host State, the TCC, and the UN is needed for the benefits of justice.

5.2.1 Investigation by the UN Office of Internal Oversight Services (OIOS)

The UN OIOS was established in 1994, under the General Assembly resolution 48/218B of 29 July 1994, to enhance the oversight functions within the United Nations.¹⁷ Member States took this action in response to the increased importance, cost, and complexity of the activities of the organisation.¹⁸ The Assembly stressed the proactive and advisory role of the new

¹¹ Spencer SW 'Making Peace: Preventing and Responding to Sexual Exploitation by United Nations Peacekeepers' 2005 (16) *Journal of Public and International Affairs* 167-181, 178.

¹² UN OIOS *Investigations Manual* (Investigations Division March 2009) 2.

¹³ Article 7 *quater* para 3(b) of revised Memorandum of Understanding, Annex to UN. Doc. A/61/19(Part III) of 12 June 2007.

¹⁴ Article 7 *quater* of the revised Memorandum of Understanding. TCC has the primary responsibility for investigating any acts of misconduct or serious misconduct committed by a member of its national contingent. See Annex to UN. Doc. A/61/19(Part III) of 12 June 2007.

¹⁵ The Host State has the duty to investigate any crime committed within the boundaries of its territory. A secondary jurisdiction over crimes by peacekeepers may be envisaged since it is on such Host State territory that the crime is committed. See Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch/DFAIT_rport.doc [last accessed 29 September 2011]. See also para 45 of UN. Doc. A/62/329 of 11 September 2007 on *Criminal Accountability of United Nations Officials and Experts on Mission: Note by the Secretary* where it is said that 'the Host States' law enforcement authorities should conduct an investigation into alleged criminal activities since that is the place where the alleged crime occurred, and it is where the witnesses and evidence are located.'

¹⁶ By third state it is understood a state other than the Host State and the TCC.

¹⁷ OIOS Mandate available at www.un.org/Depts/oios/pages/mandate.html [last accessed 21 December 2012]; US General Accounting Office/ National Security and International Affairs Division (GAO/NSIAD) *United Nations: GAO Report to Congressional Requesters B-278082* (GAO/NSIAD-98-9 of 19 November 1997).

¹⁸ *Ibid.*

Office, its operational independence, and the fact that it should assist and provide methodological support to programme managers in the effective discharge of their responsibilities.¹⁹ It seems that the Office was set up especially to investigate financial and administrative issues, but not to conduct criminal investigations.²⁰ Despite its specific role, an investigation conducted by the Secretariat through the UN Office of Internal Oversight Services, can still produce a credible and reliable report which contains information in a verifiable form, of sufficient weight to trigger a criminal investigation.²¹ The law enforcement authority of the State that has jurisdiction to prosecute the investigated conduct is, therefore, in a position to use the findings of the Office in the proceedings.²² According to the OIOS itself, some investigative processes may simply be seen as fact-finding, depending on the ultimate use of the facts.²³ The nature of the investigation determines the appropriate process to follow. The Office submits its reports to the Secretary-General who makes them available to the General Assembly.²⁴ It, thus, assists the Secretary-General in fulfilling his or her internal oversight responsibilities.²⁵

The OIOS is an internal service of the UN. It does not, therefore, seem to be the appropriate organ to investigate allegations against military personnel deployed by UN State members.²⁶ Members of national contingents remain under the control of the authorities of the Troop-contributing Country.²⁷ The aim of the investigating action of OIOS is to establish facts and make recommendations in the light of its findings.²⁸ The Secretary-General or a delegated Programme Manager, in the circumstances of each case, has the responsibility to consider

¹⁹ *Ibid.*

²⁰ For the OIOS to exercise criminal investigations, it needs police powers. See para 43 of of UN. Doc. A/62/329 of 11 September 2007 on *Criminal Accountability of United Nations Officials and Experts on Mission: Note by the Secretary*; UN Office of Internal Oversight Services available at www.un.org/Depts/oios/ [last accessed 21 December 2012]; Siegfried G *et al.* *Peer Review of the Evaluation Function of the Office of Internal Oversight Services of the United Nations* (the Swiss Agency for Development and Cooperation Federal Department of Foreign Affairs Bern 2009) 25.

²¹ Para 50 of UN. Doc. A/62/329.

²² *Ibid.* the OIOS itself lacks the jurisdiction, resources and independence to enforce the findings. See GAO *United Nations: Weaknesses in Internal Oversight and Procurement Could Affect the Effective Implementation of the Planned Renovation* (Washington D.C 25 June 2006) 1.

²³ UN OIOS *Investigations Manual op cit* (n 12) 2.

²⁴ OIOS 'UN Office of Internal Oversight Services available at www.un.org/Depts/oios/ [last accessed 21 December 2012].

²⁵ UN OIOS *Investigations Manual op cit* (n 12) 4.

²⁶ Miller AJ *op cit* (n 7) 85.

²⁷ Para 47 (b) of the Model SOFA.

²⁸ UN OIOS *Investigations Manual op cit* (n 12) 5, 89-98.

what action, if any, is to be taken after receipt of the report.²⁹ Indeed, the OIOS is not a law enforcement agency; it does not have *subpoena* or other coercive statutory powers. After investigating criminal cases, therefore, the OIOS ought to make recommendations to the Office of Legal Affairs for referral to national law enforcement authorities.³⁰

Pursuant to its overall responsibility for internal United Nations investigations, the OIOS has conducted investigations regarding the serious and strictly prohibited misconduct of sexual exploitation and sexual abuse.³¹ This category of misconduct includes sexual activity with any person under the age of 18, which is treated as rape, and the exchange of money, employment, goods, or services for sex, as indicated in Chapter II of the current thesis.³² To utilize properly and appropriately limited investigative resources, the office prioritizes cases which are reported as non-consensual sex.³³ This includes sex through coercion or violence and sexual activity with persons under the age of 18, as minors lack the capacity to consent.³⁴

5.2.1.1. The OIOS is not a law enforcement agency

The first criticism that may be levelled against the investigations conducted by the office is that, in its investigative role, the OIOS does not have coercive powers.³⁵ It is not a law enforcement agency, and it does not have *subpoena* or other coercive statutory powers.³⁶ Its investigative findings are, therefore, essentially for administrative ends and are internal to the UN.³⁷ In cases of serious misconduct that entail criminal responsibility,³⁸ the Office makes

²⁹ *Ibid.*

³⁰ UN OIOS *Investigations Manual op cit* (n 12) 5, 89-98.

³¹ UN OIOS *Investigations Manual op cit* (n 12) 4.

³² UN OIOS *Investigations Manual op cit* (n 12) 10-11.

³³ Acts of prostitution are, therefore, left out. Since sexual relationships between United Nations staff and beneficiaries of assistance are strongly discouraged, and the prohibition against sexual exploitation and sexual abuse extends to United Nations personnel, including contractors and personnel provided by the TCC, the OIOS investigations may extend to these categories of UN employees as well. See ST/SGB/2003/13 (9 October 2003).

³⁴ UN OIOS *Investigations Manual op cit* (n 12) 11.

³⁵ UN OIOS *Investigations Manual op cit* (n 12) 5.

³⁶ *Ibid.*

³⁷ Some reforms that have been undertaken, but are still largely limited to the administrative sphere: UN conduct and discipline units now serve in all UN operations; the UN's internal system of administrative justice has been rebuilt, but this does not deal with criminal matters; the UN has developed the ability to blacklist persons with records of serious misconduct; and states have been encouraged to develop the laws needed to prosecute nationals who serve in UN missions. While these are necessary and useful tools, the lack of criminal accountability remains, accompanied by the realization that these improvements are not enough, either as a punishment or a deterrent. See Durch WJ *et al. Improving Criminal Accountability in United Nations Peace Operations* (Stimson Center Report No. 65 Rev. 1 Washington 2009) xi.

recommendations to the Office of Legal Affairs for referral to national law enforcement authorities.³⁹ To hold that serious misconduct has occurred, the investigation must have identified actual criminal conduct. To this end, the investigators need the cooperation of the personnel investigated. If such cooperation is lacking, the Office may be in difficulty with regard to recommending any action, whether internally to the UN or externally by referral to the competent authority.⁴⁰

The UN investigation conducted by OIOS against peacekeeping personnel for sexual offences has resulted in a total of 157 dismissals, five staff members, thirty-two civil servants, three police officers, and one hundred and seventeen military personnel of whom none was prosecuted.⁴¹ The absence of information regarding whether further action was taken leaves the victims with the feeling that the organisation disregards the right to justice by victims. This feeling of the absence of justice to victims pushed, in regard to the DRC, the Special Representative of the UN Secretary-General, Swing, to comment that the findings of OIOS made it apparent that the impression of a total absence of prosecution of peacekeepers can be explained by the fact that policies aimed at preventing sexual exploitation and abuse in the DRC by peacekeepers were not being enforced, and also that the command structures did not always give their full cooperation to investigators.⁴² It was revealed that victims could also be intimidated if they reported the misconduct of peacekeepers.⁴³ Furthermore, since peacekeepers are rotated to other posts every six months, it can be difficult to initiate, conduct, and complete a thorough investigation before the next rotation takes place.⁴⁴

Apart from the lack of adequate procedures and mechanisms to facilitate reports of every incident of misconduct, what leads to the true extent of those deplorable incidents remaining unexposed, is the absence or lack of cooperation with the investigation.⁴⁵ This factor adds to

³⁸ Though the General Assembly resolution creating OIOS does not specifically deal with military members of national contingents, its mandate gives it complete independence. OIOS can also include TCC members to render its findings immediately usable by the TCC concerned.

³⁹ UN OIOS *Investigations Manual op cit* (n 12) 5.

⁴⁰ UN OIOS *Investigations Manual op cit* (n 12) 6, 93.

⁴¹ Murphy R 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' 2006 (13) *International Peacekeeping* 531-546.

⁴² Ladley A *op cit* (n 5) 82.

⁴³ Allred KJ 'Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It' 2006 (33) *Armed Forces and Society* 5-23, 6.

⁴⁴ Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121- 2006) 3.

⁴⁵ See UN Doc A/59/710 of 24 March 2005 para 7.

the difficulty of accessing reality on the ground. The criticism that may be raised is that if it were possible to establish the truth, the fact that the UN does not have criminal jurisdiction means that the findings of the OIOS remain without judicial consequences.⁴⁶ Investigations conducted by the OIOS are translated into summary dismissals, but not into prosecutions as this action falls under the jurisdiction of the TCCs who need to conduct their own investigations.⁴⁷

5.2.1.2. Investigation needs UN personnel cooperation

In principle, all UN personnel, volunteers and experts on mission are required to cooperate fully and actively with OIOS investigations.⁴⁸ Since military personnel, however, other than experts on mission, are not UN employees, they do not have the same obligation.⁴⁹ Their duties and obligations are set out in the Memorandums of Understanding⁵⁰ and the Status-of-Force Agreements.⁵¹ Any investigation into the actions of a military contingent will follow special procedures and will include the investigation authority of the TCC concerned. Before TCC personnel can be interviewed, command level consent (and often, the support of the TCC) must be sought and bestowed.⁵² The process of obtaining this consent may be handled at the mission level, if the individual being investigated is still there, or it may need to go through the command structure, and this will actually be the case when the personnel in question have been rotated out of the mission location.⁵³

There may be situations where the personnel under investigation belong to the military contingent.⁵⁴ In this case, if the TCC so requests, a National Investigations Officer (hereafter referred to as the TCC government representative) must be allowed to participate.⁵⁵ The extent of the participation of the TCC government representative in any interview must be

⁴⁶ The UN, after a lengthy process, can at most repatriate an individual, but it cannot see those cases followed through in the country of origin. See Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121- 2006) 6-7.

⁴⁷ Quéniévet N 'The Dissonance between the UN Zero-Tolerance Policy and the Criminalisation of Sexual Offences on the International Level' 2007 (7) *International Criminal Law Review* 657-676, 658.

⁴⁸ Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121- 2006) 21-24.

⁴⁹ *Ibid.*

⁵⁰ Revised Draft Model Memorandum of Understanding as set out in A/61/19 (Part III).

⁵¹ Draft Model Status-of-Forces Agreement as included in A/45/594.

⁵² UN OIOS *Investigations Manual op cit* (n 12) 59.

⁵³ *Ibid.*

⁵⁴ UN OIOS *Investigations Manual op cit* (n 12) 3, 25

⁵⁵ UN OIOS *Investigations Manual op cit* (n 12) 80.

agreed to in advance.⁵⁶ It is not always easy to harmonize views, and this might constitute a problem for the course of investigation. Where DNA evidence is required, in exceptional circumstances, and for the purposes of establishing evidence of serious misconduct,⁵⁷ samples can be taken only with the consent of the implicated personnel and can be used only for the purpose for which consent is given.⁵⁸ The implicated personnel may not necessarily be informed of the test results, if any, which shall be kept confidential and used solely for investigative purposes and the possible disciplinary action that follows from that investigation.⁵⁹ It is required that before handing out a contingent report, the personnel implicated therein be given the opportunity to respond to the claims or allegations of misconduct.⁶⁰ They may refuse to respond or to cooperate. Where subjects refuse to cooperate with investigators, unanswered claims may be addressed with reference to the subject's lack of cooperation.⁶¹ Reports should, where available, include exculpatory and mitigating evidence.⁶² Such reports indicate information regarding *prima facie* misconduct or serious misconduct allegedly committed by a member of a national military contingent.

In the event that the United Nations has *prima facie* grounds indicating that any member of the national contingent of a Government has committed an act of misconduct or serious misconduct, the United Nations shall, without delay, inform that Government.⁶³ Upon such a report and information delivered to the TCC concerned, it is hoped that, if the Government is fully informed, it will set up fact-finding proceedings to verify the information received. If the Government does not conduct such fact-finding proceedings, the United Nations may initiate an inquiry especially regarding serious misconduct, until the Government starts its own investigation.⁶⁴ Such an inquiry is conducted through the Office of Internal Oversight Services. It may include, as part of the investigation team, a representative of the

⁵⁶ *Ibid.*

⁵⁷ UN OIOS *Investigations Manual op cit* (n 12) 53.

⁵⁸ UN OIOS *Investigations Manual op cit* (n 12) 69

⁵⁹ *Ibid.*

⁶⁰ UN OIOS *Investigations Manual op cit* (n 12) 7, 31, 77.

⁶¹ In 2003, despite lack of cooperation from two of the three military contingents, the OIOS investigated 72 allegations, resulting in 20 case reports. Of these cases, perpetrators were positively identified in six, not identified in 11, and the accusations were not fully corroborated in two. See 'Peacekeepers' sexual abuse of local girls continuing in DR of Congo, UN finds' available at www.un.org/apps/news/story.asp?NewsID=12990 [last accessed 21 December 2012].

⁶² UN OIOS *Investigations Manual op cit* (n 12) 77.

⁶³ Article 7 *quater* para 2 of the Memorandum of Understanding as revised on 12 June 2007. See UN. Doc. A/61/19 (Part III) [hereafter revised MOU].

⁶⁴ *Ibid.*

Government. The complete report of its preliminary fact-finding inquiry is made available to the Government at its request without delay.⁶⁵ For the success of such an inquiry, the office needs the cooperation of the contingent commanders.⁶⁶

5.2.1.3. OIOS Investigation needs Contingent Commander Cooperation

Investigations in the field pose certain problems, in particular uncooperative contingent commanders. This was once confirmed by the then Under-Secretary-General, Jean-Marie Guéhenno.⁶⁷ He pointed out that, despite the existence of requests to Troop-Contributing Countries to coordinate with OIOS in order to ensure investigative findings meet the requirements of national jurisdiction; most of the member States of the UN have reserved their rights with respect to their military personnel deployed on UN missions of peace.⁶⁸ This reluctant official cooperation with the investigation of the UN is a serious obstacle to the process of collecting evidence, ensuring that the rights of the victim and the accused are not infringed, and, of course, discharging justice fairly.⁶⁹ The task of gathering evidence becomes more difficult if the subjects of the investigation threaten the UN investigators.⁷⁰ Indeed, instances of such threats have been reported with respect to the investigation into allegations of sexual misconduct in the Congo.⁷¹ Peacekeepers not only threatened investigators, but they also sought to bribe witnesses to change incriminating testimony.⁷² Peacekeepers from Morocco, Pakistan, and Tunisia reportedly paid or attempted to pay witnesses to change their testimony.⁷³ In such conditions, it is difficult to ascertain the accuracy of unsubstantiated reports, and the public remains unconvinced that the peacekeepers are innocent, feel any remorse, or have corrected their behaviour.⁷⁴

⁶⁵ *Ibid.*

⁶⁶ The Government also undertakes, through the Commander of its national contingent, to instruct the members of its national contingent to cooperate with United Nations investigations, subject to applicable national laws, including military laws. See paragraph 3(b) of Article 7 quater of the revised MOU.

⁶⁷ Guéhenno JM 'Remarks on Peacekeeping Procurement and Sexual Exploitation and Abuse by Peacekeepers', Presentation to the Security Council 23 February 2006 available at www.peacewomen.org/assets/file/Resources-UN/dpko_remarksguehennoc34_2006.pdf [last accessed 21 December 2012].

⁶⁸ *Ibid.*

⁶⁹ Durch WJ *et al. op cit* (n 37) xii, 37 *et passim*.

⁷⁰ Gardiner N 'The U.N. Peacekeeping Scandal in the Congo: How Congress Should Respond' 2005(868) *Heritage Lectures* (delivered 1 March 2005) 1-8, 2.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Early in 2009, a report found that the number of misconduct allegations against MONUC forces is on the decline. According to the report, Category I allegations dropped from 66 in 2007 to 56 last year, and, within

It is true that the primary role of investigating the misconduct of their national contingents rests entirely with the TCC concerned.⁷⁵ The UN undertakes to cooperate with the National Investigations Officers of the various TCCs.⁷⁶ A TCC may, after investigation, inform the United Nations without delay that misconduct or serious misconduct has occurred.⁷⁷ It must be said, however, that even though the UN has limited authority to discipline peacekeepers who commit crimes of sexual exploitation and abuse, it has failed to take the steps that are within its power to hold nations accountable when they fail to investigate or punish the misconduct of their troops.⁷⁸ There cannot be any prosecution of peacekeepers without the good will of the TCC. Under the 1949 Geneva Conventions, States have been obligated to prosecute and punish persons accused of serious violations of international humanitarian law through their respective national jurisdiction.⁷⁹ To fulfil such obligations, the TCC has to conduct its own investigation in order to gather the solid evidence that will allow prosecution. This is crucial towards reinstating the criminal accountability of UN personnel in a timely fashion.⁸⁰

5.2.2 Investigation by organs of the Troop-Contributing Country

Every government has the primary responsibility for investigating any acts of misconduct or serious misconduct committed by a member of its national contingent.⁸¹ When a government decides to start its own investigation and to identify or send one or more officials to

these instances, the number of sexual abuse and exploitation allegations fell from 48 in 2007 to 38 in 2008. The number of Category II allegations is also on the wane, with 202 allegations received last year, as opposed to 294 the year before. In 2008, 15 of the allegations pertaining to reported sexual abuse and exploitation primarily involved breaches of curfew. MONUC peacekeepers are prohibited from visiting bars frequented by prostitutes or areas that are off-limits for security reasons. See UN News Centre 'UN team looking into alleged sexual misconduct by blue helmets in DR Congo' available at [www.un.org/apps/news/story.asp?NewsID=31574&Cr=monuc&Cr1\[last accessed \[last accessed 21 December 2012\]](http://www.un.org/apps/news/story.asp?NewsID=31574&Cr=monuc&Cr1[last%20accessed%2021%20December%202012]).

⁷⁵ Article 7 *quater* paras 4(b) & 4(c) of the revised MOU.

⁷⁶ Article 7 *quater* paras 4(b) & 4(c) of the revised MOU.

⁷⁷ Article 7 *quater* para 1 of the revised MOU. According to para 3(a), in the event that the Government does not notify the United Nations as soon as possible, but no later than 10 working days from the time of notification by the United Nations, that it will start its own investigation of the alleged serious misconduct, the Government is considered to be unwilling or unable to conduct such an investigation, and the United Nations may, as appropriate, initiate an administrative investigation of the alleged serious misconduct without delay.

⁷⁸ Schaefer BD 'United Nations Peacekeeping: Challenges and Opportunities' Testimony before the United States House of Representatives-Committee on Foreign Affairs (The Heritage Foundation 29 July 2009) 1.

⁷⁹ Cassese A 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' 1998 (9) *European Journal of International Law* 2-17.

⁸⁰ Chun S *Sexual Exploitation and Abuse by UN Peacekeepers* (Policy Brief Paper for International Peace Research Institute Oslo October 2009).

⁸¹ Introductory paragraph to article 7 *quater* of the revised MOU.

investigate the matter, such a government is required to inform the United Nations of that decision immediately, including the identities of the official or officials concerned.⁸² The requirement of having the UN informed aims at preparing the UN to afford the necessary support or assistance to the National Investigations Officers leading the investigation.⁸³

Criticism relating to this procedure centres on the fact that, in order to investigate crimes committed on foreign territory, foreign national authorities have to overcome legal and/or diplomatic hurdles before commencing their investigations, or they must obtain the necessary cooperation from the authorities of the foreign state.⁸⁴ They may also lack any of the operational infrastructure needed to conduct effective investigations on the ground in a foreign country, or to protect potential witnesses or their own investigators.⁸⁵ Saying that the government of a Troop-Contributing Country has sovereign rights and primary responsibility to investigate reported misconduct against contingent personnel means that the state concerned exercises exclusive jurisdiction over its troops with regard to acts of misconduct committed while deployed with a peacekeeping operation. Any OIOS investigation activities as presented above are, therefore, either complementary or secondary.⁸⁶ Where the OIOS has conducted a preliminary fact-finding inquiry or investigation, it will issue a contingent report and provide its findings and evidence to the Permanent Mission of the State concerned.⁸⁷

Even when national authorities decide willingly to investigate allegations against their contingent members, the following obstacles may still be present: commissions of inquiry are often set up long after the incidents occurred;⁸⁸ the investigation team may not actually visit and investigate the place where the crime took place; witnesses' memories fade with time; some victims may not have the gumption to reveal what had happened to them; and they may fear making it common knowledge that they have been sexually abused owing to the negative

⁸² Para 4(a) of article 7 *quater* of the revised MOU.

⁸³ Paras 4(d) & 4(g) of article 7 *quater* of the revised MOU.

⁸⁴ Gallmetzer R 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas: The Strategy of the Office of the Prosecutor of the International Criminal Court' 2010 (8) *Journal of International Criminal Justice* 947-956, 949.

⁸⁵ *Ibid.*

⁸⁶ UN OIOS *Investigations Manual op cit* (n 12) 80.

⁸⁷ *Ibid.*

⁸⁸ For instance, Canadian and Italian Commissions of Inquiry looked into the events in Somalia in the 1990s.

reaction of their communities.⁸⁹ The financial cost of an investigation in the host country might certainly cause a state to refrain from conducting a fact-finding on the ground, as well as the high-risk environment such missions involve.⁹⁰ Furthermore, the people involved, especially the military personnel being investigated, may refrain from cooperating with the investigating team.⁹¹ To furnish an example: Canada's initial investigation into the events in Somalia reached the conclusion that the Canadian airborne regiment in Somalia acted with propriety with regard to acts of brutality and killing a Somali man, but a medical doctor believed the contrary to be true.⁹² The doctor believed that the man who died was first shot in the back, and, thereafter, in the neck and head.⁹³ This medical doctor was pressured to suppress the supporting medical records.⁹⁴ TCC investigations may, therefore, be seriously flawed and self-serving.⁹⁵

A Troop-Contributing Country may not be willing to lead high profile prosecutions of its soldiers. An example of such an attitude is that of Italy whose authorities prevented the prosecution of alleged war crimes committed by Italians on peacekeeping and other military operations abroad.⁹⁶ If, indeed, Italy did take the decision to intervene to investigate Somali incidents, this move was provoked by the fact that allegations were made by the victims themselves and by Somali human rights monitors.⁹⁷ Although the government announced that

⁸⁹ Italy: The Gallo Commission interviewed people in Ethiopia, Italy, and in Kenya, but did not visit Somalia itself, and, among the interviewees, very few were Somalis. See Amnesty International 'Italy: A briefing for the UN Committee against Torture' (Amnesty International May 1999 *AI Index: EUR 30/02/99*) 10.

⁹⁰ Peacekeepers operate in dangerous environments. For example, in January 2006, eight Guatemalan soldiers were killed in the midst of a year old, on-and-off military campaign against armed groups in the eastern Democratic Republic of the Congo. It is in such environment that an investigating team is sent when allegations of misconduct by peacekeepers have been brought to the attention of the TCC. See Johnstone I, Tortolani BC and Gowan R *The evolution of UN peacekeeping: unfinished business* (Center on International Cooperation New York University 2006).

⁹¹ See Miller SK 'Accountability for the Conduct of UN-Mandated Forces under International Human Rights Law: A Case Study Concerning Sexual Abuse of the UN Mission in the Democratic Republic of Congo (MONUC)' Arnold R and Knoops GJA (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers Ardsley 2006) 261-286, 269; Miller AJ *op cit* (n 7) 83.

⁹² Whitworth S 'Militarized Masculinities and the Politics of Peacekeeping: The Canadian Case' in Booth K (ed) *Critical Security Studies in World Politics* (Lynne Rienner Publishers Boulder 2005) 89-106. See also *supra* 2.2.1.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Gaeta P 'War Crimes Trials before Italian Courts: New Trends' in Fischer H, Kref C & Lüder SR (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (BWV Berlin 2004) 751-768.

⁹⁷ Amnesty International 'Italy: A briefing for the UN Committee against Torture: Findings of the Italian Government Commission of Inquiry into events in Somalia' (Amnesty International May 1999 *AI Index: EUR 30/02/99*) 9-10.

the military prosecutor's office in Rome had opened judicial investigations into specific alleged human rights violations, cases were actually transferred to civilian prosecutors.⁹⁸ The Gallo Commission set up to investigate, accompanied by members of the magistracy, gathered information in Italy, Ethiopia, and Kenya, but never visited Somalia and it interviewed 141 people, of whom a small number were Somalis.⁹⁹ Its report concluded that the overall conduct of the Italian troops in Somalia had been good. This conclusion shielded Italian troops from accountability for their acts of torturing, killing, and raping while on a UN mission in Somalia.¹⁰⁰ The only commendable recommendations of the Commission that one may record are that troops be accompanied by magistrates and persons who are experts on international and national human rights standards,¹⁰¹ and that the military authorities upgrade human rights training for conscripts.¹⁰² The commission concluded its inquiry without any pronouncement with respect to criminal responsibility. This leads one to draw the conclusion that there is a lack of objectivity on the part of the Commission of Inquiry. It is therefore important to investigate the position of Canada, Belgium, and South Africa with respect to investigating crimes committed by their military personnel while on UN missions of peace in Africa.

5.2.2.1. Canada

Though reference may be made to other sources, the developments under this heading are gleaned from the report of the Canadian commission of inquiry regarding the events that happened in Somalia.¹⁰³ The purpose of establishing the commission was to correct mistakes and systemic problems that appeared to have plagued the Canadian Forces long before their deployment to Somalia.¹⁰⁴ The other aim of the inquiry was to put in writing information regarding Canada's soldiers deployed on a mission of peace to Somalia. The first addressees

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Gaeta P 'War Crimes Trials before Italian Courts: New Trends' in Fischer H, Kreß C & Lüder SR (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (BWV Berlin 2004) 751-768.

¹⁰¹ Amnesty International 'Italy: A briefing for the UN Committee against Torture: Findings of the Italian Government Commission of Inquiry into events in Somalia' (Amnesty International May 1999 *AI Index: EUR 30/02/99*) 10.

¹⁰² *Ibid.*

¹⁰³ Commission of Inquiry 'Reports' available at <http://www.forces.gc.ca/somalia/somaliae.htm> [accessed 23 June 2011] (hereinafter CCI Somalia *op cit*).

¹⁰⁴ Siver C 'The Dark Side of Canadian Peacekeeping: The Canadian Airborne Regiment in Somalia' (Paper presented at Politics, Philosophy and Economics Seminar Series University of Washington -Tacoma 23 November 2009) 2.

of the inquiry are the Canadian public and future soldiers of Canada;¹⁰⁵ hence the aim was not essentially to see perpetrators prosecuted.¹⁰⁶ Although many other questions might be raised about the conduct of the troops deployed to Somalia and about the over 100 incidents of varying seriousness that occurred on the mission, the terms of reference directed the Commission of Inquiry to address specific issues, and its investigation was confined to significant matters that would enable it to answer the specific questions posed.¹⁰⁷

The Commission had to find the motive for the torture and killing of Shidane Arone,¹⁰⁸ the attitude of the Canadian military and its leadership *vis-à-vis* this atrocity, and other atrocities which occurred, especially the attempts to cover up these events.¹⁰⁹ The other issues the Commission had to solve related to the ethics and compassionate sensibilities of the Canadian troops and their commanders; to discipline and cohesiveness in some parts of the Canadian Forces which became dysfunctional to the point that accountability was shunned, and little value, if any, was perceived in admitting and confronting grave errors and deficiencies. The Commission had to find so many in the junior ranks have been held to account or have been punished, while the higher ranking officers have escaped accountability.¹¹⁰ These are the questions which formed the basis of the Canadian inquiry into the conduct of Canadian forces deployed in Somalia, especially the Canada Airborne Regiment, subsequently disbanded.¹¹¹

¹⁰⁵ CCI Somalia *op cit* (n 103) 1331.

¹⁰⁶ Prosecutions were conducted before the work of the Commission of Inquiry. The latter referred frequently to the decision of the court in cases that had been prosecuted.

¹⁰⁷ CCI Somalia *op cit* (n 103) 1330.

¹⁰⁸ *Supra* 2.2.1. See *Addy v. Canada* (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission) [1997] F.C.J. No. 796 para [4]. On March 16, 1993, a young Somali boy named Shidane Arone was tortured and killed by members of the Canadian Airborne Regiment (CAR). This was not the first and only profoundly disturbing incident during the deployment of the CAR to Somalia. On March 4, 1993, slightly more than a week before the death of Mr. Arone, two Somali nationals had been shot as they tried to enter the Canadian compound. One of the Somalis was killed, and there were some allegations that he had been shot "execution-style".

¹⁰⁹ The commission did not hear testimony regarding the death of Arone. See Siver C 'The Dark Side of Canadian Peacekeeping: The Canadian Airborne Regiment in Somalia' (Paper presented at Politics, Philosophy and Economics Seminar Series University of Washington -Tacoma November 23, 2009) 3.

¹¹⁰ *Ibid.*

¹¹¹ Beruto GL (ed) *International Humanitarian Law Human Rights and Peace Operations, 31st Round Table on Current Problems of International Humanitarian Law Sanremo, 4-6 September 2008* (The International Institute of Humanitarian Law In collaboration with the International Committee of the Red Cross 2008) 66; Siver C 'The Dark Side of Canadian Peacekeeping: The Canadian Airborne Regiment in Somalia' (Paper presented at Politics, Philosophy and Economics Seminar Series University of Washington -Tacoma November 23, 2009) 2, 15 *et passim*; Abbott R 'Military Peacemaking: Mission Impossible?' 2002 (41) *Military Law & Law of War Review* 13-38, 17.

In striving to understand what happened, the Commission faced stern difficulties. Among the difficulties encountered, one may mention the obstacle presented by the reluctant compliance of the Department of National Defence with the Commission's orders in terms of the Inquiries Act to produce the necessary documents, and the delays and difficulties it experienced when dealing with the Somalia Inquiry Liaison Team.¹¹² In the conduct of the investigation, the commission pointed to unanticipated obstacles relating to the lack of co-operation exhibited by the Department of National Defence in its dealings with the Inquiry.¹¹³ The Department did not manifest openness and transparency. Its actions hampered the progress and effectiveness of the Inquiry.¹¹⁴ The attitude of the Canadian Department of National Defence did not facilitate the work of the commission to the point of hampering connection between members of the commission and the onsite team liaison.¹¹⁵ The second obstacle, related to the first, concerned the manner in which the Directorate General of Public Affairs of the Department of National Defence failed to comply with an order from the Commission to disclose the documents related to Somalia and, indeed, attempted to have them destroyed.¹¹⁶ Evidence reveals, for example, that on 5 September 1995, Ms. Nancy Fournier was placing Somalia-related documents, including Responses to Queries, into a 'bum bag' for destruction when she was interrupted by Lieutenant Wong who ordered her to cease her activities immediately. Fortunately Lieutenant Wong was able to secure the material.¹¹⁷ Before the commission, Ms. Fournier testified that she had been instructed by Colonel Haswell to get rid of the documents pertaining to Somalia.¹¹⁸

With respect to the incident of 4 March 1993, the Commission of Inquiry found that the official explanation of the incident was not supported by the evidence adduced at the hearings.¹¹⁹ The shooting in the back of two unarmed Somali civilians in flight was a use of force clearly in excess of what was permitted under the Rules of Engagement, and the

¹¹² *CCI Somalia op cit* (n 103) 29.

¹¹³ Siver C 'The Dark Side of Canadian Peacekeeping: The Canadian Airborne Regiment in Somalia' (Paper presented at Politics, Philosophy and Economics Seminar Series University of Washington -Tacoma November 23, 2009) 2.

¹¹⁴ Rouillard LPF 'Canada's Prevention and Repression of War Crimes' 2005 (2) *Miskolc Journal of International Law* 43-58, 47.

¹¹⁵ *CCI Somalia op cit* (n 103) 344.

¹¹⁶ Rouillard LPF 'Canada's Prevention and Repression of War Crimes' 2005 (2) *Miskolc Journal of International Law* 43-58, 48.

¹¹⁷ *CCI Somalia op cit* (n 103) 953.

¹¹⁸ *Ibid.*

¹¹⁹ *CCI Somalia op cit* (n 103) 1054.

response to this incident by the chain of command in Somalia was wholly inappropriate.¹²⁰ Rather than providing in-depth training in cultural awareness and the Rules of Engagement in order to ease tensions between the troops and Somali civilians and to stress the need for restraint, the chain of command issued an even less restrictive interpretation of the Rules of Engagement that significantly increased the likelihood of the use of deadly force.¹²¹ The Commanding Officer did give, on 28 January 1993, some rules to the Canadian forces. These rules were interpreted as authorizing Canadian soldiers to shoot at fleeing thieves or infiltrators under certain circumstances.¹²² The interpretation went on to include entrapment tactics.¹²³ The Commission further found that the force used highly questionable tactics such as the putting out of food and water to entice Somalis to approach the Canadian installations. In the light of such actions, the reason given for the troops' fear of sabotage, that is, the theft of a fuel pump¹²⁴ is not credible and seems little more than a pretext.¹²⁵ The treatment of the captured Somalis was not consistent with how a captured saboteur would be handled. The two Somali men, Mr Abdi Hunde Bei Sabrie and Mr Ahmed Afraraho Aruush, did not approach the Canadian installations in a military fashion. They, therefore, posed no threat whatsoever to the Canadian troops or the installations apart from possible thievery.¹²⁶ Mr Abdi and Mr Aruush did not breach the wire at the helicopter compound, nor did they approach any closer than 100 metres from the boundary of the compound.¹²⁷ The two Somalis were unarmed, except for one ritual knife, which was not produced by either man during the entire incident. No hostile act was committed and no hostile intent was demonstrated that could have justified the use of force, let alone deadly force.¹²⁸ The shootings, therefore, of Mr Aruush and Mr Abdi were not consecutive to any perceived threat, but stemmed rather from the will to

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² It seems that a commander even shouted, "Get him", following which shout two soldiers 'dropped to their knees, and each fired an aimed shot at Mr Aruush' who died on the spot. See Rowe P 'Military Misconduct during International Armed Operations: "Bad Apples" or Systemic Failure?' 2008 (13) *Journal of Conflict & Security Law* 165-189, 176; Heide RL 'Obligation of the Home Front: The Necessity of Cultural Awareness Training for Interventions in the New World Order' - *After the Fall: Theory and Practice of Post-Intervention Security* (Paper presented at the Centre for Security and Defence Studies Conference Ottawa 10 March 2006) 11.

¹²³ CCI Somalia *op cit* (n 103) 1057.

¹²⁴ A fuel pump was stolen from the CAR camp. The theft was interpreted as an act of sabotage. See CCI Somalia *op cit* (n 103) 297.

¹²⁵ See finding 1.14 of the Commission. CCI Somalia *op cit* (n 103) 1055.

¹²⁶ CCI Somalia *op cit* (n 103) 1055.

¹²⁷ Finding 1.16. See CCI Somalia *op cit* (n 103) 1056.

¹²⁸ Finding 1.19.

accomplish capture as instructed. The use of such force was inappropriate and not permitted under the Rules of Engagement.¹²⁹

The Commission realised that the investigation of the military justice system into the incidents which occurred ‘in theatre’ and post deployment to Somalia were merely examples of the many cases where the decision to investigate, the investigation itself, and the reporting of the investigation, deviated from the required procedure or from what would normally be expected in a fair justice system.¹³⁰ According to the Canadian military code, commanding officers have primary responsibility for the decision to investigate¹³¹ and to decide upon the mode of investigation.¹³² In cases where a charge is laid, they are required to arrest the suspect regardless of the person’s rank or status.¹³³ In other instances, commanding officers are required to take into account the specificity of the matter investigated. Thus, if a Canadian Force member dies for any reason other than from injuries received in action, a summary investigation or board of inquiry must be held.¹³⁴ Moreover, the Military Police have powers to initiate their own investigations, although when they do so they must brief the appropriate commander, commanding officer, or other person in charge at the earliest practical moment regarding the circumstances surrounding their investigation.¹³⁵ In most cases, however, the commanding officer decides whether to investigate and what kind of investigation to conduct.¹³⁶

It is important to note that it was the death of Shidane Arone that occasioned the investigation of prior incidents by military police.¹³⁷ This means that many incidents that should have been investigated before were not investigated in time or were not investigated at all.¹³⁸ For instance, 62 incidents which required investigation occurred between the beginning of the

¹²⁹ Findings 1.21-1.35. See CCI Somalia *op cit* (n 103) 1056-1057.

¹³⁰ CCI Somalia *op cit* (n 103) 1119.

¹³¹ As from 30 November 1997 a specialised National Investigation Service exists, and it conducts all investigations and has the power to lay charges. See Pitzul JST & Maguire JC ‘A Perspective on Canada's Code of Service Discipline’ 2002 (52) *The Air Force Law Review* 1-15, 10.

¹³² Ss 163-164 of the *National Defence Act – Canada*; Canadian Forces *Military Justice at the Summary Trial Level* (Vol. 2 No.1 B-GG-005-027/AF-011 of 15 February 2006) para 45.

¹³³ S. 156 of the *National Defence Act – Canada*.

¹³⁴ CCI Somalia *op cit* (n 103) 1119.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Rouillard L-PF ‘Canada’s Prevention and Repression of War Crimes’ 2005 (2) *Miskolc Journal of International Law* 43-58, 47.

¹³⁸ CCI Somalia *op cit* (n 103) 1119.

deployment of the Canadian contingent and the incident of 16 March 1993.¹³⁹ These incidents included allegations of serious criminal or disciplinary misconduct: mistreatment of detainees; killing of Somalis; theft of public property; and self-inflicted gunshot wounds.¹⁴⁰ The commission reported that none of the 62 recorded incidents was investigated by the Military Police at the time they occurred, not even the serious ones that are required to be investigated by the Military Police.¹⁴¹ Although not appropriately and adequately performed, however, summary investigations were promptly called in eight of the 62 cases, and informal or other investigations were held in an additional 27 cases.¹⁴² Indeed, prior to the change brought by the 1997 establishment of the National Investigation Service,¹⁴³ the battle commanders had much influence on Military police who actually could not decide by themselves whether to initiate an investigation or not.¹⁴⁴

The explanation of why investigations were not conducted is said to lie in the insufficiency of military police in the theatre field, i.e. in Somalia itself.¹⁴⁵ To resolve this, two investigators were sent from Canada to investigate the circumstances of the death of Shidane Arone.¹⁴⁶ Because of the torture to death of Arone, two other military police teams were called from Canada and tasked with the investigation into the incidents of March 4th, i.e. the shooting of two Somali nationals which occurred 12 days before the incident that brought awareness.¹⁴⁷ The first team investigated the incident itself; the second investigated a possible cover-up of the incident by Canadian Force members in Somalia.¹⁴⁸ Many summary investigations that had been undertaken were incomplete or flawed, and, in some, the Canadian Force guidelines were not followed.¹⁴⁹ In other summary investigations, witness statements which should have been taken into account were not considered, and, in still other cases, those conducting or

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ CCI Somalia *op cit* (n 103) 1119.

¹⁴² *Ibid.*

¹⁴³ Pitzul JST & Maguire JC 'A Perspective on Canada's Code of Service Discipline' 2002 (52) *The Air Force Law Review* 1-15, 10.

¹⁴⁴ Halpenny A 'The Governance of Military Police in Canada' 2010 (48) *Osgoode Hall Law Journal* 1-53, 3.

¹⁴⁵ CCI Somalia *op cit* (n 103) 1121.

¹⁴⁶ *Ibid.* see also Rouillard L-PF 'Canada's Prevention and Repression of War Crimes' 2005 (2) *Miskolc Journal of International Law* 43-58, 47.

¹⁴⁷ CCI Somalia *op cit* (n 103) 1121.

¹⁴⁸ Whitworth S 'Militarized Masculinities and the Politics of Peacekeeping: The Canadian Case' in Booth K (ed) *Critical Security Studies in World Politics* (Lynne Reinner Publishers Boulder 2005) 89-106.

¹⁴⁹ CCI Somalia *op cit* (n 103) 1123.

ordering the investigations had a conflict of interest.¹⁵⁰ According to the Commission of Inquiry, the investigation of the March 4th incident missed important witness statements, and several other investigations were also incomplete.¹⁵¹ Only four statements were taken in respect of the shooting incident that killed one Somali and injured two others at the Bailey bridge on 17 February 1993. None of the Somalis and few of the soldiers who were present were interviewed.¹⁵²

In at least four of the summary investigations ordered, conflicts of interest arose since commanding officers responsible for carrying out or supervising the investigations were potentially implicated in the problematic conduct.¹⁵³ These conflicts are inherent in the formal role and responsibilities of a commanding officer.¹⁵⁴ The conflict of interest can taint the appearance of fairness of the investigations and may certainly affect their impartial outcome.¹⁵⁵ The Military Police attempted to carry out their investigations professionally and adequately. Most of the individuals involved in the two most serious incidents - the shootings on March 4th and the death of Mr. Arone on March 16th - were identified by the Military Police.¹⁵⁶

Although most of the evidence collected by the Military Police appears to have met the standards of admissibility in the military justice system, the investigative shortcomings which exist stemmed largely from the systemic challenges faced by the Military Police, especially the fact that the few appropriately-trained Military Police could not carry out the investigations adequately as many investigations were conducted long after the event and under tight deadlines, when the scene could not remain intact.¹⁵⁷ Furthermore, in any instance of a criminal charge, commanding officers were reluctant to call in the Military Police to

¹⁵⁰ *Ibid.*

¹⁵¹ CCI Somalia *op cit* (n 103) 1124.

¹⁵² Siver C 'The Dark Side of Canadian Peacekeeping: The Canadian Airborne Regiment in Somalia' (Paper presented at Politics, Philosophy and Economics Seminar Series University of Washington -Tacoma 23 November 2009) 2.

¹⁵³ CCI Somalia *op cit* (n 103) 1125.

¹⁵⁴ *Addy v. Canada* (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission) [1997] F.C.J. No. 796 paras [58] & [60].

¹⁵⁵ Fairness is important to an impartial outcome of any investigation. See Committee Against Torture (UN) *Consideration of Reports Submitted By States Parties Under Article 19 of The Convention, Third periodic report of States parties due in 1996 – Addendum Canada [19 October 1999]* (CAT/C/34/Add.13 of 31 May 2000) 54.

¹⁵⁶ CCI Somalia *op cit* (n 103) 1125.

¹⁵⁷ CCI Somalia *op cit* (n 103) 1128.

investigate.¹⁵⁸ Military Police also encountered problems when conducting individual investigations, including a lack of cooperation from soldiers and officers. Investigators were in all circumstances in difficulty as regards investigating their superiors.¹⁵⁹ Commanding officers imposed limits on investigations. Indeed, the investigations were frustrated owing to the fact that military police investigating had been subjected to disciplinary measures for having conducted investigations prior to the incidents.¹⁶⁰ Moreover, some of the investigations conducted by the military police were incomplete in part, the choice of investigative tactics was sometimes governed by irrelevant considerations, and some individuals were inappropriately cautioned, thereby restricting the information that could be gathered.¹⁶¹ In general, few attempts were made to obtain statements from Somali witnesses. As examples, there are the incident involving the alleged injury to a child by a Canadian Airborne Regiment vehicle and the investigation of the shooting at the Bailey bridge.¹⁶² It is clear that a systemic problem exists as the military is reluctant to investigate its own potential misconduct by approaching external witnesses.¹⁶³

Later investigations, conducted in 1994, exhibited several deficiencies; they were initiated long after the incidents occurred; and the time limits to the investigators did not allow efficiency.¹⁶⁴ The investigation into the alleged mistreatment of detainees could not obtain written statements from Colonel Labbé¹⁶⁵ or from other individuals who could recall having seen the detainees.¹⁶⁶ Similarly, no written statements were obtained from the key witnesses with respect to alleged orders to destroy photographs of detainees.¹⁶⁷ With regard to the investigation of taking of money from a Somali vehicle during a 'house clearing' operation, the incident was not well documented, since investigators could not secure written statements

¹⁵⁸ CCI Somalia *op cit* (n 103) 1126.

¹⁵⁹ An attempt to do so may be interpreted as an act of indiscipline. See Canadian Forces *Military Justice at the Summary Trial Level* (Vol. 2 No.1 B-GG-005-027/AF-011 of 15 February 2006) para 59.

¹⁶⁰ CCI Somalia *op cit* (n 103) 1126.

¹⁶¹ *Ibid.*

¹⁶² CCI Somalia *op cit* (n 103) 1127.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Colonel J. Serge Labbé was a serving officer in the Canadian Armed Forces. He was "In-Theatre" Commander of the Canadian Joint Forces in Somalia from December 14, 1992 until approximately June 17, 1993. See *Addy v. Canada* (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission) [1997] F.C.J. No. 796 para [7].

¹⁶⁶ para [41].

¹⁶⁷ CCI Somalia *op cit* (n 103) 1127.

from military members who had accompanied Colonel Labbé and witnessed his actions.¹⁶⁸ In other cases, the conclusions of investigators were reached prematurely, without answering important questions of obvious contradictions between different statements. For instance, the Military Police investigation into the shooting at the Bailey bridge concluded that the soldiers acted properly,¹⁶⁹ whereas the investigation could not clarify contradictions between the statements of the soldiers involved and the statements contained in briefings.¹⁷⁰

A key issue to consider is whether any prosecution followed. Charges were laid as a result of the torture and death of Shidane Arone. The soldiers and officers were charged with passing on orders that prisoners could be abused.¹⁷¹ They were also charged with failing to issue instructions to subordinates to prevent the mistreatment of prisoners, for not ensuring that a Somali prisoner was safeguarded, for failing to exercise command over their subordinates following the capture of Mr Arone, and for not intervening to put a stop to the mistreatment of the prisoner.¹⁷² There was also evidence in the courts martial that other soldiers knew that the prisoner was being tortured but they were not punished. Despite the existence of some convictions, several officers who were in a position of promoting discipline and respect for the lawful of armed conflicts escaped accountability.¹⁷³ The Commission of Inquiry itself queried why superior officers were not called to account for failing to intervene in these events.¹⁷⁴ Upon the basis of the Code of Service Discipline and the Queen's Regulations and Orders, officers would have been held accountable for neglecting to intervene to prevent misconduct by those under their command.¹⁷⁵

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ CCI Somalia *op cit* (n 103) 1128.

¹⁷¹ The most preeminent soldier who carried out the so-called order to 'abuse' the prisoner could not stand trial. In April 1994, MCpl Matchee was found mentally unfit to stand trial on charges of second degree murder and torture. At that time he was detained in the National Defence Medical Centre in Ottawa. In June 1994, the Ontario Criminal Review Board issued an order that he be transferred to the Royal Ottawa Hospital, where a programme was to be developed for his detention, custody, and rehabilitation, with a later transfer to a facility in Saskatchewan where his family resides. As at the time of the publication of this report, the charges against MCPI Matchee remain, and he can be tried in the future if he is judged competent to stand trial. See CCI Somalia *op cit* (n 103) 329-330. See also *R v. Boland* (Appeal) para [10].

¹⁷² Elvin Kyle Brown was the only soldier charged with, and found guilty of, Arone's death. He was sentenced to five years in prison and dismissed in disgrace for the torture and manslaughter of Arone. See *R. v. Brown*, especially Appeal: Elvin Kyle Brown (Private, Canadian Forces) Appellant v. Her Majesty the Queen, Respondent [1995] C.M.A.J. No. 1 Judgment 6 January 1995 para [1].

¹⁷³ CCI Somalia *op cit* (n 103) 1130.

¹⁷⁴ CCI Somalia *op cit* (n 103) 1130.

¹⁷⁵ CCI Somalia *op cit* (n 103) 1130-1131.

5.2.2.2. Belgium

The allegations that Belgian troops committed rights abuses against Somali citizens have been recounted with others in chapter two of this thesis.¹⁷⁶ The said allegations were supported by evidence, especially photographs taken by the Belgian soldiers themselves.¹⁷⁷ The issue here is, therefore, to know whether such allegations were investigated and, if so, what may have been the difficulties encountered by investigators.

Indeed, judicial investigations promptly opened into the allegations by the military authorities (*auditorat militaire*) resulted in two former paratroopers being tried before a military court in June in connection with the treatment of the Somali boy held over an open fire.¹⁷⁸ On 30 June 1997, the court acquitted both men of the charges of assault and battery and of using threats (*coups et blessures volontaires avec menaces*).¹⁷⁹ The military prosecutor, who had requested a sentence of one month's imprisonment and a fine of 10,000 Belgian francs for each of the defendants, reportedly lodged an appeal.¹⁸⁰ A sergeant was due to stand trial before a military court on 8 September 1997 in connection with the alleged forcible feeding of a Somali child.¹⁸¹ A sergeant major will also stand trial in September, apparently on suspicion of having killed the Somali on whose body he was photographed urinating.¹⁸²

Following the publication of the allegations and photographs, the Minister of Defence ordered a broader administrative investigation carried.¹⁸³ In its letter, Amnesty International asked for details of the terms of reference of the investigation to be given to it and to be informed of its outcome.¹⁸⁴ To ensure that the investigation commission worked with impartiality, Amnesty International asked whether consideration had been given to a comprehensive inquiry,

¹⁷⁶ Supra 2.2.1.

¹⁷⁷ *Ibid.*

¹⁷⁸ The investigation began on 16 September 1993 and ended in November. See Zymberaj S 'Les troupes belges en Somalie (1993)' available at www.grip.org/bdg/g1551.html [last accessed 1 July 2011]; see also discussion of the two cases supra 4.6.2.1 and 4.6.2.2.

¹⁷⁹ Amnesty International 'Belgium-Alleged Human Rights Violations by Members of the Armed Forces in Somalia' *OSCE Human Dimension Implementation Meeting, Warsaw, November 1997: Human Rights Are an Essential Component of European Security* (Amnesty International September 1997 AI Index: EUR 01/06/97) 15-17.

¹⁸⁰ *Ibid.*

¹⁸¹ The forceful feeding consisted of salted water and pork, a prohibited meat to a Muslim.

¹⁸² Amnesty International 'Belgium-Alleged Human Rights Violations by Members of the Armed Forces in Somalia' *op cit* (n 179) 16.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

independently of the military.¹⁸⁵ It is unlikely that this was the case, since the commission was headed by an army member, General Jozef Schoups.¹⁸⁶

Even though the acts of torture and killing by Belgian troops in Somalia, publicised by African Rights, were supported by photographic evidence, the Belgian army and government denied them outright.¹⁸⁷ Commander Van de Weghe said the facts had been exaggerated, taken out of context, or simply invented.¹⁸⁸ The UN has recognised that instances of sexual exploitation and abuse may constitute violations of International Humanitarian Law, Human Rights Law, or both.¹⁸⁹ There is no explanation about the position of a Troop-Contributing Country considering the allegations of sexual offences perpetrated by their troops to be negligible.¹⁹⁰

After presenting highlights of certain findings emerging from the administrative inquiry to Parliament on 8 July 1997, the Minister of Defence wished to set up an independent inquiry on racism within the army.¹⁹¹ The report by General Schoups recommended a better selection of army candidates, improvement in training, and the inclusion of more information on humanitarian law in the training programmes provisions to soldiers.¹⁹² It also indicated that excessive delays in disciplinary proceedings and problems of alcohol abuse in the army were to be addressed.¹⁹³ Despite the existence of incidents involving unacceptable conduct,¹⁹⁴ the investigation commission concluded that there was no serious problem in respect of the

¹⁸⁵ *Ibid.*

¹⁸⁶ Zymberaj S 'Les troupes belges en Somalie (1993)' available at www.grip.org/bdg/g1551.html [last accessed 1 July 2011].

¹⁸⁷ De Waal A 'US War crimes in Somalia' 1998(30) *New Left Review* 131-144, 136.

¹⁸⁸ *Ibid.*

¹⁸⁹ Zeid Report UN DOC. A/59/710 of 24 March 2005 para 10.

¹⁹⁰ The judgment of the Belgian military court at Brussels, rendered in 1997, regarding the UN peace operation in Somalia highlighted the fact that UN forces can be a party to a conflict and be constrained by the rules of international humanitarian law, although the leniency of the sentences would seem to prove otherwise, even though infringements of humanitarian law are serious offences. See Knoop GJ *Defenses in Contemporary International Criminal Law* (Transnational Publishers Ardsley 2001) 134.

¹⁹¹ Amnesty International 'Belgium-Alleged Human Rights Violations by Members of the Armed Forces in Somalia' *op cit* (n 179) 16.

¹⁹² Knoop GJ *op cit* (n 190) 134.

¹⁹³ Amnesty International 'Belgium-Alleged Human Rights Violations by Members of the Armed Forces in Somalia' *op cit* (n 179) 16.

¹⁹⁴ Belgium did not pay compensation to the victims of the incidents involving Belgian soldiers in UNOSOM. Claims by third parties were processed and paid by the UN. See Zwanenburg M *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers Leiden 2005) 229, footnote 93. After consultation with the Belgian Ministry of Defence, the sum of US\$ 2,800,000.00 was paid.

application of the law of armed conflict.¹⁹⁵ How did South Africa fare regarding allegations of crimes committed by members of its contingents in Burundi and DRC?

5.2.2.3. South Africa

As indicated earlier¹⁹⁶, South African peacekeepers have been members of the UN missions to Burundi and are still serving with the peace operation to the Democratic Republic of the Congo.¹⁹⁷ Allegations of misconduct made against the peacekeeping personnel of ONUB and MONUC were also directed against South African soldiers.¹⁹⁸ It is, therefore, interesting to investigate whether South Africa has chosen to investigate or has ignored the complaints made against a certain number of its soldiers.

It is important to recall that military personnel constitute the majority of offenders in allegations of sexual exploitation and abuse.¹⁹⁹ This section, therefore, focuses on the issue of whether the allegations against SANDF personnel serving with the two UN missions of peace have been investigated or not. Before discussing this, it is prudent first to discuss whether there is any enacted legislation in South Africa which would allow any possible investigations to be conducted outside the country. Such a discussion relates to the issue of extra-territorial matters in criminal law.

¹⁹⁵ Zwanenburg M *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers Leiden 2005) 228.

¹⁹⁶ *Supra* 3.2.3.

¹⁹⁷ *Supra* 3.2.

¹⁹⁸ Holt K and Hughes S 'South Africa: Army silent on sex scandal in DRC' available at www.iol.co.za/news-south-africa/army-silent-on-sex-scandal-1.216984 [last accessed 21 December 2012]; Gantz PH and Martin S (eds) 'Briefing Material' 2004 *Refugees International* available at www.refugeesinternational.org [last accessed 17 August 2012].

¹⁹⁹ Over 70% of allegations involve military personnel. From 2003-2008, 537 out of 767 allegations concerned military personnel. See statistics from 'Special measures for protection from sexual exploitation and sexual abuse', the Secretary-General's Reports of sexual exploitation and abuse investigation data: A/59/782, Annex I Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2004; A/60/861, Annex I Nature of allegations, by United Nations entity and category of personnel, 1 January- 31 December 2005; A/61/957 Annex VI Nature of allegations, by personnel of the Department of Peacekeeping Operations, 1 January-31 December 2006; A/62/890, Annex VI Nature of allegations in completed investigations, by category of personnel of the DPKO/DFS, 1 January- 31 December 2007; A/63/720, Annex V Nature of allegations, by category of personnel of the DPKO/DFS, for completed investigations, 1 January- 31 December 2008.

5.2.2.4.1 Recall of extra-territoriality issues

In principle, the application of the laws of South Africa is limited solely to domestic cases.²⁰⁰ However, subsection 1 of section 3 of the MDSMA states that the Act applies to any person subject to the Code, irrespective of whether such person is within or outside the Republic.²⁰¹ The Act, therefore, has provided for the extra-territorial application of the measures applicable to members of the South African National Defence Force. Section 5 also indicates that the Act may be enforced outside the RSA.²⁰² Since most crimes committed by SANDF members deployed as peacekeepers are of a sexual nature, the issue of extra-territorial jurisdiction needs also to be addressed by the Sexual Offences Act 32 of 2007, especially with respect to conduct which is not specifically related to military service.²⁰³ With respect to extra-territoriality, section 61 of the Act expressly grants extra-territorial jurisdiction over SANDF personnel for any sexual crime committed outside South Africa, even when such act is not a crime where it was perpetrated.²⁰⁴ All allegations of sexual misconduct committed by SANDF personnel, therefore, whether classified as violations of the code of Military Discipline (that is, strictly service-related offences), as violations of the ordinary criminal law (especially of the Sexual Offences Act), or as violations of international law, may be prosecuted by the South African military. Allegations of rape will typically be brought before the courts of competent senior military judges²⁰⁵ and the bench is composed of three judges.²⁰⁶ The supplementary measures to the code of Military Discipline do not indicate which court is competent if a war crime has been committed. As a general rule, however, while South Africa does not have to prosecute war crimes committed outside the RSA, the Rome Statute indicates that South African courts have jurisdiction over war crimes whoever

²⁰⁰ UNGA ‘Legal Committee Told “Jurisdictional Gaps” Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions’ GA/L/3342 of 10 October 2008 (hereinafter GA/L/3342 of 10 October 2008).

²⁰¹ *Military Discipline Supplementary Measures Act (MDMSA)*.

²⁰² Whenever this Act is enforced outside the Republic, any finding, sentence, penalty, fine, or order made, pronounced, or imposed in terms of its provisions shall be as valid and effectual, and shall be carried into effect, as if it had been made, pronounced or imposed in the Republic. This must be construed as indicating that the SANDF operating outside the RSA has to establish operational military courts, not only to enforce punishment for service-related offences, but also any offence committed by its troops.

²⁰³ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁰⁴ Military personnel are citizens of the republic. See Annex C.

²⁰⁵ S. 9(2) MDSMA.

²⁰⁶ S. 9(3) MDSMA.

may have committed them.²⁰⁷ This would include SANDF personnel serving with the UN forces if their alleged crimes are substantiated and qualify as war crimes.

Prostitution *per se* is not an offence in Congolese or Burundian law. It is also not an offence to visit a prostitute. A South African soldier, therefore, who has paid for sex in the Host State, incurs no criminal proceedings. As a South African citizen, however, he can still be prosecuted for such an act committed outside the RSA.²⁰⁸ Since South African peacekeepers have been deployed in DRC and Burundi, where frequenting a prostitute is not an offence, their conduct may remain un-reported. Indeed, no one in the Host State would actually complain to any authority about prostitution.²⁰⁹ In the absence of investigations conducted by the South African authorities, it is exceedingly unlikely that instances of prosecution would exist in this regard. Murder, rape, or culpable homicide would, therefore, be the only instances warranting prosecution as these crimes certainly possess complainants and can seldom be committed unnoticed.

5.2.2.4.2 Investigation²¹⁰ of the allegations against members of SANDF²¹¹

South African soldiers deployed on a UN Peacekeeping mission in the Democratic Republic of Congo have been accused of involvement in a massive sex abuse scandal.²¹² Although not perpetrated by the contingent from South Africa alone, the allegations include a staggering 50 cases of sex attacks on minors in Bunia throughout 2003.²¹³ Involved peacekeepers were mainly South African and Indian soldiers.²¹⁴ A South African Colonel was sent home from the Congolese province of North Kivu after investigations substantiated that he had been

²⁰⁷ S 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

²⁰⁸ S 61(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁰⁹ The South African competent authorities may resort to the OIOS findings. It may be difficult to establish the occurrence of the act beyond reasonable doubt.

²¹⁰ The obligation on the part of the State to ensure the full enjoyment of rights entails a duty to prevent, investigate, and punish any violation ... If it fails to do that, the State violates human rights. *Velasquez Rodriguez* Case, Judgment of 29 July 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988) para [172] referred to by Finell P *Accountability under International Human Rights Law and International Criminal Law for Atrocities Against Minority Groups Committed by non-State Actors* (Abo Akademi Institute for Human Rights May 2002) 16.

²¹¹ Generally speaking, soldiers deployed in conflict areas will have few opportunities to indulge in misconduct, but when deployed with a UN mission to maintain order, opportunities for misconduct are much greater. See Rowe P 'Military Misconduct during International Armed Operations: "Bad Apples" or Systematic Failure?' 2008 (13) *Journal of Conflict and Security Law* 165-189, 167.

²¹² Holt K and Hughes S 'South Africa: Army silent on sex scandal in DRC' available at www.iol.co.za/news-south-africa/army-silent-on-sex-scandal-1.216984 [last accessed 21 December 2012].

²¹³ Rasmussen J 'MONUC: Sexual Exploitation and Abuse -End of Assignment Report' 25 February 2005, 2.

²¹⁴ *Ibid.*

molesting his young male interpreter.²¹⁵ Other allegations relate to the behaviour of South African MONUC troops stationed in Kindu.²¹⁶

The question of whether the allegations levelled against SANDF members in the DRC have been investigated was also orally posed in Parliament to the South African Minister of Foreign Affairs in 2004.²¹⁷ The Legislative body wanted answers and to have details from the department regarding allegations against members of the South African contingent serving with MONUC, especially regarding the abuse of children. The second question relates to the interaction between the department and the UN, if any, and the findings with respect to that. The third and fourth questions sought to establish whether there had been any investigation including a South African official, and the findings or evidence as to whether the allegations had been substantiated or not.²¹⁸

In answering the questions, the Minister indicated that the department was aware of the allegations made in the media against SANDF members serving in the United Nations Mission in the Democratic Republic of the Congo (MONUC).²¹⁹ The UNDPKO team sent in Bunia to conduct investigations included no South African official.²²⁰ The Minister reminded the honourable Members of Parliament that, at the time when all the allegations pertaining to sexual exploitation and abuse in Bunia were reported in the media, there were only ten South African National Defence Force (SANDF) members stationed in that town.²²¹

The above answer regarding the small number of South African soldiers present in Bunia does not mean that they were not involved in any misconduct. It, however, makes it clear that

²¹⁵ UNGA 'Investigation by the Office of Internal Oversight Services into Allegations of Sexual exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo' (UN. Doc. A/59/661); Du Plessis M & Pete S 'Who Guards the Guards?: The ICC and serious crimes committed by United Nations Peacekeepers in Africa' 2004 (13) *African Security Review* 5-17, 8.

²¹⁶ Du Plessis M & Pete S *Who Guards the Guards? The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No 121 Pretoria February 2006) 6.

²¹⁷ National Assembly *Allegations of Abuse by Members of SANDF in DRC: Question No.14 For Oral Reply*, Question time: 08 September 2004 - Written question No. 390 Transferred for Oral Reply, Published in The Internal Question Paper No 8 of 6 August 2004 available at <http://www.dfa.gov.za/docs/2004pq/pq14.htm> [last accessed 21 December 2012].

²¹⁸ National Assembly *Allegations of Abuse by Members of SANDF in DRC: Question No.14 For Oral Reply*, Question time: 08 September 2004 - Written question No. 390 Transferred for Oral Reply, Published in The Internal Question Paper No 8 of 6 August 2004 available at <http://www.dfa.gov.za/docs/2004pq/pq14.htm> [last accessed 21 December 2012].

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

South Africa did not initiate an investigation into the matter. It is also obvious that the few SANDF personnel present in Bunia were not associated with the UN investigating team. The other investigation launched by MONUC in Kinshasa in 2003 was dropped because of a lack of evidence and support for the investigation from the military contingent commanders.²²² The fact that MONUC soldiers are on a six-month posting renders the investigation more complex. A rotated soldier is, therefore, unlikely to face a military investigation.²²³

It is important for South Africa to investigate in order to prove wrong the assertion that SANDF members have a cultural problem with respect to abiding by the disciplinary code, that they have exhibited an extremely poor disciplinary record, and manifested a cultural problem.²²⁴ The behaviour of South African troops, Mandrup notes, especially when off-duty in both Burundi and the DRC, has been a problem for South Africa and has given the force a bad reputation.²²⁵ This cannot be remedied if a thorough investigation is not conducted. South Africa may, by doing so, manage to create the impression of a professional and capable force, which can properly and proudly function as a representative of South Africa.²²⁶

Applying domestic law, the Military Discipline Supplementary Measures Act underlines the importance of gathering evidence.²²⁷ The Act underscores the manner in which a preliminary investigation has to be conducted.²²⁸ Except for illness or exigencies of service or other cogent reasons that the investigator judges fit, evidence by witnesses must be given *viva voce*.²²⁹ With respect to investigating crimes committed outside the RSA, it stresses that:

(8) When a preliminary investigation is held in respect of treason, murder, rape or culpable homicide, committed outside the Republic, or a contravention of section 4 or 5 of the Code²³⁰ or any offence punishable by imprisonment exceeding a period of 10 years, the prosecution counsel shall, subject to subsection (10), lead the evidence of every witness called by him or her and any

²²² Spencer SW 'Making Peace: Preventing and Responding to Sexual Exploitation by United Nations Peacekeepers' 2005 (16) *Journal of Public and International Affairs* 167-181, 169.

²²³ Du Plessis M & Pete S *Who Guards the Guards? The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No 121 Pretoria February 2006) 3.

²²⁴ Mandrup T *The South African National Defence Force: Midwife of Peace in Africa?* (Paper presented at the Institute for Strategy Royal Danish Defence College Copenhagen June 2008) 23.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ S 30 MDSMA.

²²⁸ S 30(5) MDSMA.

²²⁹ *Ibid.*

²³⁰ Ss.4 and 5 MDSMA provide respectively for resolution in cases of conflict between the Act and other laws and the extraterritorial jurisdiction of the Act.

witness may be cross-examined by the accused and may thereafter be re-examined by the prosecution counsel in relation to any evidence given by that witness under cross-examination and may at any stage of the proceedings be recalled by the presiding judge, commanding officer or recording officer for the purpose of being further examined or cross-examined, as the case may be.

(9)...

(10) When any witness cannot by reason of illness or the exigencies of the service or for any other reason which the presiding judge, commanding officer or recording officer deems fit, attend a preliminary investigation to give evidence, a sworn statement purporting to have been signed by such person may be read over to the accused and shall thereupon form part of the record of the proceedings of the preliminary investigation: Provided that the inability of the accused to exercise the rights in terms of subsection (8) which would have accrued to the accused if such person had been called to give evidence shall not be taken or construed in any subsequent proceedings to the prejudice of the accused.

From an analysis of the above-mentioned provisions, it would appear that it is an international obligation for States, pursuant to customary international law, to investigate war crimes allegedly committed by their nationals, especially members of armed forces, and, where appropriate, prosecute them.²³¹ South Africa is, therefore, expected to observe such customary rules regarding its armed forces deployed in Africa with UN missions of peace. Despite the fact that it is well established that South African troops have committed crimes while performing peacekeeping duties in Africa,²³² despite the existence of allegations of sexual offences by South African troops in Kindu and in Burundi,²³³ it does not seem that the SANDF or any other South African authority has sent any mission to the scene to investigate these allegations. South Africa should, prior to any prosecution, conduct a genuine

²³¹ Henckaerts JM 'The Development of International Humanitarian Law and the Continued Relevance of Custom' in Hensel HM (ed) *The Legitimate Use of Military Force: The Just War Tradition and Customary Law of Armed Conflict* (Ashgate Hampshire 2008) 117-133, 126.

²³² Du Plessis M & Pete S 'Who Guards the Guards?: The ICC and serious crimes committed by United Nations Peacekeepers in Africa' 2004 (13) *African Security Review* 1-17, 8 referring to Holt K and Hughes S 'SA troops "raped kids in DRC"' *Pretoria News* 12 July 2004.

²³³ Hoffmeister T 'Policing those who Police the Peace' *International Herald Tribune* 31 December 2004; Bridges D and Horsfall D 'Increasing Operational Effectiveness in UN Peacekeeping: Toward a Gender-Balanced Force' 2009 (36) *Armed Forces & Society* 120-130, 122.

investigation to identify the suspects and to collect evidence.²³⁴ No prosecution is possible without the prior and proper establishment of facts and the identification of offenders.

With respect to the allegations of crimes in Goma, Kindu, and Burundi, there is a dearth of information regarding specific instances where peacekeepers have been investigated.²³⁵ It may be noted, however, that a South African Portfolio Committee on Defence conducted an oversight visit to the DRC in October 2005, and its report, dated 14 March 2006, shows that some instances of sexual misconduct did occur, though nothing further indicates that, at the national level, proceedings have been initiated.²³⁶ The committee noted that incidences of sexual exploitation and sexual abuse by SANDF members are not widespread, but can impact negatively on the overall performance of the SANDF.²³⁷ With respect to discipline, it recalled that the contingent is under the discipline of the administrative command of the SANDF, but under the *operational* control of the UN, and, therefore, the force must observe and make sure it implements the UN non-fraternisation and ‘sexual exploitation and abuse’ policy.²³⁸ In certain quarters, however, remarked the committee, there are some grey areas with regard to the understanding of fraternisation with the local community.²³⁹

As to the issue of sexual exploitation and abuse, and its proper investigation, the committee pointed out that MONUC had an Investigative Office to this end.²⁴⁰ Known as the ‘Office for Addressing Sexual Exploitation and Sexual Abuse’, the Office addresses violations of a sexual nature that plagued the peace support mission.²⁴¹ From December 2004 to October 2005, this office investigated 110 cases of alleged sexual exploitation and abuse, involving

²³⁴ El Zeidy MM *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers Leiden 2008) 167.

²³⁵ It is important to note the prosecution taking place regarding the rape and murder committed during peacekeeping in Burundi. In August 2007, a South African military court found Air Force Sergeant Philippus Jacobus Venter guilty of raping and murdering a 14-year-old girl and assaulting a Burundian security guard while serving as a peacekeeper in Burundi in 2004. He was sentenced to 24 years of imprisonment. In October 2008 Venter appealed the ruling, claiming his constitutional right to a fair trial had been breached, as the arresting military police officer had failed to follow proper procedure. The judge reserved judgment on Venter's appeal; the case was pending at the year's end. See United States Department of State *2008 Country Reports on Human Rights Practices - South Africa* (25 February 2009) available at www.state.gov/j/drl/rls/hrrpt/2008/af-119025.htm [last accessed 21 December 2012].

²³⁶ Report of the Portfolio Committee on Defence on an Oversight visit to the Democratic Republic of the Congo 14 March 2006 available at www.pmg.org.za/docs/2006drc.pdf [last accessed 21 December 2012] (hereinafter SA-Portfolio Report on Defence).

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ SA -Portfolio Report on Defence 7.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

soldiers, police, and civilians. Ninety-five cases involved soldiers; thirty-two per cent of them were South Africans.²⁴² The Office substantiated the allegations in respect of 8 SANDF members.²⁴³ At the time of the committee's report (March 2006), two cases were in the process of being finalised by the board of inquiry.²⁴⁴ Eight SANDF members (1 officer, 1 warrant officer and 6 NCOs) were repatriated to South Africa on disciplinary grounds for sexual exploitation and abuse.²⁴⁵ Eight allegations involving possibly 15 soldiers have been forwarded to the Office of Internal Oversight Services, which took over the investigative function from the Office for addressing Sexual Exploitation and Abuse.²⁴⁶ It is, therefore, evident that many cases remained unsubstantiated because of, (i) a lack of evidence or witnesses and (ii) the long time between the alleged event and the completion of the judicial process. Four new cases, involving seven SANDF soldiers, were received, but they have been referred to the OIOS.²⁴⁷ It was stated that the Office for Addressing Sexual Exploitation and Sexual Abuse and the OIOS received the fullest support and cooperation from the SANDF leadership.²⁴⁸ The case of a South African colonel in Goma, DRC, whose conduct was substantiated during a UN investigation, and another incident of rape of a 12-year-old girl identified as Anna, involved South African troops in Goma.²⁴⁹

When the process of investigation is completed the documentation is forwarded to the Department of Peace Keeping Operations (DPKO) at the UN headquarters in New York.²⁵⁰ After it has been mentioned and which of the allegations have been substantiated highlighted, the DPKO forwards the record of proceedings of the instances investigated to the Permanent

²⁴² SA -Portfolio Report on Defence 7.

²⁴³ SA -Portfolio Report on Defence 8.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ ²⁴⁶ SA -Portfolio Report on Defence 8.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ Anna's story is as follows: "I came to Goma with my family from Massissi over two years ago when the war got very bad. My father and my two brothers were killed on the way. We had to escape the war and came here to be safe. Then a few weeks ago, I was walking past a UN vehicle and there were South African soldiers standing around with guns. They asked me if I wanted a biscuit and so I went up to where they were holding a packet out for me. As I came close, one of them grabbed me and took me inside the vehicle and shut the door. Then he ripped off my dress and made me do it with him. I was scared and tried to get away but he wouldn't let me. He told me that if I said anything he would find me and hurt me. He let me go. I ran away but I'm really scared now that maybe he'll come and find me." See Holt K and Hughes S 'South Africa: Army silent on sex scandal in DRC' available at www.iol.co.za/news/south-africa/army-silent-on-sex-scandal-1.216984 [last accessed 21 December 2012].

²⁵⁰ SA -Portfolio Report on Defence 7-8.

Mission of the relevant country for appropriate action.²⁵¹ The committee recommended that discipline should be strengthened, so that SANDF members adhere to the code of conduct of the UN and the military code of the SANDF.²⁵²

South Africa should not rely only on a report of investigation by the UN because, as a senior member of MONUC has told Holt of the *London Independent*, the OIOS enquiry does not follow the whole process relating to the sending of the report to the Troop-Contributing Country concerned.²⁵³ The head of MONUC child protection in Bunia (DRC) has also given the opinion that the solution to the plague of Sexual Exploitation and Abuse lies in a mechanism giving to the UN OIOS the power to prosecute and act as a substitute for national justice.²⁵⁴ The opinion constitutes the evidence of unwillingness on the part of states to investigate the conduct of their troops deployed on missions of peace. The absence of investigations signals the absence of prosecution. This allows peacekeepers to get away with criminal conduct. Such a situation might compromise the efforts of the UN to restore or keep peace, and it also paves the way for the continuation of grave misconduct.²⁵⁵ South Africa has not conducted its own investigations regarding repatriated SANDF members. Should this reinvest the Host State with criminal jurisdiction over crimes committed by peacekeepers?

5.2.3 Investigation by Organs of the Host State

The foundation of the right to investigate of the Host State lies in its obligation to protect its nationals against any crimes.²⁵⁶ As a MONUC briefing paper puts it, a peacekeeping mission:

cannot replace the national army and the Government's responsibility to protect its people, its borders and the natural wealth within them. These are sovereign responsibilities. This is why MONUC and other partners such as the United States are working to help the Government improve the performance and conduct of the security forces so that they can meet these responsibilities.²⁵⁷

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ See Du Plessis M & Pete S *Who Guards the Guards? The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No 121 Pretoria February 2006) 6.

²⁵⁴ Du Plessis M & Pete S *Who Guards the Guards? The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No 121 Pretoria February 2006) 6-7.

²⁵⁵ Hoffmeister T 'Policing those who Police the Peace' *International Herald Tribune* 31 December 2004.

²⁵⁶ MONUC *Briefing Materials* (MONUC Public Information Division 22 October 2009) available at www.monuc.unmissions.org [last accessed 20 December 2012].

²⁵⁷ *Ibid.*

There must, however, be a distinction between functioning state judicial systems and unreliable state judicial systems. The former may be allowed to conduct investigations regarding allegations of crimes by peacekeepers, whereas the latter should not be given this duty. Two reasons can be advanced in respect of not allowing a Host State to investigate conduct of peacekeepers; the first relates to State-related barriers which include the failure of criminal justice systems of States to meet standards of international human rights law and the second relates to the difficulties of gathering valid evidence in a timely fashion.²⁵⁸ This type of criminal system prevents a waiver of immunity, even where waiver would be possible, for example regarding peacekeeping civilian personnel. The second reason relates to the absence of ‘dual criminality’ (activities considered to be criminal both in the mission area and in the alleged perpetrator's state of nationality).²⁵⁹

Although it must be ascertained that the criminal system in the host country functions, local investigative authorities can more easily collect evidence than any investigator from outside the country in which the incident occurred. The advantage of the former authorities over the latter can be explained by the fact that the medium of communication is important to both investigators and person supplying information. Victims and witnesses are likely to be acquainted with the procedural rules usually applied by domestic authorities. These are available assets which help to uncover the facts accurately. Where the criminal system of the Host State is dysfunctional, it is advisable that the international community brings support to the Host State to lead investigations. This would also enable the damaged system to perform adequately, even after the end of the UN operation.²⁶⁰

Bourguet’s incident is the perfect example to illustrate the usefulness of implicating local police authorities in some tasks relating to investigating allegations of crimes committed by peace operations personnel.²⁶¹ The incident did not involve crimes committed by a military

²⁵⁸ Peacekeeping missions often operate in countries where the legal system is seriously compromised, if not destroyed, and their criminal justice systems often are inadequate to investigate and prosecute instances of the kind of alleged crimes by peacekeepers. See Durch WJ *et al. Improving Criminal Accountability in United Nations Peace Operations* (Stimson Center Report No. 65 Rev. 1 Washington 2009) xii.

²⁵⁹ *Ibid.*

²⁶⁰ The Chicago Principles on Post-Conflict Justice recognize that legal systems in these contexts are often dysfunctional or nonexistent. See The Chicago Principles on Post-Conflict Justice 2007, 12.

²⁶¹ Didier Bourguet was arrested in Goma in 2005 by Congolese police services and handed over to French authorities. See Vista A ‘Un Français, ancien de l'ONU, jugé à Paris pour viols sur mineures en Afrique’, available at www.avmaroc.com/actualite/francais-ancien-onu-a140179.html [last accessed 20 September 2012].

member of a national contingent but by a civilian employee of MONUC.²⁶² The intervention of the Host State investigator proved helpful in gathering the evidence.²⁶³ Bourguet was accused of having committed 23 rapes against young minor girls between the ages of 12 and 17 in two different African nations, the Central African Republic and the Democratic Republic of Congo.²⁶⁴ He was arrested by the Congolese police and handed to the French authorities. Paedophilic pornography material was seized and utilised as evidence in his prosecution.²⁶⁵ It is reported that he has been prosecuted back in France and sentenced to nine years in prison and a fine.²⁶⁶ It appears that the judge found that he had a psychiatric disorder and he instructed that the convicted Bourguet underwent eight years of treatment.²⁶⁷ In France, the obligation of treatment is executed while the imprisonment term is running.²⁶⁸

It has been confirmed, in one of the Human Rights reports on sexual violence committed by international peacekeeping forces, that it is difficult to expect the same force or the sending State of the accused force objectively, and without bias, to investigate the conduct of its own troops.²⁶⁹ It has been pointed out how the conduct of the investigations revealed a lack of appreciation for the seriousness of the problem of sexual violence.²⁷⁰ Where the Host State judicial system encounters functional difficulties, therefore, the UN should intervene and help

²⁶² On 10 September 2008, an ex-UN logistician, Didier Bourguet appeared in court in Paris for rape and other sexual abuses perpetrated against children aged between of 12 and 17 years. He had abused twenty-three victims between 1998 and 2004, when he was working with a UN mission of peace in Central African Republic and in the Democratic Republic of Congo. Pornographic pictures of his sexual activities with the minors were found stored on his computer. Bourguet was recognized to have been involved with the girls but he argued that it was prostitution as he did remunerate the girls. He contested the charge that he had raped them. He was sentenced to nine years of imprisonment, eight years of undergoing counselling, and a fine. Only two of the twenty-three counts were considered as rapes, and one case as sexual aggression. For the twenty other instances, the jury considered the evidence to be insufficient. (This is the author's own translation from French). See Hodan F 'Procès Bourguet: un vrai déni du crime de prostitution de mineur-e-s' 2008(160) *Prostitution et Société* available at www.prostitutionetsociete.fr/societe/enfants/proces-bourguet-un-vrai-deni-du [last accessed 20 December 20012].

²⁶³ Vista A 'Un Français, ancien de l'ONU, jugé à Paris pour viols sur mineures en Afrique' available at www.avmaroc.com/actualite/francais-ancien-onu-a140179.html [last accessed 20 September 2012].

²⁶⁴ Miller SK *op cit* (n 91) 268.

²⁶⁵ Vista A 'Un Français, ancien de l'ONU, jugé à Paris pour viols sur mineures en Afrique' available at www.avmaroc.com/actualite/francais-ancien-onu-a140179.html [last accessed 20 September 2012].

²⁶⁶ *Ibid.*

²⁶⁷ Hodan F 'Procès Bourguet: un vrai déni du crime de prostitution de mineur-e-s' 2008(160) *Prostitution et Société* available at www.prostitutionetsociete.fr/societe/enfants/proces-bourguet-un-vrai-deni-du [last accessed 20 December 2012].

²⁶⁸ Thieuleux I 'Fin de l'impunité pour un ancien employé de l'ONU violeur d'enfants' 2008(10) *La lettre de la commission enfants* Amnesty International Sept. /Octobre 2008 Public SF 08 – ENF 29.

²⁶⁹ Levin SA 'Sexual Exploitation of Refugee Children by UN Peacekeepers' 2003 (19) *New York Law School Journal of Human Rights* 833-842, 840.

²⁷⁰ *Ibid.*

its police to investigate each and every allegation of misconduct levelled against members of the UN forces.

For serious crimes of international concern, that is all misconduct that qualifies as war crime, a third competent State should be given the power to investigate in order to carry out prosecution and trial. The UN Secretary-General Bulletin of 1999 bestows exclusive criminal jurisdiction upon contributing countries with respect to war crimes committed by peacekeepers.²⁷¹ If, therefore, war crimes have been committed by their military personnel but have not been investigated and prosecuted, the efficiency of such a UN policy is seen to be inadequate.²⁷²

The above Secretary General Bulletin is in conformity with agreements between the organization and the Host State, the organization and the Troop-Contributing Country, the Status-of-Forces Agreement and the Memorandum of Understanding concluded with respect to peacekeeping missions. These agreements, however, like any other international convention or treaty, are *res inter alios acta* with respect to states non-party thereto.²⁷³ They are binding only on the parties²⁷⁴ to these agreements, i.e. on the UN, the Host State, and the contributing States.²⁷⁵ A third State would not be bound by such agreements.²⁷⁶ These agreements do not eliminate the criminal jurisdiction of other States not party to the Status-of-Forces Agreement or Memorandum of Understanding that may have jurisdiction over a case on other grounds, for example where the victim is a citizen of their state and the alleged

²⁷¹ Section 4 of the Secretary-General Bulletin on the *Observance by the United Nations Forces of International Humanitarian Law* (UN. Doc. ST/SGB/1999/13 of 6 August 1999). See also Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch/DFAIT_rport.doc [last accessed 29 September 2011].

²⁷² *Ibid.*

²⁷³ Fitzmaurice M 'Third Parties and the Law of Treaties' 2002(6) *Max Planck UNYB* 37-137, 38.

²⁷⁴ The *pacta sunt principle* implies that an agreement binds only parties to it. Article 26 of the Vienna Convention on the Law of Treaties of 1969 entered into force 27 January 1980 1155 U.N.T.S.; Hilary Charlesworth H and Chinkin C 'The Gender of *Jus Cogens*' 1993 (15) *Human Rights Quarterly* 63-76, 64; van der Wilt H 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' 2008 (8) *International Criminal Law Review* 229-272, 254; Burke-White WW 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' 2008 (49) *Harvard International Law Journal* 53-108,80.

²⁷⁵ Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch-DFAIT_rport.doc [last accessed 29 September 2011].

²⁷⁶ *Ibid.*

perpetrator is currently on the territory of the third State claiming jurisdiction.²⁷⁷ Such a third State is, however, likely to face impediments similar to those encountered by any Troop-Contributing Country regarding the investigation of crimes committed in a foreign country.

5.2.4 Investigation by a State other than the Host State

International crimes fall under the jurisdiction of the state where the perpetrator is currently found.²⁷⁸ A State other than the Host State, therefore, may claim jurisdiction over crimes committed by peacekeepers. A third State, however, will encounter the same difficulties as the Troop-Contributing Country while conducting an investigation in a foreign country.²⁷⁹ The reason for this is that costs, language barriers, access to witnesses, or transporting persons capable of contributing to the revelation of the truth into the country of the investigating authorities may present a burden.²⁸⁰ For a State to encumber national resources for such ends, it would be eager to do so only if it has some relationship with the conduct being prosecuted. This relationship exists where the victim of the conduct happens to be a national of the interested third State.²⁸¹ Whenever a perpetrator is currently found within the territory of a third State, it may prosecute him for the crimes committed abroad if it has enacted a law in this regard.²⁸² One would, otherwise, advocate joint cooperation between the investigating authorities and those of the Host State. The latter mechanism would help to ensure that no crime goes unpunished and that justice is done and can be seen to be done.²⁸³

Indeed, any critical analysis of the current regime embodied in the Status-of-Forces Agreements and the Memorandum of Understanding would reveal that countries with criminal jurisdiction over peacekeepers meet with practical problems during investigations. The only possible solution to such problems is to reform the regime, for example by integrating collaboration between stakeholders. An internal organ of the UN may investigate the crimes, but the shortcoming of such an organ is that it has no criminal jurisdiction over

²⁷⁷ *Ibid.*

²⁷⁸ Gilbert G *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* (Martinus Nijhoff Publishers The Hague 1998) 7.

²⁷⁹ *Supra* 5.2.2.

²⁸⁰ *Ibid.*

²⁸¹ Passive personality principle in asserting jurisdiction. See Stephens PJ 'A Categorical Approach to Human Rights Claims: *Jus Cogens* As a Limitation on Enforcement?' 2004 (22) *Wisconsin International Law Journal* 245-272, 268-269.

²⁸² Trials *in absentia* under universal jurisdiction are allowed in some States and not in others. See Konstantopoulou Z 'Universal Jurisdiction' 2009 (80) *International Review of Penal Law* 487-512, 489.

²⁸³ A recognised cliché.

peacekeepers. The Troop-Contributing Country has an obligation to investigate crimes by its respective contingents but may lack the political will to do so. The Host State is obliged to investigate any offence committed within the boundaries of its territory, but does not have criminal jurisdiction over the conduct of peacekeepers, especially military personnel. Collaboration, therefore, among the UN, the Troop-Contributing Country and the Host State is needed to bring an end to the impunity peacekeepers seem to enjoy when they commit crimes.²⁸⁴

5.2.5 Cooperation between the investigative authority and the Host State²⁸⁵

In respect of crimes against humanity and war crimes, bearing in mind that conduct by peacekeepers may fall under the latter category, the General Assembly of the United Nations has taken a resolution on the necessity for cooperation in matters regarding such crimes.²⁸⁶ An analysis of this resolution reveals that the United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of cooperation between peoples and the maintenance of international peace and security, proclaims a number of principles of international cooperation relating to the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity.²⁸⁷ The above principles show the necessity of cooperation between States to ensure that war crimes and crimes against humanity are punished.²⁸⁸

The first principle insists on investigating the crime, tracing, arresting, trying, and punishing the perpetrator if found guilty.²⁸⁹ The second principle recognises the right of each and every State to try nationals for war crimes or crimes against humanity.²⁹⁰ The general rule is that the trial must be conducted in the countries in which the crimes were committed.²⁹¹ The other

²⁸⁴ The aim of each and any criminal investigation must be prosecution in a court of law after the investigation. See Bensouda F 'Challenges Related to Investigation and Prosecution at the International Criminal Court' in Bellelli R (ed) *International Criminal Justice: Law and Practice From the Rome Statute to Its Review* (Ashgate Farnham 2010) 131-142.

²⁸⁵ A joint investigation team composed of UN OIOS personnel, the TCC, and Host State representatives may thwart any cloud of suspicion of covering up crimes by UN peacekeepers.

²⁸⁶ UNGA *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes against Humanity* (UN. Doc. A/RES/3020/ (XXVII) 3 December 1973) (Hereinafter UN. Doc. A/RES/3020/(XXVII))

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ UN. Doc. A/RES/3020/ (XXVII) of 3 December 1973 principle 1.

²⁹⁰ UN. Doc. A/RES/3020/ (XXVII) of 3 December 1973 principle 2.

²⁹¹ UN. Doc. A/RES/3020/ (XXVII) of 3 December 1973 principle 5.

principles relate to bilateral and multilateral cooperation.²⁹² Emphasis is put not only on preventing war crimes and crimes against humanity, detecting, arresting, and bringing to trial persons suspected of having committed such crimes, but also on collecting information and evidence.²⁹³ It is the latter on which a successful prosecution rests. Cooperation may also be given by refusing to grant asylum to any person about whom there are serious reasons for considering that such person has committed such crimes.²⁹⁴

It appears useful and important, therefore, to attempt to ensure that States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention of all kind of crimes by peacekeepers.²⁹⁵ The Memorandums of Understanding and Status-of-Forces Agreements should provide for such a rule. Cooperation to investigate is crucial to the gathering of reliable proof. It helps a foreign sovereign State to exercise its jurisdiction over acts committed outside its territory.²⁹⁶ This prompted Aubert to write that helping one another on the judicial level in penal matters implies putting in motion all procedures related to international cooperation in criminal prosecution.²⁹⁷ Doing so helps and allows foreign criminal judicial authorities to acquire, from the requested national authorities, the needed cooperation to collect all means of proof available within the limits of the territory of the requested State.²⁹⁸ Cooperation should also be resorted to in order to make known the decision arrived at in the competent jurisdiction. Transparency with regard to crimes committed by peacekeepers is necessary so that the general public and the victims are aware of the outcomes of such proceedings.

To assure each and every intervening party or any entity wishing justice to be done and to appear to be done, the Host State police or investigators, and members of investigating team from the OIOS, and from the Troop-Contributing Country concerned must cooperate. Then, whoever afterwards obtains criminal jurisdiction over the substantiated facts and findings can

²⁹² UN. Doc. A/RES/3020/ (XXVII) of 3 December 1973 principles 3 to 9.

²⁹³ UN. Doc. A/RES/3020/ (XXVII) of 3 December 1973 principle 6

²⁹⁴ UN. Doc. A/RES/3020/ (XXVII) of 3 December 1973 principle 7.

²⁹⁵ UNGA *Drawing on the formulation in the Declaration on the Protection of All Persons from Enforced Disappearance* (UN. Doc. A/RES/47/133 (18 December 1992)).

²⁹⁶ Reeb B «La raison d'Etat dans l'entraide internationale en matière pénale » in Zen-Ruffinen P (ed) *Du monde pénal: Droit pénal- criminologie et politique criminelle- police et exécution des sanctions-procédure pénale : Mélanges en l'honneur de Pierre-Henri Bolle* (Helding Bâle 2006) 235-246.

²⁹⁷ Aubert M «Relation bancaire et entraide internationale en matière pénale: Nouvelles pratiques suisses et étrangères» in Paolo Bernasconi (dir) *Les nouveaux défis au secret bancaire suisse: Enquêtes fiscales, commissions rogatoires, fusions d'entreprises* (Méta-Éditions Lausanne-Bellinzona 1996) 109-126.

²⁹⁸ *Ibid.*

prosecute easily. Thus, it may still be suggested that the Troop-Contributing Countries continue to hold jurisdiction over their troops in order to show to other members of the force that discipline is vital, even far away from home. It may, however, remain more important to conduct prosecution in the Host State for the sake of ensuring that the right to justice of the victims or survivors and their right to know that the wrong done to them was punished, as well as their rights to compensation and reparation, are respected.²⁹⁹ Prosecuting perpetrators who are far removed from the place where their crimes occurred, without the participation of the victims, survivors, and witnesses is to ignore the rights of the host population to know and see that justice has been done.

5.3 The purpose and period of a criminal investigation³⁰⁰

The aim of any criminal investigation must be to prosecute in a court of law after the investigation.³⁰¹ Indeed prosecuting a person has no purpose other than the function of contributing to the restoration of confidence in the rule of law.³⁰² If crimes are not punished, confidence in the validity of the values of the community is undermined.³⁰³

Victims and witnesses have a role to play in an investigation.

²⁹⁹ Beigbeder Y *Judging War Criminals: The Politics of International Justice* (MacMillan London 1999) 203-204.

³⁰⁰ With reference to the opinion of Vestberg, time is an important factor when it comes to investigating and prosecuting. Belated intervention leads to lost files, files devoured by insects, and faded memories that compromise the credibility of testimony. To cast light on a course of events, to gather evidence related to a case, investigations have to be conducted timeously to avoid collecting information after memories have faded or after files have disappeared. Visits to crime scenes may be important. See Vestberg B 'Prosecuting and Investigating International Crimes in Denmark' (Guest Lecture Series of the Office of the Prosecutor ICC-CPI and individual authors 2006) available at www2.icc-cpi.int/NR/ronlyres/9C4449DE-B59B-40E-BF2 [last accessed 30 May 2012]. This may be illustrated by the failure of Germany to prosecute the nationals left to it by the allies. An example of reluctance of States to try its own troops for serious offences committed abroad can be seen in the Leipzig trial after the World War I. The Allies submitted to the German government a list of 900 persons accused of atrocities committed outside Germany during the conflict. After a protracted argument with the Germans, a test list of only 45 people was submitted. Only 12 persons were tried, and only six of them convicted. Two of those convicted received the severest sentences but escaped from the German jails, it is thought with official connivance. Where an onsite court existed, the difficulty linked to collecting evidence can be avoided. Glueck S 'By What Tribunal Shall War Offender be Tried?' 1943 (56) *Harvard Law Review* 1059-1089.

³⁰¹ See Bensouda F 'Challenges Related to Investigation and Prosecution at the International Criminal Court' in Bellelli R (ed) *International Criminal Justice: Law and Practice From the Rome Statute to Its Review* (Ashgate Farnham 2010) 131-142.

³⁰² Cassese A 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' 1998 (9) *European Journal of International Law* 2-17, 9 referring to B. V. A. Röling 'Criminal Responsibility for Violations of the Law of War' 1976 (12) *Revue Belge de Droit International* 8, 29.

³⁰³ *Ibid.*

5.3.1 Victims' involvement in investigation

Such a purpose cannot be fulfilled if victims have no role to play in the proceedings, and if the infringements of their rights are not remedied.³⁰⁴ In fact, regarding war crimes and other international core crimes, if justice intervenes later and there is no material proof to substantiate the facts, and no written proof is available, the crimes may all too easily go unpunished.³⁰⁵ Regardless of who committed the crime, the involvement of victims in the process remains crucial to the ends of justice. Victims, whose human rights have been violated, may have a strong need to understand what happened and to identify the wrongdoers in the process of seeking to see justice done.³⁰⁶ For victims, it does matter whether the perpetrator is a rebel, an armed militia member, or a member of the UN force. They need to see that their rights have been vindicated.

As discussed earlier, the majority of victims of crimes committed by peacekeepers, especially sexual crimes, have been women and children.³⁰⁷ During the conflict they have been raped, or raped by peacekeepers and afterwards provided with money or food to give the appearance of a consensual transaction.³⁰⁸ Since the prosecution process may commence after the victims, who were minors at the time of the crime, have come of age and can fully cooperate with the judicial authority, the role they can play is crucial to the success of the proceedings.³⁰⁹ They are the witnesses who can help to establish the proof required, even though it has to be noted that testimonial proof will often be imperfect, especially where the crime alleged has to be investigated a long time after its commission.³¹⁰

³⁰⁴ The basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights law and international humanitarian law, adopted in 2000, based on the observations of governments, provide that the appropriate remedy includes the victim's right to access justice, to reparation for the harm suffered, and to access the factual information concerning the violation. See Frulli M 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Markovic* Case' 2003 (1) *JICJ* 406-427, 424.

³⁰⁵ Weber R and Ott B « Enquêtes militaires suisses pour crimes de guerre commis au Rwanda » in Ziegler AR, Wehrenberg S & Weber R (éds) *Procès de criminels de guerre en Suisse* (Nomos Zürich 2009) 99-107, 101.

³⁰⁶ Van Dyke JM 'Reconciliation between Korea and Japan' 2006 (5) *Chinese Journal of International Law* 215-239, 230.

³⁰⁷ Miller SK *op cit* (n 91) 267.

³⁰⁸ Shotton A 'A Strategy to Address Sexual Exploitation and Abuse by UN Peacekeeping Personnel' 2006 (39) *Cornell International Law Journal* 97-107, 102.

³⁰⁹ Hoffmeister T 'Policing those who Police the Peace' *International Herald Tribune* 31 December 2004.

³¹⁰ Ziegler AR, Wehrenberg S & Weber R (éds) *op cit* (n 305) 303.

The role of victims of sexual violence and crimes has been stressed, but the practical problem is that of gathering undisputed proof.³¹¹ To this end, it is required that victims be questioned in order to identify the perpetrator.³¹² As Miller puts it, however, the trauma of the victims' lives after rape may render the taking of evidence a delicate process for a number of reasons: firstly, the victim may not have seen the face of perpetrator; secondly, the victim might not be able to differentiate between foreign individuals; and, thirdly, the victim might not be able to identify the perpetrator because the act took place in the dark.³¹³ These reasons often lead to uncorroborated identification of perpetrators.³¹⁴ It must be assumed that the 296 cases investigated in the DRC during 2005, which led to 17 civilian UN personnel, 16 police, and 137 military personnel being dismissed or repatriated³¹⁵ were substantiated owing to some involvement of victims.³¹⁶ Involving victims in court proceeding may also be helpful. Nicola Henry has identified four reasons which may motivate victims to choose to stand as witnesses in war criminal proceedings, 'to speak for the dead, to tell the world the truth about what happened, to look for justice in the present, and to help prevent future war crimes from occurring'.³¹⁷ Such motivations or reasons actually meet the purposes and objectives of any criminal trial, namely, punishment, prevention, deterrence, and rehabilitation.³¹⁸ No individual can reform himself or herself where justice did not intervene and show how the crime committed shocked the values which the international community upholds. When it comes to sexual offences, judges have to accept that the difficulties of recollecting precise details of

³¹¹ The system for participation by a victim in criminal proceedings has already tested, even before the ICC. See Bellelli R 'The Law of the Statute and Its Practice under Review' in Bellelli R (ed) *International Criminal Justice: Law and Practice From the Rome Statute to Its Review* (Ashgate Farnham 2010) 387-458, 451-453.

³¹² Rape victims in the 2005 investigation in Bunia were able to help investigators. See UN OIOS report on DRC, A/59/661 of January 5, 2005, paras 12-18.

³¹³ Miller SK *op cit* (n 91) 267.

³¹⁴ *Ibid.*

³¹⁵ Guéhenno JM *Remarks on Peacekeeping Procurement and Sexual Exploitation and Abuse by Peacekeepers* (Presentation to the Security Council 23 February 2006).

³¹⁶ Some allegations of misconduct by peacekeepers are not substantiated during investigation owing to the passage of time between the commission of the act and the moment the investigating authority arrives at the scene, the age of the victims, and the fact that, even where cogent evidence exists, prosecution does not follow. See Murphy R 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' 2006 (13) *International Peacekeeping* 531-546.

³¹⁷ Henry N 'Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence' 2009 (3) *The International Journal of Transnational Justice* 114-134, 119.

³¹⁸ Henry N *op cit* (n 317) 119; Bentham J *An Introduction to the Principles of Morals and Legislation* 1781 (edited by Batoche Books Kitchener 2000); Snyman CR *Criminal Law* 5 ed (LexisNexis Durban 2008); Mujuzi JD *Life Imprisonment in International Criminal Tribunals and Selected African Jurisdictions – Mauritius, South Africa and Uganda* (Doctoral Thesis University of the Western Cape 2009); Ingierd HC *Moral Responsibility in War: A Normative Analysis Focusing on Peacekeepers* (Doctoral Thesis University of Oslo 2010); Barnes WL 'Revenge on Utilitarianism: Renouncing a Comprehensive Economic Theory of Crime and Punishment' 1999 (74) *Indiana Law Journal* 627-652.

traumatic events years after the commission of the crimes explain why witness testimony might contain inconsistencies.³¹⁹ In trials for international crimes, victims have to take part in the proceedings both as witnesses and as victims.³²⁰ Their right to such involvement should not be ignored.³²¹

No one actually, however, wishes to see peacekeepers prosecuted because it signals the failure of the peacekeepers to fulfil their protective role,³²² but again no one should ignore the rights of their victims to justice.³²³ To advocate the non-prosecution of peacekeepers would violate the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.³²⁴ Apart from reparation, victims also have the right not only to speak for the dead, as has been mentioned, but also to tell the world of their traumatic ordeal in order to prevent future crimes by the peacekeepers.³²⁵

It will be difficult to halt sexual exploitation and abuse by peacekeepers if justice is not done on behalf of the victims. It may be difficult for victims to report crimes committed against them if they know that nothing will follow their allegations, and encouraging individuals in the Host State to take such a stance does not honour the UN organisation as such. Prosecution means the allegations have been investigated. Yet, practical problems do exist regarding investigating crimes committed by peacekeepers. Investigating and gathering evidence of war crimes, for the purpose of prosecution, inevitably amounts to constructing a case after the fact. It does not appear judicious to conduct investigation in places far from the crime scenes. To build a good case, firsthand evidence is needed.³²⁶ Moreover, investigation aimed at collecting evidence to be used in proceedings conducted at home may be of some value. Such an

³¹⁹ Malcontent P 'Human Rights and Peace: Two Sides of the Same Coin' in Thakur R and Malcontent P (eds) *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (UN University Press Tokyo 2004) 1-12, 6.

³²⁰ That is the difference brought about by the Rome Statute of the ICC. See Malcontent P *op cit* 6-7.

³²¹ Lemasson AT *La victime devant la justice pénale internationale* (Thèse de doctorat en droit Université de Limoges avril 2010 [unpublished doctoral thesis]).

³²² If there should be any liability based on the failure to protect, the body to be arraigned before would be the UN Organisation itself.

³²³ Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121 2006) 36.

³²⁴ Bassiouni MC 'International Recognition of Victims' Rights' 2006 (6) *Human Rights Law Review* 203-279.

³²⁵ Henry N *op cit* (n 317) 119.

³²⁶ Del Ponte C 'Reflections Based on the ICTY's Experience' in Bellelli R (ed) *International Criminal Justice: Law and Practice From the Rome Statute to Its Review* (Ashgate Farnham 2010) 125-129.

investigation must, therefore, be conducted by the investigators from the Troop-Contributing Country that has jurisdiction over the alleged perpetrator.

5.3.2. TCC investigation for court proceedings in home country

Because Troop-Contributing Countries are often loath to admit as publicly as possible that their troops may have perpetrated some acts of wrongdoing, they are, therefore, not prepared to court-martial alleged offenders.³²⁷ Indeed, they are not interested in prompting an investigation into allegations against their troops. Such an attitude violates the rights of victims.³²⁸ The human rights of the victims are violated if they are further deprived of any possibility of presenting their version of what happened and of confronting, if possible, and identifying the wrongdoer.³²⁹ Their right to justice is violated where the proceedings have to take place far from the scene, without allowing victims to access the adjudicating court. Article 7 *quinquies* of the revised Memorandum of Understanding relative to the exercise of jurisdiction by the Government of the TCC does not provide for the presence of the victims at the trial. It provides only for the obligation to prosecute of the Troop-Contributing Country. It reads as follows:

1. Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations peacekeeping missions]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes or offences.
2. The Government further assures the United Nations that it 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 while they are assigned to the military component of [United Nations peacekeeping missions] that do not amount to crimes or offences.

³²⁷ Zeid Report UN Doc A/59/710 of 24 March 2005 para 67.

³²⁸ O'Brien M *National and International Criminal Jurisdiction over United Nations Peacekeeping Personnel for Gender-Based Crimes against Women* (unpublished doctoral Thesis University of Nottingham July 2010).

³²⁹ Van Dyke JM *op cit* (n 306) 230.

It is obvious that the responsibility to prosecute peacekeepers who have been accused of committing criminal acts lies with the state of nationality of the perpetrator.³³⁰ The first step to be taken by the country that exercises criminal jurisdiction over an offender is to investigate the allegations. This must be done in the Host State where the alleged offences occurred.³³¹ The preceding discussions have revealed a number of difficulties with respect to sending investigating authorities abroad as well as the obstacles posed by transporting witnesses and victims to the perpetrator's home country to participate in the proceedings, especially the expenses involved.³³² It is, therefore, submitted that on-site prosecution should be the aim of investigation and could be a solution to the problem.

5.3.3. Investigation by the TCC towards court proceedings onsite

It is important to recall the suggestion of the Zeid Report that Troop-Contributing Countries think of making provision for on-site courts martial accompanying their deployments.³³³ An on-site court martial has the advantage of the immediate collection of evidence, and the demonstration to the local population that contingent members remain criminally accountable.³³⁴ An on-site court martial can also put an end to the frequent complaint of Troop-Contributing Countries that evidence gathered in previous preliminary investigations by a UN organ is insufficient or that it does not meet requirements of direct use in court martial proceedings.³³⁵ This would also enable all the intervening parties to the trial to participate and allow the public to see justice being done.³³⁶ This recommendation is justified

³³⁰ Paragraph 47(b) of the UN Model SOFA (UN. Doc. A/45/594 of 9 October 1990) which bestows exclusive criminal jurisdiction to the Troop-Contributing Country renders the whole instrument a mere gentleman's agreement, because no liability is placed upon a country that fails to prosecute peacekeepers who have committed crimes while on UN mission of peace.

³³¹ Vandermeersch D 'Prosecuting International Crimes in Belgium' 2005 (3) *Journal of International Criminal Justice* 400-421, 413; Ladley A 'Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations' 2005 (1) *Politics and Ethics Review* 81-90, 87. Compare Cassese A 'The Statute of the International Criminal Court: Some Preliminary Reflections' 1999 (10) *European Journal of International Law* 144-171, 164; Arnell P 'The Case for Nationality Based Jurisdiction' 2001 (50) *The International and Comparative Law Quarterly* 955-962, 958.

³³² Most countries have little interest in seeing their peacekeepers brought to trial for crimes committed while doing good deeds elsewhere in the world. Bringing charges against troops is complicated by the fact that they are posted for six-month terms and are unlikely ever to face a military investigation. Once the military takes over the inquiry, the UN has no legal authority to follow up on the investigation and cannot ensure that a repatriated soldier will face prosecution. See Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121 2006) 3.

³³³ Zeid Report UN. Doc A/59/710 para 35.

³³⁴ *Ibid.*

³³⁵ para 28.

³³⁶ *Ibid.*

by the legal inability of the UN to follow prosecutions against UN force members accused of some crimes during a mission of peace. A secondary jurisdiction over crimes committed by peacekeepers should, therefore, exist in the Host State.³³⁷

As was stated in a report by the UN Secretary-General when UNEF was deployed, the fact that a Host State waives its jurisdiction over peacekeepers should not result in a vacuum in which a given offence might be subject to prosecution by neither the Host State nor the participating State.³³⁸ It is, therefore, submitted that, where possible, an on-site court-martial could perhaps be useful in helping to investigate the facts, and, if no on-site jurisdiction is established by the Troop-Contributing Country, to settle the matter via the host country's courts.³³⁹ The Host State may also be tasked with conducting investigations.³⁴⁰ This may facilitate the process as the victims and witnesses will be familiar with the domestic criminal system. Currently, Troop-Contributing Countries are under no legal obligation to investigate or try offenders.³⁴¹ This may be the reason why Prince Zeid recommended that the model Memorandum of Understanding should adopt a clause indicating that, where an investigation has concluded that the allegations are founded, and an official of the Troop-Contributing Country has participated in the investigation, the perpetrator must be prosecuted, and the state concerned be obliged to do so.³⁴² Indeed, as prosecution is an act of sovereignty, countries of origin of alleged perpetrators are not obliged to prosecute. Where the Troop-Contributing Country has participated in the investigation and the allegations of crimes were held to be founded, but that country decides not to prosecute, it has to inform the UN Secretary-General within a certain time, for instance 120 days as the Zeid Report recommended, and explain

³³⁷ Though not ideal, a SOFA or a MOU should provide that a Host State recovers jurisdiction over a peacekeeper if, after denouncement of an offence to the contingent chief, two months lapses without the TCC prompting an investigation and assuring prosecution thereafter. Such a system is used for NATO members. See Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121 2006) 3-4.

³³⁸ UN Secretary-General Report 'United Nations Emergency Force: Summary study of the experience derived from the establishment and operation of the Force' (UN. Doc. A/3943 of 9 October 1958) para 136.

³³⁹ Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121 2006) 3.

³⁴⁰ Vista A 'Un Français, ancien de l'ONU, jugé à Paris pour viols sur mineures en Afrique' available at www.avmaroc.com/actualite/francais-ancien-onu-a140179.html [last accessed 20 September 2012].

³⁴¹ Citizens for Global Solutions 'The United Nations responds to sexual abuse by peacekeepers in the Democratic Republic of Congo' available at Building Peace, Justice and Freedom in a Democratically Governed World www.globalsolutions.org, Last Updated 11 April 2005 [last accessed 21 December 2012].

³⁴² Zeid Report para 79. Perhaps the SOFA should have provided that the TCC which fails to comply with its obligation to prosecute engages its civil liability under international law.

why it cannot prosecute.³⁴³ Whatever the position taken by the Troop-Contributing Country, it remains in the interests of the Host State to conduct an investigation, to know the truth about what happened, and to let the victims know the measures taken against the perpetrator.

5.4 Conclusion

This chapter has revealed that hurdles do exist with respect to investigating crimes committed by peacekeepers. Investigating authorities of states other than the Host State may finally report that there is a lack of conclusive evidence for prosecution to be initiated. It transpired, from the cases of Italy, Canada, Belgium, and South Africa, that even investigations by the Troop-Contributing Country may reach biased conclusions aimed at safeguarding the image of the country and its reputation.³⁴⁴ The investigation team or a commission of inquiry may act in good faith, but its conclusions might not reveal the truth, owing to the fact that such conclusions rests on, for instance, false documentation, the relevant material or documents having been kept secret or destroyed.³⁴⁵ The Courts Martial in Canada did not even have the chance of adjudicating the case of Colonel Haswell for ordering the destruction of documents related to the Somalia event.³⁴⁶ He has furthermore never been charged with any wrongdoing. Regarding Canada, it must be noted that the commission of inquiry was not meant to collect evidence for use in court proceedings. The military judicial system in Belgium did not consider the events in Somalia to be serious.³⁴⁷ With regard to South Africa, no official investigation was initiated. South Africa seems to have been content that the UN and its investigation division had dealt with the allegations of misconduct by members of the South African military contingent in Burundi and the Democratic Republic of the Congo. Yet it was shown that the OIOS has no prosecutorial powers and some of its reports may not even have gone through the process of reaching the Troop-Contributing Country concerned.

To remedy such difficulties, it has been suggested that expert investigators be included in each contingent or an on-site tribunal be established for each contingent.³⁴⁸ The suggestion

³⁴³ UN Doc. A/59/710 para 80.

³⁴⁴ Cassese A 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' 1998 (9) *European Journal of International Law* 2-17, 5.

³⁴⁵ CCI Somalia *op cit* (n 103) 1119.

³⁴⁶ Horn B (ed) *From the Outside Looking In: Media and Defence Analyst Perspectives on Canadian Military Leadership* (Canadian Defence Academy Press Kingston 2005) 25.

³⁴⁷ Knoops GJ *op cit* (n 190) 134.

³⁴⁸ Miller AJ *op cit* (n 7) 84.

does not seem to be satisfactory in that the prosecution of alleged perpetrators will still be dependent upon the willingness of the Troop-Contributing Country concerned.³⁴⁹ That is why the present thesis suggests not only the inclusion of a provision aiming at State responsibility for omission to prosecute but also a tripartite on-site court-martial to close the *lacunae* which exist in this regard.³⁵⁰ This suggestion has the merits of circumventing all the obstacles relating to the investigation of crimes outside one's jurisdiction. The Host State, therefore, should be left with the task of investigation. The most adequate solution may be that of combining state liability for failure to prosecute with that of putting in place a mechanism that involve tripartite cooperation among the UN, the Host State, and the Troop-Contributing Country.³⁵¹

If the UN is to take serious steps to end sexual exploitation, abuse, and other misconduct by peacekeepers, it must do more than merely repatriate abusers. In order to create incentives for enforcement and deterrents against crimes by peacekeepers, there must be real consequences for individuals and for governments. The possible mechanism might not necessarily involve yielding jurisdiction over personnel to the UN or to a foreign judicial authority, but it must entail commitments by member States to investigate, try, and punish their personnel in cases of misconduct. A clear principle should be included in agreements between UN State members and the organisation so that investigators are granted full cooperation and access to witnesses, records, and the sites where crimes had allegedly occurred so that trials could proceed. Equally importantly, the UN must hold member countries strictly to these standards. States that fail to fulfil their commitments to discipline their troops should be barred from providing troops for peace operations.³⁵² This measure should not be avoided because the failure to prosecute peacekeepers accused of sexual abuses, in spite of the command structures being well aware of the plight of civilians in Host States, stems from the fact that the States are often unwilling to haul their soldiers before court. According to the Special Representative of the UN Secretary-General in the DRC [MONUC], William Lacy Swing,

³⁴⁹ An international accountability mechanism is crucial; otherwise national processes are not effective. See Sheeran SP *Contemporary Issues in UN Peacekeeping and International Law: Briefing Paper IDCR-BP-02/11* (Institute for Democracy and Conflict Resolution (IDCR) University of Essex 2011) 7.

³⁵⁰ See *infra* 7.5.

³⁵¹ *Ibid.*

³⁵² Gardiner N and Groves S 'The United States Must Act to End Abuses by U.N. Peacekeepers' January 16 2007 available at www.heritage.org/Research/Reports/2007/01/ [last accessed 20 December 2012]. See also See Durch WJ *et al. op cit* (n 37) 14 *et passim*.

Emphasis needs to be placed on the accountability of the officers of contingents to which the perpetrators belong, from contingent to company and platoon commanders... It is apparent that the feeling of impunity is such that not only have the policies not been enforced, but the command structures have not always given investigators their full cooperation.³⁵³

The UN should make public all internal reports relating to the abuse scandals in Africa and outline the specific steps it plans to take to prevent the sexual exploitation of refugees in both existing and future UN peacekeeping operations.³⁵⁴ In lieu and place of obtaining assurances that the Troop-Contributing Countries will prosecute their soldiers once they are repatriated, the Status-of-Forces Agreement should provide that an on-site court be operational in the field, and that the troop- contributing countries and Host State enter into agreement as to the levels of cooperation necessary for the trial of perpetrators who are members of a UN force. The organisation can also help rebuild the judicial system in the Host State so that there will be no fear that justice might not be properly rendered.³⁵⁵ It has, in fact, been indicated how reluctant States are to prosecute their own contingent military members. Indeed, the only serious and concrete example of action being taken against a military peacekeeper related to the rape and murder of an 11-year old Albanian girl by a US army staff sergeant Ronghi in 2000.³⁵⁶ The accused soldier Ronghi was sentenced to life imprisonment without the possibility of parole.³⁵⁷ The case does not relate to peacekeepers deployed to Africa. Since there is no status of limitation regarding international crimes, especially war crimes, it is possible to be hopeful that one day there will be prosecution of those allegations of crime by peacekeepers. Effective punishment of war crimes and crimes against humanity is important for ending such crimes and for promoting peace and international security.³⁵⁸ There is, therefore, clearly a need for legislation on an international level to address the accountability of the peacekeepers adequately.

³⁵³ See Miller SK *op cit* (n 91) 269.

³⁵⁴ Gardiner N and Groves S 'The United States Must Act to End Abuses by U.N. Peacekeepers' January 16 2007 available at www.heritage.org/Research/Reports/2007/01/ [last accessed 20 December 2012].

³⁵⁵ Compare Durch WJ *et al. op cit* (n 37) 19-20.

³⁵⁶ *United States v. Ronghi* 60 M.J. 83 (2004).

³⁵⁷ The sentence was upheld at appeal. see *United States v. Ronghi*, 84; O'Brien M 'Prosecuting Peacekeepers in the International Criminal Court for Human Trafficking' 2006 (1) *Intercultural Human Rights Law Review* 281-328, 301; Brookhart DG *Criminal Law Deskbook Volume II - Crimes and Defenses* (the Judge Advocate General's School US Army Charlottesville 2010) 4-36.

³⁵⁸ Beigbeder Y *Judging War Criminals: The Politics of International Justice* (Houndmills London 1999) 76.

The next chapter examines the issue relating to criminal jurisdiction over peacekeepers and investigates the prosecutions conducted by Canada and Belgium. Whilst these two countries are not African States, their attempts to prosecute will be discussed because they are the only Troop-Contributing Countries, amongst those who deployed peacekeepers to Somalia, which initiated proceedings against their troops once back home. There exists no further data regarding prosecutions of soldiers who were alleged to have committed crimes while serving with a UN mission of peace in Africa.

CHAPTER VI

JURISDICTION OVER CRIMES COMMITTED BY PEACEKEEPERS

6.1 Introduction

The most important legal documents pertaining to peacekeepers deployed afield determine which States have jurisdiction over crimes committed by peacekeepers. Thus, the Status-of-Forces Agreement and the Memorandum of Understanding provide for which State is actually under obligation to take action regarding any misdeed by a given member of UN peace mission personnel.¹

This chapter explores all the avenues available regarding jurisdiction over crimes allegedly committed by peacekeepers. It first discusses the exclusive jurisdiction of a Troop-Contributing Country over its military personnel. It then investigates whether the Host State retains any residual jurisdiction and whether a third State remains judicially competent over crimes committed by peacekeepers since it is not party to the Status-of-Forces Agreement or Memorandum of Understanding. The chapter also examines whether the international criminal court should have criminal jurisdiction where the alleged conduct falls under its jurisdiction. A discussion of prosecutions of instances of crimes committed by peacekeepers is undertaken in order to draw some lessons regarding States that ought to exercise jurisdiction bestowed upon them by the aforementioned agreements. The discussion extends to the issue of how far Troop-Contributing Countries have discharged their obligation under a Status-of-Forces Agreement or a Memorandum of Understanding. To this end, prosecutions by Canada, Belgium, and South Africa are investigated with respect to allegations of crimes by peacekeepers in Somalia, Burundi, and the DRC.

The principle of territoriality is the founding principle of jurisdiction in international law.² Bystander States, however, may assume their responsibility of bringing to justice the perpetrators of violations of international values where they have been authorized to do so by

¹ Model SOFA, UN. Doc. A/45/594 of 9 October 1990; Revised MOU, UN. Doc. A/61/19 (Part III) of 12 June 2007.

² Cassese A *International Criminal Law* 2 ed. (OUP New York 2008) 336; Ryngaert C *Jurisdiction in International Law* (Oxford Monographs in International Law Oxford University Press Oxford 2009) 42.

the State on whose territory the violations were perpetrated or pursuant to an agreement.³ This is the case regarding peacekeepers on UN mission and with respect to crimes they may commit. Regarding peacekeepers, the existing agreements stipulate that the Troop-Contributing Country, whose contingent member is alleged to have committed a crime, has the duty to prosecute such crime.⁴ By being party to an agreement with the UN, the Host State surrenders its jurisdiction over criminal acts by UN peacekeepers to the country of the nationality of the offender.

6.2. Exclusive jurisdiction of the TCC

States are entitled under international law to legislate with respect to the conduct of their nationals abroad through extra-territorial jurisdiction which enables a State to deal with an action that occurred in a foreign country.⁵ The technique of extra-territorial jurisdiction makes it possible to prosecute nationals at home, under national laws, for offences committed abroad. The usefulness of such a mechanism is obvious: (1) it provides a basis for arresting and prosecuting an offender who could not account for his/her acts since he or she has returned to her/his country of origin in order to avoid prosecution; and (2) it sends a clear message that countries will not let their citizens commit criminal acts with impunity.⁶ In other words, even though a law is enacted to deal with conduct that might occur within the boundaries of a given state, the limits of criminal law are no longer restricted to the domestic law where an act is perpetrated.⁷ The extension of criminal laws to citizens abroad means that nationality is an important basis of jurisdiction under international criminal law.⁸ This is particularly so in relation to armed forces stationed overseas who are compelled by the legislation of most States to carry their flag abroad with them.⁹ Thus article 7 *quinquies* of the revised Memorandum of Understanding still reserves the exercise of criminal and disciplinary jurisdiction over the conduct of a military contingent member to the Government

³ Ryngaert C *op cit* (n 2) 152.

⁴ Oswald B, Durham H and Bates A *Documents on the Law of UN Peace Operations* (Oxford University Press New York 2010) 56; Article 7.10 of the Revised Draft Model Memorandum of Understanding as set out in A/61/19 (Part III).

⁵ Beaulieu C *Extraterritorial Laws: Why they are not really working and how they can be strengthened* (ECPAT International Bangkok September 2008) 5.

⁶ *Ibid.*

⁷ Podgor ES 'Extraterritorial Criminal Jurisdiction: Replacing "Objective Territoriality" With "Defensive Territoriality"' 2003 (28) *Studies in Law Politics and Society* 117-135, 118.

⁸ Cryer R *et al. An Introduction to International Criminal Law and Procedure* 2 ed. (Cambridge University Press Cambridge (UK) 2010) 47.

⁹ *Ibid.*

of the State that contributed the troops alleged to have committed the criminal acts or acts of indiscipline.¹⁰

The recognition of the exclusive jurisdiction over acts committed by peacekeepers to the sending State is in conformity with the provision of the model Status-of-Forces Agreement.¹¹ The government of the State that contributes troops and exercises criminal jurisdiction over the contingent undertakes to prosecute any soldier that commits a crime on mission and to that end it gives assurances to the UN.¹² Giving assurances does not necessarily obligate the Troop-Contributing Country actually to prosecute.¹³ A decision whether or not to prosecute is an act of sovereignty. By giving assurances that it will prosecute any crimes that its troops might commit, the government does not divest itself of such sovereignty.¹⁴ The problem remains that the assurances expected from the Troop-Contributing Countries are not always given to the UN Secretary-General, and, if they are, this authority omits to inform the victims as to how the case was resolved. For instance, it is reported that Moroccan authorities decided on 14 February 2005 to prosecute six of its contingent members, who were then serving with MONUC, for having engaged in sexual exploitation and abuse of Congolese girls and women.¹⁵ Nothing is known of the outcome of the prosecution. In effect, as Hampson and Kihara-Hunt put it, one of the principal rationales for prosecution is to deter the commission

¹⁰ Revised Memorandum of Understanding UN. Doc. A/61/19 (Part III) of 12 June 2007. The provision reads as follows: 1. Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations peacekeeping missions]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes or offences.

2. The Government further assures the United Nations that it 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 while they are assigned to the military component of [United Nations peacekeeping missions] that do not amount to crimes or offences.

¹¹ Model SOFA para 47 (b) UN. Doc. A/45/594 of 9 October 1990. The relegation of exclusive criminal jurisdiction to the sending state may be criticized on the basis that, in these shameful circumstances, the sending state is not in a position to be impartial or to prosecute objectively. This is so because 'men armed by a sovereign government' are belligerents whose violent or warlike acts are not individual crimes or offences. See article 57 of the Lieber Code of 1863 quoted by Dehn JC 'The Hamdan Case and the Application of a Municipal Offence: The Common Law Origin of "Murder in Violation of the Law of War"' 2009 (7) *Journal of International Criminal Justice* 63-82, footnote 74.

¹² Article 7 *quinquies* of the Revised MOU UN. Doc. A/61/19 (Part III) of 12 June 2007.

¹³ *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* UN. Doc. A/59/710 of 24 March 2005 (hereinafter Zeid Report UN. Doc A/59/710), para 80.

¹⁴ *Ibid.*

¹⁵ Abus sexuels par les éléments de la MONUC: Après la France le Maroc engage des poursuites contre ses ressortissants available at www.Sfdi.org/actualites/Sentinelle7.html#maroc [last accessed 20 May 2012]; Gardiner N 'The U.N. Peacekeeping Scandal in the Congo: How Congress Should Respond' 2005 (868) *Heritage Lectures* (delivered 1 March 2005) 1-8, 1-2.

of crime.¹⁶ Conducting the proceedings in the sending State in place of conducting them where the suspect committed the crime has less, if not, impact in the Host State.¹⁷ The risk, however, of this negative or absent impact could be reduced if the Special Representative of the Secretary-General was required to be informed of such proceedings so that they could be made public in the Host State.¹⁸ For its efficiency, the publication mechanism must be sufficiently institutionalised and its violation should entail State responsibility.¹⁹ There is, however, no such requirement that a host population be informed regarding the outcome of a prosecution back home. Indeed, the enforcement of violations of international humanitarian law and the punishment of individuals hinge on and depend upon the goodwill of States, and legislation varies from one country to another.²⁰ All instruments related to the conduct of UN forces do not inform whether, in the case of non-prosecution, despite the investigation concluding the truth of the occurrence of the crimes, the Host State recovers its criminal jurisdiction over crimes committed within the boundaries of its territory.²¹ In other words, is there any residual jurisdiction by the Host State over crimes committed by peacekeepers? The issue will be discussed in the following section.

6.3. Residual criminal jurisdiction of the Territorial State (Host State)

According to the recommendations of the Zeid Report, the Host State should not be deprived of criminal jurisdiction.²² It still retains the ability to gather evidence and to arrest offenders,

¹⁶ Hampson FJ and Kihara-Hunt Ai 'The Accountability of Personnel Associated with Peace Support Operations' in Aoi, de Coning & Thakur (eds) *Unintended Consequences of Peace Support Operations* (United Nations University Press Tokyo 2007) 209.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ The undertakings to report to the Secretariat of the UN are not fulfilled when it comes to the outcomes of prosecution of peacekeepers back home. See for example Report of the Secretary-General *Criminal accountability of United Nations officials and experts on mission* (UN. Doc. A/63/260 of 11 August 2008) para 70.

²⁰ Cassese A 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' 1998 (9) *European Journal of International Law* 2-17, 4.

²¹ The territoriality principle is the most basic principle of jurisdiction in international law. See Ryngaert C *Jurisdiction in International Law* (Oxford Monographs in International Law OUP Oxford 2009) 42. For instance, Italian military laws do not subject personnel on peacekeeping missions to face criminal prosecution for crimes committed abroad. Pallen D 'Sexual Slavery in Bosnia: The Negative Externality of the Market of Peace' available at www.american.edu/sis/students/sword/Back_Issues/3.pdf [last accessed 19 December 2012]. How then can the Italian courts intervene if an Italian peacekeeper commits a crime while serving with a UN mission of peace and is repatriated? In case of conflicts of law, for instance where a peacekeeper committed an offence to his national law abroad but where the act was not a crime in the Host State such an act should not be prosecuted. If the act relates to military discipline, it can still be prosecuted to restore discipline within the ranks.

²² Zeid Report UN. Doc A/59/710 paras 89, 93.

and, since criminal jurisdiction is not an indivisible concept²³ and from the point of view that it is not easy for investigators of a foreign state to visit the place where the crimes were committed to collect all the evidence needed, some jurisdiction must be left to the Host State in order to surmount the challenges of evidence gathering.²⁴ Cooperation, therefore, is crucial since the victims of crimes committed by peacekeepers are essentially nationals of the Host State.²⁵

The Report of the Group of Legal Experts recommended that the UN should facilitate the exertion of criminal jurisdiction over peacekeepers by the Host State since the organisation is still unable to rely on other states to gather evidence or ensure that peacekeepers are effectively prosecuted on their home territory.²⁶ Furthermore, serious crimes against the person committed by peacekeepers, which do not amount to war crimes or crimes against humanity, are prosecutable by any state, even a third state if a treaty provides for this as an option.²⁷ Under the current law, crimes committed by peacekeeping personnel may go unpunished because the Host State has no criminal jurisdiction over peacekeepers.²⁸ It must be noted that the Host State is the first or the only state on whose territory the effects of the crime are felt.²⁹ The need to provide for extra-territorial jurisdiction by states other than the Host State, based on the objectives of territoriality principle, is of very limited consequence.

6.4. Residual criminal jurisdiction of a third State

According to Engdahl, the principle of exclusive criminal jurisdiction over crimes committed by peacekeepers is relevant only with respect to the Host State.³⁰ This means that military personnel suspected of war crimes cannot rely on the exclusive criminal jurisdiction of their

²³ *Report of the Group of Legal Experts on Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations* (UN. Doc. A/60/980 of 16 August 2006) (hereinafter GLE Report UN. Doc. A/60/980) para 40.

²⁴ If this is added, the existence of on-site courts martial for troops together with the aid of the UN investigators and the use of DNA and fingerprinting technology, the victims and witnesses will regain confidence in the rule of law. See Defeis EF 'UN Peacekeepers and Sexual Exploitation and Abuse: An End to Impunity' 2008 (7) *Washington University Global Studies Law Review* 185-214, 197.

²⁵ Victims of crimes by peacekeepers may also be foreigners, but most of time they are members of the host population. See GLE Report UN. Doc A/60/980 para 51.

²⁶ para 27.

²⁷ para 51.

²⁸ GLE Report UN. Doc A/60/980 para 54.

²⁹ para 50.

³⁰ Engdahl O *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law* (Martinus Nijhoff Publishers Leiden 2007) 191.

state.³¹ The Status-of-Forces Agreement and Memorandum of Understanding are the agreements that preclude the Host State from exercising criminal jurisdiction over criminal acts committed by peacekeepers. These two agreements have no bearing on the jurisdiction of third states which are not parties thereto.³² Third states, therefore, may still wish to exercise their criminal jurisdiction over a case based on a ground such as the passive principle.³³ According to this principle, a third state, i.e. a state which is not the state on whose territory the crime was committed or of origin of the perpetrator, would have the right to try a peacekeeper if the victim were a citizen of that state.³⁴ A third state would, therefore, naturally be within its right to exercise jurisdiction. Most of the time, a third state cannot exercise jurisdiction over war crimes if the perpetrator is not currently found in its territory, unless it can have the suspect extradited from where he is currently residing to the country seeking to have him or her punished. The problem remains therefore of determining when peacekeepers' conduct amounts to war crimes.³⁵ This falls away if an investigation has been conducted by the UN OIOS or by a TCC and the identified perpetrator is a fugitive in order to avoid prosecution. In fact, agreements bestowing exclusive criminal jurisdiction over acts of peacekeepers to TCCs do not bind states which are not party to such agreements.³⁶

From the aforementioned principle, a third state has jurisdiction over peacekeepers where their conduct amounts to war crimes.³⁷ This raises another key issue which is whether an international criminal court or tribunal can also be competent to exercise jurisdiction over crimes by peacekeepers?

³¹ *Ibid.* War crimes are amongst international crimes for which any state can exercise universal jurisdiction.

³² Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch-DFAIT_rport.doc [last accessed 29 September 2011].

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ According to Amnesty International, two-thirds of all states permit their courts to exercise criminal jurisdiction over conduct amounting to war crimes. Much of the legislation, however, remains inadequate in that it does not determine the scope of the said war crimes, their definition, the principles of criminal responsibility, defences, and other obstacles to effective prosecution. See Amnesty International *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation, Chapter Four - Part A: War Crimes: State Practice at the National Level* (AI Index: IOR 53/006/2001 September 2001) 14.

³⁶ See the *res inter alios acta*: It is a universal agreement that in principle a treaty creates neither obligations nor rights for third States without their consent. Article 34 of the Vienna Convention on the Law of Treaties 1969. Entry into force - 27 January 1980. See United Nations *Treaty Series* vol. 1155, p. 331.

³⁷ There can be no limitations on the rights of a State, except with its consent. With respect to treaties which promote the highest internal interests, any State can aspire to protect such rights by prosecuting whoever infringes them.

6.5. The International Criminal Court and Tribunals' jurisdiction

If the crimes alleged to have been committed fall, for instance, under the jurisdiction of the ICC, the principle of exclusive criminal jurisdiction set up in the Status-of-Forces Agreement should cease to apply because, as Miller puts it, 'the only exception to the exclusive jurisdiction of the TCC in the Host State with respect to criminal offences over their contingent members would be if the International Criminal Court asserted jurisdiction over crimes falling within its Statute.'³⁸ There is, however, still no case where the ICC has asserted such jurisdiction in relation to crimes by peacekeepers, and it is unlikely that it will actually do so.³⁹

The issue of peacekeepers falling under the jurisdiction of the ICC reoccurs frequently.⁴⁰ It is sometimes said that interpretation by States of the current language in the model Status-of-Forces Agreement points to excluding the jurisdiction of international tribunals.⁴¹ Section 46(b) of the Model Status-of-Forces Agreement that refers to the 'exclusive' jurisdiction of contingent States must be understood as not relating to international tribunals, but solely to Host States.⁴² Furthermore, immunities from the jurisdiction of Host States cannot apply in the International Criminal Court.⁴³ The ICC is not a party to the agreements between the UN and Host States, or between the UN and the TCC and cannot be bound by such instruments. For peacekeepers to be prosecuted before the ICC, however, their acts must have reached the level of widespread or systematic crimes.⁴⁴ There is no doubt that peacekeepers are prosecutable before the ICC, despite its limited capacity to adjudicate each and every case

³⁸ Miller AJ 'Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations' 2006 (39) *Cornell International Law Journal* 71-96, 80.

³⁹ It is prudent to refrain from expecting the ICC to be the panacea to the ills of the world. See Bergsmo M (ed) *Thematic Prosecution of International Sex Crimes* (TOAELP Beijing 2012) 407.

⁴⁰ Sheeran S *et al.* *United Nations Peacekeeping and the Model Status of Forces Agreement: Experts' Workshop: United Nations Peacekeeping Law Reform Project* (School of Law University of Essex February 2011) 18.

⁴¹ *Ibid.*

⁴² Compare Bedont B *International Criminal Justice: Implications for Peacekeeping* (report for the Canadian Department of Foreign Affairs and International Trade December 2001) available at www.peacewomen.org/un/pkwatch/DFAIT_rport.doc [last accessed 29 September 2011].

⁴³ See *UN-ICC Agreement: Negotiated Relationship Agreement between the International Criminal Court and the United Nations*. Its Article 19 on the Rules concerning United Nations privileges and immunities excludes the invocation of such immunities to make the ICC unable to exercise its jurisdiction. In the case the UN is required to waive the said immunities. See also Cassese A *International Criminal Law* 2 ed. (OUP New York 2008) 312.

⁴⁴ Article 8(1) of the Rome Statute: '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.'

within its jurisdiction.⁴⁵ One can infer from the fact that the UN organisation had to take a resolution to exempt peacekeepers drawn from States not party to the Rome Statute from criminal prosecution before the court actually means that the ICC does have jurisdiction over crimes committed by peacekeepers.⁴⁶ Indeed, there is no principle that in effect says an international tribunal or court has no jurisdiction over peacekeepers. Such a principle would jeopardise the *raison d'être* of any international jurisdiction. In fact, the purpose behind the setting up of an international tribunal is to put an end to partiality similar to that which happened in Leipzig.⁴⁷ As Gaeta rightly puts it, 'the perception of impartiality is crucial to the legitimacy of the court or tribunal. A choice not to prosecute certain crimes can lead to the appearance of partiality [such was the case when the ICTY chose not to prosecute the North Atlantic Treaty Organisation (NATO) bombings against Serbia]'.⁴⁸

The establishment of the ICC was a necessity resulting from the fact that, in some exceptional instances, national courts are unwilling or unable to act. It has been shown that prosecuting members of the army when back from abroad where they served under the UN flag may well fall within exceptional circumstances of state unwillingness to prosecute.⁴⁹ The ICC statute is applicable to all individuals without distinction based on official capacity.⁵⁰ The ICC does have jurisdiction over war crimes committed by peacekeepers while on UN missions of peace,

⁴⁵ The ICC has limited capacity to prosecute perpetrators of serious international crimes. See Bergsmo *op cit* (n 39) 398 *et passim*.

⁴⁶ Engdahl *Op cit* (n 30) 191.

⁴⁷ Glueck S 'By What Tribunal Shall War Offender be Tried?' 1943 (56) *Harvard Law Review* 1059-1089, 1059 *et seq.*

⁴⁸ Gaeta P 'International and Mixed Jurisdictions: Means and Achievements of Mechanisms established by States and United Nations' (Communication at the ICC-Assembly of States Parties New York 30 November to 14 December 2007 ICC_ASP/6/INF.2A) 8-9.

⁴⁹ Since under the Statute, situations can be triggered in one of following three ways: referrals to the Court by a State [Article 13(a)] or by the Security Council [Article 13(b)]; and investigations *proprio motu* of the Prosecutor consecutively to communications received by his Office and emanating from individuals, groups, States, intergovernmental, or non-governmental organizations (NGOs), and related to potential situations necessitating investigations. For the exertion of this power, the pre-trial chamber must first give authorization (Article 15). It is unlikely that a State, whose army members have been accused of committing crimes while serving with a UN peace operation, will refer the case to the ICC itself, nor will the UNSC refer such a case to the ICC. No one can actually convince that the *proprio motu* mechanism can bring the ICC to prosecute peacekeepers. The Prosecutor may not be authorized to proceed with such case. With respect to the existing workload of the ICC, see Wouters J and Chan K 'Policies, Not Politics: The Pursuit of Justice in Prosecutorial Strategy at the International Criminal Court' in Muller S and Zouridis S (eds) *Law and Justice: A Strategy Perspective: Law of the Future Series No.2* (TOAEP The Hague 2012) 143-168, 148 *et seq.*

⁵⁰ Blattmann R 'The Establishment of a Permanent International Criminal Court: Consequences and Role of the ICC' (Communication at the ICC-Assembly of States Parties New York 30 November to 14 December 2007 ICC_ASP/6/INF.2A) 14-15.

but the ICC observes the principle of complementarity that is found in the Rome Statute,⁵¹ i.e. the ICC intervenes whenever States are not willing to prosecute those who commit heinous crimes such as war crimes.⁵²

6.6. Some prosecutions of crimes by peacekeepers: TCCs

6.6.1 Canada

Despite the fact that amongst the six prosecutions before the Canadian courts-martial five relate to the same incident, it is important to give facts for each case in order to show the degree of involvement of each accused.⁵³ Indeed not all the five accused directly participated in the torturing to death of the Somali boy.⁵⁴ Moreover, any assessment of the participation in criminal conduct seeks to establish personal criminal liability of each participant.⁵⁵ In fact, despite the fact that the five prosecutions stemmed from the same incident, what is important to take cognisance of is the fact that the proceedings were separate and held in different courts. The different individuals accused were not prosecuted jointly. It must be noted, however, that the main perpetrator was not prosecuted owing to the fact that he could not stand trial.⁵⁶

⁵¹ Paragraph 10 of the preamble of the Rome Statute of the International Criminal Court.

⁵² El Zeidy MM *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff Publishers Leiden 2008) 157-158, 163-170.

⁵³ For most of the individuals involved, see Rouillard LPF 'Canada's Prevention and Repression of War Crimes' 2005 (2) *Miskolc Journal of International Law* 43-58, 50.

⁵⁴ For instance Brocklebank did not actually participate in acts of torture which brought about Arone's death. See Boustany K 'Brocklebank: A Questionable Decision of the Court Martial Appeal Court of Canada' 1998 (1) *Yearbook of International Humanitarian Law* 371-374, 371.

⁵⁵ Some of the accused in the torturing to death of Arone should be considered as accessories after the fact to some degree or other or as having committed specific crimes such as omitting to report to superiors or to punish the actual perpetrators if the aim was actually to let the perpetrator escapes accountability. See S 23 of the Canadian Criminal Code.

⁵⁶ *Elvin Kyle Brown* (Private, Canadian Forces) v. *Her Majesty the Queen*, Respondent. [1995] C.M.A.J. No. 1 File No.: CMAC 372, Judgment: January 6, 1995, para [5]. Also MCpl Matchee still has to stand trial for the murder and torture of Shidane Arone. Although he has been declared unfit to stand trial, reviews of that decision take place every two years to determine whether he is fit to stand trial pursuant to section 202.12 of the National Defence Act, to determine whether sufficient evidence can be adduced to put the accused person on trial. See UN Committee against Torture *Consideration of Reports Submitted by States Parties under Article 19 of the Convention - Fifth periodic reports of States parties due in 2004 Addendum: Canada* (CAT/C/81/Add.3 of 4 November 2004) para 84. Master Corporal Matchee was first charged with second-degree murder and torture in relation to the death of Arone in Ottawa. At his trial in April 1994, on a preliminary motion, he was found unfit to stand trial by reason of a mental disorder, namely permanent organic brain damage. See UN Committee against Torture *Consideration of Reports Submitted by States Parties under Article 19 of the Convention - Third periodic reports of States parties due in 1996 Addendum: Canada* (CAT/C/34/Add.13 of 31 May 2000) para 28.

6.6.1.1 *R. v. Brocklebank* (Appeal) [1996] C.M.A.J. No. 4

6.6.1.1.1 The facts of the case⁵⁷

Private Brocklebank was serving with the Canadian Forces on a peacekeeping mission in Belet Uen, Somalia.⁵⁸ On the evening of 16 March 1993, a military patrol captured an unarmed sixteen-year-old Somali boy named Shidane Arone.⁵⁹ Without resisting, Arone was taken into custody, bound, and placed in a bunker.⁶⁰ At the time of the capture, Brocklebank was in bed suffering from dysentery; he did not leave his tent until he was awakened by Master Corporal Matchee at approximately 2300 hours.⁶¹ Brocklebank did not have any knowledge of the captured boy and the torture he was undergoing at the hands of both Matchee and Private Brown. Brocklebank did not even have an idea why he was being awakened. He, however, understood afterwards that he was being ordered to be on duty at the front gate to the camp. As Brocklebank was heading to the front gate, Matchee called him over to the bunker. Once close to the bunker, Matchee pointed a flashlight at Arone and said, 'Look what we got here'. Brocklebank had no idea who Arone was, nor did he have any idea as to why Arone was in the state in which he saw him.⁶²

After Matchee turned off the flashlight, he ordered Brocklebank to hand over his pistol. Matchee then held Brocklebank's pistol to Arone's head and told Brown to take pictures of him. Brocklebank did not enter the bunker where Arone was being held; he remained outside the bunker watching the gate. He never went down into the bunker while Matchee was present. Brocklebank asked Matchee if anyone else had seen what had happened, and Matchee told him that Warrant Officer Murphy had kicked or hit Arone and that Captain Sox had instructed Matchee to 'give him a good beating, just don't kill him'. At no time did Brocklebank abuse the prisoner or encourage Matchee in what he was doing. Even though he knew Arone was being beaten, he assumed it was as a result of an order given to Matchee,

⁵⁷ *Her Majesty the Queen, appellant v. D.J. Brocklebank*, (Private Canadian Forces), respondent - File No.: CMAC-383 - Judgment: Ottawa, April 2, 1996 (hereinafter *R v Brocklebank* (appeal)). The case concerned the alleged torture of a Somali youth by Canadian Forces engaged in a peacekeeping mission in Somalia in 1993. See also Adaka F 'The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines' 2008 (47) *Military Law & Law of War Review* 253-265, 255.

⁵⁸ The peace operation was established pursuant to the UN Security Council Resolution 794 (1992).

⁵⁹ *Supra* 5.2.2.1.

⁶⁰ *R v Brocklebank* (appeal) para [5].

⁶¹ *Ibid.*

⁶² *Ibid.*

and he did not realize the severity of the beating. Arone subsequently died. Brocklebank testified that at no point had he been ordered to guard Arone and that he believed Arone was in the custody of Matchee.⁶³

Brocklebank was charged, under section 269 of the Criminal Code of 1985, with the offence of aiding and abetting in the commission of torture, and in the alternative with negligent performance of a military duty.⁶⁴ Brocklebank was acquitted on both charges at his Court Martial, and the Crown appealed.⁶⁵ The legal question discussed on appeal was whether Private Brocklebank should be acquitted on both charges of *aiding and abetting in torture* and of *negligent performance of military duty* since the accused did not take steps to protect the prisoner.

6.6.1.1.2 The Court-martial of Appeal decision

Regarding the conduct of Brocklebank, the court, in acquitting the accused, estimated that his attitude did not constitute a punishable offence. The prosecution disagreed and appealed against such an acquittal. The appellate jurisdiction in its majority decision dismissed the appeal on the following grounds with respect to each count of offence.

- *Aiding and abetting torture*

In order to be found guilty of the offence of aiding and abetting⁶⁶ in the commission of torture,⁶⁷ the panel should have been convinced beyond reasonable doubt that Brocklebank (a)

⁶³ *R v Brocklebank* (appeal) para [5].

⁶⁴ *R v Brocklebank* (appeal) para [8]. See also Committee Against ‘Torture Consideration of Reports Submitted by States Parties under Article 19 of the Convention Third Periodic Report of States Parties Due in 1996 Addendum – Canada [19 October 1999]’ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN. Doc. CAT/C/34/Add.13 of 31 May 2000) para 31.

⁶⁵ UN. Doc. CAT/C/34/Add.13 of 31 May 2000 31.

⁶⁶ 72. (1) Every person is a party to and guilty of an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it;

(c) abets any person in committing it; or

(d) counsels or procures any person to commit it.

⁶⁷ See S. 269.1 (1) of the Canadian Criminal Code: *Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.* The remainder of the article explains what is meant by the terms “official” and “acts of torture.”

did or omitted to having done something and (b) for the purpose of aiding Matchee (the soldier who actually tortured Arone) in the commission of the offence of torture.⁶⁸

Considering the assumption that the accused failed to take the necessary steps to prevent the torture or omitted to do something, therefore, the opinion that Brocklebank's omission to intervene aimed at aiding or abetting the torturous acts perpetrated by Matchee reposes upon a non-existing basis. Indeed the evidence that could establish that the respondent had formed the intention required to commit the offence he was charged with was not presented. No *prima facie* case was established by the prosecution with respect to this first charge.⁶⁹ The accused was, therefore, acquitted regarding the charge of aiding and abetting torture.

- *Negligent performance of military duty*

The prosecution appealed against the acquittal of the accused with respect to the charge of negligent performance of military duty on the ground that the Judge Advocate erred in instructing the panel regarding the *standard care* and the *de facto duty of care*.⁷⁰ Section 124 of the Canadian National Defence Act forms the basis of the charge. It provides that 'Every person who negligently performs a military duty imposed on that person is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.'⁷¹

The appellate jurisdiction noted that the correct definition of 'negligently' is that the word signifies that the accused either did something or omitted to do something in a manner which would not have been adopted by a reasonably capable and careful person in his position in the service under similar circumstances.⁷² With respect to exercising military service, the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred.⁷³ In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the

⁶⁸ *R v Brocklebank* (appeal) para [9].

⁶⁹ *R v Brocklebank* (appeal) para [10].

⁷⁰ para [12]-[13].

⁷¹ S. 124 Canadian National Defence Act.

⁷² *R v Brocklebank* (appeal) para [14].

⁷³ *R v Brocklebank* (appeal) para [18].

exigencies of a particular situation.⁷⁴ The reason for this is that, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to be exacting the same standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer.⁷⁵

To reach the conclusion that the prosecution's argument with respect to the standard of care fails,⁷⁶ the appellate jurisdiction indicated that the Judge Advocate's comments show that he informed the panel that in deciding whether the respondent had met the appropriate standard of care in the performance of the duty imposed upon him, the panel could consider the rank, status and training of the respondent as these were characteristics which the panel would otherwise ascribe to the reasonable person in the circumstances of the respondent.⁷⁷ A question put to the Judge Advocate by the panel points to the correctness of the understanding of the instruction,⁷⁸ and it aimed to ascertain whether, in determining the standard of care, ought one to determine the standard within the strict context of the circumstances in Somalia, or ought one to determine the standard within the context of the average Canadian soldier within the Canadian Forces as a whole. In other words, the different members of the panel wanted to know whether the standard of care to which they would subsequently compare Private Brocklebank's conduct would be determined within the circumstances and context of the situation in Somalia at the time of the alleged offence according to the evidence presented, or if the standard of care to which they would subsequently compare Private Brocklebank's conduct would be determined within the broader context of the average Canadian soldier within the Canadian Forces.

The Judge Advocate's response to the question put to him unequivocally clarified that the test to be adopted was an objective one, *viz* referred to the conduct of a 'reasonably capable and careful private in Private Brocklebank's position in the Service under circumstances similar to those in evidence' would have adopted to discharge the duty.⁷⁹

⁷⁴ *R v. BrockleBank* (Appeal) para [22].

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Para [20].

⁷⁸ Para [21].

⁷⁹ *Ibid.*

As to the question of whether the trial panel could find Brocklebank guilty of negligent performance of a *de facto* military duty to protect civilians from foreseeable danger and whether or not the soldier considered was aware of such *de facto* duty, the appellate jurisdiction concluded that the Judge Advocate had erred in instructing the panel in this regard, i.e. from the Unit Guide to Geneva Conventions such a duty existed.⁸⁰ The error, however, was of no significance in ordering the trial of the Brocklebank anew since the panel found that the deceased Arone was not under the custodial responsibility of the respondent.⁸¹

6.6.1.1.3 Criticism of the decision in *R v. Brocklebank*

The criticism regarding the case must concern the whole issue of whether Brocklebank should have been found guilty of any crime. As one may infer from the facts as presented above, the acquittal of the accused is sustained by a number of reasons that Brocklebank performed personally no act of torture against Arone. The only act he witnessed was that of Brown taking a picture of Matchee holding Brocklebank's pistol to the head of the victim.⁸² After recovering his pistol, however, Brocklebank remained outside the entrance to the bunker while Matchee continued to torture Arone.⁸³ It was the above reason that justified the acquittal of Brocklebank regarding aiding and abetting torture.

With respect to the charge of a negligent performance of duty, it is important to note the dissenting opinion of Justice of Appeal Weiler according to which opinion the appeal against the count of negligent performance of military duty should be allowed. This Judge based his argument on the ground that Brocklebank had guarded the bunker in which Arone was detained, he knew the victim was in bad state, and he took no steps to alert the hierarchy regarding the state of the detained person.⁸⁴ Perhaps Brocklebank failed to take such steps because his direct superior was the torturer, because of his assumption that Arone was under the custody of Matchee, and that his interpretation that mounting the guard at the gate and

⁸⁰ *R v. BrockleBank* (Appeal) paras [23]-[55].

⁸¹ Para 59.

⁸² Paras [5],[67].

⁸³ *R v. BrockleBank* (Appeal) para [67].

⁸⁴ The Crown discharged its burden of proving that the Judge Advocate's instructions concerning the charge of neglect of duty affected the finding of the panel. The errors made were fundamental ones which would have affected the very basis on which the panel approached the second charge. See *R v. BrockleBank* (Appeal), para 96. It is effectively true that Brocklebank failed even to attempt to put an end to the ordeal by, for instance, reporting it to a superior of Matchee.

having the custody of the detained were two different duties.⁸⁵ But Brocklebank could have tried to stop Arone's ordeal by reporting the matter to any of Matchee's superiors.⁸⁶ Indeed, if this case is considered in the context of liability for omissions highlighted in chapter three, it is submitted that a peacekeeper would not escape liability if there was such a clause in the Memorandum of Understanding or in the Status-of-Forces Agreement.⁸⁷

The most serious criticism against the judgment of appeal is that of considering that the Geneva Conventions were not applicable to the case.⁸⁸ The minority judgment also pointed at that misinterpretation of the law by stating that 'a peacekeeping mission is a military operation carried out by armed forces with the aim of preventing hostilities and, therefore, within the Geneva Convention as enlarged by the 1977 protocols.'⁸⁹ Indeed, as Oswald, Durham, and Bates put it, Geneva Conventions are relevant to peacekeepers where they are engaged in an armed conflict, i.e. when they can be considered as combatants in the spirit of the 1999 Secretary-General Bulletin.⁹⁰ In situations where peacekeepers cannot be viewed as engaged in an armed conflict, the Fourth Geneva Convention, also called the Civilian Convention, must continue to be considered to be the bench-mark standard to be applied.⁹¹

6.6.1.2 *R. v. Brown* (Appeal)⁹²

6.6.1.2.1 The facts of the case

On the night of 16 March 1993, the day of the incident, the appellant's section was assigned to guard and sentry duty in the compound of number 2 Commando under the commandment of Sergeant Boland. The immediate superior of the appellant was Master Corporal Matchee.⁹³ A

⁸⁵ *R v. BrockleBank* (Appeal) para [67].

⁸⁶ *R v. BrockleBank* (Appeal) para [67]. See also Doria J 'Attacks on UN and Regional Organizations Peacekeepers: Potential Legal Issues before the International Criminal Court' 2009 (5) *International Studies Journal* 35-89, 43; Boustany K *op cit* (n 54) 371.

⁸⁷ Compare the South African case of *Carmichele v Minister of Safety and Security and another* [2000] 4 All SA 537 (A); 2001 (1) SA 489 (SCA).

⁸⁸ Boustany noted that since the incident occurred during UNITAF, an enforcement operation, humanitarian law was more relevant; it could not be said that Geneva law was foreign to the incident. See Boustany K *op cit* (n 54) 372-374.

⁸⁹ *R v. BrockleBank* (Appeal) para [82].

⁹⁰ Oswald B, Durham H and Bates A *Documents on the Law of UN Peace Operations* (Oxford University Press New York 2010) 206, 221.

⁹¹ *Ibid.*

⁹² *Elvin Kyle Brown* (Private, Canadian Forces) v. *Her Majesty the Queen*, Respondent. [1995] C.M.A.J. No. 1 File No.: CMAC 372, Judgment: January 6, 1995.

⁹³ *R. v. Brown* (Appeal) para [3].

16-year-old Somali male was captured and was placed in the custody of the appellant's section. The detainee was severely and brutally beaten to death by Matchee,⁹⁴ who was also charged but found unfit to stand trial.⁹⁵

The appellant was present during a great part of the beating, took photos of the person perpetrating the beating, and himself posed with the victim. He even admitted to have punched him once in the jaw and to have kicked him twice on the leg.⁹⁶ Other soldiers were also present from time to time while the beating was taking place. Evidence from soldiers who visited the bunker where the beating took place tends to point to the fact that the appellant was scared of Matchee not only as his immediate superior but also because he was a violent person with a quick temper and had apparently been drinking that night.⁹⁷ The death of the boy was probably caused by brain swelling resulting from the cumulative effect of blows to the head. Lacerations on the deceased's face were probably caused by blows with a fist, and such blows may have had a concussive effect contributing to the victim's death.⁹⁸

The General Court-martial found the appellant not guilty of the charge of murder but guilty of the included offence of manslaughter. It also found him guilty of torture.⁹⁹ Brown appealed against the decision and the Crown cross-appealed regarding the sentence. The appellant's grounds of appeal from conviction were: that the denial of a trial by jury infringed his rights under paragraph 11(f) of the Charter; that the guaranteed presumption of innocence contained in paragraph 11(d) of the Charter was infringed by the absence of a requirement of unanimity to support a court martial's finding; that there was a reasonable apprehension of bias on the part of the Commanding Officer in signing the charge sheet; and that the Judge Advocate at trial erred in refusing to admit certain alleged hearsay statements.¹⁰⁰ The Crown's proposed appeal with respect to the severity of sentence alleged that a sentence of five years' imprisonment was not sufficient, given the objective gravity of both the offence of manslaughter and the offence of torture.¹⁰¹

⁹⁴ *R. v. Brown* (Appeal) para [4].

⁹⁵ Para [5].

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Para [6].

⁹⁹ Para [7].

¹⁰⁰ *R v. Brown* (Appeal) para [8].

¹⁰¹ Paras [33]-[34].

The legal questions dealt with by the Court Martial of Appeals was as follows: (1) Whether the appellant's right to be tried by a jury and his right to be presumed innocent were infringed¹⁰²; (2) whether the alleged reasonable apprehension of bias on the part of the commanding officer who signed the charge sheet and an alleged error on the part of the Judge Advocate in refusing evidence of a hearsay statement made by Matchee should have contributed in favour of the accused;¹⁰³ and (3) The Crown's Appeal upon the ground that the sentence of five years of imprisonment is not sufficient vis-à-vis the gravity of the offences of manslaughter and torture.¹⁰⁴

6.6.1.2.2 The Court-martial of Appeal decision

The appellate court dismissed both the Appeal from conviction and the Appeal with respect to severity of sentence.¹⁰⁵ The Court Martial of Appeal held that the appeal upon the ground based on the right to a jury failed because the existence of a military nexus with the crime charged constituted an exception to the right to a jury.¹⁰⁶ With respect to the guaranteed presumption of innocence, such guarantee is not infringed by the absence of unanimity to support court martial's findings,¹⁰⁷ because the requirement of unanimity exists only with respect to trial by a jury. A panel of a court martial is not a jury; its role and function are different from those of a jury.¹⁰⁸

With respect to the ground of appeal vis-à-vis the attitude of the appellant's commanding officer signing the charge sheet to take legal advice from officers in the Judge Advocate General's department, the Appellate Court held that the appellant's consideration that such commanding officer's attitude amounts to a bias is without merit since the commanding officer role is an administrative one, not judicial.¹⁰⁹ Concerning the other ground of appeal by Brown with respect to the refusal of admission of hearsay evidence, the appellate jurisdiction rejected this ground on the basis that it implicated no substantial miscarriage of justice.¹¹⁰

¹⁰² *R v. Brown* (Appeal) para [9].

¹⁰³ Paras [8] [25].

¹⁰⁴ Paras [33]-[34].

¹⁰⁵ Para [41].

¹⁰⁶ Para [13].

¹⁰⁷ Para [19].

¹⁰⁸ Para [21].

¹⁰⁹ Paras [23]-[24].

¹¹⁰ Para [32].

The sentence appeal by the Crown was also dismissed on the ground that no error on the part of the Trial Court Martial could be identified from the reading of that court's decision.¹¹¹ With respect to the other ground of dismissal of the Crown's appeal regarding the low severity of the sentence compared to the offences charged, the appellate jurisdiction held that, in the light of many factors in favour of the accused, the sentence was not inadequate in respect of both the charge of manslaughter and that of torture.¹¹²

6.6.1.2.3 Criticism of the decision in *R v Brown*

At Private Brown's court martial, the prosecution argued that Private Brown had violated his duty to protect the victim from Matchee, or at least to report the incident to someone who could stop it.¹¹³ This seems not to have been taken into account since no sentence was imposed in this regard, perhaps because the trial general court martial accepted the argument by the defence counsel that Brown could not report to any superior since his superiors were involved in the torture, or at least condoned it.¹¹⁴ It was correctly upheld that Private Brown's own acts of assault constituted torture. There seems, however, to be no justification for the position of the court to leave out the assistance that Brown gave to Matchee.¹¹⁵ The argument by the defence that Private Brown was guilty of assault, but that the evidence failed to establish that the assault perpetrated by Private Brown actually contributed to the death of Mr. Arone, or that Private Brown's acts or omissions were intended to assist Matchee in torturing the victim or in causing injuries was not accepted.¹¹⁶ Since the minimum sentence for manslaughter is four years of imprisonment,¹¹⁷ and considering that for the offence of torture no minimum is set but only the maximum of fourteen years of imprisonment,¹¹⁸ one is not wrong to argue that the sentence of five years is not completely inadequate as indeed the appellate jurisdiction held.¹¹⁹

¹¹¹ *R v. Brown* (Appeal) para [38].

¹¹² para [39].

¹¹³ Commission of Inquiry Reports available at www.forces.gc.ca/somalia/somaliae.htm [accessed 23 June 2011] 329 (hereinafter CCI Somalia *op cit*).

¹¹⁴ *Ibid.*

¹¹⁵ *R v. Boland* (Appeal), para [7].

¹¹⁶ If such an argument were accepted by the panel, it could not find Brown guilty of torture. See CCI Somalia *op cit* (n 113) 329.

¹¹⁷ S. 236(a) of the Canadian Criminal Code.

¹¹⁸ S. 269.1 of the Canadian Criminal Code.

¹¹⁹ *R v. Brown* (Appeal) para [39].

It is still, however, not explained why Kyle Brown was eligible for parole as soon as November 1995. He was convicted on 16 March 1994, exactly one year after the death of Shidane Arone; his appeal and that of the Crown were dismissed by the Court Martial Appeal Court on 6 January 1995, and leave to appeal to the Supreme Court of Canada was denied on 1 June 1995.¹²⁰ It is not indicated that during these proceedings Brown was in custody, and was, therefore, considered to have already served one half of the sentence already to be eligible for parole.¹²¹

6.6.1.3 *R. v. Boland* (Appeal)¹²²

6.6.1.3.1 The facts of the case

Boland arrived shortly before 9:00 pm to relieve Matchee who had at that time already tortured the prisoner.¹²³ The appellant found the prisoner bound by his ankles and wrists and had a baton stuck through his elbows behind his back. He ordered the prisoner's ankles to be released and arranged for a looser wrist binding. Matchee retied the prisoner's ankles and subjected the prisoner to further abuse in Boland's presence. Before the appellant, Boland, went off duty at midnight, he said to Brown and Matchee: 'I don't care what you do, just don't kill the guy.'¹²⁴

Boland subsequently met Matchee at a beer tent where Matchee told him that Private Brown had been hitting the prisoner, and that he, Matchee, intended to burn the soles of the prisoner's feet with a cigarette. Boland reportedly said, 'Don't do that, it would leave too many marks. Use a phone book on him.'¹²⁵ In the same conversation, Boland told Matchee of the instructions from senior officers that it was alright to abuse prisoners, on which Matchee commented, 'Oh yeah!' Again, in parting, Boland said to Matchee, 'I don't care what you do, just don't kill him'.¹²⁶ Boland then went to bed without returning to the bunker where the prisoner was being held.

¹²⁰ He was released from the Canadian Forces on 24 May 1995. See CCI Somalia *op cit* 329.

¹²¹ S 743.6 of the Canadian Criminal Code.

¹²² *Her Majesty the Queen v. Mark Adam Boland*, (Sergeant, Canadian Forces), [1995] C.M.A.J. No. 7 - File No.: CMAC-374 - Court Martial Appeal Court of Canada.

¹²³ *R v. Boland* (Appeal) para [12].

¹²⁴ *Ibid.*

¹²⁵ Para [13].

¹²⁶ *Ibid.*

Boland was charged with two offences. The first charge was for the torture of the prisoner. The second charge was that of negligently performing a military duty. Boland pleaded guilty to the charge of negligence and not guilty to the charge of torture.¹²⁷ The charge of torture was not proceeded with. Boland was sentenced to 90 days' detention. The Crown appealed the severity of the sentence. The appeal raised two issues: (1) should the General Court Martial have taken into account evidence presented by Boland as to the events involved in the offence itself? (2) Was the sentence of 90 days' incarceration adequate?¹²⁸ The second issue is pertinent to this thesis.

6.6.1.3.2 The Court-martial of Appeal decision

The court held that the sentence of 90 days' imprisonment imposed by the trial panel was effectively inadequate. The sentence was increased to one year.¹²⁹ The reasons for upholding the crown's appeal was that the 'public policy demands firm deterrence of those who abuse or neglect helpless persons in their charge.'¹³⁰ The primary sentencing principles are repudiation and general deterrence. The prosecution requested that the Judge Advocate instruct the court that a significant period of incarceration was required. The term of imprisonment should be a term that takes into account the stark horror of the death of Shidane Arone and the responsibility for that death that Sergeant Boland shared with others.¹³¹ If the panel of officers imposed a sentence which is so light, this must have stemmed from the inadequate instructions given by the Judge Advocate. As a minimum it must be recognized that the respondent never disputed the particulars of his offence, namely that he failed to ensure that Arone was safeguarded, as it was his duty to do.¹³² In his own examination-in-chief he confirmed on several occasions that he had been negligent. The sad but unalterable fact is that negligence led to the death of the prisoner. Even if the panel believed that Boland did not see Brown strike the prisoner on the first occasion, and even if it concluded that Boland did not believe Matchee's statement that Brown had struck the prisoner after he, Boland, had left, Boland had admitted that he considered Brown to be a 'weak' soldier who could surely not be counted on to resist the initiatives of Matchee. He admitted to having seen Matchee do life-

¹²⁷ *R v. Boland* (Appeal) para [11].

¹²⁸ Para [18].

¹²⁹ Para [35].

¹³⁰ Para [28].

¹³¹ Para [27].

¹³² The appellant was, therefore, negligent but also criminally liable for omission.

threatening acts to the prisoner by covering his nose and pouring water on him. He had subsequently heard Matchee speak of intending to burn the prisoner with cigarettes. He, thus, had good grounds for apprehension with respect to Matchee's conduct. There was also evidence from even some defence witnesses that Matchee's reputation was well known. Yet, it was clear that Boland had said at least once, and probably twice, in the presence of Matchee, 'I don't care what you do, just don't kill the guy'. He gave no proper order to Matchee as to safeguarding the prisoner and left the prisoner unsupervised. Nor was it in dispute that it was Boland's responsibility to take all reasonable steps to see that the prisoner was held in a proper manner. Boland failed in that duty, with grave consequences.¹³³ There were no mitigating circumstances, such as the presence of an armed or dangerous prisoner, or even one who was physically uncontrollable. These events did not happen in the heat of battle. There was nothing to suggest that this prisoner had caused any harm to any Canadian or to any Canadian military property; indeed he was captured, not in the Canadian compound, but in an abandoned adjacent compound.¹³⁴

6.6.1.3.3 Criticism of the decision in *R v. Boland*

It must be recalled that the sentence of imprisonment was increased from 90 days' imprisonment to one year.¹³⁵ The Geneva Conventions prescribe humane treatment of protected persons such as civilians and prisoners and also proscribe coercion that causes physical suffering that might lead to death as in the case of Arone in the hands of the Canadian forces.¹³⁶ The parties to these treaties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined by the said Conventions.¹³⁷ Torture is one of such grave breaches.¹³⁸ Failure to prosecute Boland for torture, or for at least abetting torture or condoning it, has no obvious explanation. He saw that Arone was being mistreated but took no action to stop it.¹³⁹ Boland, in fact, encouraged the inhumane treatment by telling Matchee

¹³³ *R v. Boland* (Appeal) para [29].

¹³⁴ Para [30].

¹³⁵ Para [35].

¹³⁶ Articles 27, 31-32 of the 1949 Geneva Convention IV.

¹³⁷ Articles 49/50/129/146 of Geneva Conventions I, II, III, IV respectively

¹³⁸ Articles 50/51/130/147 of Geneva Conventions I, II, III, and IV respectively.

¹³⁹ Art. 86(2) of Additional Protocol I to the Geneva Conventions provides that 'The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them

that instructions from senior officers were that it was all right to abuse prisoners.¹⁴⁰ Boland repeated to Matchee, 'I don't care what you do, just don't kill him.'¹⁴¹ One, therefore, can draw the conclusion that to have omitted to prosecute Boland for torture shows the reluctance on the part of national prosecutors and courts to punish the perpetrators of torture, especially when such acts were committed abroad against foreigners.¹⁴² Boland was superior in rank to those who materially committed the torture. Boland had as his immediate superior Lieutenant Michael Sox with whom he attended the 'Orders Group' in the morning of the incidents that claimed the death of Shidane Arone.

6.6.1.4 R. v. Sox (Appeal)¹⁴³

6.6.1.4.1 The facts of the case

Sox was the commander who passed on information that any prisoners captured as a result of a forthcoming patrol could be "abused".¹⁴⁴ He may, therefore, be considered to be the person at the basis of the torturing to death the Arone.¹⁴⁵ Tried at a General Court Martial on three charges, Sox was found not guilty with respect to the first charge of unlawfully causing bodily harm to Arone. He was convicted on the second charge, which was an alternate to charge 1, of failing to exercise properly command over his subordinates.¹⁴⁶ Expert testimony at the trial indicated that a platoon commander in Sox's situation ought to have given clear orders to ensure his troops did not abuse a prisoner and ought to have exercised such personal supervision as may have been required in the circumstances to make sure that those orders were obeyed.¹⁴⁷ He was sentenced to reduction in rank and a severe reprimand.¹⁴⁸ The Crown appealed the stay of proceedings with respect to Charge 3, and sought the substitution of a

to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.'

¹⁴⁰ *R. v. Boland* (Appeal) para [13].

¹⁴¹ *Ibid.*

¹⁴² Cassese *A International Criminal Law* 2 ed. (OUP New York 2008)148.

¹⁴³ *Her Majesty the Queen v. Michael Sox* (F58 428 369 Lieutenant, Canadian Forces), [1996] C.M.A.J. No. 7 - File No.: CMAC-390, Court Martial Appeal Court of Canada - Judgment: Ottawa, July 4, 1996.

¹⁴⁴ *R. v. Sox* (Appeal) para [2].

¹⁴⁵ Para [6].

¹⁴⁶ Para [11].

¹⁴⁷ *Ibid.*

¹⁴⁸ Para [3].

conviction. The Crown also appealed the sentence, seeking one of more severe punishment. Sox also appealed against his conviction on Charge 2.¹⁴⁹

Some four issues had to be decided by the appellate jurisdiction: (1) whether a Court Martial Appeal Court has jurisdiction to substitute a conviction on a charge where the Court Martial has entered a stay of proceedings; (2) the issue of section 124 of the Canadian Defence Act, which relates to negligent performance of a military duty; (3) as regards evidence, whether evidence related to a charge can be considered in relation to a different charge; and (4) whether the Crown may seek a more severe sentence from that imposed by the trial panel.

6.6.1.4.2 The Court-martial of Appeal decision

With respect to the first issue, the court held that there is no jurisdiction conferred on a Court Martial Appeal Court to substitute a conviction on a charge where the Court Martial has entered a stay of proceedings.¹⁵⁰ With respect to the second issue regarding negligent performance of military duty, the appellate court held that military duty arises from tasking given by a superior officer.¹⁵¹ It further added that the duty to exercise command over subordinates includes the duty to safeguard prisoners from physical abuse. Regarding the third issue, it was held that the hearsay evidence which related to Charge 1, and was irrelevant to Charge 2, should not have been considered in relation to Charge 2, but that, although such double hearsay had been admitted, it had resulted in no substantial miscarriage of justice.¹⁵² With respect to the issue of increasing sentences on appeal, the court held that it was not necessary to change the sentence to a more severe one, because the sentence the court *a quo* had inflicted was not unreasonable.¹⁵³

A number of reasons can be cited for the dismissal of the appeals and cross-appeal. In its conclusion that it was illegal to substitute a verdict of not guilty by a verdict of guilty, the Court Martial Appeal Court founded its decision upon the interpretation of section 239(1) invoked by the Crown.¹⁵⁴ This section deals with a situation where the trial court found the

¹⁴⁹ *R. v. Sox* (Appeal) para [4].

¹⁵⁰ Para [21].

¹⁵¹ Para [38].

¹⁵² Para [41].

¹⁵³ Para [45].

¹⁵⁴ Canadian National Defence Act, S. 239(1): Where an appellant has been found guilty of an offence and the court martial could, on the charge, have found the appellant guilty under section 133, 134 or 136 of some other offence, or could have found the appellant guilty of some other offence on any alternative charge that was laid,

accused guilty on one of alternative charges.¹⁵⁵ For instance, if the trial panel had found Sox guilty on charge 1 but made no pronouncement on charge 3, the appellate jurisdiction could substitute such a finding on charge 1 with the alternative charge 3. The Crown misinterpreted section 239(1) of the National Defence Act.

Regarding the finding on the military duty imposed on Captain Sox, the fact that he attended the ‘Orders group’¹⁵⁶ implied that such duty had been imposed on Sox at that session. Such a duty includes the duty to safeguard prisoners against abuse.¹⁵⁷ And, with respect to the conclusion that the admission of hearsay evidence led to no substantial miscarriage of justice, the appellate jurisdiction estimated that such admission of evidence ‘had little if any prejudicial effect on the panel, having regard to the admissions of fact and other evidence to which reference has been made concerning Sox’s comments on this subject at his orders group.’¹⁵⁸

With respect to restraint in the increase of sentences on appeal, the decision of the court is based on the principles governing appeals from the sentence of a General Court Martial, which was reviewed by the same court of Appeals in *R. v. Seward*.¹⁵⁹ In that case, the Court Martial Appeal Court noted the need for restraint on the part of an appellate court in considering whether to vary a sentence on the basis of lack of fitness. It cited formulations of the test set out in a decision of the Supreme Court of Canada in *R. v. Shropshire*.¹⁶⁰

6.6.1.4.3 Criticism of the decision in *R v. Sox*

As for the criticism regarding the preceding *Boland* case, it is important to note that international humanitarian law proscribed the inhumane treatment that Shidane Arone suffered at the hands of the Canadian Forces.¹⁶¹ Indeed he died repeating ‘Canada, Canada!’ in his painful screams.¹⁶² Arone was apprehended¹⁶³ by the patrol headed by Captain Sox¹⁶⁴

and, on the actual finding, it appears to the Court Martial Appeal Court that the facts proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute the finding of guilty made by the court martial for a finding of guilty of that other offence.

¹⁵⁵ *R v. Sox* (Appeal) para [9].

¹⁵⁶ Para [30].

¹⁵⁷ Paras [33]-[35] relating to testimonies of Captain Blackman and of Lieutenant-Colonel Geburt.

¹⁵⁸ *R. v. Sox* (Appeal) para [40].

¹⁵⁹ Para [44].

¹⁶⁰ *Ibid.*

¹⁶¹ Articles 27, 31-32 of the 1949 Geneva Convention IV.

¹⁶² *R v. Boland* (Appeal) para [7].

who, during his orders group for the section commanders in his platoon, is alleged to have said something to the effect that it would be appropriate or acceptable to abuse or ‘rough up’ anyone captured while attempting to penetrate the compound.¹⁶⁵ He, by such allusion to the appropriateness of abusing prisoners, gave a sort of *carte blanche* to those who effectively put the instruction into execution, i.e. Matchee and Brown.

By giving such an instruction to section commanders, Sox could not forget that, if someone were captured, that person could be abused, contrary to the requirements of international humanitarian law. He took no measures to prevent such abuse but said it was not bad to abuse prisoners. The fact that he did not himself torture Shidane Arone does not absolve Sox from his responsibility to protect prisoners in the custody of the Canadian forces.¹⁶⁶

One could not expect Sox to have prevented a breach of international humanitarian law when he himself had said that such a breach could be committed. Thus, in addition to his command responsibility, Sox could also be held as an accomplice since Sox conducted an orders group for the section commanders in his platoon and said persons captured could be abused.¹⁶⁷ As the expert testimony at the trial indicated, the failure to give clear orders to ensure that his troops did not abuse a prisoner, and to exercise such personal supervision as may be required in the circumstances to assure orders are obeyed, demonstrated the part played by Sox in the tragic incident against Arone.¹⁶⁸ One sees no reason why proceedings related to charge 3 had to be stayed. What was effectively grave for Sox was having stated that prisoners could be abused.

As to the appropriateness of the sentence of reduction in rank and a severe reprimand, it must be noted that such a sentence is one of the options provided for by the National Defence Act.¹⁶⁹ It denotes, however, that the offence of negligent performance of military duty is not grave when committed by commanders. Yet, any sentence meted out should reflect the

¹⁶³ *R v. Sox* (Appeal) para [30]. The apprehension must have been the result of a long chasing since Arone was captured in trying to infiltrate the Canadian compound but actually in the abandoned US compound.

¹⁶⁴ para [12].

¹⁶⁵ *R v. Sox* (Appeal) para [10].

¹⁶⁶ Article 86(2) of Additional Protocol I to the Geneva Conventions.

¹⁶⁷ Depending on national legislation of each State, military commanders may be considered criminally liable for aiding and abetting violations of IHL. See Cassese A *International Criminal Law* 2 ed. (Oxford University Press New York 2008) 237, footnote 8.

¹⁶⁸ See *R v. Sox* (Appeal) paras [30]-[37].

¹⁶⁹ S. 139 Canadian National Defence Act.

purpose of the punishment and deterrence should increase with the rank of the officer.¹⁷⁰ But, as it has already been noted, since the parties to the Geneva Conventions undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches defined by the said Conventions,¹⁷¹ such sanctions vary from one country to another.¹⁷² Captain Sox was not the very first officer to instruct the abuse of any person captured. It was Major Seward who had wilfully ordered the violation of the Geneva Convention in the circumstance. It is, therefore, interesting to know how the court dealt with his case.

6.6.1.5 R. v. Seward (Appeal)¹⁷³

6.6.1.5.1 The facts of the case

In command of 2 Commando, Canadian Airborne Regiment deployed to Somalia,¹⁷⁴ the respondent is the officer who issued orders that infiltrators into their camp were to be captured and abused, and he wanted them captured.¹⁷⁵ He was charged with having unlawfully caused bodily harm to Arone contrary to section 130 of the National Defence Act and section 269 of the Criminal Code of Canada; and with having negligently performed a military duty imposed upon him contrary to section 124 of the National Defence Act, in that he allegedly issued an instruction to his subordinates that prisoners could be abused and failed to exercise command over his subordinates properly.¹⁷⁶

The respondent was found guilty on the second charge and sentenced to a severe reprimand.¹⁷⁷ The Crown sought to appeal the above sentence. In its *factum* on the appeal, the Crown asked that the respondent's sentence be increased to dismissal from Her Majesty's service. During argument before the Appeal Court, however, the Crown suggested that an appropriate sentence would be dismissal with disgrace, the maximum sentence permitted.¹⁷⁸

¹⁷⁰ *R v. Seward* (Appeal) para [36].

¹⁷¹ Articles 49/50/129/146 of Geneva Conventions I, II, III, IV respectively

¹⁷² To have failed to report a grave breach of the Geneva Convention does not *in se* entail prosecution if the enacted law does not so provide.

¹⁷³ *Her Majesty The Queen v. Anthony Gerald Seward* (V41 906 165 Major, Canadian Forces), [1996] C.M.A.J. No. 5 - File No.: CMAC-376, Court Martial Appeal Court of Canada - Judgment: Ottawa, May 27, 1996.

¹⁷⁴ *R v. Seward* (Appeal) para [2].

¹⁷⁵ Para [4].

¹⁷⁶ *R v. Seward* (Appeal) para [9].

¹⁷⁷ *Ibid.*

¹⁷⁸ Para [10].

The Crown appealed against the sentence. The Crown considered the sentence imposed by the General Court Martial to be low, and asked the Court Martial Appeal Court to increase it.¹⁷⁹

6.6.1.5.2 The Court-martial of Appeal decision

After cautioning that the Appeal Court must show restraint in increasing sentences imposed by the trial court,¹⁸⁰ it held that the sentence of severe reprimand was unfit, and clearly unreasonable.¹⁸¹ The court increased the sentence to three months' imprisonment together with dismissal from Her Majesty's service.¹⁸²

If the trial panel of officers imposed a derisory sentence in the form of a severe reprimand, it was because the Judge Advocate did not instruct the panel properly. He also failed to take into account factors that could cast light on the issue. It is said on behalf of the respondent, that since he was acquitted on count 1 (the charge of causing bodily harm to Shidane Abukar Arone) the death of Arone through abuse at the hands of the respondent's subordinates could not be a circumstance to be taken into account with respect to sentence. It should have been instructed as the prosecutor forcefully argued that, in the matter of sentence, the consequences which followed upon the giving of the respondent's order were relevant, particularly because they reflected a breakdown in discipline to which the order must be taken to have contributed. Part of that breakdown in discipline involved the beating to death of Arone. The Judge Advocate did not accept the argument by the prosecutor that instructions by Seward contributed to the breakdown in discipline and that such circumstance had to be taken into account in sentencing. The only reference the Judge Advocate made to the prosecutor's position was the lengthy enumeration of some 18 factors the panel should consider in sentencing, including 'consequences of his negligence'. This was neither explained nor elaborated upon.¹⁸³

The Judge Advocate did not have adequate regard to the stated particulars of the offence upon which the respondent had just been convicted, namely, that he had negligently performed a

¹⁷⁹ *R v. Seward* (Appeal) para [1].

¹⁸⁰ Para [27].

¹⁸¹ Para [34].

¹⁸² Para [36].

¹⁸³ Para [30].

military duty in that, by issuing an instruction to his subordinates that prisoners could be abused, he failed to exercise command over his subordinates properly, as it was his duty to do. Even interpreted reasonably and in a way most favourable to the respondent, the evidence amply demonstrated that this failure resulted in, at best, confusion in 2 Commando and must be taken to have led ultimately to excesses by some of the respondent's subordinates. This contributed not only to the death, of which the respondent was acquitted of being a party, but also contributed to several members of the Canadian Armed Forces committing serious lapses of discipline and ultimately facing serious charges. The Judge Advocate also failed to give any direction to the panel with respect to another relevant matter, namely the sentences of other service personnel already convicted in respect of the same chain of events, for example Boland's sentence. If the Judge Advocate had properly directed the panel to compare the sentence imposed with respect to other court-martial decisions related to the incident, this panel should not have imposed so derisory a sentence of severe reprimand against the person who actually was at the base of the incident itself.¹⁸⁴

6.6.1.5.3 Criticism of the decision in *R v. Seward*

As stated in the comment on the preceding cases, international humanitarian law is violated whenever a protected person is not afforded humane treatment.¹⁸⁵ Arone, as a civilian, was such a protected person. By torturing and inflicting death on that Somali teenager, the Canadian forces violated international humanitarian rules. The material perpetrators of the torture were elements belonging to the 2 Commando of the Canadian Airborne Regiment. Seward was of a much superior rank, as an officer and commander of the whole of 2 Commando, to his subordinates.¹⁸⁶ The duty to ensure that subordinates do not perpetrate acts of indiscipline, contrary to the law of armed conflicts, belonged to him.

The question one may ask is whether Seward knew, or had information which would have enabled him to conclude, that his subordinates were going to commit a breach of International Humanitarian Law. One fails to understand why Seward could be considered as not having intended what happened. He was in a position to foresee that his subordinates would mistreat

¹⁸⁴ *R v. Seward* (Appeal) paras [31]-[33].

¹⁸⁵ Articles 27, 31-32 of the 1949 Geneva Convention IV.

¹⁸⁶ *R v. Seward* (Appeal) para [36].

any Somali, and, as in the case of Arone, to cause the death of a Somali.¹⁸⁷ Thus he had foresight that the interpretation of the orders given might lead to the violation of the rule required to be observed in the circumstances. Unfortunately, the decision does not provide particulars as to when Seward was informed regarding the torture and death of Arone and what steps he took to punish the perpetrators.¹⁸⁸ In any case, Seward did not have command responsibility for the breach only, and it should have been considered that he should be prosecuted for actually ordering his subordinates to commit the breach by abusing prisoners. That was, however, never the case before the trial panel.

Regarding the sentence which was increased on appeal, i.e. to three months imprisonment and dismissal from Canadian forces, it must be considered as appropriate to the charge on which Seward was found guilty, the negligent performance of military duty in violation of section 124 of the Canadian National Defence Act. Had Seward been prosecuted for ordering abuse, a sentence of three months imprisonment would have been inadequate when one takes into consideration the circumstances in which a senior officer deliberately pronounced an ambiguous order and the fact that the sentence must provide a deterrent to careless conduct by commanding officers.¹⁸⁹

6.6.1.6 *R. v. Mathieu* (Appeal)¹⁹⁰

6.6.1.6.1 The facts of the case

Lieutenant-Colonel Mathieu was the commanding officer of the Canadian Airborne regiment Battle Group deployed to Somalia at the end of 1992.¹⁹¹ All the Canadian forces were placed under the command of Colonel Labbé. The Airborne regiment, as well as the other Canadian forces, were stationed in Belet Huen, five kilometres from the town. Although the camp was fenced with rolls of barbed wire, unarmed Somali teenagers slipped under the wire to access

¹⁸⁷ *R v. Seward* (Appeal) para [29].

¹⁸⁸ Article 87(3) of Additional Protocol I to Geneva Convention: 'The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.'

¹⁸⁹ *R v. Seward* (Appeal) para [36].

¹⁹⁰ *Her Majesty The Queen v. Lieutenant-Colonel Joseph Carol Aristide Mathieu* [1995] CMAC-379 Court Martial Appeal Court of Canada - Judgment: Ottawa, November 6, 1995 (hereinafter *R v Mathieu*. Numbers refer to the pages of the CMAC decision, not to paragraphs).

¹⁹¹ *R v Mathieu op cit* (n 190) 1.

the camp. There were several instances of thefts of the personal belongings of soldiers such as cans of diesel fuel, binoculars, and a barrack box. No theft of any firearm was ever reported nor was the Canadian camp ever been attacked by armed forces or militia.¹⁹²

Lieutenant-Colonel Mathieu met with his ‘group orders’ every morning at eight o’clock to be informed of the events of the previous day and to issue directives to his officers. On 28 January 1993, Mathieu was very concerned about infiltrations and break-ins. He feared weapons and ammunitions could be stolen. At the meeting of the orders group, he spoke to his subordinates about the use of force against thieves and looters fleeing the camp. They could fire at a thief fleeing between the feet and the knees. The accused informed the local tribal kings and elders in the Belet Huen region that the Canadian Forces intended to fire on looters and thieves.¹⁹³

On 4 March 1993, a Somali man was killed by a patrol outside the camp.¹⁹⁴ Shortly after the incident, Lieutenant-Colonel Mathieu prohibited his troops from using deadly force against looters except where it could be positively ascertained that a thief was fleeing with a firearm in his hands.¹⁹⁵ With regard to the above incident, Lieutenant-Colonel Mathieu was charged with negligently performing military duty contrary to section 124 of the National Defence Act. The accused was acquitted by a General Court Martial. The Crown appealed against the acquittal.¹⁹⁶ On appeal the verdict was set aside and a new trial ordered.¹⁹⁷ During the second trial, Mathieu was once again acquitted.¹⁹⁸

6.6.1.6.2 Criticism of the decision in *R v. Mathieu*

The appellate court was right in pointing to the misdirection of the panel by the Judge Advocate. Had the panel been correctly directed as to the test to be used, it could have found Mathieu guilty of having been negligent in the performance of military duty. The rules of engagement are addressed to the commanders and precisely instruct when force can be used.

¹⁹² *R v Mathieu op cit* (n 190) 2.

¹⁹³ *R v Mathieu op cit* (n 190) 3.

¹⁹⁴ *Supra* 5.2.2.1.

¹⁹⁵ *R v Mathieu op cit* (n 190) 3.

¹⁹⁶ *R v Mathieu op cit* (n 190) 1.

¹⁹⁷ *R v Mathieu op cit* (n 190) 17.

¹⁹⁸ Committee Against Torture (UN), *Consideration of Reports Submitted By States Parties Under Article 19 of The Convention, Third periodic report of States parties due in 1996 – Addendum Canada [19 October 1999]*, CAT/C/34/Add.13 of 31 May 2000 para [33]; Rouillard LPF ‘Canada’s Prevention and Repression of War Crimes’ 2005(2) *Miskolc Journal of International Law* 43-58, 50.

Deadly force was to be used with great care, and only minimum force could be used to repel attacks or threat by unarmed elements.¹⁹⁹ The charge related effectively to the negligent performance of military duty in that Mathieu failed to observe the rules of engagement correctly, thus breaching the duty of care expected of him as a commander.²⁰⁰

It was because of the misdirection that the panel acquitted Mathieu at his first and subsequent trials.²⁰¹ The Judge Advocate gave incompatible definitions of negligence.²⁰² The first definition was surely one applicable in civil matters where he instructed the panel that they could find Mathieu guilty as charged if he had failed to act in good faith.²⁰³ Repeating such a direction in his closing address constituted a fundamental error. In fact, contrary to the explanation the Judge Advocate made available to the panel, the test relevant to negligence in criminal law and proceedings is that based on objective standard. A court has to assess what a reasonable person would have done in the circumstances.²⁰⁴

With regard to the second acquittal, the decision is not published. It is, therefore, difficult to tell on which grounds the acquittal rests.²⁰⁵ It is possible to assume that the fact that Lt Col Mathieu's orders had some limits, e.g. as to the spot on the body at which to fire, between the feet and the knees, the fact that he took the precaution of informing local kings and elders regarding looters and thieves, and the recall of the January 28 orders after the March 4 incident might have played an important role, or created doubt as to whether the performance of his military duty was actually negligent. To have ordered his soldiers to fire at unarmed fleeing civilians outside of the camp was, however, already an order in violation of the rules

¹⁹⁹ Supra 5.2.2.1.

²⁰⁰ *R v Mathieu op cit* (n 190) 10-11.

²⁰¹ Committee Against 'Torture Consideration of Reports Submitted by States Parties under Article 19 of the Convention Third Periodic Report of States Parties Due in 1996 Addendum – Canada [19 October 1999]' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN. Doc. CAT/C/34/Add.13 of 31 May 2000) para 33; Rouillard LPF 'Canada's Prevention and Repression of War Crimes' 2005 (2) *Miskolc Journal of International Law* 43-58, 49-50.

²⁰² *Canada Military Justice at the Summary Trial Level* – Volume 2, No.1 (February 2006) 8-8.

²⁰³ *R v Mathieu op cit* (n 190) 11.

²⁰⁴ *R v Mathieu op cit* (n 190) 13.

²⁰⁵ It is reported that the orders were not directly connected to the torture and death of the Somali teenager Arone. See Committee Against 'Torture Consideration of Reports Submitted by States Parties under Article 19 of the Convention Third Periodic Report of States Parties Due in 1996 Addendum – Canada [19 October 1999]' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN. Doc. CAT/C/34/Add.13 of 31 May 2000) para [33].

of engagement.²⁰⁶ His interpretation of the rules of engagement actually demonstrated his negligence in performing his military duty as commander.²⁰⁷

6.6.1.7 Final comment on the prosecution of peacekeepers by Canada

From the above different decisions of the Canadian military courts with respect to the prosecution of the incidents in Somalia that led to death of unarmed civilians, the most obvious lesson is that some commanding officers bore no criminal liability or were never found guilty. Thus, regarding the torture to death of Shidane Arone, the platoon commanding officer on duty on 16 March 1993, Sergeant Gresty, was acquitted on the count of negligent performance of duty on the day the death of Shidane Arone occurred. It is reported that Gresty ‘was the duty officer in the Command Post, just over 80 feet from the bunker where the beating and torture took place, but had not responded when told of the treatment of the prisoner.’²⁰⁸ With respect to the killing and wounding of 4 March 1993, Captain Rainville was the officer leading the Canadian Airborne Reconnaissance Platoon when the incident occurred.²⁰⁹ He was charged with unlawfully causing bodily harm and negligent performance of military duty in that, by telling his subordinates that they could use deadly force to capture fleeing Somalis, he was counselling them to commit an illegal armed assault.²¹⁰ He was found not guilty with regard to both charges, and no appeal was launched.²¹¹

To have prosecuted peacekeepers for crimes committed while on mission is laudable with respect to Canada. The most obvious criticism of these decisions is the general denial of applicability of the international humanitarian law to national contingent members deployed with a UN mission of peace.²¹² It must also be noted that officers in command are rarely blamed when something goes wrong and only low-ranking soldiers are actually prosecuted.²¹³ As it was been cogently argued, ‘The conduct of a State organ does not lose that quality

²⁰⁶ See rule 4(c) *R v Mathieu* 3-4.

²⁰⁷ CCI Somalia *op cit* (n 113) 296.

²⁰⁸ CCI Somalia *op cit* (n 113) 329.

²⁰⁹ CCI Somalia *op cit* (n 113) 331.

²¹⁰ *Ibid.*

²¹¹ CCI Somalia *op cit* (n 113) 332.

²¹² Faite a & Grenier JL(eds) *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces Geneva 11-12 December 2003* (ICRC-UCIHL – Report 2004) 74.

²¹³ Rouillard LPF ‘Canada’s Prevention and Repression of War Crimes’ 2005 (2) *Miskolc Journal of International Law* 43-58, 51; Shorey G ‘Bystander Non-Intervention and the Somalia Incident’ 2000-2001 *Canadian Military Journal* 19-28.

because that conduct is, for example, coordinated by an international organization, or is even authorized by it'.²¹⁴ Indeed, States must not retreat behind the fact that their military members were actually at the disposal of an international organization like the UN to deem the law of armed conflict not to be applicable.²¹⁵ The State organ was lent to the organization only in order to fulfil its objectives, and the State retains control over such organ.²¹⁶

Despite the above criticism, it must be noted that, even though some Canadian peacekeepers involved in criminal conduct in Somalia were acquitted or some charges and allegations were not prosecuted, Canada fared better than other countries against which allegations existed, who did not prosecute or where prosecutions existed but no punishment was imposed.²¹⁷ An example of prosecutions without a single conviction is Belgium.

6.6.2 Belgium²¹⁸

After the report of the commission of inquiry into the acts of Belgian soldiers in Somalia, very few prosecutions followed before the Belgian courts-martial. Three paratroopers were acquitted of manslaughter, one case of aggravated assault was brought against a troop but thrown out of the court martial,²¹⁹ and the case of a Somali boy who was held over the burning brazier was prosecuted in 1997.²²⁰ The two soldiers accused of the conduct in the latter case were acquitted on the ground that the victim launched no complaint.²²¹ In one case, relating to a forced strip-show, a sentence of three months was imposed at the trial stage, but

²¹⁴ Chapman PF 'Ensuring Respect: United Nations Compliance with International Humanitarian Law' 2009 (17) *Human Rights Brief* 2-11, 5.

²¹⁵ Zwanenburg M 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory?' 2000 (39) *Military Law & Law of War Review* 13-43, 27.

²¹⁶ Pitschas CR 'International Responsibility of Public International Organizations and their Member States' 1994 *LLM Theses and Essays* Paper 137, 30.

²¹⁷ A total of nine soldiers was charged in relation to the incidents of 4 and 16 March 1993. Different sentences were handed down and the whole Airborne Regiment Battle Group disbanded. See Lattimer M & Sands P (eds) *Justice for Crimes against Humanity* (Hart Publishing Oxford 2003) 137-138.

²¹⁸ Since the decisions are from unofficial translated material, it is not possible to refer to specific pages or paragraphs of the court decisions. Indeed, the Belgian system of reporting judgments does not subdivide the decision into paragraphs, and only quashed decisions or decisions of the *cour de cassation* are regularly published. Twenty-four appeared before a military court on charges ranging from assault, homicide, and other offences. See Van Hoerlande P 'Les limites de l'esprit de corps : le cas Somalie' 2003 *Reflection Paper Type 2* (Institut Royal Supérieur de Défense) 1-7.

²¹⁹ The decisions in two of those acquittals are discussed below.

²²⁰ Accused Kurt Coelus and Claude Baert. See Zymberaj S 'Les troupes belges en Somalie (1993)' available at www.grip.org/bdg/g1551.html [last accessed 1 July 2011].

²²¹ De Waal A 'US War crimes in Somalia' 1998 (30) *New Left Review* 131-144, 136.

increased to one year on appeal.²²² This sentence was the only conviction of all the cases and allegations. There has been not a single conviction for rape, torture/assault or murder.²²³ Most of these egregious acts were treated as ill-treatment or unintentional killing of Somalis.²²⁴ One case of assault in which the accused was acquitted and one other case of murder merit further scrutiny and will now be discussed.

6.6.2.1 Case A²²⁵: *Korad Kalid v. Paracommando Soldier*²²⁶

6.6.2.1.1 Facts

The charges against the accused find their basis within the context of the duties the said accused was performing on 21 August 1993 as a member of UNOSOM, the UN humanitarian operation in Somalia. In the performance of these duties, the accused, who was a night guard, fired an aimed rifle shot at the legs of a child, the claimant in the civil action, and in so doing wounded the victim, aged twelve at the time of the incident.

The accused was an unnamed soldier member of the 3rd Para Battalion in Tielen who was accused of having deliberately wounded Ayan Ahmed Farah in Kismayo, Somalia, on 21 August 1993. As a soldier, the accused formed part of a Belgian contingent which was dispatched to protect a humanitarian operation. The deployment of military forces presupposes that the humanitarian operation could be threatened by force and that the international community considered that legitimate force could be used to curb or neutralize unlawful force. Despite the peaceable intentions of the Belgian and other troops, peacekeepers had to deal, both in Somalia and elsewhere, with hostile armed elements. In those

²²² De Waal A *op cit* (n 221) 136. The prosecution of this case included assault and battery, threat and racial discrimination as well as incitement to immorality in the camp. The sentence, even having been increased to one year, is still a very light one. See Dubois O 'Implementation of international humanitarian law: Biannual update of national legislation and jurisprudence January to June 1998' 1998 (325) *International Review of the Red Cross* 730-733, 732.

²²³ De Waal A *op cit* (n 221) 136.

²²⁴ Knoops GJ *Defenses in Contemporary International Criminal Law* (Transnational Publishers Ardsley 2001) 134.

²²⁵ This unpublished case being in Dutch, the discussion refers to the translation by Sassòli M, Bouvier AA *et al.* *A How Does Law protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume II - Cases and Documents*, 2 ed. (ICRC-Geneva 2006, case A No. 168 Belgium, Belgian soldiers in Somalia available under No. 7 A.R. 1995 at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial) 1696-1701.

²²⁶ *The Public Prosecutor's Department and 104 Korad Kalid Omar*, resident in Kismayo, Somalia, v. *VJFJ*, 3rd Para Battalion in Tielen, standing accused (hereinafter *Prosecutor v 3rd Para Battalion* case No. 168 Belgium *op cit* (n 225)).

circumstances the Belgian officers were compelled to take security measures in order to perform their mission and to ensure their own safety and that of their men.

The incident took place at a check-point before the beach of Kismayo, where the Belgian contingent was established. Its base was protected by a wall. The guard posts were set up in front of the wall, and a barbed wire fence was put up in front of those guard posts. On the night of 20 to 21 August 1993, the accused was on guard duty between two and three o'clock in Post 3 with orders to prevent anyone from penetrating into the safety area through the barbed wire fencing. He suddenly spotted a shadow which he identified as a child. The intruder was indeed a child. Ayan Ahmed Farah (then aged twelve). He carried out his instructions. It was subsequently found that Liebrand, who was manning Post 4 and had a night-glass, reacted in exactly the same manner, i.e. he fired a warning shot followed by a shot aimed at the legs.

The legal issue the court had to decide was whether the accused was justified in invoking the provisions of Article 70 of the Belgian penal code, according to which 'no offence is committed if the act is prescribed by law and ordered by the competent authority'.²²⁷

6.6.2.1.2 The Court Martial decision

The court acquitted the accused. The following grounds are reported to have supported the decision of the court. To be able to claim a superior's order as a ground of justification:

- (a) The invoked order must have been given beforehand, and its implementation must correspond to the purpose of that order;
- (b) The invoked order must be issued by a legitimate superior acting within the limits of his authority; and
- (c) The order issued must be legitimate, i.e., in conformity with the law and regulations.²²⁸

In connection with the last point, it may generally be assumed that a soldier of the lowest rank may base his actions on the assumption that the order was legitimate.²²⁹ A careful

²²⁷ Article 70 of the code pénal belge : *Sauf en ce qui concerne les infractions définies dans le livre II, titre I bis, il n'y a pas d'infraction, lorsque le fait était ordonné par la loi et commandé par l'autorité.* Therefore, unless the crime is in violation of International Humanitarian Law, obedience to superior order constitutes a defence.

²²⁸ See articles 152 and 260 of the code penal belge. For instances of non invocation of the defence of superior orders, see articles 136 *octies* with respect to violations of Humanitarian Law, and 417 *ter* with respect to the crime of torture. See also *Prosecutor v 3rd Para Battalion* case A No. 168 Belgium *op cit* (n 225) 1698.

²²⁹ For instance if he or she did not know that the order would violate Humanitarian Law or amount to torture.

investigation, therefore, must be made to establish whether the force dictated by the senior officer did not exceed the necessary force to bring about the intended action. The order given to the accused during his duties as a night guard at the time of the facts was ‘to defend and prevent anyone from penetrating into’ the cantonment of various Belgian military units.²³⁰

The order invoked by the accused in the context of Article 70 of the penal code must also be viewed in conjunction with other, more general and earlier, permanent instructions given to such a soldier in the form of the rules of engagement. The rules of engagement are to be understood as meaning the general directives issued by the competent authority in the matter (in this instance, the UN as the international political authority). They were intended to give precise instructions to the armed forces under the direct or indirect command of the aforementioned competent (political or military) authority regarding the circumstances in which they may use all forms of force in the performance of their duties in an existing or possibly impending armed conflict.

The Member States, on the other hand, also ‘*translate*’ the rules of engagement *into the form of an order*, relating to the use of armed force, for the troops *they deploy*.²³¹ Such oral or written order to Belgian military personnel is translated into an obligation of obedience and would, therefore, be admissible in a prosecution for insubordination under the terms of Articles 28 *et seq.* of the military penal code. The order must be issued by a hierarchical or operational superior of the same nationality, within the meaning of said Article 28 of the military penal code. On the other hand, an order may be disobeyed if its implementation can clearly involve the commission of a crime or offence.²³²

According to the court, the accused acted with the necessary care and in accordance with the law in the circumstances.²³³ After observing that the child crept through the concertina and thus arrive in the immediate vicinity of the bunker, he first gave the necessary verbal warnings in both Somali and English.²³⁴ He then fired two warning shots into the ground

²³⁰ Gossiaux C ‘Les règles d’engagement : norme juridique nouvelle?’ 2001 (40) *Military Law and Law of War Review* 159-179, 172.

²³¹ See Article 11, para 2, subpara 2, of the *Tuchtwet* (Code of Military Discipline [Law of 14 January 1975] available in French on <http://www.just.fgov.be>). See *Prosecutor v 3rd Para Battalion* case A No. 168 Belgium *op cit* (n 225) 1699.

²³² *Ibid.*

²³³ *Prosecutor v 3rd Para Battalion* case A No. 168 Belgium *op cit* (n 225) 1700-01.

²³⁴ *Ibid.*

about 50 cm away from the child, who still showed no reaction. He finally decided to fire an aimed shot at non-vital organs, *viz* the legs. The infiltration detected terminated only with this aimed shot. The procedure followed by the accused was the only possible one to fulfil his defensive duty.²³⁵

There was no other action suitable in the circumstances which could be taken to prevent further penetration. He acted in accordance with legitimate orders given beforehand by a legitimate superior acting within his authority. The force used was proportional to the nature and extent of the threat. Another guard acted in almost the same manner as the accused.

6.6.2.1.3 Criticism of the decision

The court did not actually consider the issue of whether or not an unarmed child constituted a threat for the accused soldier to use such force. The court limited itself to considering the validity of superior orders but not the issue whether such orders could be carried out against an unarmed civilian, especially a child. The position of the court may lead to the reproduction of similar conduct by members of the army.²³⁶ As one senator has observed, leniency in prosecuting acts which would amount to grave breaches of international humanitarian law entails that members of the same contingent will not be intimidated and will, therefore, willingly repeat similar conduct.²³⁷ The senator underlined that, with regard to the instruction of the case, the court proceeded too quickly, without a thorough examination of the facts and relevant law and that it reached a superficial decision.²³⁸ The Military Court of Appeal upheld the verdict of acquittal in the case. This position of the court is observed in another similar case.

²³⁵ *Prosecutor v 3rd Para Battalion* case A No. 168 Belgium *op cit* (n 225) 1700-01.

²³⁶ Sénat de Belgique, Question orale de M. Desmedt au ministre de la justice sur «les conséquences à tirer du jugement rendu le 30 juin par le conseil de guerre de Bruxelles à l'égard de faits commis par des militaires belges en somalie» *Annales parlementaires - Séances du jeudi 10 juillet 1997*, 3369-3370.

²³⁷ *Ibid.*

²³⁸ Sénat de Belgique *op cit* (n 236) 3370.

6.6.2.2 Case B²³⁹: *Osman Somow v. Paracommando Soldier*²⁴⁰

6.6.2.2.1 Facts

Belgium, along with many other countries, dispatched soldiers to protect humanitarian operations. The dispatch of military troops is justifiable only insofar as humanitarian operations are threatened by force and the international community considers that it has the right to neutralize or curb such force by means of another legitimate force. As a soldier on active service in Kismayo, Somalia, the accused caused the death of Hassan Osman Soomon through a lack of foresight or care on 14 April 1993.²⁴¹

The accused was assigned, on 14 July 1993, between 7.00 and 9.00 a.m., to an observation post on the Kismayo beach with orders to guard a shooting sector between barbed wire fences on his left and an imaginary line on his right within which were at least two wrecked ships, with the instruction that no-one was to enter that sector and that no-one should have the opportunity to ‘install’ himself in the wrecks. It happened that there was a person to the right of the largest ship. The accused, after issuing all the specified warnings, aimed at the port side of the hull as a warning and in order not to hit the person on the starboard side of the hull, but the bullet (probably, for nothing is certain) ricocheted and struck the victim in the forbidden area.²⁴²

The legal issue was whether the use of a weapon which caused the death of Hassan Osman Soomon was justified and whether, in the use of this weapon, an error was made which would not have been committed by a regular, cautious, highly-trained soldier. The legal question to be answered is, in other words, whether the accused failed to exercise foresight and care when firing his warning shot.

²³⁹ Sassòli M, Bouvier AA *et al.* *A How Does Law protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume II - Cases and Documents*, 2ed. (ICRC Geneva 2006 case B No. 168 Belgium, Belgian soldiers in Somalia available at the Auditorat Général près la Cour Militaire, Brussels; not published, original in Dutch, unofficial translation) 1701-1705.

²⁴⁰ *The Public Prosecutor's Department and 102 Osman Somow Mohamed*, resident in Jilib-Gombay-Village, Somalia, [...] v. *103 D A Maria Pierre* (Paracommando Battery in Braaschaat) standing accused (hereinafter *Osman Somow v Paracommando Soldier* case B No. 168 *op cit* (n 239)).

²⁴¹ *Osman Somow v Paracommando Soldier* case B No. 168 *op cit* (n 239) 1702-03.

²⁴² *Osman Somow v Paracommando Soldier* case B No. 168 *op cit* (n 239) 1702.

6.6.2.2.2 The Court Martial decision

The court declared the accused not guilty of the charges brought against him on the chief ground that, after examining the documents on file and the case presented in court, the conclusion was that the accused correctly carried out the order given to him. In the given circumstances, he behaved with the care required of a regular, cautious, highly-trained soldier in accordance with the law. It was not established from the overall investigation that the accused formally exceeded the rules of engagement. No fault, therefore, not even carelessness, was proven to meet the requirements of the law. Indeed, the accused was being prosecuted for having killed the victim. This conduct took place in the course of the performance of his duties in observance of the rules of engagement and the orders received from his superiors. No offence can be said to have been committed if the act is prescribed by law or ordered by the competent authority.²⁴³ Furthermore, article 260 of the Belgian Penal Code constitutes a defence in favour of an official who has carried out an unlawful order issued to him by a superior in matters falling under the latter's authority.²⁴⁴

The accused's statement that his instructions were to drive out any person found in a certain area of the beach at Kismayo, Somalia, using all possible means of intimidation is not contradicted by any other information in the file. In fact, an undated report by the deputy prosecutor, Franskin, emphasizes the military importance of the order, to wit that the shipwreck lying in the forbidden area could be used by a sniper. The Public Prosecutor's Department rightfully did not dispute the fact that the accused was authorized, in the given circumstances, to fire a warning shot.²⁴⁵ The 'force' inherent in the firing of that warning shot was found to be proportional to the extent of the established threat, and it can be recalled that it was never the accused's intention to harm anyone's bodily integrity. The warning shot was necessary to intimidate the person who was entering the forbidden area.²⁴⁶

²⁴³ Article 70 (code pénal belge).

²⁴⁴ Article 260 du Code pénal belge : *Lorsqu'un fonctionnaire ou officier public, un dépositaire ou agent de la force publique, aura ordonné ou fait quelque acte contraire à une loi ou à un arrêté royal, s'il justifie qu'il a agi par ordre de ses supérieurs, pour des objets du ressort de ceux-ci et sur lesquels il leur était dû une obéissance hiérarchique, il sera exempt de la peine, qui ne sera, dans ce cas, appliquée qu'aux supérieurs qui auront donné l'ordre.*

²⁴⁵ *Osman Somow v Paracommando Soldier* case B No. 168 *op cit* (n 239) 1704.

²⁴⁶ *Ibid.*

At the time of firing the warning shot, the accused did not notice the presence of the victim. Unfortunately the shot ricochet against the curved steel bow of the wreck boat and fatally wounded the victim. In view of the curvature of the steel bow of the wreck, the bullet could have ricocheted only towards the area which no-one was allowed to enter. It may be assumed that the accused selected this aiming point precisely in order that the person with regard to whom he was required to take intimidation measures should not be injured or killed by a ricocheting bullet. It was very clear from the report of the investigation conducted by deputy prosecutor Franskin on the spot that the victim was fatally wounded at only some five metres from the port side of the wreck. This relatively short distance supports the accused's claim that he had never seen the victim and could not, therefore, take account of his presence. The accident, therefore, may be ascribed solely to a set of unfortunate circumstances which could not be foreseen by the accused.

6.6.2.2.3 Criticism of the decision

The arguments were purposely selected to reach an acquittal. For instance the assumption that to select the target was calculated to avoid any injury to the person being intimidated does not hold water. A regular, well-trained shooter would have foreseen the possibility of the bullet's ricocheting on contact with curved hard surfaces. It is not also demonstrated that some other warning shots were directed into the ground or into the air to achieve a similar result, namely, intimidating the person who had crept into the forbidden area.

6.6.2.3 Final comment on the prosecution of peacekeepers by Belgium

The above Belgian court-martial decisions reflect unwillingness in actually prosecuting soldiers who have violated humanitarian law.²⁴⁷ Not all incidents were actually dealt with. Thus in the case of the prosecution of the incident of holding a Somali youth over a burning

²⁴⁷ Belgium, like Canada, considered the Geneva conventions as not being applicable to soldiers placed under UN command, although military personnel remain under the criminal and disciplinary jurisdiction of their state of origin, and thus an organ of the contributing state. See Zwanenburg M 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory?' 2000 (39) *Military Law & Law of War Review* 13-43, 27.

brazier, the court acquitted the alleged perpetrator upon the overly-odd ground that there was not an armed conflict in Somalia to which Geneva law could be applicable.²⁴⁸

This is the reason why Mr Desmedt, the Belgian senator, in referring to the words of the prosecutor during the prosecutions of some of the cases related to the incidents in Somalia, remarked that, if soldiers could behave as they did in peacekeeping missions, in situations of actual war they could behave more badly.²⁴⁹ After observing that military troops suspected of having committed crimes are seldom, or leniently punished, by their peers, military personnel, even though they may be judges, coupled with the *esprit corporatiste*, the senator suggested the suppression of military jurisdictions in times of peace.²⁵⁰ Indeed, although the materiality of facts have on every occasion been established, the military jurisdiction pronounced shocking judgments, acquitting the accused individuals, granting them suspended sentences, or condemning them to derisory punishment execution of which was generally suspended. The military court, on no occasion, took into account the gravity of the facts.²⁵¹

The two abovementioned cases and the opinion of the Belgian senator confirm that national courts, especially military courts, are not eager to punish troops who have committed crimes outside their country. One has, however, to be cautious before jumping to any final conclusions. Did countries other than Belgium and Canada prosecute peacekeeping personnel who have allegedly committed crimes on mission?

²⁴⁸ Lattimer M & Sands P (eds) *Justice for Crimes against Humanity* (Hart Publishing Oxford 2003) 138; ‘International Humanitarian Law: National Implementation “Belgium” Military Court, 17 December 1997 (Ministère public and Centre pour l’égalité des chances et la lutte contre le racisme v. C... et B...) *Journal des Tribunaux*, 4 April 1998, pp. 286-289. Unofficial French translation from the Dutch original ruling.’ www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/c6907de3c449dea541256641005c6d00 [last accessed 18 September 2012].

²⁴⁹ Sénat de Belgique, Question orale de M. Desmedt au ministre de la justice sur «l’utilité du maintien des juridictions militaires», *Annales parlementaires - Séance du jeudi 9 novembre 1995*, 177-178.

²⁵⁰ Sénat de Belgique, Question orale de M. Desmedt au ministre de la justice sur «la nécessité de légiférer d’urgence en vue de supprimer les juridictions militaires», *Annales parlementaires - Séance du jeudi 2 avril 1998*, 5240.

²⁵¹ Sénat de Belgique, Question orale de M. Desmedt au ministre de la justice sur «la nécessité de légiférer d’urgence en vue de supprimer les juridictions militaires», *Annales parlementaires - Séance du jeudi 2 avril 1998*, 5240.

6.6.3 South Africa

With respect to alleged crimes committed during peace missions in the DRC²⁵² and Burundi by peacekeepers from South Africa, it appears that only one case triggered prosecution. Similarly to the prosecutions in Canada, which involved incidents that led to the death of civilians, the instance being adjudicated by South African courts involves an incident relating to the murder of a 14-year-old girl.²⁵³

At the time of the incidents, the Air Force Sergeant, Philippus Jacobus Venter, was deployed as a peacekeeper in Burundi. It is reported that, on 20 September 2004, the accused raped and killed the 14-year-old girl; he is also accused of assaulting a guesthouse guard who refused to rent him a room.²⁵⁴ He was charged, and, for the first time, a South African military court conducted prosecution outside South Africa, in Burundi.²⁵⁵ In August 2007, the accused, Philippus Jacobus Venter, was found guilty on all the charges and given a sentence of 24 years' imprisonment.²⁵⁶ On 8 October 2007, the accused filed an appeal against the ruling of military court on the grounds that he had not had a fair trial.²⁵⁷ Meanwhile, on 26 April 2006, while on bail in connection with the Burundi incident, he murdered his two children and attempted to kill his wife.²⁵⁸ Tried for these new charges, he was sentenced to ten years' imprisonment. Upon appeal by the prosecution this sentence was almost doubled. It was raised to 18 years imprisonment. This sentence was still light considering the facts, but, as the Supreme Court of Appeals stated, the Burundi episode and its aftermath rendered the accused

²⁵² Not a single case is known to have been prosecuted with respect to the allegations of rape and other sexual offences by South African soldiers deployed in DRC. See also Report of the Portfolio Committee on Defence on an Oversight visit to the Democratic Republic of the Congo 14 March 2006 available at www.pmg.org.za/docs/2006drc.pdf [last accessed 21 December 2012] 8. South African peacekeepers have been involved in humanitarian rights abuses. See SA Soldier Monthly Magazine, Department of Defence, 2005, 11.

²⁵³ United States Department of State *2008 Country Reports on Human Rights Practices - South Africa* (25 February 2009) available at www.state.gov/j/drl/rls/hrrpt/2008/af/119025.htm [last accessed 21 December 2012]; Otto H 'SA soldier facing murder charge in Burundi' available at www.iol.co.za/news/africa/sa-soldier-facing-murder-charge-in-burundi-1.267660 [last accessed 21 December 2012]. The prosecution of Venter regarding the Burundi episode has been invoked with respect to the prosecution of the same accused for murdering his two children and an attempted murder on his wife. See *DPPTransvaal v Venter* (430/2007) [2008] ZASCA 76 (30 May 2008) paras [5], [10]-[11] *et seq.*

²⁵⁴ Otto H 'SA soldier facing murder charge in Burundi' available at www.iol.co.za/news/africa/sa-soldier-facing-murder-charge-in-burundi-1.267660 [last accessed 21 December 2012].

²⁵⁵ *Ibid.*

²⁵⁶ Department of State *Country Reports on Human Rights Practices for 2007 volume I Report submitted to the Committee of Foreign Affairs U.S. House of Representatives and the Committee of Foreign Relations U.S. Senate* (August 2008) 513.

²⁵⁷ *Ibid.*

²⁵⁸ *DPP Transvaal v Venter* (430/2007) [2008] ZASCA 76 (30 May 2008).

irrational and availed him a diminished responsibility.²⁵⁹ Unless the decision in the matter has been withheld from publication for military secrecy, the appeal against the finding of the military court is still pending.

Regarding the prosecution by the South African military court, it must be mentioned that this is the only case prosecuted or with respect to which snippets of information do exist. The other incidents of rape are not reported to have been investigated or prosecuted. Even where they might not amount to violations of the law of war, they should have been investigated and prosecuted in conformity with South African obligations under the Status-of-Forces Agreement and Memorandum of Understanding, whereby Troop-Contributing Countries undertake to exercise criminal jurisdiction over their contingent members.

6.7. Conclusion

During an armed conflict, many crimes are perpetrated. Most of those crimes are mainly of a sexual character, committed against women and children by military forces, police and security officials. Other acts of sexual violence are perpetrated by international peacekeeping forces or humanitarian aid workers.²⁶⁰ Although all acts against civilians during an armed conflict or thereafter, do not necessarily qualify as war crimes, especially where the link to the conflict may not be sufficient, the perpetrators should be brought to justice.²⁶¹ With respect to acts which may qualify as war crimes, these are no longer simply of local interest.²⁶² They infringe sacred principles and trample on the rights and the dignity of the human being. Where national leaders, therefore, do not have the will to prosecute the individuals responsible for these acts in court, or where the courts lack the courage to prosecute, the international justice system constitutes the unique alternative to impunity.²⁶³ In fact, 'sexual violence happens in conflict because it is allowed to happen. Until perpetrators are held accountable for their crimes, violence will continue'.²⁶⁴ This also applies to peacekeepers in

²⁵⁹ *DPP Transvaal v Venter* (430/2007) [2008] ZASCA 76 (30 May 2008) paras [34] [46] [70].

²⁶⁰ Dahrendorf N and Shifman P 'Sexual Violence in Conflict and Post Conflict: A Need for More Focused Action' 2004 (23) *Refugee Survey Quarterly* 7-19.

²⁶¹ Compare Quirico O 'The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law' in Francioni F and Ronzitti N (eds) *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press New York 2011) 423-447, 431.

²⁶² Del Ponte C and Sudetic C *La traque-les criminels de guerre et moi: Madame la procureure accuse* (Autobiographie traduite de l'anglais par Isabelle Taudière Éditions Héloïse d'Ormesson 2009) 20.

²⁶³ *Ibid.*

²⁶⁴ Dahrendorf N and Shifman P *op cit* (n 260) 11.

that, if peacekeepers do not account for their acts, future operations may be fraught with similar misconduct.

The fact that each and every State is entitled to legislate with respect to the conduct of nationals abroad has no other meaning than the recognition that a state has criminal jurisdiction over the criminal conduct its nationals might be guilty of outside the boundaries of such a State territory. The nationals of a State that has asserted such a jurisdiction are on notice that none of their illegal conduct or acts will go unpunished.²⁶⁵ Whereas States are not obligated to legislate regarding each and every act considered as criminal in the law of another country, since criminal legislation varies from country to country, most of the States have enacted laws with respect to crimes outside their jurisdictions especially regarding their military forces since their actions entail State international responsibility.²⁶⁶ One of the rationales for considering the conduct of military personnel abroad is that agreements with the Host State where the crime might have occurred might have provided for immunities for such personnel before the jurisdictions of the Host State. Without either Host State or sending State ensuring jurisdiction over conduct by foreign forces, crimes could be committed with total impunity. To fill the gap, the Status-of-Forces Agreement and the Memorandum Understanding provide for immunity from the jurisdiction of the Host State and recognise criminal jurisdiction over military peacekeepers as the prerogative only of the Troop-Contributing Country.

From the above exclusive criminal jurisdiction over peacekeepers, the question that arises is whether there is any residual jurisdiction left to the Host State. It has been noted that, with respect to members of the UN mission personnel other than those of national military contingents, the Host State has jurisdiction over their conduct on the condition that it obtains the waiver of their immunities from the UN Secretary-General. Furthermore, it has been noted that jurisdiction should not be considered to be indivisible and, therefore, the responsibility of either the Host State or the Troop-Contributing Country to ensure offenders are prosecuted and if found guilty punished. This means that even with respect to conduct by military personnel subject to the exclusive jurisdiction of the Troop-Contributing Countries, it remains

²⁶⁵ Beaulieu *C op cit* (n 5) 5.

²⁶⁶ See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (UN. Doc A/56/10) *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, as corrected 47.

judicious to recognise some jurisdiction over their conduct to the Host State. It can still be helpful, for instance to recognise that the authorities of the Host State might be the most suitable to gather evidence relative to the alleged crime.

With respect to any jurisdiction by a State other than the Host State and the troop-contributing State, it was noted that since a third State is not bound by agreements between the UN and the Host State or the UN and the Troop-Contributing Countries, its prosecutorial powers pertaining to its sovereignty remain untouched by such agreements. Indeed, a third State can still claim jurisdiction over a peacekeeper where, for instance, the victim of such peacekeeper's conduct is its national, or on the basis of universal jurisdiction *vis-à-vis* a crime of international interest.²⁶⁷

The discussion of the issue of whether the international criminal court (ICC) has jurisdiction over peacekeepers concluded that. Indeed, it does have jurisdiction if their conduct amount to acts that fall under its jurisdiction. In such a case, peacekeepers can be prosecuted before the ICC. The other argument was that it was upon such fear of being arraigned before the ICC that a number of members of the UN prompted the Security Council to vote into force two resolutions prohibiting the prosecution before the ICC of peacekeepers from States who are not parties to the Rome Statute. Up to 2012, however, not a single case exists where a peacekeeper has been indicted before the permanent criminal court. The court is, furthermore, a court of last resort since the primary duty to prosecute individuals alleged to have committed crimes rests with national or domestic jurisdiction.

With respect to effective prosecution of peacekeepers before their national courts for alleged crimes committed while serving on a mission of peace, especially missions deployed on the African continent, the chapter discussed instances of prosecution in Canada, Belgium, and South Africa. In the prosecutions conducted, the offence stemmed from an incident that led to death of the victim or to grievous bodily harm. Many other incidents were not adjudicated. In cases where superiors were aware of the perpetration of the act, they took no action to halt it or to punish it. The lesson was that commanding officers are seldom blamed for crimes committed by peacekeepers. Considering the weight of sentences meted out against those

²⁶⁷ Zerk JA *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas* (Corporate Social Responsibility Initiative Working Paper No. 59 Cambridge MA, John F. Kennedy School of Government Harvard University 2010) 121.

found guilty as charged, it must be said that they manifest unwillingness on the part of Troop-Contributing Countries to prosecute their troops seriously for crimes committed while on peace missions abroad.

For the special situation of prosecution by South African courts of the allegations of crimes committed by peacekeepers from this country in the DRC and in Burundi, only one case of rape, murder, and assault that occurred in Burundi has reached the courts. It appears to be still pending. If it has been disposed of, then the secrecy surrounding military matters and the judiciary has precluded its publication. If it is so, this is a violation of the right to access to information held by the State that the public is entitled to.²⁶⁸

According to Glueck, to employ existing criminal courts is inadvisable, but to send the perpetrators and any witnesses to district courts distant from the scene of the crime remains an impractical and expensive alternative.²⁶⁹ A new mechanism is still needed. The failure to provide for the criminal accountability of peacekeepers and the absence of a systematic mechanism to inform the victims of any outcome of proceedings lodged against peacekeepers remains an unsolved problem. The focus on gender mainstreaming and the strengthening of guidelines and standards for peacekeepers does not *per se* curb the plight of victims.²⁷⁰ A policy to remedy the situation should be that countries that have failed to prosecute peacekeepers for crimes allegedly committed during UN missions of peace should be barred from recruitment for future operations.²⁷¹ Such a mechanism might prompt States to prosecute acts that amount to war crimes since they are not subject to any statute of limitation. Crimes committed by peacekeeping personnel are of a grave nature and they should not be minimised as the random, isolated conduct of individual peacekeepers.

The next chapter critically analyses the Draft Convention on the Criminal Accountability of UN Officials and Experts on Mission²⁷² and proposes an alternative mechanism to solve the issue of information to victims and witnesses, as well as the hurdles to investigating and

²⁶⁸ Constitution of South Africa, Act 108 of 1996. Section 32 (1) (a) reads: 32. Access to information.
- (1) Everyone has the right of access to -
(a) any information held by the state.

²⁶⁹ Glueck S 'By What Tribunal Shall War Offender be Tried?' 1943 (56) *Harvard Law Review* 1059-1089, 1060.

²⁷⁰ Sweetser CE 'Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel' 2008 (83) *New York University Law Review* 1643-1678, 1648.

²⁷¹ The solution to the lack of prosecution may lie in engaging liability for omission against the state that failed to prosecute.

²⁷² UN Doc. A/60/980 of 16 August 2006.

prosecuting crimes committed outside one's territory. The aim of the analysis is to investigate whether the proposed convention also includes military personnel of various national contingents. If this is not the case, areas of amelioration to the extant draft convention on the accountability of peacekeepers will be provided.

CHAPTER VII

THE DRAFT CONVENTION ON THE CRIMINAL ACCOUNTABILITY OF UN OFFICIALS AND EXPERTS ON MISSION¹ AND ON-SITE COURTS FOR PEACE MISSION PERSONNEL

7.1. Introduction

The preceding chapters have shown that some of the allegations of crimes committed by peacekeepers have been substantiated by UN investigative teams. Save for the rare instances of prosecution in Canada, however, and some reluctant prosecutions in Belgium,² the existing measures to hold peacekeepers criminally accountable are seldom applied and are, in practice, ineffective.³ Whereas their official capacity, based on international law, should not avail peacekeepers exemption from punishment for crimes that all too often fall within the definition of war crimes, it must be noted that, despite the exclusion of official capacity as a ground for exemption or mitigation, the prosecution of peacekeepers is a rare event.⁴ At the international level, no single case exists where a peacekeeper has been prosecuted by an international court. At the national level, it is apparent that no political will exists.⁵ As Prince Zeid recalls with respect to the US readiness to condemn the conduct of MONUC peacekeepers, ‘we condemn publicly the abuses committed by international peacekeeping personnel, abuses that include the crimes of rape, the trafficking of human beings and illicit narcotics, but we remain tight-lipped when it is our own peacekeepers who commit them.’⁶ This is an expression of the position of so many States. In fact States are readily prepared to prosecute war crimes committed by individuals other than their nationals or members of their

¹ Hereinafter Draft Convention. This document is an annex III to the Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations. UN Doc. A/60/980 of 16 August 2006 [GLE report A/60/980]

² Supra chapter 2 and cases discussed there.

³ See GLE report A/60/980, para 84. Also Sweetser CE *Ensuring Accountability of Peacekeeping Personnel for Human Rights Violations* (Centre for Human Rights and Global Justice Working Paper No.16 2007) 18.

⁴ Article 27 of the Rome Statute of the International Criminal Court (RS ICC).

⁵ If there were a political will to hold peacekeepers accountable, cases on prosecution for crimes committed abroad should not be so scant.

⁶ Prince Zeid Ra’ad Zeid Al-Husseini ‘For Love of Country and International Criminal Law’ 2009 (24) *American University International Law Review* 647-664, 650 and note 9 where he refers to comparing U.S. Department of State, *Trafficking in Persons Report* 230 (2007) condemning the acts of sexual exploitation and abuse perpetrated by UN peacekeepers in the Democratic Republic of Congo with Notar SA ‘Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo’ 2006 (14) *American University Journal of Gender Social Policy and Law* 413-429, 425-27.

armed forces. For instance, Belgium is known to be good at exercising universal jurisdiction.⁷ But, as it was shown in the preceding chapter six, it imposed no serious sentence on soldiers who committed crimes in Somalia while serving with a UN peace operation.⁸

According to the Model Status-of-Forces Agreement,⁹ only Troop-Contributing Countries hold criminal jurisdiction over peacekeepers, especially the military component of the force.¹⁰ Most of the countries contributing troops to the UN have shown that they are reluctant to prosecute their military personnel for crimes committed abroad while serving with UN missions of peace.¹¹ It must be recalled, at the same time, that the UN does not have criminal jurisdiction with respect to the military members of its missions.¹² The provisions of the Model Status-of-Forces Agreement which provide for exclusive jurisdiction over peacekeepers have reached the status of customary international law¹³ in that those provisions recognise universal restraint in that a State on whose territory a foreign force is present with its consent abandon its sovereign powers to exercise criminal jurisdiction over such a force, because it is almost a universal praxis that visiting forces exercise exclusive disciplinary

⁷ Amnesty International *Universal Jurisdiction: UN General Assembly should support this essential international justice tool* (Amnesty International Publications-Index: IOR 53/015/2010 2010) 29,45; Baker RB 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment' 2009 (16) *ILSA Journal of International & Comparative Law* 141-167; Amnesty International *Universal Jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad* (AI Index: IOR 53/001/2003).

⁸ *Supra* chapter 6: 6.6.2.1; 6.6.2.2.

⁹ A SOFA is an international agreement to be respected and fulfilled in good faith, according to the universally recognised principle of *pacta sunt servanda*. See Article 2(2) of the UN Charter; preamble to and Article 26 of the *Vienna Convention on the Law of Treaties of 1969* (into force 27 January 1980) 1155 U.N.T.S.; Article 23 of the Draft Articles on the Law of Treaties with commentaries 1966 *Yearbook of the International Law Commission 1966*; Lee YA 'Criminal Jurisdiction under the U.S. - Korea Status of Forces Agreement: Problems to Proposals' 2003 (13) *Journal of Transnational Law and Policy* 213-249, 245; Talmon S 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi (ed) *International Responsibility Today* (Koninklijke Brill NV 2005) 405-421, 410. A State cannot invoke its constitution or internal law to avoid applying international conventions it voluntarily entered to. See Uzoukwu LI *Constitutionalism, Human Rights and the Judiciary in Nigeria* (LLD thesis UNISA 2010) 231.

¹⁰ Model Status of Forces Agreement (SOFA) UN. Doc. A/45/594, paras 46-48 regarding jurisdiction of peacekeepers; UNGA 'Note by the Secretariat: Criminal Accountability of United Nations Officials and Experts on mission' UN. Doc. A/62/329 of 11 September 2007, para 16; Allais C 'Sexual Exploitation and Abuse by UN Peacekeepers: The Psychosocial Context of Behaviour Change' 2011 (39) *Scientia Militaria- South African Journal of Military Studies* 1-15, 8.

¹¹ Burke R 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' 2011 (16) *Journal of Conflict & Security Law* 63-104, 67; van Baarda TA 'Military Ethics in Peacekeeping and in War: Maintaining Moral Integrity in a World of Contrast and Confusion' available at <http://jha.ac/articles/a129.htm> [last accessed 1 July 2011].

¹² UNGA *Model Status of Forces Agreement between the United Nations and Host Countries* (UN Doc A/45/594 of 9 October 1990).

¹³ Burke R *op cit* (n11) 94 *et seq.*

jurisdiction over its members while they are in the foreign country.¹⁴ Applied to a UN force, without such a customary rule, Troop-Contributing Countries would be reluctant to deploy their military contingents in the absence of expansive immunities consented to by the Host State.¹⁵

In principle, the TCCs must give assurances to the UN¹⁶ that, if military personnel commit crimes during their deployment, the TCC concerned will exercise its criminal jurisdiction to investigate reports or allegations of such crimes, and, if substantiated, to repatriate the suspect for proper action to be taken against him or her.¹⁷ Another obligation of the TCC, for which it gives assurances to the UN, concerns the undertaking to inform the UN with regard to the outcome of the proceedings in the home country.¹⁸ Even when such assurances are given, the information required is seldom forthcoming.¹⁹ The UN seems to have no power, or seems to lack the political will, to compel the TCC to do so.²⁰ Furthermore, no rule or norm exists whereby the UN must inform the Host State of the outcome of these cases so that the victims might in turn be informed of the outcome.²¹

This chapter offers an analysis of the Draft Convention on accountability of UN officials and experts on mission²² not only to highlight its flaws, but the chapter also proposes a tripartite on-site jurisdiction to close the *lacunae* that exists as far as court matters relating to peacekeepers are concerned. Taking into consideration the available mechanisms devised by

¹⁴ Koo JH 'The Uncomfortable SOFA: Anti-American Sentiments in South Korea and The U.S.-South Korea Status of Forces Agreement' 2011 (1) *National Security Law Brief* 102-115,106; Ladley A 'Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations' 2005 (1) *Politics and Ethics Review* 81-90, 84; Fleck D 'Are Foreign Military Personnel exempt from International Criminal Jurisdiction under Status of Forces Agreements?' 2003 (1) *JICJ* 651-670, 656.

¹⁵ Burke R *op cit* (n 11) 95.

¹⁶ Defeis EF 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' 2008 (7) *Washington University Global Studies Law Review* 185-214, 207 *et passim*.

¹⁷ Up to July 2009, the United Nations had not received any information from the relevant States on action being taken. UN. Doc. A/64/183 para 63.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Jennings KM *Protecting Whom? Approaches to Sexual Exploitation and Abuse in UN Peacekeeping Operations* (Fafo Policy Report Oslo 2008) 22.

²¹ Prosecutions of peacekeepers are rare. If the UN is informed about outcome of action taken, it does not, in turn, inform the victims or witnesses of the authorities of where such acts occurred. For charges reported to the 39 Troop-Contributing Countries in 2010, 13 governments responded to the U.N. regarding their progress in investigating the charges and taking action. In 2009, the U.N. sent 82 requests for information on actions taken by national authorities concerning misconduct related to sexual exploitation and abuse, and received 14 responses. In 2008, the U.N. sent 69 such requests and received eight responses on action taken, while in 2007, 67 requests were made and 23 responses were received. See Ilg GM *Few Governments Answer U.N. Queries on Peacekeeper* (United Nations Inter Press Service Thursday 5 August 2010); Defeis EF *op cit* (n 16) 207.

²² Annex III to UN Doc. A/60/980 of 16 August 2006.

the UN to deal with the issue of sexual exploitation and abuse, the most common allegation made against peacekeepers, and one which may be regarded as a war crime or ordinary crimes, this chapter will show that the Draft is not likely to solve the problem since it does not include all the components of a UN mission of peace. Whereas statistics show that the majority of crimes are perpetrated by military personnel, military contingent members are not included in the proposed convention.²³ Jurisdiction over such personnel is still exclusively dependent upon the willingness of the contributing State to prosecute. The chapter, therefore, argues that the convention should oblige States to prosecute effectively, especially through a system of courts-martial applicable to military forces outside the borders of each state. This may help to circumvent the hurdles identified in chapter five of this thesis by the mechanism of an on-site tripartite court-martial²⁴ for all members of a peacekeeping operation.

7.2. Current status of the Draft Convention

Before drafting the proposed convention pertaining to the accountability of UN officials and experts on mission, the working group, known as the Special Committee, pointed out the need to ensure that all military, civilian police, and civilian personnel in United Nations peacekeeping missions managed by the Department of Peacekeeping Operations function in a manner that preserves the image, credibility, impartiality, and integrity of the United Nations.²⁵ The Special Committee emphasized that any misconduct, real or supposed, as well as perceptions of impropriety from the local population, are unacceptable and have a detrimental effect on the relations of national contingents with the local population and could cause difficulties in fulfilling mandates.²⁶ The Committee voiced its outrage with respect to the large number of allegations of sexual misconduct by military and civilian personnel in the United Nations peacekeeping mission in the Democratic Republic of the Congo.²⁷ The committeemen and committeewomen were also concerned about the impact which such acts

²³ For instance, in 2003 the investigation indicated 19 cases against the military contingent and 5 against staff. In 2004, out of 72 allegations, 68 were against military personnel and 4 against civilian personnel. See Zeid report UN. Doc. A/59/710 paras 7-8.

²⁴ This is the solution proposed by this dissertation the advantage of which is ensuring that justice is fairly done and can be seen to be done. The solution circumvents the barriers of language during investigations and proceedings before the court itself and during any process of obtaining evidence. In chapter 8 a brief convention in this regard is drafted.

²⁵ Report of the Special Committee on Peacekeeping Operations and its Working Group, GA Official Records, Fifty-ninth Session, Supplement No. 19 (UN. Doc.A/59/19/Rev.1) 4-8 April 2005 para 48.

²⁶ *Ibid.*

²⁷ UN. Doc.A/59/19/Rev.1 *op cit* (n 25) para 49.

of gross misconduct have had on the good name of military, civilian police, and civilian personnel in United Nations peacekeeping missions.²⁸ The issue of such conduct by personnel on peacekeeping mission, the seriousness of the allegations, and the implications for the future of United Nations peacekeeping, call for the need to address the problem more broadly, comprehensively, and systematically.²⁹ It was upon the basis of such blatant reality that the Committee emphasized that all stockholders in a peace operation be aware of their ‘responsibility not to allow those responsible for acts of gross misconduct to go unpunished’.³⁰

Whether Troop-Contributing Countries actually prosecute those responsible for gross misconduct in UN operations of peace is not clearly reported.³¹ Because of the unwillingness of TCCs to prosecute according to their obligations under the Memorandum of Understanding, the Group of Legal Experts³² proposed the Draft Convention.³³ UN officials and experts on mission are obliged to respect the law of the Host State and, where applicable, the Host State has criminal jurisdiction over such UN personnel.³⁴

After expressing its deep concern regarding the criminal conduct of peacekeepers, and noting that ‘such conduct, if not investigated and, as appropriate, prosecuted, would create the negative impression that United Nations officials and experts on mission operate with impunity’.³⁵ The General Assembly formulated some recommendations in order to curb the situation and to avoid reproductions of similar conduct in the future. The General Assembly³⁶:

- *Strongly urges* States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the

²⁸ UN. Doc.A/59/19/Rev.1 *op cit* (n 25) para 49.

²⁹ *Ibid.*

³⁰ UN. Doc.A/59/19/Rev.1 *op cit* (n 25) para 50.

³¹ TCCs consider matters relative to military personnel to be secretive and not available to the public. Moreover, the UN does not name the individuals involved or their nationality. See Notar SA ‘Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo’ 2006 (14) *American University Journal of Gender Social Policy & the Law* 413-430, 418.

³² Established by General Assembly Resolution 59/300 of 22 June 2005 upon the recommendation of the Special Committee on Peacekeeping Operations.

³³ See A/RES/62/63. Criminal accountability of United Nations officials and experts on mission. Resolution adopted at 62nd Plenary Meeting 6 December 2007.

³⁴ UN Model SOFA UN. Doc. A/45/594 paras 46-49.

³⁵ Resolution adopted by the General Assembly on the Criminal accountability of United Nations officials and experts on mission, A/RES/62/63 of 8 January 2008.

³⁶ A/RES/62/63 paras 2-5.

United Nations under international law, and in accordance with international human rights standards, including due process;

- *Strongly urges* all States to consider establishing to the extent that they have not yet done so jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, at least where the conduct as defined in the law of the State establishing jurisdiction also constitutes a crime under the laws of the Host State;
- *Encourages* all States to cooperate with each other and with the United Nations in the exchange of information and in facilitating the conduct of investigations and, as appropriate, prosecution of United Nations officials and experts on mission who are alleged to have committed crimes of a serious nature, in accordance with their domestic laws and applicable United Nations rules and regulations, fully respecting due process rights, as well as to consider strengthening the capacities of their national authorities to investigate and prosecute such crimes;
- *Requests* the Secretariat to ensure that requests to Member States seeking personnel to serve as experts on mission make States aware of the expectation that persons who serve in that capacity should meet high standards in their conduct and behaviour and are aware that certain conduct may amount to a crime for which they may be held accountable.

The above recommendations are analysed below in order to ascertain whether or not they are actually enforceable or remain mere recommendations.

7.2.1 Dealing with crimes of UN experts on mission at State level

All States have been strongly urged to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice.³⁷ Among the measures to be taken by State members, the enacting of appropriate laws is crucial.³⁸ By urging all States to consider establishing jurisdiction over crimes committed by their nationals while serving as United Nations officials or experts on mission, the UN General Assembly seems to have considered that UN officials or experts on mission remain under the jurisdiction of the State which contributed them.³⁹ By recommending that jurisdiction be established over acts which are crimes in their existing domestic criminal laws,⁴⁰ the General Assembly seems to have

³⁷ A/RES/62/63 para 2.

³⁸ Para 3.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

overlooked the obligation by peacekeepers and UN officials and experts on mission to observe the laws and customs of the country where such personnel are deployed. Countries of nationality of UN officials and experts should be urged to enact laws that permit prosecution of any individual that commits a crime while serving on a UN mission, without subjecting the enactment to double criminalisation.⁴¹ The jurisdiction of the country of nationality of a perpetrator should attach only if the official or expert has returned home before the criminal act he is alleged to have committed is revealed, investigated, and prosecuted. This would seem important, especially with regard to the obligation to respect local legislation.⁴² As far as immunity applicable to UN officials and experts on mission is concerned, the mechanism of waiver must also be highlighted.⁴³ The waiver permits the Host State to prosecute the member of UN personnel for crimes committed within its territory.⁴⁴ Indeed, since the UN has no criminal jurisdiction over members working with the organisation, the lack of a forum to which civilian personnel can answer for any criminal charge may constitute a gap in the sense that if the immunity is not waived, the perpetrator of the crime would go unpunished. This is, in fact, the case regarding UN officials and experts on mission who are repatriated since the country of nationality is not under an obligation to prosecute.⁴⁵ The country of nationality of a UN official or an expert on mission is under no obligation to give assurances to the UN that, if such a member of the personnel commits a crime, the State of nationality will prosecute. UN officials and experts on mission are not considered to be representatives of the State of their nationality.⁴⁶ Instead of urging States to enact laws regarding the prosecution of UN officials and experts on mission, it should be judicious to emphasize the necessity for States to include within their forces deployed abroad a special staff member for an on-site court

⁴¹ The countries of origin of UN officials and experts on mission are under no international obligation to prosecute such persons because they are not representative of a State member (experts on mission other than civil police also considered as experts on mission). The country of origin of civilian personnel of a UN peace operation has no obligation under international law to prosecute the repatriated civilian for an offence he committed while serving with the UN. See Oswald B, Durham H and Bates A *Documents on the Law of UN Peace Operations* (Oxford University Press New York 2010) 36, 366.

⁴² A UN publication entitled 'We Are United Nations Peacekeepers' sets out what UN peacekeepers have to observe. They undertake to respect local laws and customs. To ignore the engagement constitutes a lack of observance of UN standards.

⁴³ If the Host State wished to bring a charge against a UN official or expert on mission, all it needs is to observe the procedure set out in the SOFA. See para 47(a) of the UN Model SOFA, UN. Doc. A/45/594 of 9 October 1990. See also Oswald B, Durham H and Bates A *op cit* (n 41) 36.

⁴⁴ Report of the Secretary-General on Criminal accountability of United Nations officials and experts on mission, UN Doc. A/63/260 of 11 August 2008 para 60. (hereinafter SG Report on Criminal Accountability, UN. Doc. A/63/260).

⁴⁵ Oswald B, Durham H and Bates A *op cit* (n 41) 36.

⁴⁶ *Ibid.*

martial.⁴⁷ Such a court martial has the advantage not only of reducing the cost of investigation but also of ensuring that the prosecution of any offence is not subject to the principle of double criminalisation⁴⁸ since any violation is prosecuted where it took place.

The specific recommendation to State members is that jurisdiction over crimes committed by their nationals sent to serve as UN officials or experts on mission should be established.⁴⁹ The legislation to be enacted must take into account the fact that criminal legislation varies from one country to another. Every form of conduct criminalised by the laws of each state must, therefore, be prosecuted if they also constitute crimes under the laws of the Host State.⁵⁰ One would suggest that the prosecution envisaged be conducted where the crime was committed by the officials of the TCC to make it possible for victims and witnesses to be involved.

7.2.2 Role of UN regarding the curbing of crimes by UN officials and experts on mission

It is the UN that asks Member States to contribute personnel to serve as UN officials and experts on mission.⁵¹ Its Secretariat must, therefore, ensure that requests to such an end are sent with an explanation to make not only the State member, but also the individuals themselves, aware that persons intending to serve in that capacity are required to observe high standards.⁵² These standards should be clearly mentioned. It should be expressly mentioned that to prosecute any conduct it must amount to a crime whether in the Host State or in the state of origin of the perpetrator.⁵³

Since experts on mission act in the name of the UN, the Secretary-General is tasked with the obligation of bringing all credible allegations that reveal that a crime may have been committed by United Nations officials and experts on mission to the attention of the States

⁴⁷ For a tripartite onsite court see *infra* 7.3.3.6.

⁴⁸ Double criminality imposes a condition on prosecution in some legal systems by requiring that the allegations constitute an offence both under that country's extraterritorial jurisdiction and also in the foreign country. See Ireland-Piper D 'Extraterritoriality and the Sexual Conduct of Australians Overseas' 2010 (22) *Bond Law Review* 16-40.

⁴⁹ The establishment of criminal jurisdiction by states over UN officials and experts on mission is warranted only regarding civilian police personnel. In fact UN officials and experts may be engaged by the UN directly to accomplish a specific task for the organization. They might have no status as State member representatives. UN officials and experts on mission are not recruited by asking State members to contribute personnel. See Oswald B, Durham H and Bates A *op cit* (n 41) 366.

⁵⁰ UNGA *Criminal accountability of United Nations officials and experts on mission* (A/RES/62/63 of 8 January 2008) para 3.

⁵¹ Para 5.

⁵² *Ibid.*

⁵³ *Ibid.*

against whose nationals such allegations are made. He must be asked also to request from those States an indication of the status of their efforts to investigate and, when appropriate, prosecute crimes of a serious nature, as well as the types of appropriate assistance States may wish to receive from the Secretariat for the purposes of such investigations and prosecutions.⁵⁴

For the whole system to work efficiently, States should cooperate. This is why the General Assembly encourages:

all States to cooperate with each other and with the United Nations in the exchange of information and in facilitating the conduct of investigations and, as appropriate, prosecution of United Nations officials and experts on mission who are alleged to have committed crimes of a serious nature, in accordance with their domestic laws and applicable United Nations rules and regulations, fully respecting due process rights, as well as to consider strengthening the capacities of their national authorities to investigate and prosecute such crimes.⁵⁵

It is evident from an interpretation of the above quotation that an accused person can be given a fair trial if the allegations of crimes are properly investigated. This can be possible only if the TCC which is prosecuting has sufficient evidence to shed light on the case. Indeed, therefore, it cannot be 'due process' where the prosecuting authority did not actually investigate the incident or has doubts with respect to the findings of a foreign authority or the UNOIOS. This explains the insistence of the UN on cooperation with regard to the exchanging of information.

In its meeting of October 2008, a representative of France suggested that the zero-tolerance policy with respect to serious crimes committed by United Nations officials on mission must be enforced, and States should, first and foremost, be encouraged to establish and exercise criminal jurisdiction over their nationals in a Host State.⁵⁶ They also needed to cooperate with other States and the United Nations to advance criminal proceedings.⁵⁷ As it appears, however, the Draft is not yet an international Convention signed by States and ratified to be a

⁵⁴ para 9 shows the responsibility of the UN to follow up.

⁵⁵ UNGA *Criminal accountability of United Nations officials and experts on mission* (A/RES/62/63 of 8 January 2008) para 4.

⁵⁶ UNGA *Legal Committee Told 'Jurisdictional Gaps' Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions* (GA/L/3342 of 10 October 2008 (hereinafter GA/L/3342 of 10 October 2008)).

⁵⁷ *Ibid.*

binding instrument. It can, therefore, still be amended and ameliorated. There are a number of *lacunae* that exist in the draft that will be examined.

7.3. Content and scope of the Draft Convention

Under this section an analysis will be undertaken which focuses on personnel covered by the draft convention, jurisdiction over conduct of such personnel, and the practical exercise of such jurisdiction. With respect to the latter issue, the discussion furthermore explores international jurisdiction, Host State jurisdiction, TCC jurisdiction, third State jurisdiction, universal jurisdiction, and hybrid jurisdiction. A form of jurisdiction is also proposed which consists of an on-site tripartite court composed of individuals from the United Nations, the Host State, and the Troop-Contributing Country concerned.

7.3.1 Personnel covered by the Draft Convention

As the persons covered are not elsewhere defined under international law, the criterion given by the Draft Convention itself may help to determine the category of individuals covered, *viz.* UN officials and experts on mission. The Draft does not clearly define the group comprising this category of personnel. The Draft convention explains that the ambiguity should be left as such in order to avoid omitting individuals who may also be considered as ‘officials and experts on mission.’⁵⁸ This category of persons includes members of a United Nations peacekeeping operation who are considered UN officials pursuant to article V and UN experts on mission pursuant to article VI of the General Convention on the privileges and immunities of the UN.⁵⁹ It also includes individuals who are considered to be experts on mission pursuant to either the provisions of the Status-of-Forces Agreement entered into by the United Nations and the Host State for the peacekeeping operation, or, pending the conclusion of such an agreement, the provisional application of the Model Status-of-Forces Agreement of 9 October 1990.⁶⁰ Apart from the above categories of UN officials and experts on mission, this status is also bestowed upon other agents of the United Nations ‘who are present in an official capacity in the area where a United Nations peacekeeping operation is being conducted and who enjoy

⁵⁸ See footnote 11 to article 1 of the Draft Convention.

⁵⁹ Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946.

⁶⁰ Article 1(d) (i) of the Draft Convention.

privileges and immunities of the United Nations pursuant to either articles V or VI of the General Convention, if applicable, or Article 105 of the Charter of the United Nations'.⁶¹

The above definition is wide enough and its interpretation must indicate that the list is not exhaustive. Indeed, the Secretary General's Report of 2008 indicates that 'experts on mission' may include consultants or contractors, even *rapporteurs* of the Human Rights Council or members of the International Law Commission.⁶² With respect to missions of peace, 'experts on mission' include military observers, military liaison officers, military advisers, and arms monitors, members of formed police units, and corrections officers. The status-of-forces or status-of-mission agreements indicate which individuals are actually considered as 'experts on mission'.⁶³

In order to determine whether a given agent must be considered as an expert on mission or a UN official, the answer must be found in the wording of the agreement signed to that end between the UN and the Host State. This is why even UN volunteers and agents of specialized agencies may be considered as falling within the category of 'experts on mission' if the agreement so provides.⁶⁴ It must be noted, however, that the Draft Convention covers only UN officials and experts on mission. This means that any categories of UN personnel or agents that do not fit the above definition are excluded.⁶⁵ Such excluded groups of peacekeeping personnel are military personnel of national contingents and other individuals who, pursuant to the Status-of-Forces Agreement, are subject to the exclusive jurisdiction of Troop-Contributing Countries.⁶⁶ UN officials and experts on mission cease to be subjected to the draft convention if the UN operation to which they are assigned to calls for the observance of International Humanitarian Law. This means that United Nations officials or experts on mission are considered as combatants whenever they are serving with a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations. In such a situation the law of international armed conflict

⁶¹ Article 1(d) (ii) of the Draft Convention.

⁶² SG Report on Criminal Accountability UN. Doc. A/63/260 para 65.

⁶³ *Ibid.*

⁶⁴ UN GA *Criminal accountability of United Nations officials and experts on mission, Note by the Secretariat* (UN Doc. A/62/329 of 11 September 2007) see explanatory note and para 14.

⁶⁵ Article 2 of the Draft Convention.

⁶⁶ Article 2(2) of the Draft Convention.

applies.⁶⁷ Crimes committed by UN forces during such engagements should be considered to be war crimes.⁶⁸ There is an opposite view that peacekeepers cannot commit war crimes.⁶⁹ Indeed, it is also argued that no peacekeeping operation has ever been deployed where there is no armed conflict, and a UN force is, therefore, by nature an international one.⁷⁰ Even when actual circumstances on the ground do not amount to hostilities, the situation of conflict is troubled enough to prompt the UN to deploy troops⁷¹ and, in such circumstances, crimes committed by peacekeepers do not escape the domain of war crimes on the ground that they are, or were not, committed in the heat of a battle, which is not a requirement for establishing war crimes.⁷² As will be shown later, among the criticisms levelled at this text is the need for the convention to cover all situations where criminal responsibility of individuals may be engaged.⁷³ A differentiation should be made, however, between peacekeepers engaged as combatants, especially uniformed personnel, and other UN agents. UN officials and experts on mission should still continue to benefit from the status of ‘protected persons’ even during enforcement action by a UN force. The Draft Convention considers them as combatants whenever they are deployed within a Chapter VII mission, and, therefore, their acts cease to

⁶⁷ Article 2(3) Draft Convention. This will be the case where peacekeepers are considered as combatants and so party to a conflict. What is not easy to determine, however, is whether every Chapter VII operation UN force should be deemed party to the conflict whether it be in hostilities with armed groups (rebels) or with regular armed forces of a state.

⁶⁸ See Zwanenburg MC *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Doctoral thesis Leiden 2004) 195-196.

⁶⁹ See Odello M ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’ 2010 (15) *Journal of Conflict & Security Law* 347–391.

⁷⁰ Kolb R ‘Applicability of International Humanitarian Law to Forces Under the Command of an International Organization’ *Report of the Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (ICRC-UCIHL Geneva on 11-12 December 2003) 61-69, 67.

⁷¹ The question of whether an international organisation is a party to the treaty that provides for the *ius in bello* is resolved by the fact that States providing contingents to peace operations remain bound by the treaties to which they are parties. The provisions of Common Article 1 of the Geneva Conventions, which requires State parties ‘to respect and to ensure respect for the present Convention in all circumstances’ and Article 1(1) of Additional Protocol I, which is in the same terms, are cogent proof that UN forces are bound by international humanitarian law. See Swindon S *The Joint Service Manual of the Law of Armed Conflict: Joint Service Publication 383* (Joint Doctrine and Concepts Centre Wiltshire 2004) 378.

⁷² O’Brien M ‘Prosecuting Peacekeepers in the International Criminal Court for Human Trafficking’ 2006 (1) *Intercultural Human Rights Law Review* 281-328, 325.

⁷³ See also O’Brien M *National and International Criminal Jurisdiction over United Nations Peacekeeping Personnel for Gender-Based Crimes against Women* (Doctoral thesis University of Nottingham July 2010) 122-125. Personnel members recruited locally are excepted though it seems that immunity is extended to such personnel especially in relation to conduct perpetrated in pursuance to the UN duty of the agent. See General Assembly [Sixty-third General Assembly, Sixth Committee, 5th Meeting (AM)], Legal Committee Told ‘Jurisdictional Gaps’ Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions, GA/L/3342 of 10 October 2008.

be covered by the Draft Convention.⁷⁴ From this last exclusion, it appears that the jurisdiction of the envisaged convention does not cover war crimes. It is important to try to discuss which possible misconduct by peacekeepers is covered with regard to jurisdiction and with regard to the practical exercise of such jurisdiction.

7.3.2. Jurisdiction over conduct

The Draft Convention envisions jurisdiction over crimes committed by officials and experts on mission as being in the domain of the national law systems.⁷⁵ Once it is signed and ratified, the State parties are required to domesticate the Convention and to enact the law accordingly.⁷⁶ In this way, parties to the Convention will establish jurisdiction, taking into account the territorial principle⁷⁷ of the commission of the crime and the active personality.⁷⁸ A State party may also establish jurisdiction based on passive personality, which means jurisdiction based on the law of the nationality of the victims⁷⁹ or on the stateless status of the victim residing within the State establishing such jurisdiction.⁸⁰ When the State on whose territory the perpetrator is currently found is not in a position to prosecute such a perpetrator, it is under an obligation to extradite him or her to any State that has established jurisdiction over the crimes listed in the Convention.⁸¹ It should be noted that extradition must be consequential to a request from the competent State.⁸² It would have been more judicious if the Draft Convention had indicated that the extradition procedure is not subject to the

⁷⁴ Article 2(3) of the Draft Convention considers UN officials and experts on mission with a UN enforcement action as combatants. This author thinks that UN civilian personnel should still retain their status of protected persons even in chapter VII operation.

⁷⁵ Article 4 of the Draft Convention.

⁷⁶ *Ibid.*

⁷⁷ Article 4(1)(a) of the Draft Convention.

⁷⁸ Article 4(1)(b) of the Draft Convention.

⁷⁹ Article 4(2)(a) of the Draft Convention.

⁸⁰ Article 4(2)(b) of the Draft Convention.

⁸¹ Article 4(4) of the Draft Convention.

⁸² Articles 49/50/129/146 of the four Geneva Conventions respectively use the expression 'hand over' rather than 'extradite' to provide for cooperation in the enforcement of international humanitarian law. It is, therefore, an international obligation to extradite when a state finds itself not prepared to prosecute. International crimes are serious crimes. States are always required to enact laws that make them extraditable offences under domestic law. See Cryer R *et al.* *An Introduction to International Criminal Law and Procedure* 2nd ed. (Cambridge University Press, Cambridge (UK) 2010) 96-97; Öberg MD 'The Absorption of Grave Breaches into War Crimes Law' 2009 (91) *International Review of the Red Cross* 163-183; Swindon S *op cit* 417.

prerequisite of an extradition treaty between the two states, and to decree that the principle of non-extradition of nationals does not apply.⁸³

The crimes covered by this jurisdiction are set out in article 3 of the Draft Convention which reads:

Article 3 - Crimes committed during United Nations peacekeeping operations

1. A United Nations official or an expert on mission commits crime within the meaning of this Convention if that person intentionally engages in conduct which constitutes one of the serious crimes set out in paragraph 2 of the present article while serving on a United Nations peacekeeping operation in a Host State.
2. The serious crimes referred to in paragraph 1 of the present article are, for each State party establishing and exercising jurisdiction pursuant to this Convention, those which, under the national law of that State party, correspond to:⁸⁴
 - (a) Murder;
 - (b) Wilfully causing serious injury to body or health;
 - (c) Rape and acts of sexual violence;
 - (d) Sexual offences involving children;
 - (e) An attempt to commit any crime set out in subparagraphs (a) to (d); and
 - (f) Participation in any capacity such as an accomplice, assistant or instigator in any crime set out in subparagraphs (a) to (e).

As a first ground of criticism, the Draft Convention errs in listing the crimes that peacekeepers, as UN officials or experts on mission, may possibly commit. Such an exhaustive list has the effect of leaving out some of the types of serious misconduct with which the MONUC personnel were reproached, such as pillaging and weapons trafficking⁸⁵ as well as the horrendous crime of torture which was reported in Somalia,⁸⁶ unless one interprets the crime of torture as covered under subparagraph (b) of the section. The UN has itself underlined the difficulty of establishing a finite list of crimes that should be covered by a

⁸³ Some states do not extradite nationals, but they provide for jurisdiction for crimes committed abroad. Cryer R *et al. An Introduction to International Criminal Law and Procedure* 2nd ed. (Cambridge University Press Cambridge (UK) 2010) 97. To prohibit recourse to the principle would avoid areas of impunity, for example where the state does not extradite and is not prepared to prosecute.

⁸⁴ Torture, pillaging, arms trafficking, and other serious crimes are not listed in this article of the Draft Convention.

⁸⁵ See UN GA *Criminal accountability of United Nations officials and experts on mission* (UN. Doc. A/62/329 of 11 September 2007).

⁸⁶ See Chapter II of this thesis.

convention.⁸⁷ The provided list above limits criminal acts by peacekeepers to crimes against the person.⁸⁸ Yet investigations regarding conduct of UN peacekeepers deployed in Africa, especially in the Democratic Republic of the Congo, have proved that peacekeepers can commit other crimes than those listed in the Convention.⁸⁹ The investigation into gold smuggling and trafficking in weapons in MONUC highlights the need for a convention to apply to all serious crimes to ensure there is no jurisdictional gap.⁹⁰ This explains the suggestion that any attempt to list the crimes to be covered, or to specify how crimes by UN officials and experts on mission should be defined, is an error of interpretation.⁹¹ To avoid such limitation and error, it has been suggested that the scope *ratione materiae* be left to the discretion of the state asserting jurisdiction.⁹² The convention, therefore, should cover crimes which are specified under the national law of the State that has established jurisdiction but punishable under that nation's law by at least two/three years' imprisonment.⁹³

In addition, the Convention should, to appear as a complete treaty, include all core international crimes⁹⁴ and general principles referring to any violation of national law of the Host State as well as of each UN Troop-Contributing Country.⁹⁵ It is not judicious to assume that peacekeepers cannot commit international crimes simply because their conduct sometimes may not rise to the level of violations of *jus cogens* to entail universal jurisdiction.⁹⁶ The criminal conduct of peacekeepers goes beyond ordinary crimes and

⁸⁷ UN Doc. A/62/329 para 37.

⁸⁸ *Ibid.*

⁸⁹ Criminal acts alleged to have been committed by MONUC personnel range from sexual offences to smuggling gold, ivory, and other natural resources, drug dealing, and even trading weapons with armed groups who were supposed to be disarmed by the same peacekeepers. See van Rooyen F *Blue Helmets for Africa: India's Peacekeeping in Africa-Occasional Paper* (South African Institute of International Affairs (SAII) May 2010)17; Schaefer BD 'Keep the Cap on U.S. Contributions to U.N. Peacekeeping' 2007 (2067) *Backgrounder* 1-20, 6-7.

⁹⁰ UN Doc. A/62/329 para 37.

⁹¹ *Ibid* para 39.

⁹² *Ibid.*

⁹³ *Ibid.* Any conduct that may be considered to be petty crime is left out. Thus an offence such as adultery in Burundian law, as well as in Congolese law, cannot as such be prosecuted since it is only punished by a fine (Articles 26-29 of the Burundian Penal Code) or by an imprisonment of a maximum term of twelve months (Article 467 of the Congolese Family Code. 'Loi no. 87-010 portant Code de la Famille' *Journal Officiel du Zaïre*, numéro spécial 1^{er} aout 1987). In the Somali penal code, adultery is punishable by a term in jail of up to two years (Article 426 of the Somali Penal Code).

⁹⁴ For purposes of recall, international core crimes include the crimes of genocide, crimes against humanity, and war crimes. See supra 4.2.1 and Cryer R *et al. op cit* (n 82) 4.

⁹⁵ UN Doc. A/62/329 para 39.

⁹⁶ Sweetser CE 'Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel' 2008 (83) *New York University Law Review* 1643-1678, 1656-58.

constitutes human rights violations.⁹⁷ Indeed, if peacekeepers could not commit international crimes, namely the core international crimes within the jurisdiction of the International Criminal Court (ICC), there should not have been any opposition to such this permanent and vocationally universal criminal court. Furthermore, if crimes by peacekeepers could not amount to international crimes, the UN Security Council Resolutions 1422 (2002), 1487 (2003) and 1497 (2003) excluding the jurisdiction of the ICC over some peacekeepers would not have been passed.⁹⁸ Peacekeepers sent to Liberia at the time when these resolutions were passed were, therefore, prosecutable before the ICC, and this is still the situation today.⁹⁹

7.3.3. Practical exercise of jurisdiction

There are a number of available forums competent to adjudicate criminal acts by peacekeepers. These include *inter alia* the national courts of the Host State on whose territory the act is performed; the national courts of the Troop-Contributing Country; an international

⁹⁷ *Ibid.* As an example trafficking in human beings is an international crime and peacekeepers in Kosovo and elsewhere have been accused of committing such acts. See Jennings KM & Nikolić-Ristanović V *UN Peacekeeping Economies and Local Sex Industries: Connections and Implications* (MICROCON Research Working Paper 2009); Chun S 'Sexual Exploitation and Abuse by UN Peacekeepers' Policy Brief 10/2009; Skjelsbæk I 'The NATO Stabilization Force in Bosnia and Herzegovina: A Military Intervention Facing New Civilian Challenges' in Olsson L *et al. Gender Aspects of Conflict Interventions: Intended and Unintended Consequences - Case Studies on the United Nations Mission in Eritrea/Ethiopia (UNMEE), the NATO Stabilization Force in Bosnia and Herzegovina (SFOR) and the Temporary International Presence in Hebron (TIPH)* (Final Report to the Norwegian Ministry of Foreign Affairs Oslo March 2004) 25-38; Kent V 'Protecting Civilians From UN Peacekeepers and Humanitarian Workers: Sexual Exploitation and Abuse' in Aoi C, de Coning C & Thakur R (eds) *Unintended Consequences of Peace Support Operations* (United Nations University Press Tokyo 2007) 44-66.

⁹⁸ Oswald B, Durham H and Bates A *Documents on the Law of UN Peace Operations* (Oxford University Press New York 2010); Zwanenburg MC *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Doctoral thesis Leiden 2004); Jain N 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court' 2005 (16) *EJIL* 239-254; Zappala S 'Are Some Peacekeepers Better than Others? UN Security Council Resolution 1497 (2003) and the ICC' 2003 (1) *Journal of International Criminal Justice* 671-678; Zappala S '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' 2003 (1) *Journal of International Criminal Justice* 114-134; Zwanenburg M 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces' 1998 (11) *Leiden Journal of International Law* 229-245; Zwanenburg M 'Editorial: Double Standards in Peacekeeping? Subcontracting Peacekeeping and International Humanitarian Law' 1999 (12) *Leiden Journal of International Law* 753-757; Zwanenburg M 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?' 1999 (10) *EJIL* 124-143.

⁹⁹ Engdahl O *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law* (Martinus Nijhoff Publishers Leiden 2007) 191.

court or tribunal and the courts of a third state.¹⁰⁰ Some of these forums are more effective than others in ensuring criminal accountability.¹⁰¹

In the preceding chapters of this thesis the possible impediments to the exertion of jurisdiction have been discussed. This section, therefore, examines the possible mechanisms to overcome the identified hindrances. The relevance of the analysis resides in the fact that, with respect to UN officials and experts on mission who are not members of the military component of the force, the Host State is not precluded from exercising criminal jurisdiction over their criminal conduct, except where their immunity is not waived.¹⁰² The Troop-Contributing Country remains concurrently competent with the Host State regarding its nationals serving with the UN as UN officials and experts on mission.¹⁰³ Coupled with such relevance to the analysis is the variation in national laws as to what constitutes criminal conduct and the definitions for each crime.¹⁰⁴ For example, there are national differences in the definition of rape and other violent sexual crimes and the age at which an individual is capable of giving valid consent to a sexual act.¹⁰⁵ The issue, therefore, of what conduct has to trigger the intervention of the prosecuting authority of one or the other competent jurisdictions referred to above lies in identifying a common understanding of what is needed to be done. To overcome such variation, an international jurisdiction would be more suitable regarding the adjudication of criminal conduct of international personnel.¹⁰⁶

¹⁰⁰ The hurdles to the effective exertion of such jurisdiction, especially with regard to military members of a peace operation, have been shown in chapter III of this thesis.

¹⁰¹ Effectiveness stems from the existence of an agreement to such an end, but for prosecution actually to take place willingness is needed.

¹⁰² According to the model SOFA, the Host State has only to manifest its desire to bring to justice a UN official or expert on mission. It has, therefore, to obtain the permission of the Secretary-General's Special Representative in order to obtain the waiver of the immunity enjoyed by the official or expert alleged to have committed an offence. See paras 42 and 47 of the UN Model SOFA, UN. Doc. A/45/594 of 1990.

¹⁰³ To avoid the suggestion that immunity leads to impunity, the Draft Convention of the accountability of UN officials and experts on mission has propounded that jurisdiction be established in each and every state party to the convention. See Article 4. Host State, sending State and State of the nationality of victims all are concerned.

¹⁰⁴ Regarding the crimes considered in the Draft Convention, see Article 3.

¹⁰⁵ Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations. UN Doc. A/60/980 of 16 August 2006, para 19.

¹⁰⁶ UN operations are, by their very nature, of an international character. UN personnel are, therefore, international personnel or agents. See Kolb R 'Applicability of International Humanitarian Law to Forces Under the Command of an International Organization' *Report of the Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (ICRC-UCIHL Geneva on 11-12 December 2003) 61-69, 62.

7.3.3.1. International jurisdiction

It is important that all categories of peacekeeping personnel be subject to the same norms of conduct, including national contingent members, particularly in relation to sexual exploitation and abuse.¹⁰⁷ The Zeid report identified that different components of peacekeeping operations are governed by different rules and disciplinary procedures because they each have a distinct legal status and said that a uniform code of conduct may be the solution.¹⁰⁸

Although the Secretariat can decree that experts on mission, contractors, consultants, and United Nations volunteers have to observe the standards established by the 2003 Secretary-General bulletin¹⁰⁹ which have been incorporated into the draft conditions of service of international United Nations volunteers, and, although violations of those standards will result in appropriate action within the authority of the Secretary-General, criminal and disciplinary responsibility in respect of members of national contingents depends on the national law of the Member State.¹¹⁰ Moreover, with respect to those personnel over whom the national law of the sending State has not exclusive criminal jurisdiction, the Secretariat has no power to hold them criminally accountable.¹¹¹ It has been realised that the UN Secretariat cannot conduct a criminal investigation regarding UN officials or experts on mission where it is alleged that the conduct engaged in by the persons participating on a United Nations operation may amount to a crime.¹¹² Nor can the Secretariat prosecute an alleged offender.¹¹³ But where the operation is comparable to those deployed in Kosovo¹¹⁴ or East Timor,¹¹⁵ the exercise of

¹⁰⁷ For instance engaging the services of a prostitute is not a crime in Congolese law whereas it is an offence under South African criminal law. See chapter III, paragraph 3.2.2 of this thesis.

¹⁰⁸ UN. Doc. A/59/710 para 14.

¹⁰⁹ Report of the Group of Legal Experts on making the standards contained in the Secretary-General's bulletin binding on contingent members and standardizing the norms of conduct so that they are applicable to all categories of peacekeeping personnel UN Doc. A/61/645 of 18 December 2006 para 40.

¹¹⁰ Report of the Special Committee on Peacekeeping Operations and its Working Group at the 2006 substantive session, New York, 27 February-17 March 2006, UN Doc. A/60/19 of 22 March 2006 para 65.

¹¹¹ The UN, being not a State and having no own military force, has no criminal jurisdiction over any category of its personnel. There is a need for clear legislation regarding criminal offences that may be committed by members of UN personnel, especially with respect to peacekeeping missions.

¹¹² UN GA *Criminal accountability of United Nations officials and experts on mission, Note by the Secretariat* (UN Doc. A/62/329 of 11 September 2007) para 16.

¹¹³ *Ibid.*

¹¹⁴ See Security Council resolution 1244 (1999).

¹¹⁵ See Security Council resolution 1704 (2006).

criminal jurisdiction by the authorities of the operation is not only possible but also falls within the duties of the operation.¹¹⁶

It should be noted that ‘international jurisdiction’ does not necessarily mean jurisdiction by a UN tribunal.¹¹⁷ Hence, where those crimes may be qualified as war crimes, an international criminal adjudicating forum such as the ICC¹¹⁸ should be considered competent.¹¹⁹ One scholar has even stated that the ICC is the sole exception to the principle of exclusive jurisdiction over peacekeepers by the sending State.¹²⁰ It must be remembered that the ICC Statute does not expressly refer to the applicability of International Humanitarian Law to UN forces.¹²¹ Article 8 of the Statute, which deals with war crimes, however, considers attacking personnel involved in a peacekeeping mission as a war crime within the jurisdiction of the Court.¹²² But this is subject to the condition that such personnel must have been entitled to the protected status of civilians.¹²³ In other words, when a peacekeeper cannot avail himself or herself of civilian protected status, he or she is considered as a combatant party to the conflict and subject to the international law of armed conflict.¹²⁴ Actions of peacekeepers during UN missions of peace, depending upon the specific circumstances, therefore, may fall within the

¹¹⁶ In enforcement operations, such of Kosovo and Timor-Leste, the UN mandate comprises executive and prosecutorial powers. See UN Doc. A/62/329 of 11 September 2007 para 16.

¹¹⁷ Where there is a gap in law because of lack of jurisdiction over crimes committed by UN officials and experts on mission, the UN Secretariat, which does not possess criminal and prosecutorial powers, cannot fill such a gap. See UN Doc. A/62/329 of 11 September 2007 para 18.

¹¹⁸ See discussion in Chapter III of this thesis regarding the question of whether conduct by peacekeepers qualifies as international crime. The reason why the USA opposes the ICC and threatens to cut, and has indeed cut, military aid to dozens of ICC signatories, including South Africa, who refuse to enter into bilateral agreements with the US government, is effectively that UN peacekeepers who commit war crimes fall with the jurisdiction of the Court. In 2002, President Bush signed into law the *American Service Members Protection Act*, which was intended to intimidate countries that ratify the ICC treaty. This US law authorizes the use of military force to liberate any American or citizen of a US ally being held by the Court in The Hague. This provision, dubbed the ‘Hague invasion clause’, has caused a strong reaction from US allies around the world. The law also provides for the withdrawal of US military assistance from countries ratifying the ICC treaty, and it restricts US participation in UN peacekeeping unless the USA obtains immunity from prosecution. See Oxfam International *OI Policy Compendium Note on the International Criminal Court* May 2007.

¹¹⁹ Murder, even a single murder of a protected person, amounts to a violation of article 8(2)(c)(i) of the Rome Statute. See Zimmermann A ‘Article 8 of the Rome Statute of the ICC: Preliminary Remarks on Paragraph 2 (c)-(f) and Paragraph 3: War Crimes committed in an Armed Conflict not of International Character’ in Triffterer O (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, (Nomos Baden-Baden 1999) 262-288.

¹²⁰ Miller AJ ‘Sexual Exploitation and Abuse in Peacekeeping Operations’ 2005 (39) *Cornell International Law Journal* 71-96, 80.

¹²¹ Zwanenburg MC *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Doctoral thesis Leiden 2004) 220.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Shraga D ‘The United Nations as an Actor Bound by International Humanitarian Law’ 1998 (5) *International Peacekeeping* 64-81.

category of war crimes.¹²⁵ It was for fear that American troops engaged in the Balkans would be prosecuted by the ICC ‘that the United States chose to veto the extension of the mandate of the United Nations Mission in Bosnia and Herzegovina as one of the steps in its efforts to exempt United States military personnel from the jurisdiction of the Court.’¹²⁶ In fact the personnel of peace operations are capable of committing war crimes which consist of violations of international humanitarian law. As stated in a letter of the then UN Secretary-General, Kofi Annan, to Colin Powell, then US Secretary of State, peacekeepers are capable of committing crimes under the jurisdiction of the ICC, though the occurrence of such crimes is highly improbable.¹²⁷

Other scholars have indicated that peacekeepers cannot commit war crimes within the purview of the ICC, because Article 8 of the Rome Statute implies that the conduct of a UN force is incapable of fulfilling the requirement that ‘[t]he 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,’¹²⁸ or that a UN force cannot commit great breaches of the Geneva Conventions because the UN is not a party to such treaties.¹²⁹ Such arguments, especially when related to the sexual violence perpetrated by the peacekeepers, reveal that they originate from the traditional consideration of sexual crimes as isolated acts, as private crimes perpetrated discreetly.¹³⁰ This is so because, when a soldier (or an international aid

¹²⁵ A war crime is any serious violation of international humanitarian law. The violation of this body of law applicable in armed conflict entails individual criminal liability under international law. See Cryer *et al. op cit* (n 82) 267.

¹²⁶ Zwanenburg MC *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Doctoral thesis Leiden 2004) 220-221. See Zwanenburg M *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers Leiden 2005) 158 where the author gives the opinion that ‘the UN exercise exclusive command and control over all troops comprising its forces, which are recruited and organized as national contingents. As a consequence of its command and control, the UN is deemed a party to armed conflict and thereby subject to the obligations of international humanitarian law’ citing Glick R ‘Lip Service to the Laws of War: Humanitarian Law and UN Armed Forces’ 1995 (17) *Michigan Journal of International Law* 97-98.

¹²⁷ *Ibid.*

¹²⁸ Harrington AR *Victims of Peace: Current Abuse Allegations against U.N. Peacekeepers and the Role of Law in Preventing them in the Future* (Paper 630 Bepress Legal Series 2005) 20-25.

¹²⁹ Odello M *op cit* (n 69) 370 *et passim*. Contra, see Zwanenburg M *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers Leiden 2005) 158; Spencer SW ‘Making Peace: Preventing and Responding to Sexual Exploitation by United Nations Peacekeepers’ 2005 (16) *Journal of Public and International Affairs* 167-181, 171.

¹³⁰ Compare Haffajee RL ‘Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory’ 2006 (29) *Harvard Journal of Law and Gender* 201-221, 204; Sexual exploitation and abuse constitute violations of article 3 common to the four Geneva Conventions; they constitute war crimes. See Spencer SW ‘Making Peace: Preventing and Responding to Sexual Exploitation by United Nations Peacekeepers’ 2005 (16) *Journal of Public and International Affairs* 167-181, 171.

worker) is accused of rape, it is most often very difficult to get evidence.¹³¹ If it is proven that a peacekeeper committed a war crime, and it consisted of murder, torture or rape, and the crime was perpetrated as part of a large-scale commission of similar crimes, that peacekeeper can be prosecuted and found guilty of a war crime by the International Criminal Court.¹³² But the formulation of Article 8 of the Rome Statute, although requiring the indicated *chapeau element*, does not exclude the possibility of the Court's exercising jurisdiction over isolated war crimes.¹³³

It has already been indicated that, effectively, the *chapeau* element of war crimes seems to require that war crimes, as well as genocide and crimes against humanity, be committed collectively or on a large-scale.¹³⁴ Yet war crimes are not necessarily collective in nature, even though wars are fought by groups, and are thus collective in nature.¹³⁵ Although random or isolated criminal occurrences do not have sufficient nexus to the armed conflict, it is possible that a single act against individual values may still amount to war a crime¹³⁶ as the status of the soldier as combatant or uniformed military is sufficient to show the required nexus.¹³⁷ The UN OIOS has shown that sexual exploitation and abuse has been widespread, i.e. committed on a large-scale, though not necessarily in fulfilment of any preconceived policy or plan.¹³⁸ Bonafè correctly observes that war crimes need not be planned or executed on a large-scale at the State or organisational level to give rise to individual criminal

¹³¹ The Nordic Africa Institute *Sexual Exploitation and Abuse by Peacekeeping Operations in Contemporary Africa* (Policy Notes 2009/2 March 2009) 3.

¹³² Du Plessis M & Peté S *Who Guards the Guards? The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No 121 Pretoria February 2006) 27.

¹³³ See Lee RS *et al.* (eds) *The International Criminal Court: Elements of Crimes and Rules of Procedures and Evidence* (Transnational Publisher Ardsley 2001) 109-110.

¹³⁴ The Rome Statute seems to equate 'attack against civilian' with State or organizational policy in provisions relating to widespread requirement. See Haskell JD 'The Complicity and Limits of International Law in Armed Conflict Rape' 2009 (29) *B.C. Third World Law Journal* 35-84, 57.

¹³⁵ Anderson K 'The Rise of International Criminal Law: Intended and Unintended Consequences' 2009 (20) *European Journal of International Law – EJIL* 331- 358, 346.

¹³⁶ See Schomburg W & Peterson I 'Genuine Consent to Sexual Violence under International Criminal Law' 2007(101) *ASIL* 121-140, 130.

¹³⁷ Within a Chapter VII mandate, a peacekeeper will always be considered a combatant. See Breau SC 'The Impact of the Responsibility to Protect on Peacekeeping' 2006 (11) *Journal of Conflict & Security Law* 429-464, 446-7; and, even when operating as part of a UN force, military forces remain in their capacity as State agents, which means they have to observe the law applicable to armed conflict where State forces are engaged. See McLaughlin R 'The Legal Regime Applicable to Use of Lethal Force When Operating Under a United Nations Security Council Chapter VII Mandate Authorizing "All Necessary Means"' 2008 (12) *Journal of Conflict and Security Law* 389-417, 395.

¹³⁸ *Supra* Chapter 2.

responsibility.¹³⁹ Therefore, since Troop-Contributing Countries may not be, or are not, willing to prosecute crimes by peacekeepers owing to their special status, it should be suggested that their conduct be referred to an impartial forum.

As the present discussion deals with jurisdiction over UN officials and experts on mission, it may be noted that the ICC does not possess the proper jurisdiction for the prosecution of those peacekeepers charged with abuses of any type, and particularly sexual abuses, for ‘the ICC statute was created to codify the tradition of prosecuting those accused of political and military-political atrocities which started with the prosecutions at Nuremberg ... or complicity in a larger plan to harm or destroy a population.’¹⁴⁰ This simply does not describe the type of possible misconduct by UN officials and experts on mission whose crimes, most of the time, are akin to domestic law violations.¹⁴¹ Host States, as well as the country of origin of the individual alleged to have committed an offence while serving as UN official or expert on mission, remain competent to prosecute such an individual.

7.3.3.2. Host State jurisdiction¹⁴²

For several reasons enumerated by the Group of Legal Experts the Host State should exercise jurisdiction over crimes committed by peacekeeping personnel in its territory.¹⁴³ Not only it is the duty of the State to do so, but it offers better access to witnesses, and the fact is that the local laws were infringed contrary to the pledge that peacekeepers will observe those laws.¹⁴⁴ Trial or prosecution in the Host State gives a good impression and justice is seen to be done.¹⁴⁵ This is not so new since, according to the Group:

¹³⁹ Bonafè BI *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff Publishers Leiden 2009) 91.

¹⁴⁰ Harrington AR *op cit* (n 128) 24-25.

¹⁴¹ Most of the criminal conduct of UN officials and experts on mission can hardly fall into categories within the jurisdiction of the ICC.

¹⁴² The courts of the territory within which the offender committed his offence have jurisdiction over that offence. See Levitt A ‘Jurisdiction over Crimes II’ 1926 (16) *Journal of the American Institute of Criminal Law and Criminology* 495-518. This is clearly affirmed in the Draft Convention Article 4(b) (a).

¹⁴³ GLE report A/60/980 para 27.

¹⁴⁴ *Ibid.*

¹⁴⁵ (a) When a crime is committed in the territory of the Host State, there is little doubt that it may establish jurisdiction over conduct within its territory. This is regardless of the identity of the alleged offender or of the victim, or whether another State can exercise jurisdiction over the same conduct; (b) the Host State is likely to be the place where most of the witnesses and evidence are located. Holding criminal trials in the Host State averts the expense, delays, and inconvenience of witnesses having to travel overseas or of evidence having to be transmitted abroad; (c) holding an alleged offender criminally accountable in the Host State flows from the

There have been instances where United Nations personnel have been subject to the exercise of criminal jurisdiction by the Host State of a peacekeeping operation and have had their immunities waived for this purpose. This has occurred even in Host States whose legal systems are perceived as dysfunctional. In these cases, the waiver of immunity may be subject to *ad hoc* arrangements being made by the United Nations to ensure that the interests of the alleged offender are protected.¹⁴⁶

In Host States where the judicial system is dysfunctional, it has been suggested that, regarding the adjudication of crimes committed by peacekeeping personnel, the Host State agrees to and receives assistance from the United Nations in order to ensure that criminal proceedings against international personnel satisfy international human rights standards.¹⁴⁷ Although the group pointed to the fear of instituting double standards in the domestic judicial system in order to ensure peacekeepers are dealt with in observance of international standards of the human rights, this does not constitute a prejudice to the judicial system. The experience by the judges may help in improving their approach of the handling cases even regarding nationals of the said Host State. This would be a tremendous contribution to the host country. It is, therefore, not so difficult to overcome the reluctance to waive the immunity of peacekeepers and allow the Host State to prosecute them. It is also possible for the mission to train Host State judges or to establish hybrid courts where national judges, and those designated by the mission, together handle all the matters regarding peacekeepers, especially their criminal offences. Regarding criminal accountability of the special personnel called ‘UN officials and experts on mission,’ the jurisdiction of the country of origin should not be ruled out as a practical and potentially effective option.¹⁴⁸ In fact, the Secretary-General Bulletin on protection from sexual exploitation and sexual abuse provides that cases of sexual exploitation and abuse ‘may’, upon consultation with the Office of Legal Affairs, be referred to national authorities for criminal prosecution.¹⁴⁹ The use of ‘may’ means that the UN

obligation of United Nations peacekeeping personnel to respect all local laws and regulations as a corollary to their enjoyment of privileges and immunities in the Host State; and (d) holding trials in the Host State will give the local population a greater sense of justice being done and being seen to be done. This would be an important demonstration of the UN commitment to the rule of law. GLE report A/60/980 para 27.

¹⁴⁶ However, not one case is cited. GLE report A/60/980 para 29. Considering the inadequate state of the judicial systems of most hosting countries, the SRSG will always be reluctant with respect to waiving immunity of civilian staff of a UN operation. See Jennings KM *Protecting Whom? Approaches to Sexual Exploitation and Abuse in UN Peacekeeping Operations* (Fafo-Report 36 Allkopi AS (Norway) 2008) 21.

¹⁴⁷ GLE report A/60/980 para 30.

¹⁴⁸ See UN Doc. A/62/329 of 11 September 2007 para 21.

¹⁴⁹ Miller SK ‘Accountability for the Conduct of UN-Mandated Forces under International Human Rights Law: A Case Study Concerning Sexual Abuse of the UN Mission in the Democratic Republic of Congo (MONUC)’ in Arnold R and Knoops GJA (eds) *Practice and Policies of Modern Peace Support Operations under International Law* (Transnational Publishers Ardsley 2006) 261-286, 282.

investigative team is not obliged to do so, but may use this as a means to supplement the absence of a UN criminal jurisdiction over its personnel or to prosecute crimes committed by peacekeepers.¹⁵⁰

7.3.3.3. Jurisdiction of the Troop-Contributing Country

If the Host State's judicial system is not functioning, or is unable to exercise criminal jurisdiction to a satisfactory level in the short-term with or without international assistance, the intervention of other States is inevitable.¹⁵¹ One of these States is the State of nationality of the perpetrator.¹⁵² Under the Model Status-of-Forces Agreement,¹⁵³ individuals upon whom the status of experts on mission is conferred, enjoy, as provided for by the Convention on the Privileges and Immunities of the United Nations, the same privileges and immunities as UN Staff.¹⁵⁴ United Nations staff members are required to follow the directions and instructions properly issued by the Secretary-General and their supervisors.¹⁵⁵ They are required to comply with local laws and honour their private legal obligations, including the obligation to honour orders of competent courts.¹⁵⁶ UN officials and experts on mission, therefore, undertake to observe local laws.¹⁵⁷ But a jurisdictional gap is still possible since, contrary to the deployment of military personnel,¹⁵⁸ the countries contributing civilian personnel are not asked to give assurances to the UN that if UN officials and experts on mission do not live up to their obligation to respect local laws and customs they will prosecute them.¹⁵⁹ United Nations officials and experts on mission enjoy privileges and immunities. With the exception of the members of UN peacekeeping personnel recruited locally and assigned an hourly

¹⁵⁰ Zwanenburg M 'The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?' 1991 (10) *EJIL* 124-143, 127-129; Zwanenburg M *Accountability of Peace Support Operations* (Martinus Nijhoff Publishers Leiden 2005) 238.

¹⁵¹ GLE report A/60/980 para 40.

¹⁵² Para 41.

¹⁵³ Model SOFA UN Doc. A/45/594.

¹⁵⁴ Paras 25-26.

¹⁵⁵ Annex II - Standards of conduct for United Nations peacekeeping personnel UN. Doc. A/61/645 of 18 December 2006 paras 4, 6.

¹⁵⁶ *Ibid.*

¹⁵⁷ Rule 2 of the Ten Rules - Code of Conduct for Blue Helmets available at www.un.org/en/peacekeeping/documents/ten_in.pdf [last accessed 19 December 2012]; We Are United Nations Peacekeepers [Obligations] available at www.un.org/en/peacekeeping/documents/un_in.pdf [last accessed 19 December 2012].

¹⁵⁸ Para 48 of the model SOFA, UN. Doc. A/45/594.

¹⁵⁹ There is no requirement in international law for the civilian-contributing State to prosecute the repatriated civilian member for offences committed during peace operations. It must also be indicated that experts on mission are not representatives of their states of origin. See Oswald B, Durham H and Bates A *Documents of the Law of UN Peace Operations* (Oxford University Press New York 2010) 36, 366.

rate,¹⁶⁰ no automatic action against UN officials and experts on mission can be taken.¹⁶¹ This would make it difficult for any State to assert jurisdiction over their acts. However, the Secretary-General has the authority and duty to waive them in order to avoid the impeding of the course of justice.¹⁶² It is after such a waiver that a State can assert jurisdiction and prosecute crimes alleged to have been committed by UN officials and experts on mission.

Criminal jurisdiction of Troop-Contributing Countries over peacekeepers, other than those provided for in the different agreements regarding the deployment of the operation, finds legal basis not upon the territoriality principle but in the well-established active nationality principle.¹⁶³ Where it may be ascertained that the Host State is not able to exercise its jurisdiction, the sending State should be asked to intervene because the UN has no criminal jurisdiction.¹⁶⁴ It has even been suggested that this may be especially so with respect to custodial issues after investigation and prosecution have been conducted and the perpetrator sentenced.¹⁶⁵ The intervention of the State of nationality of the perpetrator in a later stage may be recommended in that it avoids the difficulties relating to gathering evidence in a foreign country. But what if the State of nationality construes custodial powers as available only over persons convicted and sentenced according to national law? To answer this question, the UN has listed views regarding crimes committed outside the boundaries of States, especially by individuals serving with a UN mission of peace.¹⁶⁶ It appears, from the views of different countries, that there are many variations. For instance, Canadian law applies to crimes committed within Canada, including cases where only part of an offence has taken place in Canada, or where there is some other real and substantial connection.¹⁶⁷ The general rule, in line with its common law tradition, is to limit the application of the criminal law of Canada to events occurring within the territorial jurisdiction of Canada.¹⁶⁸ Exceptions to this principle are found in section 7 of the Criminal Code and the Crimes against Humanity and the War

¹⁶⁰ GA/L/3342 of 10 October 2008.

¹⁶¹ Bastick M, Grimm K & Kunz R *Sexual Violence in Armed Conflict Global Overview and Implications for the Security Sector* (DCAF Geneva 2007) 173.

¹⁶² *Ibid.*

¹⁶³ According to the active nationality principle, the state of origin of the perpetrator has jurisdiction over the offence committed by its national. Some states require that the act be criminal in both the State of commission as well as in their State. Other assert jurisdiction regardless of the double incrimination principle. See Cassese A *International Criminal Law* 2nd ed. (Oxford University Press New York 2008) 337.

¹⁶⁴ UN. Doc. A/62/329 paras 17-19.

¹⁶⁵ GLE report A/60/980 para 41.

¹⁶⁶ SG Report on Criminal Accountability UN. Doc. A/63/260.

¹⁶⁷ Para 11.

¹⁶⁸ *Ibid.*

Crimes Act.¹⁶⁹ Several such exceptions fulfil international legal obligations to prosecute such acts committed by Canadians outside Canada or to prosecute others accused of extraterritorial offences who are found in Canada.¹⁷⁰ The other exceptions relate to the protection of the essential interests of Canada, particularly with respect to offences in areas such as immigration law, the integrity of the Canadian passport, and similar matters, as well as maintaining control over Canadian officials and military personnel working abroad.¹⁷¹ Accordingly, Canada would extend jurisdiction over crimes committed by Canadian nationals while serving as United Nations officials or experts on mission only when they fall within one of those exceptions.¹⁷²

According to a UN report, South Africa, like other common law countries, does not exercise extra-territorial jurisdiction on grounds of nationality.¹⁷³ Exceptions to this stance are, for example, the Defence Act, 1957 that provides for criminal jurisdiction over military and civilian elements of its defence force deployed beyond South Africa.¹⁷⁴ Furthermore, an amendment to the Criminal Procedure Act of 1977 was introduced in Parliament in 2008 with a view to enabling prosecution against South African nationals who committed serious offences while serving abroad.¹⁷⁵ Indeed, most States have enacted laws to ensure that serious crimes committed outside by one of their nationals are punishable within the country, provided that the perpetrator is currently found in his or her home country and the principle of double criminality is satisfied,¹⁷⁶ i.e. the conduct is an offence according to the law of the State exercising jurisdiction, or independently to whether or not the conduct is criminalized where it was perpetrated.¹⁷⁷ It is upon this provision that the countries of origin can prosecute

¹⁶⁹ S 7 of the Canadian *Crimes against Humanity and War Crimes Act 2000* relates to breach of responsibility by military commander or other superior.

¹⁷⁰ Ss 6 and 8 of the Canadian *Crimes Against Humanity and War Crimes Act 2000* with respect to crimes of genocide, crimes against humanity, and war crimes committed outside Canada.

¹⁷¹ SG Report on Criminal Accountability UN. Doc. A/63/260 para 12.

¹⁷² *Ibid.*

¹⁷³ UNGA *Legal Committee Told 'Jurisdictional Gaps' Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions* (GA/L/3342 of 10 October 2008) (hereinafter GA/L/3342 of 10 October 2008).

¹⁷⁴ SG Report on Criminal Accountability, UN. Doc. A/63/260 para 32.

¹⁷⁵ The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 establishes extraterritorial jurisdiction over citizens and those who ordinarily reside in the Republic who are alleged to have committed a sexual offence or other offences in terms of the Act outside its borders.

¹⁷⁶ Cyprus, Finland, Greece, Liechtenstein, Norway, Qatar, Tunisia to cite a few. See SG Report on Criminal Accountability UN. Doc. A/63/260 paras 13, 16, 18, 25, 28, 30, 34.

¹⁷⁷ Brazil, Czech Republic, Germany. See SG Report on Criminal Accountability UN. Doc. A/63/260, paras 10, 14, 17.

peacekeepers for crimes committed abroad. Furthermore, a UN Secretary-General Report indicates that

‘efforts to hold violators to legal account for past abuses have not been limited to the courts of countries in which violations take place or international tribunals alone. Recent years have seen an un-precedented number of cases brought in the national courts of third-party States, under the universality principle...’¹⁷⁸

Although this statement applies to crimes committed by parties to an armed conflict other than peacekeeping personnel, nothing precludes its application to peacekeepers if their conduct amounts to war crimes.

7.3.3.4 Third State jurisdiction: universal jurisdiction¹⁷⁹

As Engdahl has pointed out, the principle of exclusive criminal jurisdiction is only relevant vis-à-vis the Host State, and not with respect to a third State within which peacekeepers cannot rely on the exclusive criminal jurisdiction of their State of nationality.¹⁸⁰ To operate effectively, such a principle should be clearly mentioned in the Convention envisaged or, in the meantime, in the revised model Memorandum of Understanding.¹⁸¹ It means, in other words, that third States have jurisdiction over peacekeepers under the principle of universal jurisdiction regarding any conduct which amounts to a war crime.¹⁸² Universal jurisdiction entails that a national court is competent to try a person suspected of a serious international crime such as genocide, war crimes, crimes against humanity, or torture, even if neither the suspect nor the victim are nationals of the country where the court is located (‘the forum

¹⁷⁸ The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General, UN. Doc. S/2004/616 of 23 August 2004 para 48.

¹⁷⁹ It is a duty and right of each and every State to prosecute alleged perpetrators of gross violations of human rights and humanitarian law. See ‘The Chicago Principles on Post-Conflict Justice’ in Bassiouni MC (ed) *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia Antwerp 2010) 43-65, Principle 1.

¹⁸⁰ Engdahl *O op cit* (n 99) 191.

¹⁸¹ The revised draft model MOU [UN. Doc. A/61/19 (Part III) of 12 June 2007] does not allude to criminal jurisdiction over civilian members of UN peace operations other than those subject to the military laws of their country.

¹⁸² Human Rights Watch *Universal Jurisdiction in Europe: The State of the Art* (Human Rights Watch vol. 18 No. 5(D) 2006) 1-2. War crimes, therefore, which do not qualify as grave breaches of the Geneva Convention cannot usually trigger universal jurisdiction. This may be the case of crimes by peacekeepers. The law contains gaps. See Sweetser CE *Ensuring Accountability Of Peacekeeping Personnel For Human Rights Violations* (Center for Human Rights and Global Justice Working Paper Number 16 (2007)) 15.

state'), and the crime took place outside that country.¹⁸³ The exercise of universal jurisdiction is commonly authorized, or even required, by an international convention to which the State is a party. For example, the Convention against Torture and the Grave Breaches provisions of the Geneva Conventions both mandate the exercise of universal jurisdiction.¹⁸⁴

It may be recalled that, although universal jurisdiction is not disputed regarding international core crimes, especially grave breaches,¹⁸⁵ acts constituting non-grave breaches but which are violations of the laws or customs of war can fall within universal jurisdiction.¹⁸⁶ Other crimes, such as those constituting violations of the UN Torture Convention on forced disappearance, have come within the scope of the required exertion of universal jurisdiction.¹⁸⁷ This means that States should create legislation and otherwise enable their courts to exercise universal jurisdiction for gross violations of human rights and humanitarian law in accordance with principles of treaty law and customary international law.¹⁸⁸ This is so because the *nullum crimen sine lege* principle has to be respected in all circumstances.¹⁸⁹ Many countries have enacted laws to enable the judicial system to prosecute crimes requiring universal jurisdiction.¹⁹⁰

Despite the fact that international crimes as such are not frequently committed by 'UN officials and experts on mission', the discussion of universal jurisdiction by third States remains relevant when analysing the Draft Convention because the aim of the analysis is to

¹⁸³ Under customary law, States have the right to vest universal jurisdiction in their national courts over war crimes whoever is alleged to have perpetrated them. See Ryngaert C 'Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: An Appraisal of the Afghan and Rwandan cases' 2007 (2) *Hague Justice Journal /Journal judiciaire de la Haye* 13-36, 16.

¹⁸⁴ Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1); Article 1 common to the Geneva Conventions.

¹⁸⁵ Van der Wilt H 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' 2008 (8) *International Criminal Law Review* 229–272, 240 *et passim*; Mohammed J 'Individual Criminal Responsibility in International Human Rights Law: The Contribution of the International Criminal Court' in Worone A and Vey A (eds) *Carleton Review of International Affairs* (United Nations Society Ottawa 2009)1-14.

¹⁸⁶ Aksar Y *Implementing International Humanitarian Law: From the Ad Hoc Tribunal to a Permanent International Criminal Court* (Routledge London 2004) 137-139.

¹⁸⁷ Human Rights Watch *Universal Jurisdiction in Europe: The State of the Art* (Human Rights Watch vol. 18 No. 5(D) 2006) 1-2.

¹⁸⁸ Ryngaert C *op cit* (n 183)16.

¹⁸⁹ Van der Wilt H 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' 2008(8) *International Criminal Law Review* 229–272.

¹⁹⁰ FIDH-International Federation for Human Rights *Universal Jurisdiction Developments: January 2006- May 2009*.

extend the provisions of the Draft to military peacekeepers.¹⁹¹ Unfortunately there are no cases where a third State has conducted proceedings against a UN peacekeeper for crimes committed on mission, and for which the country of origin of the alleged perpetrator failed to take action. One may consider that it has been because of such a lack of prosecution by a third State that the UN General Assembly requested the Secretary-General to bring credible allegations which reveal that a crime may have been committed by United Nations officials and experts on mission to the attention of the States against whose nationals such allegations are made.¹⁹² The Secretary-General is also tasked with the duty of requesting from those States of nationality indications showing their efforts to investigate and, where appropriate, prosecute crimes of a serious nature by their nationals.¹⁹³ The UN Secretariat is disposed to assist States for the purposes of such investigations and prosecutions.¹⁹⁴ It would also be judicious to request the UN Secretariat to urge the Host State and the relevant TCCs to collaborate in order to ensure that justice is done.¹⁹⁵ Such collaboration should lead to a hybrid jurisdiction by the two states involved.

7.3.3.5. Hybrid jurisdiction

To circumvent all difficulties related to the territorial jurisdiction of the Host State, as well as the reluctance of TCCs effectively to exercise criminal jurisdiction over crimes committed abroad, and to make sure that justice is done and is seen to be done according to international standards with respect to human rights, the GLE suggested the establishment of hybrid tribunals.¹⁹⁶

¹⁹¹ Torture was committed by peacekeepers during UNISOM.

¹⁹² Report of the Sixth Committee, Sixty-second session, Criminal accountability of United Nations officials and experts on mission, UN Doc. A/62/448 of 21 November 2007, para 9 of the part on recommendations.

¹⁹³ UN Doc. A/62/448 of 21 November 2007 para 9.

¹⁹⁴ *Ibid.*

¹⁹⁵ By a *note verbale* dated 31 December 2008, the Secretary-General drew the attention of all States to resolution 63/119 and requested them to submit, by 1 July 2009, information on the extent to which their national laws establishes jurisdiction, in particular over crimes of a serious nature committed by their nationals while serving as United Nations officials or experts on mission, as well as information on cooperation among States and with the United Nations in the exchange of information and the facilitation of investigations and prosecutions of such individuals. See Report of the Secretary-General, 'Criminal accountability of United Nations officials and experts on mission' UN Doc. A/64/183 of 28 July 2009, para 2.

¹⁹⁶ GLE report A/60/980 para 33.

Hybrid jurisdiction means that a court can be composed of judges and prosecution personnel from inside the Host State as well as from other countries.¹⁹⁷ Such jurisdiction should not depend upon the executive mandate of the UN, but focus upon facilitating the action of the Host State to handle questions relating to crimes committed by peacekeepers.¹⁹⁸ Indeed, examples of such hybrid tribunals existed only to prosecute international crimes,¹⁹⁹ but nothing precludes that tribunals be established to dealing ‘exclusively with domestic crimes, including those committed by peacekeeping personnel, which do not rise to the level of international crimes.’²⁰⁰ One should bear in mind that even where the conduct of a peacekeeper may rise to the level of an international crime, considering the circumstances of its perpetration, it is still, at the same time, a crime under domestic law.²⁰¹

The following section presents some criticism of the Draft Convention. It argues that it needs reformation to include all peacekeeping personnel and their crimes committed where they are deployed, whether these crimes fall within international or domestic law. These need not exclusively be sex-related crimes.

7.4. Other considerations on the Draft Convention

The main reproach to the Draft Convention is that it does not take into account the need for standardisation.²⁰² It leaves out the bulk of perpetrators, especially with regard to sexually-related crimes, whereas the idea behind the creation of the Convention stems from the large-scale perpetration of such crimes by peacekeepers. Why then are the military contingent members not taken into consideration?²⁰³ As a student website puts it, there are glaring gaps

¹⁹⁷ *Ibid.*

¹⁹⁸ GLE report A/60/980 para 33. The UN Transitional Administration in East Timor established Special Panels for serious crimes to try serious criminal offences in Timor-Leste.

¹⁹⁹ GLE report A/60/980, para33 - Examples of such hybrid tribunals are the Special Court for Sierra Leone, the Extraordinary Chambers established in Cambodia to try senior leaders of Democratic Kampuchea [and one should add the Lebanese Special Chambers] (square brackets added).

²⁰⁰ GLE report A/60/980 para 34.

²⁰¹ The territorial criminal jurisdiction does not apply owing to the observation of the *pacta sunt servanda* rule with regard to agreements entered into, and the TCC may still not prosecute because of unwillingness.

²⁰² The fact that different categories of peacekeeping personnel are subject to different standards has lead to the differing consequences for any breach of those norms of conduct. See Report of the Group of Legal Experts on making the standards contained in the Secretary-General’s bulletin binding on contingent members and standardizing the norms of conduct so that they are applicable to all categories of peacekeeping personnel, UN Doc. A/61/645 of 18 December 2006 para 40.

²⁰³ The Convention would apply only to a certain category and not to military contingent members. See also Quénivet N ‘The Dissonance between the UN Zero-Tolerance Policy and the Criminalisation of Sexual Offences on the International Level’ 2007 (7) *International Criminal Law Review* 657-676.

in legal standards and the normative acceptance of internal organisational corruption to the point that peacekeepers are undeterred when committing sexual crimes.²⁰⁴ Such lack of deterrence *vis-à-vis* peacekeepers compromises the ability of the UN to try to advise host countries on human rights standards and the rule of law legitimately.²⁰⁵

This reveals how incomplete the attempt is and why no action will be taken against peacekeepers alleged to have been involved in misconduct against the local population. This strengthens the perceived lack of accountability on the part of soldiers. But one may respond that members of national military contingents are already under the disciplinary and criminal jurisdiction of their contributing countries. Merely inserting provisions in different agreements to the effect that States contributing military personnel to a UN mission will retain criminal and disciplinary jurisdiction over such personnel, does not cause the Troop-Contributing Country whose contingent member is accused of having committed an offence actually to enforce the said jurisdiction. The Draft Convention should, therefore, not deal only with UN officials and experts on mission. It needs improvement to take all scenarios of possible crimes into account and to include all categories of peace operations personnel. It may contain propositions such as those suggested by Rowe, *viz* that all participating states be encouraged to enact domestic law that provides investigation procedures, and especially to allow courts-martial to be established where troops are deployed.²⁰⁶ According to Rowe, it is still necessary for legal proceedings concerning serious crimes to take place within the home State, and the Secretary-General can be informed through the normal monitoring process.²⁰⁷ This means that each and every crime that involves peacekeepers has to be referred to the national courts, which have demonstrated their unwillingness to prosecute nationals for crimes committed outside the borders of their jurisdiction.²⁰⁸ International crimes should not

²⁰⁴ Pallen D 'Sexual Slavery in Bosnia: The Negative Externality of the Market for Peace' available at www.american.edu/sis/students/sword/Back_Issues/3.pdf [last accessed 19 December 2012].

²⁰⁵ Kent VL 'Peacekeepers as Perpetrators of Abuse: Examining the UN's Plan to Eliminate and Address Cases of Sexual Exploitation and Abuse in Peacekeeping Operations' 2005 (14) *African Security Review* 85-92, 86.

²⁰⁶ Rowe P 'United Nations Peacekeepers and Human Rights Violations: The Role of Military Discipline: Responding to Tom Dannenbaum "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers"' 2010 (51) *Harvard International Law Journal* 69-81, 80. This has also been suggested by the Zeid Report. UN. Doc. A/59/710 paras 28, 31, 35.

²⁰⁷ *Ibid.*

²⁰⁸ Odello M *op cit* (n 69) 365; Report of the Special Committee on Peacekeeping Operations and its Working Group at the 2006 substantive session New York 27 February-17 March 2006 (UN Doc. A/60/19 of 22 March 2006) para 65.

be left out of the scope of the crimes covered by the Convention either.²⁰⁹ Another suggestion by Rowe is that the Secretary-General should encourage States to improve disciplinary procedures and that States that do not act upon allegations of crimes by their troops be barred from participation in future operations.²¹⁰ Thus, when a State with a poor record of prosecuting its soldiers for crimes committed during past missions of peace offers troops, the Secretary-General should refuse the offer on the ground of previous and unpunished misconduct by its contingent members.²¹¹ This may cause Troop-Contributing Countries to take all the necessary measures to ensure discipline in the forces and to make sure that prosecution is conducted for misconduct.²¹² This recommendation should, therefore, also be included in the Draft, though it might render it unacceptable to a number of States if not all.²¹³

Another reproach relative to the Draft Convention lies in the attempt to limit possible offences that a peacekeeper may commit to murder, wilfully causing serious injury to body or health, and to sex-related offences.²¹⁴ Sexual behaviour and conduct has not been the only issue plaguing United Nations officials. The UN Secretariat has also expressed the same criticism with respect to the temptation of establishing a finite list of crimes that may be committed by UN officials and experts on mission included in the draft convention.²¹⁵ A convention should not be limited to crimes against the person, or sexual crimes, since the occurrence of instances of gold smuggling and trafficking in weapons in MONUC should prompt the drafters of the convention to devise an instrument applicable to all serious crimes. A complete convention

²⁰⁹ UN Doc. A/62/329 of 11 September 2007 para 39.

²¹⁰ Rowe P *op cit* (n 206) 80.

²¹¹ To date, the action by the UN has consisted in reforms largely limited to the administrative sphere: UN conduct and discipline units now serve in all UN operations; the investigative abilities of the Office of Internal Oversight Services (OIOS) have improved somewhat; the UN's internal system of administrative justice has been rebuilt; the UN has developed the ability to blacklist persons with records of serious misconduct; and States have been encouraged to develop the laws needed to prosecute nationals who serve in UN missions. While these are necessary and useful tools, the lack of criminal accountability remains, accompanied by the realization that these improvements are not enough, either as a punishment or a deterrent. See Durch WJ *et al. Improving Criminal Accountability in United Nations Peace Operations* (Stimson Center Report No. 65 Rev. 1 Washington 2009) xi. The UN Security Council should consider excluding from future operations not only individuals who have committed crimes while serving on peace mission but also countries whose peacekeepers have a history of human rights violations unless they demonstrate a commitment to try to punish their nationals accused of criminal behaviour. See Gardiner N and Groves S 'The United States Must Act to End Abuses by U.N. Peacekeepers' available at www.heritage.org/Research/Reports/2007/01/The-United-States-Must-Act-to-End-Abuses-by-UN-Peacekeepers [last accessed 20 December 2012].

²¹² It is important to note that there is a Code of Conduct for UN peacekeeping missions, but no procedure to hold peacekeepers accountable. The gaps in law have to be filled in by a multilateral convention.

²¹³ Rowe P *op cit* (n 206) 80.

²¹⁴ *Supra* 7.3.2.

²¹⁵ UN Doc. A/62/329 of 11 September 2007 para 37.

must avoid jurisdictional gaps.²¹⁶ As the UN Secretariat indicates, therefore, the convention should avoid any listing of the crimes to be covered. It should also avoid suggesting how crimes should be defined. The Convention should state only that it covers crimes as they are known and defined under the national law of the State asserting jurisdiction punishable by a term of at least two/three years of imprisonment.²¹⁷ If these concerns are adequately dealt with in the drafting process, the envisaged Convention will be worthy to be presented to UN State members for signature and ratification. This Convention is long overdue.

After considering that these mechanisms should not be limited to peacekeeping personnel who are not military contingent members, the present researcher recommends a more special on-site tripartite mechanism to deal with all matters regarding the accountability of peacekeeping personnel. The proposed mechanism has the merits of avoiding the hurdles related to bestowing jurisdiction upon one or the other of the countries immediately involved.²¹⁸ The tripartite mechanism needs the participation of the UN, as sponsor of the mission or operation during which the crime was committed, the Host State as the country on whose territory the crime was committed and whose nationals are the victims, and the TCC as the State of nationality of the perpetrator.

7.5. Proposed form of jurisdiction: Onsite Special Tripartite Court

Since TCCs have shown unwillingness to prosecute personnel involved in alleged criminal acts effectively, which reluctance should not be underestimated,²¹⁹ and considering the fact that the holding of the prosecution far away from the sources of evidence and witnesses may prove inefficient, it seems judicious to approach the matter in a way that satisfies the parties involved.²²⁰ From this perspective, owing to the practical difficulties of gathering evidence and the summoning of witnesses, which national authorities face when prosecuting

²¹⁶ *Ibid.*

²¹⁷ UN Doc. A/62/329 of 11 September 2007 para 3739.

²¹⁸ A tripartite on-site criminal court is needed to remedy the problems of the rotation of alleged perpetrators, the non-recourse to DNA samples as evidence, and the fact that Troop Contributing Countries are not ready to use their own resources to investigate allegations. For the non-requirement of DNA and limitation of investigations of sexual offences and abuses, see Bailliet MC 'Examining Sexual Violence in the Military within the Context of Eritrean Asylum Claims Presented in Norway' 2007 *IJRL* 471-510, 494-5.

²¹⁹ Odello M *op cit* (n 69) 365.

²²⁰ There is a need to bring an end to the exclusion of rape and other forms of sexual violence from investigation and from prosecution as war crimes. The investigation and presentation of the evidence relating to this kind of sexual violence is in the interests of justice and of the victims. See *Prosecutor v. Jean-Paul Akayesu* Case No. ICTR-96-4-T (2 September 1998) para 417.

peacekeepers for acts that may transgress International Criminal Law or the domestic Criminal Law of the Host State, the present author suggests the creation of an *on-site special tripartite Court* which will be explored in this thesis.

There has been a recommendation that Troop-Contributing Countries should establish on-site courts in the country where the alleged offences were committed²²¹ but this is not a tripartite court and may be criticised as being insufficient mechanism to deal with the problem. Such a mechanism would afford immediate access to witnesses and evidence in the mission area, and would also demonstrate (to both the peacekeeping mission and the local community) a strong commitment to the fact that perpetrators will be accountable for their acts.²²² On-site courts martial are envisaged as an enforcement of the Status-of-Forces Agreement that leaves legal and disciplinary action against the peacekeepers, as members of national military contingents, to the Troop-Contributing Countries.²²³ This means that each TCC is required to set up a court in the country where criminal acts were committed by military peacekeepers.²²⁴ The difficulties of collecting evidence and summoning witnesses will be overcome, but it is foreseeable that the difficulties of language translation will not be resolved as easily.²²⁵ How does this open access to the witness protected confidentiality? It should not be overlooked that holding peacekeepers accountable for sexual violence is important for the credibility of the mission, which, in turn, is essential to the mission's effectiveness, but the mission has to make sure confidentiality remains.²²⁶ What happens if a state is not ready to set up or provide personnel for an on-site court martial since no national legislation provides for this? The drawbacks of not being able to conduct an on-site court martial dates back half a century as alluded to by the Secretary-General almost 50 years ago in his report entitled 'United Nations

²²¹ UNGA *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations* (UN Doc. A/59/710) para 35 (hereinafter Zeid Report).

²²² Zeid Report para 35. See also Defeis EF 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' 2008 (7) *Washington University Global Studies Law Review* 185-214, 197.

²²³ Model SOFA UN Doc. A/45/594 of 9 October 1990 para 47 (b).

²²⁴ In August 2007, a South African military court found Air Force Sergeant Philippus Jacobus Venter guilty of raping and murdering a 14-year-old girl and assaulting a Burundian security guard while serving as a peacekeeper in Burundi in 2004. He was sentenced to 24 years' imprisonment. See US Bureau of Democracy Human Rights and Labor 2009 *Country Reports on Human Rights Practices-South Africa* 11 March 2010 available at www.state.gov/j/drl/rls/hrrpt/2009/af/135977.htm [last accessed 7 July 2011]. Also Department of State *Country Reports on Human Rights Practices for 2007 volume I Report submitted to the Committee of Foreign Affairs U.S. House of Representatives and the Committee of Foreign Relations U.S. Senate* (August 2008) 513.

²²⁵ See Otto H 'SA soldier facing murder charge in Burundi' available at <http://www.iol.co.za/news/africa/sa-soldier-facing-murder-charge-in-burundi-1.267660> [last accessed 21 December 2012].

²²⁶ Bastick M, Grimm K & Kunz R *op cit* (n 161) 173.

Emergency Force: Summary study of the experience derived from the establishment and operation of the Force'²²⁷ which stated, 'Those countries which remain committed to participating in peacekeeping operations but whose legislation does not permit on-site courts martial should consider reform of the relevant legislation.'²²⁸

Why not make it possible and provide that even the non-military personnel of a country that has established an on-site criminal court will be arraigned before such a court, i.e. that the latter on-site court be enabled to adjudicate matters relating to the conduct of non-military personnel? Indeed, regarding non-military personnel, such as peacekeeping staff, repatriation is the most commonly used disciplinary measure in the case of misconduct.²²⁹ Since this process and its implications are not properly explained in the Host State, it is very often perceived as a simple 'removal' of the perpetrator without any repercussions and as a means of securing impunity for him or her.²³⁰ This is why Bastick, Grimm and Kunz are of the opinion that:

Whilst protecting the confidentiality of victims and witnesses, missions should provide information to the host community on how allegations of sexual exploitation and abuse are being handled, and explain the outcomes of investigations to the victim and other involved persons, whether local or other international staff. It may be appropriate for a mission's Special Representative of the Secretary-General, a Force Commander, a Police Commissioner or another person in authority to make a public announcement to the effect that the party/parties concerned has/have been removed from the mission and are being punished, so that the community can see that appropriate action is being taken.²³¹

It is clear from the abovementioned quotation that if the Secretary-General waives a peacekeeper's immunity to allow the host country to prosecute such accused peacekeeper, an important barrier may still exist in the viability of the judicial system of the country in which the relevant peacekeeping mission is deployed.²³² The Host State could be in such a situation that its legal system is not able to exercise criminal jurisdiction to a satisfactory level, with or without international assistance.²³³ So, as the report of the group of legal experts rightly states, jurisdiction is not an indivisible concept to be pinned to a specific country. It

²²⁷ Zeid Report para 35 footnote 5.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Bastick M, Grimm K & Kunz R *op cit* (n 161) 173 -174.

²³² GLE report A/60/980 para 40

²³³ *Ibid.*

encompasses various activities: investigations, adjudication, and detention of persons which can be shared.²³⁴ Two or more States can, therefore, share the exertion of the different but mutually supportive aspects of criminal jurisdiction.²³⁵ For example, the authorities of the Host State may be able to carry out the investigation and prosecution of offenders satisfactorily but its custodial institutions may be inadequate for imprisonment.²³⁶ In such cases, the Host State investigates and prosecutes the person, but on conviction, he or she is returned to the State of nationality to serve the sentence of imprisonment under appropriate arrangements for the transfer of prisoners.²³⁷ If, on the other hand, the judicial system of the Host State is not functioning to a satisfactory level and another State has to conduct the trial, it may still be possible for the investigatory authorities of the Host State to investigate the alleged crime, with or without assistance.²³⁸

That is why, for more efficacy and neutrality, the present study considers that it is possible to set up credible criminal courts in the Host State but a proper multilateral convention is needed in this regard. The present researcher therefore suggests that the composition of such courts must be tripartite, i.e. involving the United Nations, the Host State, and the Troop-Contributing Countries. This can ensure witnesses, perpetrators, and the population that the UN is committed to upholding the rule of law. The three parties involved have to cooperate in the investigation, adjudication, and detention. This concept which is believed to be a valuable solution will now be addressed in the sections below and will conclude, in the last chapter of the thesis, with possible draft legislation by the present researcher which could be utilised to close the current *lacunae* existing in International Criminal Law.

7.5.1 Investigation of crimes committed by peacekeepers.²³⁹

It is firstly submitted that the chief investigator who will interact with witnesses may be a person chosen by the Host State. He or she must be assisted by investigators from the UN and the Troop-Contributing Countries. The findings of the investigation will need to be discussed

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ GLE report A/60/980 para 41

²³⁷ *Ibid.*

²³⁸ GLE report A/60/980 para 42.

²³⁹ The recommendation that the investigative body be staffed by experts who have had experience in sex crime investigations, particularly those involving children (Zeid Report para 36) is commendable but, as the Secretary-General has remarked, the experience of MONUC proved that other criminal allegations of a different nature do exist. Investigators must work correctly and need skills in investigating crimes of any kind.

collegially, and the action to be taken decided thereafter. The benefits of such a mechanism of cooperation may be, as conceived by the UN investigative service, deterrence and commitment to accountability.²⁴⁰ The UN OIOS investigations manual begins by giving the function of any investigation and, thereafter, the tools for collecting facts. In executing investigating function properly, investigators can achieve purposes beyond simply collecting facts. In particular:

- Deterrence against possible impropriety. Individuals who may be inclined to act improperly are deterred by the fact that such conduct will be subject to effective investigation.
- Commitment to accountability. The process of investigating matters of possible employee misconduct is a function of the internal accountability system in the United Nations. Also, as investigations are conducted into other categories of personnel engaged in United Nations activities, it is important for individuals, beneficiaries and Member States to see that there are consequences for misconduct. This requires a robust capacity to establish facts so that there will be consequences for this misconduct which is critical for achieving accountability.²⁴¹

It is clearly evident from the above quotation that a further advantage of involving the investigative authorities of different States is the benefit to the criminal justice practitioners of the host country, as well as of the other States involved, of conducting investigations properly. In fact, it seems unrealistic today to confine all criminal investigations or prosecutions related to peacekeeping personnel to one country, be it the one of nationality of the individuals alleged to have committed an offence or of the Host State. Mutual legal assistance in investigations, prosecutions, and judicial proceedings is, therefore, crucial, and the Convention that will be signed and ratified to this effect should formalize this necessity. As for joint investigations in matters regarding terrorism,²⁴² parties or states involved are immediately informed and this could prevent any double expense in trying to verify the findings of the investigating authority.²⁴³ The possibility of anonymous testimony by a witness, if there are grounds to believe that the person concerned would otherwise be exposed to a serious danger to his or her life, health, well-being, or freedom, must be granted, and the

²⁴⁰ UN OIOS *Investigations Manual* (Investigative Division March 2009) 1.

²⁴¹ *Ibid.*

²⁴² United Nations Office on Drugs and Crime (UNODC) *Vienna Manual on International Cooperation in Criminal Matters related to Terrorism* (United Nations New York) 2009, 142.

²⁴³ *Ibid.*

Convention must provide for such an eventuality.²⁴⁴ If the UN, the Host State, and the Troop-Contributing Country conduct investigations jointly, there is no need to ask assurances from the TCC that it will prosecute the perpetrator or inform the host country as to the outcome of proceeding since the subsequent steps of action are decided together. Referrals would no longer exist. In the extant system, when the UN requests information as to the action taken or makes a request for assistance, the states concerned may not respond.²⁴⁵

7.5.2 Prosecution relating to crimes committed by peacekeepers.

The second aspect which needs to be considered relates to the prosecution. Collegiality must be the norm in the decision to charge and in the conduct of proceedings before the tripartite on-site court. Here the chief president authority may come from the UN, and, preferably, he or she must not be a member of the mission so as to avoid possible bias. The other judges may come from the States concerned. With respect to the person being prosecuted, however, if such a person is a member of a military contingent, it should be possible to include high-ranking military members trained in legal matters. They may sit as assessors. The majority judgment must be taken as the decision of the court.²⁴⁶

7.5.3 Detention of suspected perpetrators.

Thirdly, according to the International Covenant on Civil and Political Rights which provides for the right for anyone deprived of his liberty by arrest or detention to approach a court, in order that the approached court may decide without delay on the lawfulness of his detention and order his release if the detention is found to be unlawful.²⁴⁷ The same principle applies if

²⁴⁴ Compare section 162 of the Austrian Criminal Code, cited in Report of the Secretary-General 'Criminal accountability of United Nations officials and experts on mission' (UN Doc. A/64/183 of 28 July 2009) para 32.

²⁴⁵ See SG Report on Criminal Accountability UN. Doc. A/63/260, paras 69-70 and UN Doc. A/64/183 of 28 July 2009 para 63. It seems noteworthy to point to the prosecution by US military courts of Sergeant Frank J. Ronghi for having raped and murdered an 11-year old Albanian girl called Merita Shabin in Kosovo. See *U.S. v. Ronghi* 60 M.J. 83 (A.A.F. 2004). The case is similar to that of the raping and murdering of a Burundian 14-year girl, except that the outcome of the prosecution of the latter has never been published.

²⁴⁶ Since this purported tripartite model is nowhere provided for, an improved convention relating to criminal accountability of peacekeepers must not leave the question unresolved.

²⁴⁷ Article 9(4) of the *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.

the person (a peacekeeper) is detained awaiting trial. He or she must be assured of the lawfulness of his or her detention. The detention referred to here is ‘preventive detention’.²⁴⁸

As far as preventive detention is concerned, UN officials and experts on mission are generally immune from such an action. Indeed experts on mission are accorded the necessary privileges and immunities for the discharge of their functions, including immunity from personal arrest and detention.²⁴⁹ They are also immune from legal process of every kind in respect of words spoken or written and acts perpetrated by them in the course of the performance of their mission.²⁵⁰ But the privileges and immunities are not for individual personal benefit.²⁵¹ This is why the UN Secretary-General is vested with authority to waive them in order for the bearer to be prosecuted.²⁵²

Even when the criminal conduct of a peacekeeper is not duty related, it is still in violation of the mandate of the peacekeeper as it is still performed in the course of the mission.²⁵³ Even where acts are committed when off duty, the peacekeeper’s acts cannot lead to the detention of the alleged perpetrator pending the investigation by Host State authorities.²⁵⁴ But, if the envisaged Convention deems it necessary, one might suggest that such detention be one of the powers bestowed upon the Troop-Contributing Country concerned. In any case, where the circumstances so warrant, the nationality of the offender or alleged offender will determine

²⁴⁸ A law of preventive detention sanctions the confinement of individuals in order to prevent them from engaging in activities considered injurious to the community. Preventive detention is also used to ensure that a person against whom an investigation is being conducted does not suppress elements of evidence or escape from investigation and prosecution. See Kakule Kalwahali C *De l’indemnisation des victimes d’une détention préventive injustifiée en droit congolais* (Mémoire de licence (unpublished LLB thesis ULPGL-Goma 2000) 1 *et seq.* The International Committee of the Red Cross favours the term ‘internment,’ which it defines as ‘deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned’. See Pilloud C *et al. International Commission of the Red Cross: Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 875 cited by Elias SB ‘Rethinking ‘Preventive Detention’ From a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects’ 2009 (41) *Columbia Human Rights Law Review* 99-210, 111.

²⁴⁹ S 22 of Convention on the Privileges and Immunities of the United Nations.

²⁵⁰ *Ibid.*

²⁵¹ S 23 of Convention on the Privileges and Immunities of the United Nations.

²⁵² *Ibid.*

²⁵³ UN officials and experts on mission are required to conduct themselves at all times (both on and off duty) in a manner befitting their status as members of the mission and they ought to carry out their duties and regulate their conduct solely with the interest of the United Nations in view. See UNGA *Making the standards contained in the Secretary-General’s bulletin binding on contingent members and standardizing the norms of conduct so that they are applicable to all categories of peacekeeping personnel: Note by the Secretary-General* (UN. Doc. A/61/645 of 18 December 2006) para 19 (a).

²⁵⁴ It is only when substantiation of criminal conduct can be given to the Special Representative of the UN Secretary-General that arrest can be made and the arrested person handed over to his/her contingent for appropriate disciplinary action. See Model SOFA para 41.

the troop contributing-country expected to take the offender into custody or apply other measures to ensure that person's presence at trial. Custody and other possible measures may be provided for in the law of that State must be implemented in a manner respectful of the rights of the person, and must, therefore, not entail treatment that could be judged to be inhumane or torturous.²⁵⁵

Detention consequent to the finding of the tripartite court that the accused is guilty as charged (i.e. the sentence of imprisonment) must be executed in the home country. Pecuniary sanctions against the perpetrator may be executed by the UN, especially when these sanctions consist of reparation and damages to the victims. The settlement of such obligations can be done after negotiations with the host country that assumed the victims' rights, but an independent NGO may be most suited to the handling of victims' rights.

7.6 Conclusion

The lack of sanctions relating to peacekeepers accused of misconduct is, by implication, directly related to the absence of a deterrent whereby fear is signalled with regard to the possibility for other peacekeepers of being caught.²⁵⁶ Because they are deployed under a UN flag means that peacekeepers represent the United Nations itself, which means in turn that they serve a greater and higher cause than their own selves.²⁵⁷ They should, therefore, not conduct themselves as simple citizens on a tour.²⁵⁸ United Nations peacekeepers on mission need to become aware of their special status and the effects of their actions. Being officials who serve the host country citizens, they are precluded from taking advantage of their position.²⁵⁹

The allegations of crimes by peacekeepers discussed in this thesis are predominantly committed in under-developed countries, war-torn societies without functioning judicial systems. Victims of actions by peacekeepers have not been acquainted with challenging big organizations such as the United Nations. A clear set of policies, therefore, which are capable of being enforced for *all* personnel would help to clarify how victims within these populations

²⁵⁵ Articles 7 and 10 (1) of the International Covenant on Civil and Political Rights.

²⁵⁶ UN *Criminal Accountability of United Nations and Experts on Mission: Current Situation* available at www.gtmun.org/documents/2008/GA6Topic3currentSituation.pdf [last accessed 30 July 2011].

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

ought to behave when seeking to assert their violated rights.²⁶⁰ The Draft Convention should, therefore, provide some clauses stating that whenever the UN sets up a peace mission, a tripartite court will also be set up in the host country to deal with any criminal act alleged against any member of the peace mission personnel. To such an end, Troop-Contributing Countries have to be required to select among personnel involved in peace missions, persons with legal training in case a national of that country may be said to have committed a criminal act where they are deployed.

UN officials and experts on mission are obliged to respect Host State laws and, where applicable, the Host State has criminal jurisdiction over such UN personnel. Thus, the current Draft Convention covers only UN officials and experts on mission. It also limits the exercise of jurisdiction over crimes by these UN personnel to national courts. This is why it requires State parties to legislate accordingly. Legislation should include establishing jurisdiction based on passive personality²⁶¹ and the stateless status of the victim residing within the State establishing such jurisdiction.²⁶² It has been argued in the discussion that where it may be ascertained that the Host State is not able to exercise its jurisdiction, the sending State should be asked to intervene because the UN has no criminal jurisdiction.²⁶³ Upon such understanding, the Troop-Contributing Country can prosecute peacekeepers for crimes committed abroad, and a third State, which is not a Host State or Troop-Contributing Country will also have jurisdiction. If military personnel suspected of war crimes, therefore, have to travel to a third State, they would no longer be able to rely on the exclusive criminal jurisdiction of the State of their nationality. Since sexual offences, especially rape, are notoriously hard to prosecute successfully even on a domestic level despite the frequency of their occurrences, when drafting a convention to address crimes of the kind, all measures need to be taken to ensure that the difficulties regarding proof of the crimes and the question of the rotation of the alleged perpetrators are dealt with in a practical manner.²⁶⁴

²⁶⁰ *Ibid.*

²⁶¹ Article 4(2) (a) of the Draft Convention.

²⁶² Article 4(2) (b) of the Draft Convention. The *passive personality principle* establishes jurisdiction based on the nationality of the victim.

²⁶³ By sending State is understood the country of the nationality of the alleged perpetrator. It has the same meaning as Troop-Contributing Country, but the latter relates more to military and police personnel.

²⁶⁴ Pearce H 'An Examination of International Understanding of Political Rape and the Significance of Labeling it Torture' 2003 (14) *International Journal of Refugee Law (IJRL)* 534-560.

Ensuring accountability for actions by the personnel international missions is crucial to the success of such UN operations of peace and to the re-building of the judicial system of the affected country. All personnel of the mission, military or civilian, need legal lights to guide them for any conduct that entails either accountability at the international or domestic level. The analysis of the Draft Convention has underlined the inadequacies of the provisions related to jurisdiction of courts which are physically remote from the evidence at the scene and from local witnesses. If these issues are not addressed, the Convention will be another missed opportunity for safeguarding the integrity of justice and for establishing a deterrent for future misconduct. An effective system of accountability for peacekeepers is possible by means of adequate legislation. The current Draft does not provide for effective accountability because it is restricted to sexual crimes committed by certain categories of UN personnel, leaving aside the military contingents that constitute the highest percentage of perpetrators. There is no other means to guarantee adherence to humanitarian law by peacekeepers than ensuring that, when they commit crimes, investigation, and prosecution will follow. Fear of criminal and disciplinary punishment, in addition to the record of past convictions, can be an effective deterrent for soldiers.²⁶⁵

It has been shown that states are reluctant not only to prosecute their troops accused of misconduct during peace operations, but also that they may actively prevent such prosecution. The example is that of the Italian authorities with respect to crimes committed in Somalia and elsewhere by Italian soldiers.²⁶⁶ Although accounts of abuses can reach the media and NGOs, follow ups by the UN do not exist, and investigations by the investigating division of the UN Office of Internal Oversight Services can only recommend repatriation and this only where evidence suggests that a case exists. Knowing that investigations and action by Troop-Contributing Countries are glaringly lacking, the drafting of a convention to remedy the situation must explore all options and retain the most efficient and binding of those options. Thus, the proposed on-site tripartite²⁶⁷ formula can successfully end the impunity of

²⁶⁵ Wolfrum R and Fleck D 'Enforcement of International Humanitarian Law' in Fleck D (ed) *The Handbook of International Humanitarian Law* 2 ed. (Oxford University Press Oxford 2008) 675-722, 687.

²⁶⁶ Gaeta P 'War Crimes Trials before Italian Courts: New Trends' in Fischer H, Kreß C & Lüder SR (eds) *International and National Prosecution of Crimes Under International Law: Current Developments* (BWV Berlin 2004) 751-768, 753. Italian, Dutch, and Croatian peacekeeping troops abused girls as young as nine years in the UN Mission in Ethiopia-Eritrea, and no single case exists of their prosecution for such crimes. See Pallen D 'Sexual Slavery in Bosnia: The Negative Externality of the Market for Peace' available at www.american.edu/~sis/students/sword/Back_Issues/3.pdf [last accessed 19 December 2012] 36.

²⁶⁷ Some clauses are suggested in chapter 8 to ameliorate the Draft Convention.

peacekeepers guilty of misconduct. This does not exclude the possibility of using DNA and fingerprinting technology in order to gather irrefutable evidence to render indisputable decisions.²⁶⁸ The advantage of prosecuting in the Host State has been indicated. It not only plays a deterrent role that exists in every prosecution, but also avoids or overcomes the unwillingness manifested by Troop-Contributing Countries and the lack of follow up on the part of the Secretary-General, as well as the importance of making the outcome of the proceedings public so that victims and witnesses are informed and are able to see justice done on their behalf.²⁶⁹ This cannot be achieved by applying the extant framework within which the Troop-Contributing Countries pledge to prosecute perpetrators back home and give assurances to the UN Secretary-General that they will keep him informed regarding the outcome of any prosecution of peacekeepers, and yet, in practice, do not fulfil this undertaking. It has been shown that such information is not being sent to the Secretariat, and the assurances made are not binding.²⁷⁰ The analysis of the Draft has demonstrated the pressing need for coherent, cogent, and practical legislation. The next chapter will suggest solutions in the form of draft legislation by the present researcher to close the *lacunae* which currently exist with regard to peacekeepers who manage to escape accountability for their crimes.

²⁶⁸ See Defeis EF 'U.N. Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' 2008 (7) *Washington University Global Studies Law Review* 185-214, 197.

²⁶⁹ Compare Hampson FJ & Kihara-Hunt A 'The Accountability of Personnel Associated with Peace Support Operations' in Aoi C, de Coning C & Thakur R (eds) *Unintended Consequences of Peace Support Operations* (UN University Press Tokyo 2007) 195-220, 209.

²⁷⁰ Hunter L 'Should We Prosecute the Protectors? Holding Peacekeepers Accountable in Cases of Sexual Exploitation and Abuse' in Worone A & Vey A (eds) 2009 (1) *Carleton Review of International Affairs* 15-34, 24-25.

CHAPTER VIII

GENERAL CONCLUSION

8.1 Synthesis

The study undertaken in this thesis has demonstrated that conduct by the UN personnel deployed in Africa amounted to criminal law violations of not only the domestic law of the countries where these peacekeepers were on mission and the domestic law of the States of nationality, but also International Criminal Law. It has focused on three of the UN peace missions deployed in Africa. It has been shown that the substantive domestic Criminal Law of these different systems is applicable to the conduct of peacekeepers. The study addresses the issues of jurisdiction over peacekeepers and their accountability for the crimes committed during UN missions of peace.

Chapter one set forth the contextual background in which the deployment of peacekeepers takes place, especially in Africa. It stated that the deployment of a UN mission of peace is generally consecutive to the existence of armed conflicts and political instability during which horrendous crimes and barbaric acts are usually committed against civilians. The most paradoxical thing is that UN personnel have been accused of committing crimes, especially sexual crimes, murder, torture, and assault against the already victimized civilians. Although the seriousness of those crimes has been established, the crimes of peacekeepers have been kept quiet.¹ It has been noted that in most post-conflict peace operations, serious human rights abuses by peacekeepers, such as sexual exploitation and abuse have, been committed by almost all categories of UN peacekeeping personnel, members of the military, the civilian police, and civilian servants.²

It has been shown that, under the current international law and the UN Model Status-of-Forces Agreement, criminal jurisdiction over peacekeepers rests with their sending States.³ Most of the allegations of crimes by UN personnel have been investigated by the United

¹ UNDPKO *Public Information Guidelines for Allegations of Misconduct Committed by Personnel of UN Peacekeeping and Other Field Missions* (DPKO/MD/03/00996 DPKO/CPD/DPIG/2003/001).

² Jennings KM and Nikolić-Ristanović V *UN Peacekeeping Economies and Local Sex Industries: Connections and Implications* (MICROCON Research Working Paper 17 Brighton 2009) 20. Not all places are considered as 'off-limits' so that peacekeepers find ways of continual fraternization. See Dahrendorf N *Sexual Exploitation and Abuse -Lessons Learned Study: Addressing Sexual Exploitation and Abuse in MONUC* (Discussion Paper - United Nations Peacekeeping 2006) paras 53-58.

³ Para 47(b) of the Model Status of Forces Agreement (SOFA) (UN. Doc. A/45/594 of 9 October 1990).

Nations itself, through its Office of Internal Oversight Services.⁴ Future UN missions of peace run the risk of being riddled with similar problems if peacekeepers continue to commit crimes with impunity.⁵ The lack of UN jurisdiction over troops underlines the difficulty of maintaining discipline among military and civil UN personnel.⁶ Even though UN peacekeepers alleged to have committed crimes are nationals of a variety of Troop-Contributing Countries, the discussion in this study has concerned only three of these Troop-Contributing Countries, namely Canada, Belgium, and South Africa, in respect of prosecution of peacekeepers alleged to have committed crimes during UN missions of peace in Africa. It has been argued that all the agreements signed relative to the deployment of any UN mission of peace should include a clause that Troop-Contributing Countries are under an obligation to prosecute and the UN to follow up, and this should be the reason for the Host State consenting to the operation.

From the aforementioned, one realises clearly that chapter one sets out the background of crimes alleged to have been committed by peacekeepers in Africa.⁷ The UN mission in Somalia was the very first peace operation on the African continent that not only failed, but also where criminal conduct by peacekeepers was exposed.⁸ During other operations of peace, however, peacekeeping personnel from a great number of countries are alleged to have perpetrated criminal acts.⁹ Among all the countries whose soldiers were involved in committing criminal acts, Canada and Belgium alone have actually brought their soldiers to justice with respect to the events that happened in Somalia.

Chapter one further sought to elucidate the different concepts used throughout the thesis.¹⁰ Its last part introduced the different topics constituting the headings of the following chapters. These topics ranged from revisiting the three case-study missions, the allegations of crimes and their discussion under the domestic law of the Host State as well as the domestic law of South Africa as a Troop-Contributing Country. Other areas and issue which were investigated

⁴ Supra 2.2.2; 2.2.3 and 5.2.1.

⁵ Ntoubandi FZ *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff Publishers Leiden 2007) 1 quoting Justice Robert H. Jackson, UN Chief Prosecutor during the Nuremberg Trials in his opening statement before the Nuremberg Tribunal, 1945.

⁶ Fleshman M 'Tough UN line on peacekeeper abuses: Action initiated to end sexual misdeeds in peacekeeping missions,' available at www.un.org/africarenewal/magazine/april-2005/tough-un-line-peacekeeper-abuses [last accessed 15 December 2012].

⁷ Supra 1.1.

⁸ Supra 1.2.

⁹ *Ibid.*

¹⁰ Supra 1.3.

relate to whether international criminal law deals with the matter of crimes by peacekeepers, the analysis of the practical problems relating to investigating crimes outside its own jurisdiction, the determination of criminal jurisdiction over peacekeepers, and the exploration of all available avenues which may make it possible for the proceedings to be held within the territory of the Host State.¹¹ The Draft Convention on the accountability of UN officials and experts on mission was discussed before concluding, synthesising the findings, giving recommendations, and proposing some issues for further study.¹²

Since peacekeepers, military and civilian personnel, do commit crimes against the civilian population of the Host State, it has been shown that every Status-of-Forces Agreement and every Memorandum of Understanding should contain specific clauses obligating Troop-Contributing Countries to prosecute and the UN to follow-up in such cases.¹³ Current rules relating to crimes by peacekeepers reflect the traditional position of many States who do not allow other authorities to exercise criminal jurisdiction over their troops.¹⁴ It has been argued that the exclusive jurisdiction over peacekeepers should not let allegations of crimes such as rape, murder, torture, and assault go unpunished. The message sent to the victims in such a case is that there is no avenue to which they may turn and that peacekeepers are above the law, if those who commit crimes are not prosecuted. Contrary to the scenario of peacekeepers not being held accountable for their conduct, members of armed groups must know that, sooner or later, they will be hauled before a national or an international court to account for their criminal acts. The absence of accountability on the part UN peacekeepers suggests that future UN peace operations may be riddled with crimes against the civilian population whose protection was, or should be, one of the reasons for the establishment a peace operation.¹⁵

Chapter two investigated the crimes alleged to have been committed by peacekeepers. It gave an account of those allegations. In this chapter it was shown that rape and other sexual acts of violence, murder, and assault constitute offences under Somali, Burundian, and the Congolese domestic criminal law, but, owing to agreements recognising exclusive jurisdiction over

¹¹ *Supra* 1.7.

¹² *Ibid.*

¹³ This is so in light of the existing mechanism that grants criminal jurisdiction over peacekeepers to the sending State.

¹⁴ Patterson M 'A Corporate Alternative to United Nations *ad hoc* Military Deployments' 2008 *Journal of Conflict and Security Law* 1-18.

¹⁵ Instances of rape, murder and torture, when committed by peacekeepers, may be considered as war crimes.

peacekeepers to Troop-Contributing Countries, these offences cannot be prosecuted under the domestic law of these Host States.

Under Somali law, the discussion revealed that instances of rape and killings constituted the majority of the reported human rights violations in Somalia by peacekeepers and that most of the incidents remaining unreported.¹⁶ Instances of torture and assault were reported regarding members of the UN operation in Somalia and remain specific to that operation.¹⁷ With respect to the UN operation in Burundi, it was shown that reported allegations of crimes by peacekeepers relate to sexual offences, an instance of assault, and one case of murder. It was also highlighted that most of the allegations of crimes committed by members of the peace operation in the Democratic Republic of Congo were sexually related crimes, and that there had also been instances of the pillaging of natural resources and of weapons-minerals trafficking.¹⁸ This chapter highlighted that sexual offences are similar under the legal systems of all the three countries of reference.¹⁹ The main defence to rape that is often raised relates to the key issue of consent. The accused always seeks to establish that sexual penetration was consensual. This is so because, where it can be proved that the parties to a sexual act were consenting adults the crime of rape cannot be established.²⁰ Indeed, consent is a definitional element when it comes to rape, not a ground of justification. Penetrative sex with children, however, is considered to be rape, because a person who has not attained the age of consent is considered not to have understood the nature and scope of the sexual activity he or she is engaging in.²¹ Allegations of rape committed by peacekeepers also involved children incapable of validly consenting to sexual penetration. It was also explained that grounds of justification, such as necessity, superior orders, and self-defence, are not valid defences when it comes to rape.

The crime of murder is a punishable crime under domestic laws of all three Host States. Yet only a few instances of murder have been reported regarding the peace operations in Somalia and in Burundi. No single instance of murder has been reported with respect to the

¹⁶ *Supra* 2.3.1.1.

¹⁷ *Supra* 2.2.1.

¹⁸ *Supra* 2.1; 2.2.4 and 2.3. This conduct was not further discussed because it is specific the sole case of the DRC and has not occurred in Somalia or in Burundi.

¹⁹ *Supra* 2.3.

²⁰ *Ibid.*

²¹ *Supra* 2.3.3.2.

Democratic Republic of Congo.²² It was also noted that prostitution is not a crime in Burundi or in the Democratic Republic of Congo. Save in instances of forced prostitution, therefore, a peacekeeper cannot be prosecuted under the domestic law of those two countries for having engaged the services of a prostitute.²³ Where the prostitute has not reached the age of consent, the person engaging the services of such a prostitute is committing rape. With respect to the Congolese (DRC) domestic law, therefore, a distinction was pointed at regarding the age of consent prior to 2006 and thereafter.²⁴

Chapter two concluded that the domestic law of all three countries would be the applicable law with respect to crimes committed within their territorial jurisdictions. It was shown, however, that peacekeepers could not be prosecuted there, because of the agreements which existed between the Host States and the United Nations, which agreements specifically recognise exclusive criminal and disciplinary jurisdiction to belong solely to the State of origin of the alleged perpetrator.²⁵

Chapter three further discussed sexual crimes and other crimes alleged to have been committed by peacekeepers from the perspective of South Africa as a Troop-Contributing Country. It was shown that the South African legal system distinguishes between rape and compelled rape. This distinction is not encountered in the domestic law of Somalia, Burundi, or the Democratic Republic of Congo. The elements of rape are still, however, similar in all the four domestic legal systems.²⁶ With respect to other sexual offences, it was indicated that, by criminalising the ‘engaging the services of a person 18 years or older’, a person visiting a prostitute commits an offence under the South African law.²⁷ Where it can be proved, therefore, that a peacekeeper from the Republic of South Africa paid for sexual services, he can still be prosecuted before South African courts, although the services were provided by prostitutes in the Host State.²⁸

²² Supra 2.3.1.3; 2.3.2.3; 2.3.3.3.

²³ Supra 2.3.2.2.

²⁴ Supra 2.3.3.2.

²⁵ Supra 2.4.

²⁶ Supra 3.2.1.

²⁷ Supra 3.2.2.

²⁸ In Burundi and the DRC where South African peacekeepers were deployed, prostitution *per se* and visiting prostitutes are not criminal acts.

After noting, during the discussion of the crime of murder in South African law, that no single country exists which does not consider murder as a crime,²⁹ the other notable discussion of chapter three relates to the issue of state liability for failure to prosecute and to prevent.³⁰ Pursuant to that issue, it was indicated that state liability is envisioned only as civil liability³¹ and not criminal liability.³² It was shown that state liability is engaged with respect to actions and conduct of individuals acting in their official capacity as organs of the state.³³ In this regard, some cases were discussed where South African state liability has been invoked, *viz Carmichele*,³⁴ *Duivenboden*,³⁵ *Ewels*³⁶ and *K versus Minister of Safety and Security*.³⁷ Of great importance, it was shown that, within the realm of domestic law of South Africa, there exists an avenue for a victim to sue for damages where the State has failed to prevent harm against him or her. It may, therefore, be considered to be the duty of the State of nationality of victims to exercise any action on behalf of victims.³⁸ With respect to the suing of another state for damages on behalf of its citizens, such an action can be brought only before the International Court of Justice³⁹ which remains the most competent forum to settle disputes between two sovereign States.⁴⁰

Chapter four investigated the issue of identifying crimes alleged to have been committed by peacekeepers in the light of international law. The chapter mentioned the fact that the discussion of those crimes under domestic law did not preclude such crimes being discussed under international law. Indeed, it was highlighted that the criminalization of certain conduct

²⁹ Supra 3.2.3.

³⁰ Supra 3.3.

³¹ If state liability could be considered as criminal, then there would be a myriad action, for the commission of any crime would amount to failure on the part of state actually to safeguard the victim against the acts of other individuals. The state has always a legal duty to protect citizens and their properties. It would also become a collective criminal liability which does not exist in criminal law. When a statute provides that a legal duty to intervene exists, this means that a citizen has a duty to intervene, not the state itself. For more details on the scope of public duties involved, see Ashworth A 'Public Duties and Criminal Omissions: Some Unresolved Questions' 2011 *Journal of Commonwealth Criminal Law* 1-21, 12-15.

³² In common law systems criminal liability for omissions is exceptional and entails individual criminal liability. See *R v West Coroner, ex p Gray* [1988] QB 467. The existence of the legal duty to act may contrast with the principle of legality. See Ashworth A 'Public Duties and Criminal Omissions: Some Unresolved Questions' 2011 *Journal of Commonwealth Criminal Law* 1-21, 12-15.

³³ Supra 3.3.

³⁴ Supra 3.3.2.3.

³⁵ Supra 3.3.2.2.

³⁶ Supra 3.3.2.1.

³⁷ Supra 3.3.2.4.

³⁸ Victims may also ask the UN itself to pay damages, an action that can be fruitful if their State of nationality intervenes. For comparison, see Salmon JJA 'Les accords Spaak -U Thant du 20 février 1965' 1965(11) *Annuaire français de droit international* 468 - 497, 478.

³⁹ On the condition that the State being sued accepts the jurisdiction of the ICJ.

⁴⁰ See articles 34(1) and 36 of the International Court of Justice (San Francisco 1945).

at a domestic level may be dictated to a State in terms of its obligations under International Law. In that case the State incorporates a treaty it has ratified in order for the said treaty to become part of the domestic law. One of a State's obligations under international law includes its obligation to prosecute the perpetrators of international crimes.⁴¹ A state will not fulfil such an obligation if it has not enacted adequate law which gives domestic judicial institutions the competence to apply international criminal law as incorporated into their legal system.⁴² This enables the competent authority to bring persons who commit international crimes to justice before a national court of law and in terms of its enacted domestic laws.⁴³ The domestication of international norms seeks to make sure that the principle of legality is satisfied.⁴⁴

In this same chapter an analysis of the allegations of crimes committed by peacekeepers was undertaken from an International Criminal Law perspective. This analysis demonstrated that the crimes alleged to have been committed by peacekeepers could not amount to genocide or to crimes against humanity on the ground that the State element, which is characteristic to these two categories on international crimes, is lacking. The chapter argued, however, that crimes by peacekeepers can amount to the third category of international crimes, i.e. war crimes.⁴⁵ From there, the following discussion related to the definition and presentation of the core international crimes, *viz* genocide, crimes against humanity, and war crimes. It further pointed out that crimes by peacekeepers may amount to war crimes, which are international crimes, i.e. crimes over which an international tribunal or court has jurisdiction. Upon the basis of universal jurisdiction, a third state, which is not party to the agreements recognising exclusive criminal jurisdiction over peacekeepers to a Troop-Contributing Country, can assert its jurisdiction over crimes by peacekeepers. It was pointed out, however, that not a single case of prosecution of a peacekeeper for a crime committed while on UN mission had ensued whether by an international criminal tribunal or by a third state criminal court. The possibility of such prosecution does, however, exist as was elucidated in this chapter.

⁴¹ Cassese A *International Criminal Law* 2ed. (Oxford University Press New York 2008) 3.

⁴² Cryer R *et al. An Introduction to International Criminal Law and Procedure* 2nd ed. (Cambridge University Press, Cambridge (UK) 2010) 63.

⁴³ Implementation of the Rome Statute of the International Criminal Court Act No. 27, 2002 of 18 July 2002; see also Article 3(d) of the Act.

⁴⁴ The principle of legality means, in domestic law as in international law, that no conduct can be subject to criminal sanction unless it is prohibited by law. see Boas G, Bischoff JL & Reid NL *Elements of Crimes under International Law: International Law Practitioner Library Series Volume II* (Cambridge University Press Cambridge (UK) 2008) 8.

⁴⁵ *Supra* 4.2.

In chapter five, the issue of the investigation of the crimes by peacekeepers and the problems related thereto were addressed. In the presentation of the problems, obstacles, or barriers relating to investigating crimes by peacekeepers, this chapter of the thesis noted firstly the fact that the law pertaining to the issue of conduct by peacekeepers recognises jurisdiction over peacekeepers as belonging to the Troop-Contributing Country. This is absolutely the case with respect to members of the military contingents of a UN force.⁴⁶ The exercise of such jurisdiction is not possible without a prior investigation. Thus, it is required that the Troop-Contributing Country concerned conducts an investigation outside its boundaries, in the Host State.⁴⁷ The chapter indicated that conducting an investigation in a foreign country may meet with hurdles amongst which are the fact that the investigating authorities may be reluctant to use state money for issues arising outside the boundaries of the said state, and also the fact that such an action may actually be costly.⁴⁸ This very often explains the reluctance of the State whose soldiers are alleged to have committed crimes to initiate investigation likely to lead to prosecution. The only existing investigative reports are those of the UN Office of Internal Oversight Services with respect to allegations of sexual exploitation and abuse by peacekeepers. It was noted that, while the UN may conduct the investigation, it still, however, has no criminal jurisdiction over the investigated individuals because, as an international organisation, the UN does not have a tribunal to judge its peacekeeping personnel. Indeed, it was highlighted that the UN has no criminal tribunal to prosecute those against whom there is substantiated proof that they have committed crimes. The UN may only repatriate the suspect to the country of origin.⁴⁹ It is nowhere provided that the Troop-Contributing Country will inform the OIOS regarding the outcome of any prosecution or with respect to the decision of non prosecution of the troop concerned. It was suggested, therefore, that the country that has criminal jurisdiction over the crime should deploy its investigating authority. The Troop-Contributing Country, its courts and laws, must be used to conduct investigations and prosecutions against each and all of its nationals when they commit a criminal offence. With respect to South Africa, no investigating team has been set up to consider the allegations against members of the SANDF deployed with MONUC and ONUB.⁵⁰

⁴⁶ Supra 5.1.

⁴⁷ Supra 5.2.

⁴⁸ Supra 5.2.2.

⁴⁹ Supra 5.2.1.3.

⁵⁰ Supra 5.2.2.4

To overcome the barriers relating to investigating crimes outside the jurisdiction of a State, cooperation between States and the involvement of the Host State was reiterated as being an absolute necessity.⁵¹ It was shown that no matter which State has criminal jurisdiction over peacekeepers the investigation may be conducted by the Host State, the prosecution by an impartial on-site tripartite tribunal, and the serving of the sentence undertaken in and by the State of origin of the person prosecuted.⁵² Such a system has the merit of making sure that the interests of the victims are served, especially the right to know that justice is done and is seen to be done with their involvement in the process of establishing the truth.⁵³ To conduct prosecution far from the place where the crime occurred, without the involvement of the victims, amounts to a denial of the rights of victims⁵⁴, and the legal and other forms of assistance to victims seem not to be available in such circumstances,⁵⁵ although the assistance and support as such does not take the place of the individual responsibility of the alleged perpetrator.⁵⁶

Chapter six analysed the existing agreements with respect to jurisdiction over peacekeepers.⁵⁷ Since handling crimes by peacekeepers is regulated by agreements between the UN and the Host States as well as with the States contributing troops,⁵⁸ the Status-of-Forces Agreement and the Memorandum of Understanding indicate which State has primary responsibility.⁵⁹ Both agreements exempt the members of the UN force, to a certain extent, from the criminal

⁵¹ Supra 5.2.3; 5.2.4.

⁵² An impartial onsite tripartite court is advocated because '[w]hile contributing States have a legal obligation to carry out national investigations and prosecutions, the lack of an international accountability mechanism means such national processes are often not fully effective'. See Sheeran SP *Contemporary Issues in UN Peacekeeping and International Law: Briefing Paper IDCR-BP-02/11* (Institute for Democracy and Conflict Resolution (IDCR) University of Essex 2011) 7.

⁵³ Supra 5.3.

⁵⁴ Supra 5.3.2.

⁵⁵ UNGA *United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel* (UN Doc A/RES/62/214 of 7 March 2008) para 6 *et seq.*

⁵⁶ Para 14.

⁵⁷ Supra 6.1.

⁵⁸ By entering these agreements, the Host State renounces its criminal jurisdiction over criminal acts committed within its boundaries, *pacta sunt servanda*. See article 26 of the Vienna Convention on the law of treaties 1969; Yoon-Ho AL 'Criminal Jurisdiction under the U.S.-Korea Status of Forces Agreement: Problems to Proposals' 2003 (13) *Journal Transnational Law & Policy* 213-249, 245.

⁵⁹ According to the UN Model Status-of-Forces Agreement for Peacekeeping Operations (UN-Doc. A/45/594 of 9 October 1990), Troop-Contributing Countries have exclusive criminal jurisdiction over crimes committed by soldier peacekeepers. TCC apply their national law which must have integrated international humanitarian law. See also Engdahl O *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International law* (Martinus Nijhoff Publishers Leiden 2007).

jurisdiction of the Host State.⁶⁰ Under some circumstances,⁶¹ however, or on the condition that the Secretary General waives the immunity of non-military peacekeepers, the Host State retains some jurisdiction over civilian UN personnel and jurisdiction with respect to civil proceedings.⁶² The jurisdiction of the Host State, its courts and law, over crimes committed by peacekeepers is, in principle, obvious since ‘when a criminal offence has been committed within the territory of a State, that State shall establish its jurisdiction.’⁶³ The existence of this residual criminal jurisdiction should not distract from the obligation of the Host State to observe the Status-of-Forces Agreements regarding criminal jurisdiction over peacekeepers and the limitation⁶⁴ that such Status-of-Forces Agreements impose on the national law and courts.⁶⁵ The difficulty of distinguishing acts amounting to violations of domestic law *per se* and those constituting violations of laws and customs of war was underlined, as well as the fact that it is not indicated whether the declaration of observance of local laws extends to all members of UN Force and whether the violations of such local laws constitute criminal offences under exclusive jurisdiction of the sending State.⁶⁶ The conclusion was that violations of local laws not amounting to international crimes or crimes against their code of military discipline might remain unpunished when perpetrated by soldiers.⁶⁷ In such instances, if the decision is that the person involved should be prosecuted, the Host State should have jurisdiction over that peacekeeper on the basis of the territoriality principle.⁶⁸

⁶⁰ Zwanenburg M ‘The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?’ 1999 (10) *European Journal of International Law* 124-143, 127.

⁶¹ The Host State can take into custody any person who has committed a criminal act. See para 43 of the Model SOFA (UN Doc A/45/594 of 9 October 1990).

⁶² The reference is to non-military personnel of a peace operation but it can also conduct civil proceeding relating to any member of the peace operation, provided that the SRSG be informed to assure the said proceedings are not duty-related acts. See paras 47(a) and 49 of the Model SOFA (UN Doc A/45/594 of 9 October 1990).

⁶³ Frieberger J ‘Search for Criteria Determining the Competent Jurisdiction to Carry out Investigations and Prosecutions in the European Union in the Context of Mutual Recognition of Decisions in Criminal Matters’ in De Kerchove G and Weyembergh A (eds) *L’espace pénal européen : enjeux et perspectives* (Institut d’Etudes Européennes Bruxelles 2002)119-124, 122.

⁶⁴ Respect of the doctrine of *pacta sunt servanda*. See article 26 of the Vienna Convention on the law of treaties 1969; Yoon-Ho AL ‘Criminal Jurisdiction under the U.S.-Korea Status of Forces Agreement: Problems to Proposals’ 2003 (13) *Journal Transnational Law & Policy* 213-249, 245; van Wyk JA *et al.* ‘The International Politics of Nuclear Weapons: A Constructivist Analysis’ 2007 (35) *Scientia Militaria: South African Journal of Military Studies* 23-45, 26.

⁶⁵ Para 47 (a) UN Model SOFA (UN. Doc. A/45/594).

⁶⁶ *Supra* 6.2.

⁶⁷ *Supra* 6.4.

⁶⁸ *Supra* 6.3.

To the question of jurisdiction where the conduct falls within the jurisdiction of the ICC⁶⁹, i.e. an international crime such as war crimes, it was argued that the law of peacekeeping should be developed to include regulations, such as universal jurisdiction and the intervention of an international court, to ensure that no crime goes unpunished.⁷⁰ It was considered that, if a crime falls under the jurisdiction of the ICC, this should mean it can also be prosecuted by other States, including the Host State. Where the criminal extant system of the Host State is dysfunctional, the State can refer the case to the ICC, especially if the alleged crimes amount to war crimes⁷¹ under the jurisdiction of the ICC.⁷²

Returning to the issue of jurisdiction over peacekeepers, the chapter discussed the decisions of some cases prosecuted in Canada and Belgium,⁷³ and it explored the prosecution pending in South Africa relative to the case of murder perpetrated by an Air force Sergeant from South Africa.⁷⁴ Amongst the incidents actually prosecuted, it must be noted that only the most publicised incidents by the media received the attention of the above Troop-Contributing Countries. Indeed, only instances of crime that led to the death of the victim have been prosecuted. The only case of grievous bodily harm that came before courts, and the perpetrator received the required sentence, is that of Gunnery Sergeant Harry Conde.⁷⁵ Other allegations of rape and instances of looting have never been prosecuted.⁷⁶ Where Canada and

⁶⁹ Miller AJ 'Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations' 2006 (39) *Cornell International Law Journal* 71-96, 80. Indeed, even for crimes under the ICC jurisdictions are crimes under the jurisdiction of domestic courts.

⁷⁰ Supra 6.5.

⁷¹ The international law recognizes the existence of some offences in respect of which every country in the world is recognised as possessing the right, and, perhaps, even the duty, of exercising criminal jurisdiction regardless of the nationality of the offender, or of the victim, or of the *locus* of the offence. See Green LC 'International Crimes and the Legal Process' 1980 (29) *International and Comparative Law Quarterly* 567- 584, 568. States have a duty to prosecute international crimes under international law and such a duty explains the principle of complementarity found in the Rome Statute of the ICC. See Murungu C & Biegon J (eds) *Prosecuting International Crimes in Africa* (Pretoria University Law Press Pretoria 2011) 14-15. For jurisdiction over war crimes, see Henckaerts J-M and Doswald-Beck L (eds) *Customary International Humanitarian Law Volume II: Practice* (Cambridge University Press for ICRC-Geneva Cambridge 2005) 3883-38940.

⁷² The Rome Statute is based on two principles, complementarity and cooperation. State Parties to the Rome Statute are committed to investigate, prosecute, and prevent massive crimes when perpetrated within their own jurisdiction. They accepted that, should they fail genuinely to investigate and prosecute; the International Criminal Court can independently decide to step in. State Parties also committed to cooperate with the Court whenever and wherever the Court decided to act. See Moreno-Ocampo L 'The International Criminal Court – Some Reflections' 2009 (12) *Yearbook of International Humanitarian Law* 3-12, 5.

⁷³ Supra 6.6.

⁷⁴ Supra 6.6.4.

⁷⁵ Adams TK 'SOF in Peace-Support Operations,' 1993 (6) *Special Warfare* 2-7, 2.

⁷⁶ Supra 6.6.3.

Belgium did conduct prosecution, the sentences imposed were very light compared to the gravity of the alleged crimes.⁷⁷

Chapter six also recommended that Troop-Contributing Countries which do not prosecute their soldiers for crimes committed while on mission of peace be barred from participating in future similar operations. The fear that, if that were the case, few countries would be available to contribute troops to UN operations should not distract from the fact and necessity of setting an example and contributing to bringing peace and security in war-torn societies.⁷⁸ The analysis of the draft convention on the accountability of UN officials and experts on mission can suggest more practical avenues to ensure that no crime by peacekeepers goes unpunished.

Chapter seven analysed the Draft Convention on the accountability of UN personnel and experts on mission⁷⁹ and the present researcher proposed an on-site tripartite court mechanism. It commenced by pointing out that prosecution of peacekeepers is rather a rare occurrence.⁸⁰ This may be the same regarding the prosecution of UN officials and experts on mission who are expected to observe the laws of the Host State. Where it is not expressly precluded, therefore, the Host State should have jurisdiction over violations of its laws, regardless of the perpetrator of the act.

The above possibility of prosecuting UN officials and experts on mission in the State where they are alleged to have committed crimes seems to be contradictory by comparison with the statement of the UN General Assembly requiring States to establish jurisdiction over UN officials and experts on mission.⁸¹ This means that the Host State, as well as the UN, has no jurisdiction over the conduct of such personnel. It was noted that, unlike members of a national contingent of a UN mission of peace, UN officials and experts on mission are not representatives of their States of nationality. Hence, the criminal conduct they may commit in the place where they are deployed falls under the jurisdiction of domestic law of the country where such act is committed.⁸²

⁷⁷ See criticism of each case, *supra* 6.6.

⁷⁸ *Supra* 6.7.

⁷⁹ Annex III to the Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations. UN Doc. A/60/980 of 16 August 2006 [GLE report A/60/980].

⁸⁰ *Supra* 7.1.

⁸¹ *Supra* chapter 7.

⁸² *Supra* 7.2.

It was shown that the Draft Convention, taken holistically, can be criticized on a number of grounds. First of all, it lists crimes that peacekeepers, whether UN officials or experts on mission, commit on mission. Secondly, the Host State seems to have no jurisdiction over crimes committed within its boundaries even where the perpetrators are not members of the military component subject to the exclusive jurisdiction of the TCC. The third ground on which the Draft Convention can be criticised is that it did not refer to the Rome Statute, although peacekeepers can commit crimes under the jurisdiction of the ICC.⁸³

It was important, however, to mention the doctrine of non indivisibility of jurisdiction, a doctrine which allows the recognition of some residual jurisdiction over peacekeepers or UN officials and experts on mission to the Host State. It was also mentioned that where Host State jurisdiction does not function properly, the possibility of helping such a state should not be ignored. In either instance, investigative tasks should be made the responsibility of the Host State, and other authorities should exercise other acts regarding proceedings against peacekeepers. It was suggested that the Host State and sending State cooperate for optimal justice.⁸⁴

The proposition from the present researcher was that of setting up a tripartite jurisdiction involving the UN, the Troop-Contributing Country, and the Host State. Such a jurisdiction should be recognised as being competent to adjudicate any matter related to peacekeeping personnel, whether civil or criminal, or whether constituting the enforcement of Host State laws or relating to international crimes. It was highlighted that a tripartite mechanism has the merit of ensuring accountability for crimes committed by peacekeepers because it allows the participation of the victims and witnesses throughout the proceedings. Indeed, the draft convention which tries to provide a solution to the crimes committed by peacekeepers did not include military contingent members, though statistics have shown that the large proportion of sexual crimes perpetrated by peace support operations personnel are perpetrated by military members. At the end of the analysis, a tripartite mechanism that involves the UN, as the sponsor of the mission or operation during which the crimes are committed, the Host State, as the country on whose territory the crimes are committed and whose nationals are the victims, and the Troop-Contributing Country as the State of nationality of the perpetrator(s) was suggested. To set up such a mechanism, the convention has to be reviewed to include all

⁸³ Supra 7.4.

⁸⁴ Supra 7.3.

peacekeeping personnel and their possible crimes, whether such crimes fall within international law or are limited to domestic law. They need not be exclusively sex-related crimes.⁸⁵ There is no other means to guarantee adherence to humanitarian law and international human rights law by peacekeepers than making sure that when they commit crimes, investigation and prosecution follow.⁸⁶

Before the suggested mechanism can be agreed upon, considering the legal inability of the UN to follow-up the prosecutions conducted against UN force members in their home country pursuant to the law applicable to peacekeepers as it stands today, it was suggested that a court with jurisdiction over crimes committed by peacekeepers in the Host State will assist with the investigation of the facts. Where an on-site court is not established by the Troop-Contributing Country, the jurisdiction of the courts of the Host State must be recognised.⁸⁷ Collaboration between the UN, the Troop-Contributing Countries, and the Host State is needed to ensure accountability for crimes committed by peacekeepers.

The reality of peace operations today is that there exists a complex regime that comprises peacetime rules of international law, international humanitarian law, and national law⁸⁸, and internal rules of the UN which determine how the UN force will function, despite the fact that national contingents remain subjected, in respect to disciplinary and criminal jurisdiction, to the law of the respective contributing countries.⁸⁹ Despite the fact that criminal jurisdiction over peacekeepers rests with the countries of origin of the personnel concerned, the discussion demonstrated that it was difficult actually to discharge this responsibility which entails that the prosecuting authority deploys an investigating team in a foreign country to collect evidence⁹⁰ or has the victims and witnesses flown to the country where the trial is held.⁹¹

⁸⁵ UN Doc. A/62/329 of 11 September 2007, para 39.

⁸⁶ *Supra* 7.3.3.6.

⁸⁷ Du Plessis M & Peté S *Who Guards the Guards? The ICC and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph series No. 121 2006) 3.

⁸⁸ Klappe BF 'International Peace Operations' in Fleck D(ed) *The Handbook of International Humanitarian Law* 2 ed. (Oxford University Press Oxford 2008) 635-673, 642-43.

⁸⁹ Disciplinary jurisdiction means competence to control the conduct of soldiers during military operations, and, where possible, to sanction acts contrary to the discipline of the army. Acts of indiscipline include the misuse of alcohol, sexual misconduct, and insubordination, violence, and black market activities. See Rowe P 'Military Misconduct during International Armed Operations: "Bad Apples" or Systemic Failure?' 2008 (13) *Journal of Conflict & Security Law* 165-189; Winslow D 'Misplaced Loyalties: The Role of Military Culture in the Breakdown of Discipline in Two Peace Operations 21 January 1999' 2004 (6) *Journal of Military and Strategic Studies* 1-19.

⁹⁰ To surmount the issue of investigation by State of nationality of an alleged perpetrator, the UN urges the Troop-Contributing Countries to include personnel investigating units in peace operations. See para 57 of the

It was pointed out importantly that crimes committed in Somalia were widespread and that prosecution in sending states, namely in Canada and in Belgium, was inadequate in that punishment meted out did not reflect the gravity of the incidents. It was shown, however, that Canada had attempted to keep up with the law of armed conflict for it disbanded the Canadian airborne regiment accused of having violated humanitarian law in Somalia.

With respect to crimes by peacekeepers in Burundi, the mechanism of the ONUB Code of Conduct Unit and the appointment of a gender adviser who was placed there to minimise misconduct by the UN personnel can be considered to have worked quite well. Instances of crimes by peacekeepers were not widespread. It was indicated, however, that war crimes do not require a widespread character for prosecution, especially in domestic law. This explains why the case of rape and murder of Therese Nkeshimana is being prosecuted.

With respect to the Democratic Republic of Congo, several UN reports showed that sexual crimes by peacekeepers were widespread. They also revealed that the UN Organisation was well aware of the pillaging and weapons-for-minerals trafficking with rebels.⁹² UN reports have indicated that the organisation had not received any request from the troop-contributing countries to use evidence available to the UN in prosecuting repatriated alleged perpetrators. On the other hand, Troop-Contributing Countries do not send information to the UN Secretariat regarding the action they have taken against repatriated troops. This attitude constitutes the proof that States are not prosecuting their soldiers for crimes committed while on UN missions of peace. Indeed, with the exception of the instances of prosecution related to the Somali operation, and the pending prosecution of Sergeant Philippus Jacobus Venter in South Africa, no other prosecution exists. For instance, no soldier has been prosecuted for crimes committed when serving with MONUC. The state of law related to peacekeeping, especially in respect to national military contingents of the UN force, does not ensure that the repatriated individual will face prosecution once home.

It is for all the reasons mentioned above that sexual violence against women and girls has occurred and will, perhaps, continue to occur unabated since no adequate mechanism has been put into place. For rape, it does not matter whether the act is performed by members of rebel

UNGA Report of the Special Committee on Peacekeeping Operations and its Working Group: 2009 substantive session (UN Doc A/63/19 of 24 March 2009).

⁹¹ Supra chapters 5 and 6.

⁹² Adaka F 'The Enforcement of Military Justice and Discipline in External Military Operations: Exploring the Fault Lines' 2008 (47) *Military Law and the Law of War Review* 253-265, 256.

groups or by people upon whom victims should be able to rely to regain hope for life. The act is graver when perpetrated by peacekeepers.

8.2 Recommendations

Since the UN OIOS is unlikely to be given the power to prosecute as a substitute for national justice, it must be required of State members of the UN to take a more cogent responsibility in the selection of troops to be deployed with the UN. To uphold the UN code of conduct, strong and enforceable mechanisms are needed and have to be applicable to all peace support operations staff, whether military or civilian. They must serve as a deterrent against sexual abuses, especially with minors.⁹³ Instituting a practical system of accountability by providing for on-site courts martial in each contingent was advised by the Zeid Report. It was suggested that the solution could lie in the creation of a tripartite criminal court dealing with all types of misconduct by peacekeepers that amount to an offence, whether under domestic or International Criminal Law. Before such a mechanism is put in place, and where a Troop-Contributing Country does not prosecute, it may be recommended that the ICC competency be triggered in order to compel Troop-Contributing Countries to act in accordance with their obligations under the Rome Statute, Memorandum of Understanding, and other international instruments. In the interim, before an adequate convention is set up, signed, and ratified to become enforceable, the Host State should be allowed the jurisdiction to investigate. It was indicated that the findings of the investigation would have to be presented in evidence before the suggested courts martial. It was suggested that the Secretary General should, or must, waive immunity for non-military personnel and help the Host State to conduct proceedings. This would ensure that international standards are observed during prosecutions, and that Host State authorities are invited to observe them even in prosecutions of specific cases relating to their nationals. It is in that way that the UN may play a meaningful role in restoring peace.

If peacekeepers cannot refrain from committing crimes against civilians, and, if it happens that they violate the law but they do not face justice, which should be the case, no one will expect the government and/or rebel groups to do any differently. Such a stance adds to the

⁹³ Du Plessis M & Peté S *Who Guards the Guards: The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa* (ISS Monograph Series No. 121 February 2006) 6-7 quoting Kristina Peduto, the head of MONUC child protection in Bunia, interviewed by the London Independent Newspaper *UN wire Abuse by UN troops in DRC may go unpunished, report says*, 12 July 2004.

hardships of civilians, especially women and children. The UN should be encouraged to take a strong stance against those responsible for committing serious human rights violations, including sexual violence against women. The UN should not limit its reaction solely to repatriation and pecuniary sanctions. Perpetrators should be fairly tried, and, if found guilty, face penalties that correspond to their crimes. If a Troop-Contributing Country does not live up to its obligations under the Memorandum of Understanding, it should be warned that it is no longer eligible to contribute troops in future operations. There should not be a fear that, in doing this, the UN runs the risk of not gathering sufficient troops to keep the peace, for it is not worthy of the UN to deploy troops that do not observe their mandate, and who act contrary to what is expected of them, to the disadvantage of the host population. States should not be eager to contribute troops without any commitment to ensuring that those troops are actually capable of being an outstanding example for the benefit of the host population. Some Troop-Contributing Countries may be eager to be involved in order to further a political or economic agenda against the host country.

To this end, the present author has devised and drafted possible measures as a convention which could be considered to hold peacekeepers accountable from a substantive, procedural, and jurisdictional perspective. This is set out below.

- **Suggested Draft Convention on Accountability of UN Peace Personnel**⁹⁴

Preamble

The States parties to this Convention

Recognizing the important role the United Nations peace operations play in bringing peace and stability to war-torn countries to fulfil the purposes and principles of the Charter of the United Nations;

Bearing in mind that, although peacekeepers have carried out their duties with professionalism and dedication under arduous and often dangerous conditions, the United Nations peacekeeping operations' record is being tarnished by unconscionable criminal conduct committed by a few individual members of those operations;

⁹⁴ This proposed Convention differs greatly from the Draft Convention by the Group of Legal Experts UN. Doc. A/60/980 of 16 August 2006 (Annex III). It fills the gaps or grounds of criticism identified in chapter VII of this thesis.

Affirming that criminal conduct by United Nations peacekeeping operations personnel are serious crimes which undermine the credibility and the effectiveness of the mandate of the Organization under the Charter, namely, the maintenance of international peace and security;

Stressing the obligation of members of United Nations peace operations to respect all local laws and regulations of the Host State as well as International Humanitarian Law and International Human Rights;

Noting that United Nations peace operations personnel enjoy privileges and immunities as set out in the Convention on the Privileges and Immunities of the United Nations and adopted by the General Assembly of the United Nations on 13 February 1946;

Emphasizing that such privileges and immunities are granted in the interests of the United Nations and not for the personal benefit of the individual;

Having in mind that, in the case of crimes committed by United Nations peace operations personnel in the territory of the Host State, it may be difficult for the alleged offender to be prosecuted by the Host State because of the ineffectiveness of the Host State judiciary in handling criminal matters in conformity with international standards of fairness; and

Believing that the present Convention will ensure that such situations do not lead to impunity for offenders, in particular those who commit serious crimes under local and international criminal laws;

Have agreed as follows:

Article 1: Definitions

For the purposes of this Convention:

- (a) “General Convention” means the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946;
- (b) “United Nations peace operation” means any operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations,

conducted under United Nations authority and control for the purpose of maintaining or restoring international peace and security;

- (c) “Host State” means a State in whose territory a United Nations peacekeeping operation is conducted;
- (d) “United Nations peace operations personnel” means Members of a United Nations peace operation who enjoy any immunities from the jurisdiction of the Host State pursuant to article V or article VI of the General Convention or pursuant to either the provisions of the status-of-forces agreement entered into by the United Nations and the Host State for the peace operation or, pending the conclusion of such an agreement, the provisional application of the model status-of-forces agreement (A/45/594) dated 9 October 1990;
- (e) “Third State” means any State other than the Host State or the Troop-Contributing Country (State of origin of the alleged perpetrator); and
- (f) “Universal jurisdiction” means court jurisdiction over international crimes regardless the place of perpetration, the nationality of victims or perpetrators.

Article 2: Scope of application

1. This Convention applies to all members of the UN peacekeeping personnel, whether civilians or military.
2. It also applies to UN operations established under Chapter VII of the UN Charter.
3. No Status-of-Agreement Forces will provide otherwise.

Article 3: Crimes committed during United Nations peace operations⁹⁵

1. A member of United Nations peace operation personnel commits a crime within the meaning of this Convention if that person intentionally engages in conduct which constitutes one of the serious crimes set out in paragraph 2 of the present article while serving on a United Nations peace operation in a Host State.
2. The serious crimes referred to in paragraph 1 of the present article are:

⁹⁵ See Article 3 and alternative paragraph 2 of Article 3 of the Draft Convention on Accountability of UN Officials and Experts on mission UN Doc A/60/980 of 16 August 2006.

- (a) Intentional Crimes against the physical integrity of a person, including but not limited to murder, assault with the intent to cause grievous bodily harm, rape and sexual offences such as enforced prostitution, and crimes against property punishable under the national law of the Host State by imprisonment or other deprivation of liberty of at least two years of imprisonment or by a more severe penalty;⁹⁶
 - (b) An attempt to commit any such crime; and
 - (c) Participation in any capacity, such as an accomplice, assistant, or instigator in any crime set out in subparagraphs (a) and (b).
3. Any violations of embargoes imposed pursuant to UN Security Council Resolutions.

Article 4: Jurisdiction over crimes committed by UN peace operations personnel

1. The UN Security Council resolution establishing a peace operation shall provide for an on-site tripartite court that will have jurisdiction over the conduct of individuals involved in the peace operation.
2. The on-site tripartite court envisioned in paragraph 1 above shall be composed of judges and prosecutors as follows:
 - (a) Three Judges, of whom one comes from the Host State, one from the State of nationality of the offender, and one designated by the UN from a third State⁹⁷;
 - (b) The prosecution shall be conducted by a Prosecutor from the Host State. Prior to prosecuting an offender, investigations shall be conducted by the Prosecutor with the assistance of the UN Investigation Division of the Office of Internal Oversight Services as well as of an investigator of the nationality of the suspect offender;
 - (c) The proceedings related to the prosecution of a person involved with a peace operation shall be conducted where the alleged offence was committed.
3. Each State party shall have jurisdiction over crimes committed by a peace operation personnel member if such a person has not been prosecuted according to the tripartite mechanism as provided for in subparagraphs 1 and 2 of the present article.

⁹⁶ These crimes include international crimes.

⁹⁷ Third State here means a State involved in the peace operation from which the offender is not a national.

4. The State party in the territory in which the alleged offender is present shall, if it does not extradite that person, be obliged, without exception whatsoever and without undue delay, to submit the case to its competent authorities for the purpose of prosecution through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a serious nature under the law of that State. The State parties concerned shall cooperate with one another, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

Article 5: Issues related to extradition

1. The crimes set out in article 3 shall be considered extraditable offences in any extradition treaty existing between States parties. State parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded by them.
2. When a State party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State party with which it does not have an extradition treaty, the requested State party may, at its discretion, consider this Convention as a legal basis for extradition in respect of the offences.
3. State parties which do not make extradition conditional on the existence of a treaty shall recognize the crimes as extraditable offences between themselves.
4. The provisions of all extradition treaties between State parties with regard to the crimes set out in article 3 shall be deemed to be modified as between State parties to the extent that they are incompatible with this Convention.

Article 6: Reparation to victims⁹⁸

1. The competent Court under Article 4 shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation. On this basis, in its decision, the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss, and injury to, or in respect of, victims, and it will state the principles on which it is acting. The court may order the forfeiture of any valuables of the offender to serve to pay damages. Where the

⁹⁸ This article draws upon articles 75 and 109 of the Rome Statute.

adjudicating court is the Tripartite On-site Court, it may indicate that reparation will be made by the UN or by the State of Origin of the offender.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the United Nations or a NGO indicated in the decision.
3. Before making an order under this article, the Court may invite, and shall take account of, representations from or on behalf of the convicted person, victims, and other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall take measures to recover the value of the proceeds, property, or assets ordered by the Court to be forfeited, without prejudice to the rights of *bona fide* third parties.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

8.3 Implications for further studies

Since the present study has dealt with only three countries, it may be important also to study the allegations of crimes by peacekeepers in Cote d'Ivoire, Liberia, Darfur, and Sierra-Leone, especially the attitude of Troop-Contributing Countries to such claims and the action taken, if any. It may also be interesting to conduct such a study and ask experts from the armies of such Troop-Contributing Countries to suggest the mechanism that may well suit soldiers deployed in a host country for at least six months. Their contribution is critical to the search

for adequate means of curbing the commission of the kind of crimes commonly committed by such soldiers.⁹⁹

8.4 Final remarks

For a long time, sexual violence and rape committed by peacekeepers in all peace operations have been ignored. Since the unveiling of information by the media, given the widespread nature of these acts and especially given the fact that they were perpetrated against women and girls in war-torn societies such as Somalia, the Democratic Republic of Congo, and Burundi, the lack of prosecution amounts to the double victimization of women and children. Crimes by peacekeepers, therefore, must be dealt with in an appropriate manner if they are to be avoided in the future. There is no need for the UN to wait until acts of peacekeepers amount to crimes against humanity for the organization to act.¹⁰⁰

The present thesis has argued that to let the crimes committed by UN peacekeepers go unpunished sends the message that some persons are above the law. At the present state of the law of peacekeeping, the Troop-Contributing Country enjoys the monopoly of trying members of its military contingent for their crimes committed abroad during UN missions of peace. This is the consequence of agreements between the UN and the Host State, the UN, and the Troop-Contributing Countries. It is normal that agreements signed be respected. It is possible to imagine a mechanism that circumvents the impunity peacekeepers enjoy under the current agreements by recommending full follow-ups by the United Nations that the Troop-Contributing Countries concerned effectively exercise their criminal jurisdiction as agreed upon or otherwise be barred from future participation in peacekeeping operations. The UN has the means of ensuring that the victims and witnesses in the Host State, where the crimes were committed, are informed of the outcomes of the prosecution of perpetrators, consistent to the law.

⁹⁹ For instance, since extradition excludes offences under military law, and this would be the case where the conduct by a peacekeeper amounts to a war crime or an offence to military discipline, the mechanism of extradition may envision overruling the customary military offence exception. If such an exception does not stand against extradition procedures, the handling of members of for example the SANDF accused of having committed crimes while on UN mission of peace would reveal to be much easier or at least South Africa would find to be actually prosecuting them in order to fulfill its obligations under international law. If such proposition comes from military officers, it may be a manifestation of willingness of tackling impunity.

¹⁰⁰ As Van der Bijl and Rumney point out, the focus on legal rules that define offences or govern procedures, while ignoring many other factors with a real impact on the enforcement of the criminal law, is not enough to meet the objectives of any reform. See Van der Bijl C and Rumney P 'Attitudes, Rape and Law Reform in South Africa' 2010 (73) *Journal of Criminal Law* 414-449.

The present thesis propounds that the proposed code of conduct¹⁰¹ which at present is limited to sexual offences committed by UN personnel other than members of national military contingents be extended to the latter category. It seems important to create an on-site investigating team¹⁰² within each contingent of each UN mission of peace to circumvent the problems of investigation by the Troop-Contributing Countries, which, under the current mechanism, exercise exclusive criminal and disciplinary jurisdiction over peacekeepers. The UN can erect a special tripartite on-site court for any criminal offence committed during peacekeeping mission by peacekeepers. It has been pointed out that the crimes by its personnel are not always sexual offences, but may also include weapons trafficking in violation of embargoes. For example, to supply weapons to rebels in order to get minerals, diamonds, and other natural resources, is simply a way of fuelling the conflict. Without such mechanisms being put in place, it will remain difficult to hold peacekeepers criminally accountable.

Amongst other identified gaps in the law applicable to UN peacekeeping operations, it is imperative to point to the discreet manner with which the Organisation as well as Troop-Contributing Countries hold facts and information related to alleged crimes.¹⁰³ The present research recommends the commitment of the UN to an obligation of naming the countries whose peacekeeping personnel have been repatriated after the substantiation of misconduct. It is recommended that the outcome of any prosecution should be made available to the public. To increase awareness of such crimes, one scholar has even suggested that there be a “UN peacekeeping Bill of Rights” to curb the scourge.¹⁰⁴ Such a *corpus* of rights should include the individual rights of victims and witnesses to know the outcome of any prosecution.¹⁰⁵ Apart from the right to information, the proposition should also include a commission tasked with entertaining claims from the public with respect to any violation of the Peacekeeping Bill

¹⁰¹ Draft Convention, Annex III to UN Doc. A/60/980 of 16 August 2006.

¹⁰² The tripartite on-site court mechanism will therefore be able to function by choosing investigators from such a team.

¹⁰³ For instance findings of the Office of Internal Oversight Services, Investigation Division, are classified as *Strictly Confidential, Internal to UN*. The OIOS Report of the investigation of an allegation of sexual assault in 2006 was consistently classified, the service withholding all informative details of the identity of perpetrator and the details of the investigation. See UN OIOS-ID *ID Case No. 0553-06 of 11 October 2007*.

¹⁰⁴ Bongiorno C ‘A culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor’ 2002 (33) *Columbia Human Rights Law Review* 623-692, 677-678.

¹⁰⁵ It may be difficult for a court to reach a sound decision without the help of victims. With respect to crimes of peacekeepers, most of them are sexual. During investigation, therefore, it is important to take into account this factor. Investigators should include female experts. See Hudson H ‘Mainstreaming Gender in Peacekeeping Operations: Can Africa Learn from International Experience?’ 2000 (9) *African Security Review* 18-33, 21.

of Rights.¹⁰⁶ Other human rights institutions, such as an ombudsperson, courts, and monitoring commissions ought to be present in every deployed UN mission of peace.¹⁰⁷

Regarding the matter of the jurisdiction of crimes allegedly committed by peacekeeping personnel, an on-site tripartite court composed of representatives of the UN, Host State, and Troop-Contributing Countries would be the proper solution.¹⁰⁸ The on-site jurisdiction has the advantage of ensuring that all the abused victims participate in identifying the wrongdoers, and, above all, witness the rule of law taking precedence and justice being seen to be done.¹⁰⁹ Such a court should include all offences whether in violation of international law or the domestic law of the host or sending State. Even if it is essentially a court martial, it should be given the power to adjudicate allegations levelled against other categories of UN personnel.¹¹⁰ The prosecution of perpetrators of the crimes committed today can prevent the repetition of similar crimes in the future.¹¹¹

¹⁰⁶ Bongiorno C *op cit* (n 103) 683.

¹⁰⁷ Bongiorno C *op cit* (n 103) 686-687, 690.

¹⁰⁸ It is important always to prosecute crimes where they occur. For fear of the ICC to prosecute US peacekeepers, see Cerone JP 'Dynamic Equilibrium: The Evolution of US Attitude towards International Criminal Courts and Tribunals' 2007 (18) *European Journal of International Law* 277-315, 315.

¹⁰⁹ Van Dyke JM 'Reconciliation between Korea and Japan' 2006 (5) *Chinese Journal of International Law* 215-239, 230.

¹¹⁰ See, for hybrid courts Kanu AI and Tortora G 'The Legal Basis of the Special Court for Sierra Leone' 2004 *Chinese Journal of International Law* 515-552, 517.

¹¹¹ Ntoubandi FZ *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff Publishers Leiden 2007) 1 quoting Justice Robert H. Jackson, UN Chief Prosecutor during the Nuremberg Trials in his opening statement before the Nuremberg Tribunal 1945.

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GC I - Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (1950-75 U.N.T.S. 31).

GC II - Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (1950-75 U.N.T.S. 85).

GC III - Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (1950-75 U.N.T.S.135).

- GC IV - Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (1950-75 U.N.T.S. 287).
- GC/API I - Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (1978-1125 U.N.T.S. 3).
- GC/AP II - Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, 8 June 1977 (1978-1125 U.N.T.S. 609).
- Hague Convention IV - Respecting the Laws and Customs of War on Land with its Annex: Regulations concerning the Laws and Customs of War on Land (The Hague 18 October 1907).
- Protocol II to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999).
- Rome Statute -Addendum: *Finalized Draft Text of the Elements of Crimes* (U.N. Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000).
- Rome Statute of the International Criminal Court 17 July 1998 (into force 2 July 2002 - 2187 U.N.T.S. 38544).
- U N Doc. A/RES/44/25 Convention on the Rights of the Child (12 December 1989).
- U N Doc. S/RES/955 (1994) Statute of the International Criminal Tribunal for Rwanda.
- UN Doc. A/RES/260 (III) A of 9 December 1948 - Convention on the Prevention and Punishment of the Crime of Genocide.
- Vienna Convention on the Law of Treaties of 1969 (1155 U.N.T.S.).
- UN Convention on the Privileges and Immunities of the United Nations, adopted by the UNGA 13 February 1946 (1 U.N.T.S. 15).
- UN Convention on the Safety of United Nations and Associated Personnel (UN GA res. 49/59 of 9 December 1994, 49 U.N. GAOR Supp. No. 49 U.N. Doc. A/49/49 (entered into force 15 January 1999)).
- UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (S. Treaty Doc. No.100-20, 1465 U.N.T.S. 85).
- UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, approved by UN.G.A. Res. 317 (IV) of 2 December 1949 (entered into force 25 July 1951).

ANNEXURES**Annexure A****Excerpts from Burundian Penal Code (French) - Translation by Kakule Kalwahali**

...

Article 25:

A person who, at the time of doing an act which if committed by a sound person would constitute an offence, by reason of mental illness or deficiency did not possess the power of appreciating the nature of his or her actions or of controlling such actions to conform them to the requirements of the law shall not be held criminally responsible.

Article 26:

A person, however, who voluntarily deprives himself or herself of the use of his /her mental faculties at the time of the offence, remains criminally responsible, even though this deprivation has not been provoked in order to commit the offence.

Article 27:

A person who commits an act under irresistible duress or *force majeure* shall not be punished.

Duress can never be used as a defence in cases of genocide, crimes against humanity, war crimes, and other international crimes, but it can be taken into account for the reduction of the sentence.

Article 28:

Children under fifteen years of age shall be deemed to lack criminal capacity and shall not be tried for, or convicted of, any offence, which he or she is alleged to have committed.

The acts of the above children, shall not, however, affect any civil claim by the aggrieved party against the parents or guardian of the child.

Article 29:

When the offender or the accomplice of an offence is a minor of, or above, fifteen years of age but less than eighteen years of age at the time of the offence, the punishment will be as follows:

1. If the incurred punishment would have been life imprisonment, the sentence imposed on the minor shall be five to ten years of imprisonment; and
2. If the incurred punishment would have been a privation of freedom limited in time or a fine, the sentence against him or her shall not be over four years.

...

Article 31:

There is no offence:

1. When the act was either ordered or authorized by the law or by the legitimate authority, except if the act was obviously illegal.

Superior order can never be used as a defence in cases of genocide, crimes against humanity, war crimes, and other international crimes, but may be taken into account for the reduction of the sentence.

2. In an instance of state of necessity, which is the situation of a person who is placed in serious and imminent danger to himself or herself, to others, or to a property, or with the aim of preventing/interrupting the commission of an offence, commits an act which falls under the ambit of criminal law in order to safeguard a more superior interest to the interest sacrificed. The means used to achieve this goal must not be disproportionate to the gravity of the threat.

State of necessity can never be used as a defence in cases of genocide, crimes against humanity, war crimes, and other international crimes, but may be taken into account in mitigation of the sentence.

Voluntary homicidal offences are not affected by the content of point 2.

3. In the instance of private defence, which is the reaction of a person who, in the face of unjustified aggression towards himself/herself or others, accomplishes an act that falls under the penal law, provided that the means used are not disproportional to the gravity of the aggression.

...

Article 144:

To be effective any abandonment of a complaint must, except in cases where the law has provided otherwise, take place before the verdict becomes final.

Article 145:

If the complaint has been lodged by several victims of the same offence, prosecution can be stayed only if all the complainants withdraw.

...

Article 196:

By 'crime against humanity' is understood any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack:

1. Murder;
2. Extermination;
3. Enslavement;
4. Deportation or forcible transfer of population;
5. Imprisonment or any other severe deprivation of physical liberty in violation of the fundamental provisions of the international law;
6. Torture;

7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph the article 197, 10, or other grounds that are universally recognized as impermissible under international law, in connection with any crime within the jurisdiction of the Court;
9. Enforced disappearance of people;
10. Crimes of apartheid; or
11. Other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Article 197:

For the purposes of the previous article:

1. ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in the previous article against any civilian population, pursuant to, or in furtherance of, a State or organizational policy to commit such an attack;
2. ‘Extermination’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
3. ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and include the exercise of such power in the course of trafficking in persons, in particular women and children;
4. ‘Deportation or forcible transfer of population’ means the forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

5. 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody of, or under the control of, the accused; except that torture shall not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions;
6. 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law;
7. 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
8. 'The crime of apartheid' means inhumane acts of a character similar to those referred to in the previous article, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups, and committed with the intention of maintaining that regime;
9. 'Enforced disappearance of persons' means the arrest, detention, or abduction of persons by, or with, the authorization, support, or acquiescence of a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons with the intention of removing them from the protection of the law for a prolonged period of time;
10. The term 'gender' refers to the two sexes, male and female, within the context of society. It does not imply any different meaning.

Article 198:

By 'war crimes' means any crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes, in particular:

1. Any of the grave breaches of Geneva Conventions of 12 August 1949:
 - a. Intentional homicide;
 - b. Torture or inhuman treatment, including biologic experiments;

- c. Wilfully causing great suffering, or seriously injury to body or health;
 - d. Destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly on large-scale;
 - e. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
 - f. Wilfully depriving a prisoner of war or any other protected person of the rights of a fair and normal trial;
 - g. Unlawful deportation or transfer or unlawful confinement; and
 - h. The taking of hostages.
2. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- a. Intentionally directing attacks against the civil population as such or against individuals not taking direct part in hostilities;
 - b. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - c. Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - d. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - e. Attacking or bombarding, by whatever means, towns, villages, dwellings, or buildings which are undefended and which are not military objectives;

- f. Killing or wounding a combatant who, having laid down his arms or not having any means of defence, has surrendered at his discretion;
- g. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy, or of the United Nations, or of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury to others;
- h. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- i. Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives;
- j. Subjecting persons who are in the power of an hostile party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental, or hospital treatment of the person concerned nor carried out in his or her interests, and which cause death to, or seriously endanger the health of, such person or persons;
- k. Treacherously killing or wounding individuals belonging to the hostile nation or army;
- l. Declaring that no quarter will be given;
- m. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- n. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- o. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- p. Pillaging a town or place, even when taken by assault;
- q. Employing poison or poisoned weapons;

- r. Employing asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices;
- s. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- t. Employing weapons, projectiles, and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in the violation of the international law of armed conflict, provided that such weapons, projectiles, and material and methods of warfare are the subject of a comprehensive prohibition;
- u. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- v. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 197, 6°, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- w. Utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;
- x. Intentionally directing attacks against buildings, material, medical units and transport, without any precaution being taken to avoid these objects becoming targets of military operations;
- y. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- z. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; and
- aa. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

3. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause:
 - a. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture;
 - b. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - c. Taking of hostages; and
 - d. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Article 198:

4. Point 3 above applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature.
5. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - b. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - c. Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in humanitarian assistance or a peacekeeping mission in accordance with the

Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

- d. Intentionally directing attacks against buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - e. Pillaging a town or place, even when taken by assault;
 - f. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 197, 6, enforced sterilization, and any other form of sexual violence also constituting a serious violation of the Geneva Conventions;
 - g. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - h. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - i. Killing or wounding treacherously a combatant adversary;
 - j. Declaring that no quarter will be given;
 - k. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to, or seriously endanger, the health of such person or persons; and
 - l. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.
6. Point 5 above applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

...

Article 211:

Any act by which a person intentionally causes the death of another person is murder. It is punished by imprisonment for life.

Murder committed in preparation for, or in furtherance of, an offence or a crime, either to encourage the flight or to silence witnesses in order to assure the impunity of the perpetrator or of the accomplice of a crime or an offence is punished with imprisonment for life.

Article 212:

The murder of fathers, mothers, or other legitimate grandparents as well as the murder of one's natural father or natural mother is parricide. It is punished with imprisonment for life.

The murder of a person's children, brothers, or sisters, whether legitimate or natural, is also punished with imprisonment for life.

The murder committed by the father or by the mother of a newborn child whether legitimate or natural is infanticide. It is punished with imprisonment for life.

Article 213:

Murder committed with premeditation is qualified murder or assassination. It is punished with imprisonment for life.

There is premeditation when the intention to achieve a homicidal act has been formed before the action.

Article 214:

Murder committed by the means of substances which are susceptible to give death more expeditiously, no matter how these lethal substances have been administered to the victim, constitutes the crime of poisoning. It is punished with imprisonment for life.

Article 215:

Whoever has voluntarily administered any substances susceptible of causing death or which, without likely to be susceptible of causing death, can, however, seriously impair health, is punished with a term of imprisonment from one year to twenty years and with a fine between one hundred thousand and one million francs.

Article 216:

The perpetrators who resort to acts of barbarism during the commission of any crimes provided for in the preceding articles of the present section are punished with imprisonment for life.

...

Article 219:

Whoever has voluntarily caused injuries or has assaulted others is punished with imprisonment from two months to eight months and with a fine of fifty thousand to two hundred thousand francs, or with one of these two sentences.

In the case of premeditation the person found guilty is punished with a term of imprisonment from one month to two years and with a fine of two hundred thousand francs.

Article 220:

If the assault or the injuries cause an illness or a permanent inability to work, or if the conduct impaired severely the use of an organ or resulted in a serious mutilation, or if either was carried out against a pregnant woman and the perpetrator knew the state of pregnancy, the accused shall incur a sentence of between two and ten years imprisonment and a fine of fifty thousand to two hundred thousand francs.

Article 221:

The penal servitude provided for in the two preceding articles shall be doubled whenever the assault is perpetrated against a parent or grand-parent, a spousal or a child of less than eighteen years of age, or against any person living in the same house with the perpetrator, or any other parent or an in-law up to the 4th degree of relationship.

...

Article 554:

[Rape is defined as] any act of sexual penetration, whatever the nature of such an act, committed by an adult person against a minor even if such a minor consented to the act.

It is also defined as rape, if accompanied by violence, sexual assault committed with a minor who has not reached eighteen years of age, even with his or her consent.

Domestic rape is punished only with a prison sentence of eight days and a fine of ten thousand francs to fifty thousand francs or one of these sanctions.

Article 555:

Rape is committed, either by means of violence or serious threats or by duress against a person, directly or through the intermediary of a third person, either by surprise, by psychological pressure, within a coercive environment, either while abusing a person who, as a result of illness, by the loss of his/her faculties, or by all other accidental reasons would have lost the use of his/her senses or would have been deprived of such in whatever manner, even though the victim is the person's spouse:

1. By any man who, whatever his age, introduces his sexual organ, even superficially into that of a woman, or any woman who, whatever her age, obliged a man to introduce, even superficially, his sexual organ into hers;
2. By any man who penetrated, even superficially, the anus, the mouth, or any other opening of the body of a woman or of a man with his sexual organ, or with any other part of the body or with any other object;
3. By any person who introduces, even superficially, any other part of the body or any object into the woman's sexual organ;
4. By any person who obliges a man or a woman to penetrate, even superficially, his/her anal opening, or his/her mouth by a sexual organ.

Rape is punished by five years to fifteen years of penal servitude and a fine of fifty thousand francs to hundred thousand francs.

Article 556:

Rape is punished by fifteen years to twenty five years of penal servitude and a fine of fifty thousand to two hundred thousand francs:

1. When committed against a minor of less than eighteen years of age;
2. When committed by a parent or grandparent or by a child or grandchild, legitimate, natural or adoptive, by a brother or a sister, or by the victim's stepfather or the victim's stepmother;
3. When committed by a person in the victim's service;
4. When committed by a person who abuses the authority conferred by his/her functions;
5. When committed by an educator (of the victim);
6. When the rape is committed by a minister of religion (of the victim).
7. When committed by physicians, surgeons, obstetricians, or other medical staff towards people confided to their care; and
8. When committed against a vulnerable person because of his/her age, illness, infirmity, physical or mental deficiency, or pregnancy, and that vulnerability is obvious or known to the perpetrator;

Article 557:

The rape is punished with penal servitude of twenty to thirty years and with a fine of one hundred thousand to five hundred thousand francs:

1. When committed by several people acting as either a principal or accomplices (gang-rape);
2. When the perpetrator was carrying a weapon;

3. When it caused a serious change in the victim's health and/or resulted in serious physical and/or psychological effects such as mutilation, permanent infirmity, or the transmission of a disease;
4. When committed with the use or threat of a weapon;
5. When the rape was committed against a child of less than 12 years; and
6. When committed in public.

Article 558:

Rape is punished with perpetual penal servitude (life imprisonment):

1. When the perpetrator had knowledge that he or she had a sexually transferable disease of an incurable character;
2. When the rape caused the victim's death;
3. When the rape was committed against a child of less than 12 years.
4. When the rape was preceded by, or accompanied with, acts of torture or barbarism.

Article 559:

The punishments provided by the provisions of the present section cannot be commuted, cannot be rendered void by any statute of limitation, are not eligible to amnesty laws, and cannot be pardoned by the President of the Republic.

Article 560:

The official capacity of anyone accused of offences of a sexual violence cannot exonerate him/her, on any account, of his/her responsibility or constitute a reason for the reduction of the punishment.

Article 561:

The defence of superior orders or the command of a legitimate civil or military authority does not exonerate the perpetrator of his/her responsibility for a crime of sexual violence.

Article 562:

Regarding the infringements of the provisions relating to sexual modesty and rape, the judge pronounces, in addition to the main punishment, at least one of the following supplementary sanctions:

1. The publication of the sentence;
2. The presentation of the convicted person to the public;
3. The interdiction to exercise civil rights, and family rights;
4. The interdiction of sojourn (in Burundi where the perpetrator is a foreigner);
5. The attendance to socio-judicial counselling sessions.

If the judge perceives that the victim would be harmed with regard to point 1 above, the victim's identity is not made known to the public.

Annexure B

Excerpts from DRC legislation (French) - Translation by Kakule Kalwahali

Article 2 of the statute on the protection of children (Law no.09/001 of 10 January 2009)

1. A child means every human being below the age of eighteen years.

...

9. 'A child in conflict with the law' is defined as a child between the age of fourteen and eighteen who performs an act which amounts to a violation of criminal law.

Article 28 of the DRC Constitution of 18 February 2006:

A person is relieved of the duty of obedience whenever a superior order is obviously an illegal order. Any individual and/or any state agent is relieved of the duty of obedience when the received order manifestly constitutes a violation of human rights, public liberties, and good morals.

The burden of proof of the obvious illegality of the order rests with the subordinate who refused to carry out the said order.

Article 467 of the DRC family Code (1987):

Any person convicted of adultery shall be punished with imprisonment of six months to one year and with a fine; such person shall include:

1. Anyone, unless he has been deceived, has had sexual intercourse with a married woman;
2. A husband who has had sexual intercourse with a person other than his wife, if the conduct is particularly offensive to his wife;
3. A woman who has had sexual intercourse with a married man under the circumstances provided for under point 2 of this article;
4. A married woman who has had sexual intercourse with a person other than her husband.

Law no 06/018 of 20 July 2006 modifying and supplementing the Decree of 30 January 1940 - Congolese penal Code

Preamble

Since the second half of the previous century a new form of criminality has developed all over the world on a large-scale. It has been economically, socially and politically driven, although it consists of crimes of sexual violence.

The wars of 1996 and 1998 in our country have worsened the already dire economic situation and provoked millions of victims of whom the most vulnerable and targeted have been cruelly weakened by all kind of crimes. These victims have been violated in their dignity, their body, in their moral integrity, and also in their lives. Such acts of violation should, therefore, not go unpunished in the future.

In order to warn perpetrators, to punish crimes of sexual violence severely, and to ensure that victims are systematically attended to, it has been of paramount necessity to revisit some of the provisions of the penal Code.

Up to this time the Congolese penal law has not contained all the crimes that contravene international law as it existed since 1946 to serve as a deterrent against those who, ordinary and important people alike infringe international law, especially international humanitarian law, thus denying the quality of life and values of humanity to the civil population.

The present law, thus, modifies and supplements the Congolese penal Code by integrating into it the principles of international humanitarian law relating to crimes of sexual violence. This law largely takes into account the protection of the most vulnerable people, namely women and children and men who are victims of crimes of sexual violence.

It is hoped that this law will contribute to the restoration of public morality, public order, and security in the country.

Regarding the penal Code, modifications relate mainly to provisions with respect to the crime of rape and sexual assault. The other provisions supplement the penal code and provide for new crimes of different forms of sexual violence, not previously criminalized under the penal Code. The definition of rape is now in conformity with applicable international norms.

Article 42 (bis)

The official capacity of the perpetrator of a crime of sexual violence cannot exonerate such a perpetrator of his criminal responsibility nor constitute a mitigation of the sentence.

Article 42 (ter)

Superior orders or the command of a civil or military legitimate authority does not exonerate the accused of a crime of sexual violence of his/her criminal responsibility.

...

Articles 44 and 45

Homicide committed with the intention to cause death is murder.

Murder committed with premeditation is assassination.

They are punishable by death.

Article 46:

Whoever has voluntarily caused injuries or assaulted another human being is punished by imprisonment of eight days to six months and with a fine, or with either one of these two sentences.

In the case of premeditation, the convicted person shall be sentence to a term in prison of one month to two years and with a fine.

Article 47:

If the conduct causes an illness or an inability to engage in personal employment, or if the conduct results in a serious impairment so that any organ can no longer be used or has been seriously mutilated, the perpetrator shall be sentenced to a term in prison of two years to five years and a fine.

Article 48:

When voluntarily assault unintentionally causes the death of the victim, the perpetrator shall be sentenced to a term in prison of five years to twenty years and a fine.

Article 48 bis (Law no. 11/008 of 9 July 2011 criminalizing torture)

Any civil servant or public officer, or any person entrusted with a public service or any person acting in official capacity or at the instigation of or with consent or acquiescence of a public officer, has intentionally or deliberately inflicted severe pain or suffering, whether physical or mental, for such purposes as obtaining from a victim or a third person information or confession, punishing him/her for an act he or she has committed or is suspected of having committed, or intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind shall be sentenced to five to ten years in prison and to a fine of fifty thousand to one hundred thousand Congolese francs.

Article 48 ter (Law n° 11/008 of 9 July 2011 criminalizing torture)

A person guilty of torture shall be sentenced to imprisonment from ten to twenty years and a fine of one hundred thousand to two hundred thousand Congolese francs when the conduct envisaged in article 48 *bis* has left the victim with a serious trauma, an illness, a permanent inability to work, a physical or psychological deficiency, or when the victim is a pregnant woman, an underage minor, an elderly person or a person living with a disability.

If the acts of torture cause the death of the victim, the torturer shall be punished with imprisonment for life.

Article 48 quater (Law n° 11/008 of 9 July 2011 criminalizing torture)

Notwithstanding the provisions of article 24 of the penal Code, the prosecution resulting from articles 48 *bis* and 48 *ter* is not subject to a statute of limitation or a period of prescription.

...

Article 67:

A person who unlawfully, by violence, ruses or threats, arbitrarily abducted or caused abduction to be conducted, arrested or instigated arrest, detained or instigated the detention of any person shall be sentenced to a term in prison of one to five years.

When the abducted, arrested, or detained person has been subjected to torture, the accused shall be punished with a term of imprisonment of five to twenty years. If torture caused the death of the victim, the accused shall be sentenced to imprisonment for life or to death.

...

Article 167:

Any act contrary to good morals which is directly and intentionally performed against another person without the valid consent of the latter constitutes sexual assault.

Any sexual assault committed without violence, ruse, or threats against the person of a child below the age of eighteen years shall be punished with a term of imprisonment of six months to five years. The child's age can be determined by medical expertise in the case of the absence of a birth certificate.

Article 168:

Sexual assault committed with violence, ruse, or threats against people of either gender shall be punished with a term of imprisonment of six months to five years.

Sexual assault committed with violence, ruse, or threats against or through the intermediary of the person of a child below the age of 18 years shall be punished with a term of imprisonment of between five and fifteen years. If sexual assault has been committed against or through the intermediary of people below the age of ten years, the perpetrator shall be punished with a term of imprisonment of five to twenty years.

...

Article 170:

Any person who, either by violence or serious threats or by coercion against another person, directly or through the intermediary of a third person, either by taking advantage of a coercive environment, or by abusing a person who, by the effect of illness, impairment of his/her psychological faculties, or by any other accidental cause has lost or has been deprived of the use of his/her senses, has committed rape. Such persons include:

- a) Any man, whatever his age, who has inserted his sexual organ, even superficially, into the sexual organ of a woman, or any woman, whatever her age, who has obliged a man to insert, even superficially, his sexual organ into hers;
- b) Any man who has penetrated, even superficially, the anus, the mouth, or any other opening of the body of a woman or of a man by his sexual organ, by any other part of the body, or by any object;
- c) Anyone who has inserted, even superficially, any other part of the body or any object into the vagina;
- d) Anyone who has obliged a man or a woman to penetrate, even superficially, his/her anus, mouth, or any opening of his/her body by a sexual organ, by any other part of the body, or by any object.

Anyone found guilty of rape shall be punished with a term of imprisonment of between five to twenty years and a fine not less than one hundred thousand Congolese francs.

Sexual intercourse with persons designated under article 167, paragraph 2, is considered as rape committed with violence.

Article 171

If rape or sexual assault causes the death of the person against whom it has been committed, the perpetrator shall be given a life sentence.

...

Article 174 c

Anyone who, in order to get pecuniary or other benefit, has caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons or another person, or by taking advantage of such person's or persons' incapacity to give genuine consent, shall be punished with a term of imprisonment from three months to five years.

...

Article 174 m

Whoever has made any description, however created, of a child taking part in explicit, real, or simulated sexual activities, or any representation of a child's sexual organs, mainly for sexual ends shall be punished with a term of imprisonment of five to ten years and with a fine of one hundred fifty thousand Congolese Francs.

Annexure C**Excerpt from Act 16 of 1999 Military Discipline Supplementary Measures Act of 23 April 1999 (South Africa).**

...

Section 3

3. (1) This Act shall, subject to subsection (2), apply to any person subject to the Code irrespective whether such person is within or outside the Republic.
- (2) For the purposes of the application of this Act and the Code, “person subject to the Code” includes, to the extent and subject to the conditions prescribed in this section and in the Code—
- (a) all members of the Permanent Force;
 - (b) every member of the Reserve Force—
 - (i) while rendering any service, undergoing any training or doing any duty in terms of the Defence Act, 1957; or
 - (ii) when liable or called up therefore, fails to render that service or to undergo that training or to do that duty;
 - (c) all persons, other than members of a visiting force, lawfully detained by virtue of or serving sentences of detention or imprisonment imposed under the Code or this Act;
 - (d) every member of the auxiliary services established in terms of section 80 of the Defence Act, 1957, being on service as defined in the Code;
 - (e) every person attached to the South African National Defence Force in terms of section 131 of the Defence Act, 1957;
 - (f) all students under instruction at a military training institution, in accordance with section 77(3) of the Defence Act, 1957;

- (g) every person not otherwise subject to the Code who, with the consent of the commanding officer of any portion of the South African National Defence Force, is with or accompanies or performs duty with that portion of the Defence Force which is -
- (i) outside the borders of the Republic; or
 - (ii) on service: Provided that any person who is subject to the Code by virtue of any consent given under this paragraph shall be so subject -
 - (aa) where that consent has been given in writing, on the basis indicated in that consent; or
 - (bb) where consent has not been given in writing, on the basis on which he or she has been accepted and treated for living and messing facilities; and
- (h) every prisoner of war as contemplated in Articles 4 and 33 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, or by customary international law, and who is in the power of the Republic and detained by the South African National Defence Force.
- (3) When a person who is subject to the Code is suspected of having committed murder, treason, rape or culpable homicide in the Republic, the matter will be dealt with in accordance with section 27 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), and any ensuing trial shall take place in a civilian court.

INDEX

A

Abdi	180
absence of prosecution of peacekeepers	164, 170
accountability	178, 185
acts of sexual violence	26
<i>Addy v. Canada</i>	178, 183, 184
Aden Abukar Ali	28
agent of consent	<i>see rape</i>
Arone	178, 181–85, 222, 223, 225, 227, 231, 232, 237, 242, 232–42, 245
Aruush	46, 48, 180
assault	23, 31–37, 45, 52–55, 63–65, 78–81, 107–9, 156–58, 391, 394, 395
assurances	212, 216, 263, 267, 284, 298, 303
<i>Aydin v. Turkey</i>	148

B

Belgian troops	28, 186, 187
bilateral and multilateral cooperation	202
Boma	75, 76, 80, 368
<i>Bongi Biyela v the State</i>	94
brothel keeping	<i>See engaging the services of a prostitute</i>
brothel-keeping	60
Bunia	8, 11, 27, 32, 86, 190, 191, 196, 205, 319, 365

C

Canadian airborne regiment	176, 318
<i>Carmichele v Minister of Safety and Security and Another</i>	121, 122
<i>Child pornography</i>	74
chronic underreporting	35
civilian population	2
combatant	144–57, 270–75
commissions of inquiry	<i>See investigative authority</i>
compensation and reparation	203
competent authority	
referral to	<i>See investigative authority</i>
comprehensive inquiry	186
conclusive evidence	166
consent	<i>see rape, See rape, See rape</i>
contingent commanders	33, 173, 192
Convention on forced disappearance	288
core international crimes	130, 131, 141, 163, 275
<i>coups et blessures volontaires</i>	186
crimes against humanity	24, 32, 60, 62, 131, 140, 136–41, 163, 201, 212, 218, 281, 287, 310, 326, 374, 375
criminal accountability	19, 21, 174
criminal investigation	
purpose of	203–10
criminal investigations	168
criminal jurisdiction	10, 20, 26, 36, 165, 171, 217, 262, 265
criminal liability	36, 111
criminal proceedings	20, 205

<i>Crossberg v S</i>	107
cultural barriers.....	30
D	
Detention of suspected perpetrators	298
Didier Bourguet.....	31, 34, 153, 197
domestic criminal law	1, 26
domestic Criminal Law	18
double criminalisation.....	93, 94, 267
double criminality.....	<i>See</i> double criminalisation
<i>DPPTransvaal v Venter</i>	255
Draft Convention on accountability	263
E	
elephant tusks	35
Elis. 11 janvier 1916.....	63
Elis. 30 décembre 1915	76
enforced prostitution	61, 72, 153, 323, 377, 381, 383
enforcement action.....	15, 271, 273
engaging the services of a prostitute	1, 27, 44, 69, 71–74, 85, 98, 99, 101, 98–103, 109, 128, 278
<i>esprit corporatiste</i>	254
exclusive criminal jurisdiction.....	161, 199, 216, 218, 220, 257, 278, 287, 301, 310
exclusive jurisdiction	214, 216, 262
exploitation and sexual abuse	194
extradition	201, 273, 324
extra-territorial jurisdiction	189, 215, 286
extra-territoriality	189
F	
<i>F v Minister of Safety and Security</i>	112, 113, 114, 115, 116
<i>Fanuel Sitakeni Masiya v DPP and Minister of Justice and Constitutional Development</i>	87, 88
financial cost of an investigation	176
<i>Fose v. Minister of Safety and Security</i>	110
G	
<i>G Smit v The State</i>	97
Gallo Commission	177
gathering of reliable proof.....	202
genocide	4, 62, 134, 136, 139, 141, 163, 275, 281, 287, 310, 374, 375
Genocide	131–36
gold smuggling	275
Goma	34, 153, 194, 195, 299
grave breaches	143, 144, 145, 149, 152, 155, 234, 239, 250, 287, 288, 378
grievous bodily harm	323
grievous bodily harm	28, 49, 258, 314
guesthouse employee	29, 63, 107
H	
Human Rights Law	187
human rights organisations.....	6
human rights standards.....	166, 177, 266, 283, 291

humanitarian assistance.....	3
humanitarian law	1, 174
Humanitarian Law	18, 187, 271
humanitarian personnel	22
hybrid jurisdiction.....	270, 289
I	
immunity.....	55, 158, 159, 160
impartiality.....	14, 186, 221, 264
impediments	277
internally displaced people.....	27
international armed conflict.....	16, 142, 143, 144, 147, 149, 154, 163, 271, 379
international convention.....	129, 199
<i>International Criminal Court</i>	196, 212
international criminal law.....	1
International Criminal Law	13, 18, 23
international customary rules.....	13
international peace and security.....	16
investigating authorities	<i>See</i> investigative authority
investigation in a foreign country	<i>See</i> investigative authority
investigative authority.....	201, 167–203
investigative jurisdiction	167
involvement of victims.....	204
I ^{re} inst. Eq.....	80, 369
I ^{re} inst. Kas	79, 368
I ^{re} inst. Stan.....	75, 80, 369
I ^{re} inst. Usa	78, 368
J	
judicial authority.....	124, 204, 211
judicial investigations	177, 186
jurisdiction of the ICC.....	153
Jurisdiction of the troop-contributing country	284
Jurisdiction over conduct	273
K	
<i>K v Minister of Safety and Security</i>	112, 113, 114, 122, 123, 124, 125, 126, 128
<i>kidogo usharati</i>	31
Kindu	<i>See</i> South African troops
<i>Kruger v Coetzee</i>	120
L	
law of armed conflict	149, 188, 246, 279, 318, 379, 381, 383
laws and customs of war	142, 145, 147, 149, 151, 153, 158, 163, 313
lengths of wood	35
Léo.....	78, 368
Léo. 13 mai 1954.....	76
looting	1, 36, 37
M	
<i>Mapule v The State</i>	95

<i>Mbatha v State</i>	109
Melchior Ndadaye	3
military contingent	<i>See</i> military personnel
military court	186, 255
military personnel	1, 5, 32, 112, 117, 188, 214, 249, 253, 254, 291, 295, 319, 367
Military Police	181, 182, 183, 185
mineral resources	6
<i>Minister van Polisie v Ewels</i>	118, 119
<i>Minister of Police v Rabie</i>	112
<i>Minister of Safety and Security v Van Duivenboden</i>	119, 120
Mogadishu	28
<i>Mostert v S</i>	107
<i>Motaung and Others v State</i>	105
murder	26, 28, 45–51, 61–63, 74–77, 85, 107, 155–56, 307, 323
Murder	36
Muyinga	29

N

<i>Naidoo and Two Others v. The State</i>	106
national contingent	<i>See</i> military contingent
national courts	276
national jurisdiction	173, 174
national resources	<i>See</i> investigative authority
negligent performance of duty	227, 245
Nelson Mandela	4
NGO	325
<i>NK v Minister of Safety and Security</i>	112
non-consensual sex	<i>See</i> rape
non-fraternisation	194
non-international armed conflict	142, 149, 163
<i>Notito v The State</i>	91, 98
<i>nullum crimen sine lege</i> principle	288

O

Office of Internal Oversight Services	
mandate of the	<i>See</i> investigative authority
on-site courts	208
on-site tripartite court	264, 270, 315, 323, 328
on-site tripartite mechanism	<i>See</i> on-sit tripartite court
organs of the troop-contributing	<i>See</i> investigative authority
<i>Osman Somow v Paracommando Soldier</i>	251–53

P

paedophilia	10
peace operations	15, 17, 27
peacekeepers	<i>See</i> peacekeeping personnel
peacekeeping civilian personnel	197
peacekeeping mission	294
peacekeeping personnel	1, 6, 8, 19, 32, 159, 188, 218, 261, 278, 282, 283, 284, 287, 290, 293, 297, 304, 305, 311, 322, 327, 328, 365
Philippus Jacobus Venter	29, 194, 255, 294

photographic evidence	187
pillaging	26, 36, 109, 142, 274, 307, 318
pistol flare	28
pornography	1, 34, 71, 81, 153, 198
Prosecutor v 3rd Para Battalion	247–50
<i>Prosecutor v. Akayesu</i>	134
<i>Prosecutor v. Kayishema and Ruzindana</i>	134
<i>Prosecutor v. Kunarac, Kovac and Vukovic</i>	140
<i>Prosecutor v. Musema</i>	134
Prostitution <i>per se</i>	60, 71, 98, 190
protected persons	145, 156, 234, 272

R

R v Brocklebank	223–28
<i>R v Gibbins and Proctor</i>	75
<i>R v Instan</i>	75
R v Mathieu.....	242–45
<i>R v V.</i>	94
<i>R v West Coroner, ex p Gray</i>	309
R v. Boland.....	232–35
R v. Seward	239–42
R. v. Brown	228–32
R. v. Sox.....	235–39
<i>R. v. Wijesinha</i>	165
<i>Radebe v State</i>	107
rape	26, 27, 28, 31, 37–43, 56–60, 66–71, 87–98, 153, 169, 323
relevance of State liability cases to peacekeeping forces	125–28
Reparation to victims	324
<i>res inter alios acta</i>	18, 199, 219
<i>Residual criminal jurisdiction</i>	217, 218
responsibility of the State	<i>See state liability</i>
rhinoceros horns	35
rotation	170, 293, 301
Rules of Engagement.....	181

S

<i>S and Minister for Justice and Constitutional Development v Acting Regional Magistrate, Boksburg</i>	89
<i>S v Baloyi</i>	126
<i>S v Coetzee</i>	97, 109, 111
<i>S v F & others</i>	94
<i>S v Goliath</i>	106
<i>S v Mangokoane and Others</i>	90, 109
<i>S v Mshumpa</i>	105
<i>S v Ndlovu</i>	105
<i>S v Nivathi</i>	104
<i>S v Norbert Glenn Agliotti</i>	106
<i>S v Sikakane</i>	109
<i>S v Zuma</i>	97
S.S. “Lotus”.....	96
SANDF members	<i>See South African troops</i>
sex with under-aged persons.....	<i>See age of consent</i>

sexual crimes	86
Sexual crimes	27
sexual exploitation and abuse	32, 33, 34, 166, 174, 191, 206, 264
sexual exploitation and the abuse	22
sexual offences	55, 152–55, 323
sexual services	69, 98, 102, 109, 308, <i>See</i> engaging the services of a prostitute
sexual-related crimes	35
South African troops	85, 192, 193, 195
state liability	211, 309
State liability	12, 125
State of their nationality	267, 301
stigmatization	35
<i>subpoena</i>	169
substantive definitions	84, 85, 110
substantive law	12, 18, 27, 128, 129
Suggested Draft Convention	320
summary investigations	182

T

territorial jurisdiction	189, 215, 218, 285, 289
territorial law	23
territorial principle	273
territoriality principle	55, 65, 81, 217, 218, 285, 313
Therese Nkeshimana	29, 57, 62, 318
third State	162, 164, 167, 199, 200, 214, 218, 258, 270, 287, 289, 301, 323
torture	156, <i>See</i> assault

U

UN officials and experts on mission	267, 273, 277, 292, 299
<i>United States v. Ronghi</i>	212
universal jurisdiction	162, 219, 258, 262, 270, 275, 287, 288, 310, 314
unwillingness	19, 90, 160, 162, 196, 221, 253, 259, 265, 290, 291, 293, 303

V

<i>Van der Westhuizen v S</i>	106
<i>Van Eeden v Minister of Safety and Security</i>	124, 125, 126, 127
vicarious liability	<i>See</i> state liability
<i>Vilakazi v The State</i>	98
voluntary prostitution	60

W

war crimes ... 22, 24, 43, 50, 60, 62, 131, 137, 144, 147, 149, 151, 142–54, 156, 158, 163, 162–64, 189, 218, 220, 221, 279, 280, 281, 287, 374, 375, 378	
weapons and mineral trafficking	1
weapons for minerals	9
<i>Whitehead v The State</i>	106
willingness	55, 211, 264, 277

Y

<i>Yamashita v. Styer</i>	43
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