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ORGANISATIONS AND THE RULE OF LAW:
PERILS AND PROMISE

THIS ISSUE INCLUDES CONTRIBUTIONS BY

José E Alvarez

Róisín Burke

Treasa Dunworth

Carolyn M Evans

Amelia Keene

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington, New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

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CENTRAL AFRICAN REPUBLIC PEACEKEEPER SEXUAL CRIMES, INSTITUTIONAL FAILINGS: ADDRESSING THE ACCOUNTABILITY GAP

*Róisín Burke**

Complicity by United Nations military peacekeepers in sexual exploitation and sexual abuse (SEA) has been well documented over recent years, most recently exemplified in relation to peacekeepers in the Central African Republic (CAR). In response to the dilemma, the United Nations has undertaken a number of initiatives and reforms in attempting to eradicate such abuse. These measures, to some extent, have taken two different trajectories given the different legal status of the various categories of United Nations personnel. SEA by United Nations military peacekeepers has therefore been dealt with separately by the United Nations from similar conduct by United Nations officials and experts on mission. This, to a large extent, is due to jurisdictional concerns. In mid-March 2015 an internal United Nations report dated November 2013, drawn up as a result of an expert mission to examine the continuing problem of SEA on United Nations operations, was leaked. The report emphasises the continued failings of the United Nations and deploying states to address sexual abuse effectively and to address impunity. A panel appointed to look into United Nations institutional failings with respect to its response to allegations of SEA of children by peacekeepers in CAR also issued a detailed report. The report detailed dire institutional failings. These are not new issues, however the legal framework governing extraterritorial sexual crimes by United Nations peacekeepers, and indeed other peacekeepers, remains poorly understood. Practitioners, expert panels and academics have proposed alternative accountability and response frameworks, but implementation is stalled. Therefore, the author is keen to address some of the legal complexities around criminal accountability of peacekeepers, civil and military, for sexual offences, and in light of recent developments, suggest possible ways forward.

* Senior Lecturer, University of Canterbury.

INTRODUCTION

Sexual exploitation and abuse (SEA) at the hands of a minority of civilian and military peacekeepers has been well documented with respect to many peace operations. From 2013 to 2015 there have been 108 reported incidents of SEA by peacekeepers, involving both civilian and military personnel deployed to the Central African Republic (CAR).¹ These were brought into the limelight through the media and leaked United Nations reports. Many of these allegations involved minors. A United Nations employee leaked a United Nations Children's Emergency Fund (UNICEF) report in May 2015 revealing alleged child sex abuse by French soldiers in CAR. The abuse is alleged to have involved young boys between the ages of 8 and 13 who were living in an Internally Displaced Person (IDP) camp. The peacekeepers allegedly engaged in sexual acts with children in exchange for food rations or money. There are indications that there were also other child victims who have not come forward.² Troops from Chad and Equatorial Guinea were also alleged to have sexually abused children,³ but there is no public evidence of any investigations into these abuses by these countries. In response to numerous further allegations that have arisen this year, implicating French, but also peacekeepers of other nationalities, and which have included allegations of four teenage girls been forced into acts of bestiality, one subsequently dying of an unknown disease, the French authorities released a statement on 5 April 2016 stipulating:⁴

These allegations of sexual exploitation and abuse are sickening and odious. They create a profound indignation and anger. The French authorities are determined to shed full light on these grave allegations, in cooperation with the United Nations and the Central African Republic. The French authorities forwarded to the French justice the information communicated by OHCHR on the same day as it was received in Paris, on Wednesday 30 March 2016. The information are [sic] thus in the hands of the French Justice, which has already opened a criminal proceeding regarding previous similar allegations. It's clear

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- 1 Ryan McCarrel "The United Nations and Sexual Abuse: Why Peacekeeping Reform has Failed" *Foreign Affairs* (online ed, New York, 14 February 2016); and Margaux Benn "UN Sex Scandal in the Central African Republic Hits Rock Bottom", *Foreign Affairs* (online ed, New York, 18 April 2016). For a breakdown of statistics on SEA by United Nations peacekeepers only see United Nations Conduct and Discipline Unit "Allegations for All Categories of Personnel Per Year (Sexual Exploitation and Abuse)" (31 March 2016) <cdu.unlb.org> but note that the data does not match up.
 - 2 Marie Deschamps, Hassan B Jallow and Yasmin Sooka *Taking Action on Sexual Abuse and Exploitation by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic* (United Nations, 17 December 2015) at ii [CAR Panel Report].
 - 3 Kevin Sieff "UN says some of its peacekeepers were paying 13-year-olds for sex" *The Washington Post* (online ed, Washington (DC), 11 January 2016).
 - 4 Permanent Mission of France to the United Nations in New York "Statement by Mr François Delattre, Permanent Representative of France to the UN, in reaction to the recent allegations of sexual exploitation and abuse in Central African Republic" (media statement, 5 April 2016).

that if the facts were proven, exemplary disciplinary action will be imposed, in addition to the criminal response.

Anders Kompass, the director of field operations for the Office of the High Commissioner for Human Rights (OHCHR), who revealed the UNICEF CAR report, was initially suspended pending disciplinary hearings for the leak. He has since been reinstated due to a ruling by the United Nations Dispute Tribunal, which declared his suspension unlawful. While the soldiers were not under United Nations employ (that is, they were not United Nations peacekeepers) the incident, nevertheless, is reminiscent of problems with respect to whistle-blower protections, cover-ups and retaliation in the past,⁵ protections that are supposed to be assured by the United Nations.⁶ The initial suspension was allegedly for breach of United Nations protocols regarding confidential documents. Kompass' suspension was authorised by Zeid Ra'ad Al Hussein, the High Commissioner for Human Rights (the author of the Zeid Report in 2005, which constituted the first comprehensive examination of SEA by United Nations peacekeepers in the Democratic Republic of the Congo).⁷ Kompass' initial suspension may discourage other potential whistle-blowers from revealing incidents of SEA by United Nations peacekeepers or others: for example the African Union, NATO or non-governmental organisations. Indicative of more widespread sexual abuse by peacekeepers, a further four cases of sexual exchanges (for as little as 50 cents and involving 13-year old girls) were alleged in January 2016 against United Nations peacekeepers, again at an IDP camp in CAR. According to media reports, some United Nations officials have suggested that these latter allegations implicated troops from Gabon, Burundi, Morocco and France. Allegedly, the United Nations peacekeepers used the services of a prostitution ring, involving men and local boys (as runners), for the procurement of girls.⁸ What is further disconcerting is that this closely follows the report of the CAR Panel and the presence of investigators into allegations against French troops in CAR. There were other allegations involving the rapes of women and girls in CAR in 2015, including by a United Nations police officer.⁹ Numerous other serious allegations of sexual abuse by United Nations peacekeepers from a number of different states in CAR have emerged in 2016.¹⁰ It ought to be stressed that sex with children and young teenagers is an issue of paedophilia and not of prostitution.

5 Jane Rasmussen "MONUC – *Sexual exploitation and abuse: End of assignment report*" (25 February 2006) Relief Web <reliefweb.int>; and Colum Lynch "The Whistleblower: The Movie the UN would prefer you didn't see" *Foreign Policy* (online ed, New York, 29 June 2011).

6 *Secretary-General's Bulletin: Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations* ST/SGB/2005/21 (2005).

7 Zeid Ra'ad Al Hussein *A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations* A/59/710 (2005).

8 Sieff, above n 3.

9 Sieff, above n 3.

10 Benn, above n 1.

The United Nations' investigative office, the Office of Internal Oversight Services (OIOS), which conducts administrative investigations, has commenced an investigation into the allegations with respect to the civilian personnel implicated in the failures to reveal the incidents of SEA in CAR. It is also examining the manner in which *Kompass* revealed the document. French authorities are investigating allegations of SEA against French troops, but these have yet to be completed and nobody has been subject to prosecution. This is despite detailed accounts provided by the child victims of the features, names and other identifying factors with respect to at least some of the accused soldiers.¹¹ It is unclear, thus far, what action other states are taking with soldiers implicated, as highlighted by the CAR Panel, whose report is discussed below.

In 2015 the United Nations Secretary-General established an external Independent Review Panel on the United Nations response to allegations of sexual exploitation and abuse and other serious crimes by members of foreign military forces not under United Nations command in the Central Africa Republic.¹² Ms Marie Deschamps of Canada chaired the Panel. The final 170-page report (CAR Panel Report) was released on 17 December 2015.¹³ The Panel had unrestricted access to all documents and communications within the United Nations system, including with respect to the OIOS, revealing interesting results on the internal workings of the United Nations system and possible politics or failures at play at various levels of that system. The Panel shed light on the failures to report and deal adequately with the CAR sex abuse allegations. According to the report, the head of the CAR operation failed to take any action when the allegations arose. UNICEF and other human rights personnel (that is, the Human Rights and Justice Section of the Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), the Special Representative for the Secretary-General for Children in Armed Conflict and the OHCHR) failed to institute protection measures with respect to the victims or potential child victims of SEA. The Panel partly attributed this to institutional fragmentation within the United Nations system.¹⁴ Institutional silos are undermining operational capacity on multiple levels in the United Nations system. Even attempts by French authorities to secure the co-operation of United Nations bodies so as to facilitate their investigation into allegations against their troops were met with significant resistance. This included a failure, on the initial request of French authorities, to waive the immunity of the UNICEF employee

11 Deschamps, Jallow and Sooka, above n 2, at ii.

12 United Nations "Secretary-General Appoints Independent Review Panel on UN Response to Allegations of Sexual Abuse by Foreign Military Forces in Central African Republic" (press release, 22 June 2015). See also Radina Gigova "UN investigating new allegations of sexual abuse against peacekeepers" (13 November 2015). CNN <www.cnn.com>.

13 Deschamps, Jallow and Sooka, above n 2.

14 At iii.

who first reported on the allegations so that she could participate in legal proceedings in the French justice system. A waiver was finally granted a year later.¹⁵

The CAR Panel cleared Kompass for his role in leaking the report on SEA by French peacekeepers (the Sangaris force). Yet Kompass' conduct, and the manner in which he reported the abuse, was in line with the standards set out in the Secretary-General's Bulletin on protection against retaliation.¹⁶ The Panel stressed that the situation arose out of "gross institutional failure" on the part of the United Nations.¹⁷ It was highly critical of the preoccupation of bodies and individuals implicated with the political sensitivity of the allegations, instead of dealing with them and ensuring the protection of the children involved. The Panel stressed that these failures were not just disciplinary matters but human rights violations falling squarely within the United Nations' human rights policy framework, as derived from the Charter of the United Nations (Charter).¹⁸ It was critical of the OIOS and its systematic failures when dealing with the CAR allegations and surrounding circumstances, and suggested that the OIOS' impartiality was compromised. The head of the OIOS has now been replaced, with the Panel finding that she had abused her authority and compromised the independence of the OIOS with respect to Kompass. That stated, the utility of these results, in the context of SEA by United Nations peacekeepers, is limited given that legal and procedural systems differ fundamentally. We should not confuse the two. These personnel were simply not deployed under United Nations command (albeit the operation had United Nations authorisation) so normal investigative procedures and United Nations SEA policies will not apply. Going forward, as the United Nations seeks to rely increasingly on regional bodies in conducting peace operations which will not fall under its command, this may cause increasing problems given that these bodies tend to be regulated to a lesser extent even than United Nations peacekeepers. Nevertheless, in a context such as this, the United Nations' human rights policy framework would still apply with respect to investigating and reporting on allegations of SEA.

I will not address in any detail the legal frameworks and difficulties arising with respect to troops not falling under United Nations command, given that this would require a far broader study. There are, however, some parallels. The CAR Panel report, while focusing on non-United Nations

15 At 1 and vi.

16 *Secretary-General's Bulletin: Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*, above n 6.

17 Deschamps, Jallow and Sooka, above n 2, at v.

18 *Secretary-General's Bulletin: Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations*, above n 6. Note that I have addressed the issue of United Nations responsibility for human rights violations elsewhere, but it is worth noting that while the United Nations may have responsibility at a normative and policy level, legal implications, possible impact on accountability, and redress for victims will likely be limited. See generally Róisín Burke *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Martinus Nijhoff, Leiden, 2014).

peacekeepers, makes a number of recommendations for the reform of the United Nations internal system to better deal with SEA allegations. At present the system appears to be inherently bureaucratic and ineffective.

What has changed over the past year is the renewed focus that has been placed on SEA by United Nations peacekeepers over recent months. This is largely due to the CAR allegations, highlighting problems within the United Nations system, and a series of extensive reviews that have been, and are being, conducted of the United Nations in 2015 and into 2016. Attention was particularly placed on SEA in the month of October 2015 at the United Nations in the context of the Security Council Open Debate on Women, Peace and Security. As outlined in this article, a few developments have occurred in the last few months, which may, one would hope, spur discussion and more robust action on the issue of SEA by United Nations military and civilian peacekeepers (and indeed non-United Nations peacekeepers).

As a preliminary note, the Secretary-General in 2003 issued the *Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual Abuse*.¹⁹ The Bulletin defines sexual abuse as any "actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions". Sexual exploitation is defined as:²⁰

... any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

The Bulletin directly governs United Nations staff as an administrative issuance. These definitions are also embedded in Annex F of the revised *Model Standard Memorandum of Understanding between Troop Contributing Countries and the Department of Peacekeeping Operations* (revised Model MOU), which governs the conditions under which military contingent personnel are deployed.²¹ These definitions cover a wide spectrum of conduct, which may or may not constitute criminal acts under national or international laws, including prostitution, trafficking, sexual abuse of minors, rape, relationships with beneficiaries of assistance, and others.

This article is concerned with serious sexual offences such as rape and sex with minors. As noted in the Global Study on the Implementation of Security Council Resolution 1325, addressed below, although many perceive SEA allegations against United Nations peacekeepers as involving some form of transactional sex, exploitive or otherwise, nearly half of the allegations actually involve egregious

19 *Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse* ST/SGB/2003/13 (2003).

20 At 1.

21 *Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions* A/C.5/63/18 (2009) [COE Manual] at ch 9.

crimes, including rape and sex with minors. Sex with those under 18 is prohibited under the Secretary-General's 2003 Bulletin.²² Engagement with prostitutes, who may or may not have a level of agency in engaging in transactional sex in fragile and conflict-affected environments where poverty is endemic, has already been subject to much academic literature, in particular in feminist spheres, about the degree of agency exercised.²³ I will not engage in this debate here, but focus on non-consensual sex, rape, sexual violations of minors, and other serious forms of sexual abuse. What is apparent from United Nations statistics and Secretary-General reports, along with the reports of many other reputable bodies, is that approximately half of the allegations and incidents of SEA, from males and females, involve non-consensual sex, rape, and sexual abuse of minors, and not prostitution.²⁴ In these contexts, agency discussions are unhelpful.

United Nations Security Council Resolution 1325 was passed in 2000, which calls for an end to violence against women and children, an end to sexual and gender-based violence generally and for greater participation of women in peace and security processes.²⁵ This was followed by seven subsequent resolutions on women, peace and security (WPS), the most recent of which was Security Council Resolution 2242, adopted on 13 October 2015 at the Open Debate of the Security Council on WPS.²⁶ Marking the 15th anniversary of Security Council Resolution 1325, a Global Study, commissioned by the Secretary-General, was conducted by an independent group of legal experts on the progress at global, regional and national levels on the implementation of Security Council Resolution 1325 (Global Study). This was led by Radhika Coomaraswamy, the former Special Representative of the Secretary-General on Children and Armed Conflict and former Special Rapporteur on Violence against Women. The Global Study was launched at the United Nations on 14

22 *Secretary-General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse*, above n 19.

23 See further: Dianne Otto "Making Sense of Zero-Tolerance Policies in Peacekeeping Economies" in Vanessa Monro and Carl Stychin (eds) *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, New York, 2007) at 260; and Olivera Simic "Rethinking 'sexual exploitation' in UN peacekeeping operations" (2009) 32 *Women's Studies International Forum* 288.

24 UN Women *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council resolution 1325* (October 2015) at 116; United Nations Conduct and Discipline Unit <cdu.unlb.org>; and *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General A/69/779* (2015). See also Francis Elliott and Ruth Elkins "UN shame over sex scandal" *The Independent* (online ed, London, 7 January 2007); and Corinna Csáky *No One to Turn To: The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers* (Save the Children, April 2008).

25 *Resolution 1325 (2000): Adopted by the Security Council at its 4213th meeting, on 31 October 2000* SC Res 1325, S/Res/1325 (2000).

26 *Resolution 2242 (2015): Adopted by the Security Council at its 7533rd meeting, on 13 October 2015* SC Res 2242, S/Res/2242 (2015).

October 2015.²⁷ In 2015 a High Level Expert Panel also conducted a review of United Nations peace operations.²⁸ Both the Global Study and review of the High Level Panel on peace operations reiterated the importance of dealing with SEA by all categories of United Nations peacekeepers in a more robust way and ensuring accountability. The study was mandated by the United Nations and was carried out by prominent, independent experts. It recommended that independent experts should be appointed and mandated by the Secretary-General to conduct a detailed review of the United Nations' internal system for dealing with allegations of SEA and any subsequent investigations.²⁹ In the context of these reviews I will touch on some alternatives to the current accountability framework, which are likely to be the subject of United Nations discussions regarding SEA going forward.

Part I of this article focuses on the issue of functionalism, jurisdictional immunities, immunity waivers and certification matters. I have addressed jurisdictional immunities in previous writings,³⁰ however, in the context of this article it is necessary to address this issue in greater detail. Part II will explore some of the key developments on the issue over recent months and the proposals put forward in the Secretary-General's 2015 Report *Special measures for protection from sexual exploitation and sexual abuse*.³¹ These proposals, along with the CAR Panel's report, are being discussed within the United Nations, particularly in the Sixth Committee (Legal), but may also come up in the Fifth and Fourth Committees. This builds on a Group of Legal Experts' (GLE) report issued in 2006 on criminal accountability of United Nations officials and experts on mission, and its prior recommendations.³² Part III will touch on possible ways forward in addressing SEA in brief with respect to immunities and more robust avenues for holding perpetrators to account.

I FUNCTIONALISM, IMMUNITY RATIONE MATERIAE

I have discussed elsewhere the issue of jurisdictional immunities granted to the various categories of United Nations peacekeepers.³³ It appears, however, worth renewing attention to this issue given the likelihood that this will feature in state and United Nations discussions over the coming months

27 UN Women, above n 24.

28 *Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people* A/70/95, S/2015/446 (2015).

29 UN Women, above n 24, at 123–124.

30 See for example (with permission of the publisher Taylor & Francis Ltd) Marco Odello and Róisín Burke "Between immunity and impunity: peacekeeping and sexual abuses and violence" (2016) *IJHR* 839; and Burke, above n 18.

31 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24.

32 *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* A/60/980 (2006).

33 Odello and Burke, above n 30.

and year(s). If reform is the result, there may well be legal implications for the frameworks governing United Nations peacekeepers both within the internal United Nations regulatory system and also state legal systems and in terms of jurisdictional reach.

Jurisdiction is a central concern when dealing with peacekeepers implicated in acts of sexual abuse or violence. Jurisdiction can be established on the basis of the principles of nationality of the offender (active personality jurisdiction), nationality of victims (passive personality jurisdiction), territoriality (linking jurisdiction to the place where the crime occurs) and the protective principle (where a state's security or national interests are injured). Territorial jurisdiction is the foremost premise for the exercise of jurisdiction under international law and is tied to sovereign entitlements of states to govern and regulate their own territory and conduct that occurs within it. Other jurisdictional bases may, however, be asserted with respect to third states on the above basis. The principle of the law of the flag as a jurisdictional basis generally means that jurisdiction accompanies certain categories of persons overseas; in contemporary times it applies to war ships.³⁴ Others make reference to a form of organic jurisdiction of states to maintain control over and regulate the conduct of their organs.³⁵ Finally, certain types of serious offences might be covered by universal jurisdiction, when a crime is sufficiently serious to be of international concern. This in turn may result in conflicting jurisdictional claims. Clearly, sexual crimes by peacekeepers may give rise to a multitude of jurisdictional claims, but the closest links are based on territoriality, nationality, and perhaps universal jurisdiction. Moreover, states can relax their territorial jurisdiction, should they so choose, in favour of another state with a jurisdictional claim. Historically and presently they do so to greater and lesser extents with respect to diplomats, heads of state, other senior state representatives, visiting armed forces, peacekeepers, personnel of international organisations and so forth. The tendency, however, has been to restrict immunities over recent years.³⁶ Jurisdiction has a slightly different meaning in the context of international human rights law and extraterritorial jurisdiction.³⁷ In this article this latter notion of jurisdiction will not be addressed.

What jurisdictional immunities do in their application to United Nations peacekeepers is that they limit the circumstances in which the host state can exercise its primary jurisdictional claim over them for crimes committed in the host state on the basis of territorial jurisdiction. These immunities are premised on functionality or functional necessity and limited as such. This is clearly articulated in arts

34 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), art 27–28.

35 See further Rain Liivoja "Service Jurisdiction Under International Law" (2010) 11 Melbourne Journal of International Law 309 at 331–333.

36 See Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2011) 21 EJIL 815.

37 Burke, above n 18, at 5. See further Michal Gondek *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (1st ed, Intersentia, Maastricht, 2009) at 47–49.

104 and 105 of the Charter.³⁸ Article 105(1) provides that the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes". Article 105(2) stipulates that "officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization". It is more than apparent from the wording of these provisions that absolute immunity was not envisaged, and indeed with respect to peacekeepers, if properly applied, absolute immunity should not arise. Under art 105(3) the General Assembly may make recommendations on implementing art 105(1) and (2) and "propose conventions to the Members of the United Nations for this purpose".³⁹ The United Nations Convention on Privileges and Immunities (CPI) entered into force in 1948 to elaborate on the immunities from jurisdiction afforded to United Nations staff.⁴⁰ The United Nations General Assembly could choose in the future to draw on art 105(3) to further define the scope of immunities granted to peacekeeping personnel by convention or recommendation, and clarify the issues of waiver of immunities. Mission specific Status of Forces Agreements (SOFA) with the host state, and Memorandums of Understanding with the Troop Contributing State (MOU), which are largely based on United Nations templates, further regulate peacekeepers in the host state and their relationship with the United Nations. Host states can rely on their territorial jurisdiction and historically have done so with respect to certain high profile state representatives, heads of state, diplomats, sometimes armed forces and certain international organisation representatives, amongst others, to greater and lesser extents.

The regulatory rules applying to persons deployed differ according to whether they are considered United Nations officials, United Nations experts on mission or national military contingent personnel.

A The CPI, Functional Necessity: Staff, Officials and Experts

In short, very senior United Nations officials such as the Secretary-General, Under Secretary-Generals, Assistant Secretary-Generals, Special Representatives of the Secretary-General (SRSGs),

38 Article 104 provides that the United Nations "shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". This incorporates United Nations subsidiaries. See Charter of the United Nations, art 104; *Responsibility of International Organizations: Comments and observations received from international organizations* A/CN.4/545 (2004) at 17; and Lilly Sucharipa-Behrmann "Peace-Keeping Operations of the United Nations" in Franz Cede and Lilly Sucharipa-Behrmann (eds) *The United Nations: Law and Practice* (Wolters Kluwer, Alphen aan den Rijn, 1999) 89 at 100.

39 Agreement on the status of the United Nations Interim Force in Lebanon United Nations–Lebanon 1901 UNTS 397 (signed 15 December 1995). See also Convention on the Privileges and Immunities of the United Nations 1 UNTS 15 (opened for signature 13 February 1946, entered into force 17 September 1946) [CPI Convention].

40 CPI Convention, above n 39; Charter of the United Nations, art 105; Walter Gary Sharp *St Jus Paciarrii: Emergent Legal Paradigms for UN Peace Operations in the 21st Century* (1st ed, Paciarrii International, Stafford (Virginia), 1999) at 15 and 53.

head of the civilian police and the Force Commander are accorded immunity equivalent to diplomatic immunities, derived from the Charter and the CPI.⁴¹ Originally, United Nations representatives were seen to serve a similar type of purpose as diplomats. This is how the term 'diplomatic immunities' arose. It was largely based on representational theory.⁴² The original use of the term diplomatic is somewhat deceptive. These personnel are accredited to the United Nations and not a state, immunity is not reciprocal and *persona non grata* as a state control mechanism over who is present in its territory does not apply. The grant of these broad immunities to United Nations officials is solely based on the functionality justification drawn from the Charter and CPI, for fear of host state interferences in the operations of the United Nations.⁴³ Indeed, the Preparatory Committee during the drafting of the Charter was explicit in drawing a distinction between the rationale for the immunities granted pursuant to the Charter, and diplomatic immunity, stressing the functional premise only.

Generally, however, United Nations officials (United Nations staff) are afforded what should operate as a limited form of functional immunity from host state criminal jurisdiction for acts, words or omissions done in the context of their official duties. As set out in art 5 of the CPI, United Nations officials are subject directly as employees to United Nations rules and regulations. However, the category official excludes local recruits paid hourly.⁴⁴ United Nations Volunteers are professionals serving the United Nations on a voluntary and non-remunerated basis, albeit a stipend is provided. They sign an undertaking to abide by United Nations rules and regulations, but while United Nations officials may be subject to internal administrative measures through the United Nations Dispute Tribunal and United Nations Appeals Tribunal, a United Nations Volunteer will be subject to the United Nations volunteer internal disciplinary process.⁴⁵ They are afforded under the terms of SOFAs identical immunities to those afforded to United Nations officials.⁴⁶

Experts on mission are not referenced in the Charter. They are generally individuals who are appointed by the United Nations Secretary-General on an individual basis for specific tasks, which are ordinarily for a relatively short specified term. It appears to be a flexible category and, in the context of United Nations peace operations, it has tended to cover consultants and individual

41 See CPI Convention, above n 39, ss 19 and 27.

42 Moreover, diplomatic immunity revolves around the principle of reciprocity. A state can request that an individual leave by declaring the *persona non grata*. This will not apply to these senior United Nations officials. See Tim Hillier *Sourcebook on Public International Law* (1st ed, Cavendish, London, 1998) at 315.

43 Vienna Convention on Diplomatic Relations 500 UNTS 95 (opened for signature 18 April 1961, entered into force 24 April 1964), art 9.

44 *Respect for the privileges and immunities of officials of the United Nations and the specialized agencies and related organisations* GA Res 51/227, A/Res/51/227 (1997).

45 Office of Internal Oversight Services *Investigations Manual: Provisional, pending promulgation of the revised ST/AI/371* (January 2015) at 21.

46 At 20–21.

contractors (who are not subject to the United Nations' internal disciplinary system), United Nations military experts on mission (that is, military observers, military liaison officers and military advisors),⁴⁷ United Nations police officers and formed police units (generally on secondment and subject to a MOU between the United Nations and the sending state). It also covers persons such as rapporteurs with respect to human rights, and members of the International Law Commission.⁴⁸ Although some experts on mission will retain links with their sending state, while they are experts on mission they are exclusively international personnel, and under United Nations authority only.⁴⁹ The SOFA with the host state will specify who is to be considered an expert on mission generally.⁵⁰ Article 6 of the CPI provides experts on mission with:⁵¹

... such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions.

Neither the CPI nor the Charter provide any guidance on what is necessary and who should make this determination in any given case.⁵² They are afforded "immunity in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". This also includes immunity from arrest and detention, in addition to less relevant immunities such as the inviolability of their baggage.⁵³ The purpose of these immunities is to prevent interference with their duties.⁵⁴ Experts on mission generally refer to people assigned specific tasks by the United Nations Secretary-General. This categorisation is afforded by specific and individualised agreement with the Secretary-General.⁵⁵ United Nations military contingent

47 At 23.

48 See *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission* ST/SGB/2002/9 (2002) at [3].

49 Regulation 1.

50 While the sending state may still have disciplinary authority over police and military experts on mission they must cooperate with any UN OIOS internal administrative investigation. A Model Undertaking and Declaration is signed by Experts on Mission: UN Police Officer/Corrections Officer/Military Observers/Military Liaison Officers. See Office of Internal Oversight Services, above n 45, at 23–24.

51 CPI Convention, above n 39, art 6.

52 See generally Alexander Orakhelashvili "Jurisdictional immunity of international organizations: from abstract functionality to absolute immunity" in Alexander Orakhelashvili (ed) *Research Handbook on Jurisdiction and Immunities in International Law* (1st ed, Elgar, Cheltenham, 2015) 497 at 503–504.

53 CPI Convention, above n 39. See further Anthony Miller "United Nations Experts on Mission and their Privileges and Immunities" (2007) 1(4) *International Organizations Law Review* 11.

54 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62. See also *Stichting Mothers of Srebrenica v Netherlands* (65542/12) Section III, ECHR 11 June 2013 at [139].

55 *Report of the Group of Legal Experts*, above n 32.

personnel will not generally fall within this category. Regulation 1(e) of the United Nations Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission expressly stipulates:⁵⁶

These privileges and immunities furnish no excuse to those who are covered by them to fail to observe the laws and police regulations of the State in which they are located; nor do they furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, an official or an expert on mission shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived, in accordance with the relevant instruments.

The United Nations Secretary-General has a legal responsibility to waive the immunities granted to United Nations officials and experts on mission where "in his opinion, the immunity would impede the course of justice".⁵⁷ With respect to SEA allegations against United Nations peacekeeping personnel, the author is not aware of instances where immunity has been waived despite these acts clearly falling outside the remit of official duties or, more appropriately, acts being certified as non-official.⁵⁸ That stipulated, according to the GLE there have been incidents where immunity has been waived and United Nations personnel were subjected to host state criminal jurisdiction, even where the host state's legal system might be regarded as dysfunctional. Apparently, waiver of immunity may be subject to ad hoc arrangements between the United Nations and host state so as to protect the rights of the alleged offender.⁵⁹ The Global Study stresses the need to expedite the process by which the Secretary-General certifies conduct as non-official or waives immunity.⁶⁰ It would be useful for the Secretary-General to explicitly clarify the process by which he or she does this in a transparent manner. It appears that the United Nations Office of Legal Affairs (OLA) plays an advisory role here.⁶¹ Of course SEA will never fall within the remit of official functions, but in practice there still appears to be a reluctance to act without a United Nations sanction. There needs to be some effort by the United Nations to clarify what falls within the scope of 'official' capacity or duties, or to simplify things and clarify what certainly falls beyond 'official' duties. States, in essence, have not renounced their jurisdiction under the CPI for acts falling outside official duties. The waiver issue should not even arise, and the United Nations cannot assert it. In the *Commaraswamy* case before the ICJ, the court stated that whether an act was carried out in the course of official functions would depend on

56 *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission*, above n 48, reg 1(e).

57 CPI Convention, above n 39, s 20.

58 *Report of the Group of Legal Experts*, above n 32, at 11.

59 At 29.

60 UN Women, above n 24, at 117.

61 See further Office of Internal Oversight Services, above n 45.

"the facts of the particular case".⁶² This does little to clarify the scope of official functions, or who should make such a determination: presumably the Secretary-General. Nevertheless, it is clear that sexual offences are in no way within that scope. The manner in which officials behave or omit to act when allegations arise, which may involve ultra vires conduct in terms of how they in policy are supposed to act, gives rise to more complex difficulties, I would argue, in determining whether such conduct falls within the scope of official duties. Orakhelashvili warns that, with respect to waiver, what the Secretary-General has been afforded under the CPI is a type of diplomatic protection over agents acting within the scope of their duties. They are still bound by the terms of the treaty, as opposed to an auto-determination power of the Secretary-General which has no limits, but in practice auto-determination occurs.⁶³ It is questionable whether acts of various United Nations agents in the context of repeated sexual offences by peacekeepers and the manner such abuse has been addressed, are in line with the United Nations' constitutive instrument: that is, the functionality which is set out in the Charter, and the protection of human rights as a core purpose of the United Nations.⁶⁴ Failures to waive immunity or, more appropriately, to certify sexual offences as unrelated to official duties, could be challenged by the host state through an ICJ Advisory Opinion per s 30 of the CPI, at least in theory, given that such a failure goes against the interests of justice.

A reverse illustration of the operation of the immunities granted to United Nations officials and experts on mission was highlighted in the context of the CAR Panel Report, wherein the United Nations official originally documenting the abuse against the children was not initially able to participate in investigations by French authorities given that, on advice of the United Nations OLA, her immunity was not waived by the Secretary-General so as to enable her to participate in the French judicial process. This served as an impediment to the ability of the French authorities to effectively investigate the allegations against its soldiers, resulting in delays. This immunity was eventually waived only at a much later stage in the process, likely due to increased media attention and international pressure on the United Nations to act.⁶⁵ It would be useful for the Secretary-General and OLA to set out guidance on such waivers. To reiterate, host states clearly have jurisdiction, but I am not aware of any case where they have exercised it in the context of sexual offences by United Nations officials or experts on mission. Impediments to doing so may be multi-fold, not least host state capacity, the fact that the individual may no longer be in the country, as well as political considerations. United Nations officials and experts on mission are regulated by Staff Regulations and Rules, administrative issuances (such as the Secretary-General's 2003 Bulletin) and the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat

62 *Difference Relating to Immunity*, above n 54, at 85.

63 Orakhelashvili, above n 52, at 511.

64 Charter of the United Nations, Preamble; and *Al-Jedda v United Kingdom* (27021/08) Grand Chamber, ECHR 7 July 2011.

65 Deschamps, Jallow and Sooka, above n 2.

Officials, and Experts on Mission, but these will not give rise to criminal sanction, their being limited to internal administrative measures.⁶⁶

SEA has been perpetrated by the various categories of United Nations peacekeeping personnel. Too frequently, states are unwilling, or perhaps unable, to effectively investigate and prosecute. Even when there is a judicial process there appears to be a tendency to take lenient criminal and disciplinary measures.⁶⁷ For instance, in the case of Haiti, three Pakistani police officers raped a disabled teenage boy. While the Pakistani authorities carried out an onsite court martial in Haiti, the result was a one-year sentence.⁶⁸ The United Nations cannot exercise criminal jurisdiction, at least not under the present status quo. Unlike United Nations military contingent personnel, where the law follows the individual deployed, with respect to United Nations officials and experts on mission often states' criminal laws simply do not apply extraterritorially and states have little will, or perhaps capacity, to carry out an effective investigation and prosecution with respect to crimes committed in a foreign and often volatile host state. As noted by the International Law Commission, in the context of attribution of responsibility to states and international organisations, there is certain conduct that is so far removed from official duties that only the responsibility of the individual arises.⁶⁹ A distinction might be made between sexual violence and failure to act when a violation occurs. Clearly sexual offences are beyond the remit of official duties, so immunity should not arise. That stated, the reality is that the United Nations will have to certify that this is the case. I am unaware of any such certification occurring with respect to sexual offences, likely due to concerns about exposing the individual to a host state legal system that might not have adequate human rights standards. In the context of an omission to act, even if *ultra vires*, it may be more difficult to sever the official duties link. This is not one and the same as stating that the international organisation or a state may not have committed a wrongful act and that responsibility may ensue where a legal obligation exists. On reading the CAR Panel Report, some of the complexities with this are apparent, partly given institutional silos within the United Nations system, which have given rise to a situation of the passing off of responsibility.

B United Nations Military Contingents: Limitations on Absolutist Immunity

The ordinary military contingent personnel deployed on United Nations missions will not fall under the CPI and their legal status in the host state is regulated by two key documents. The first is a SOFA and the second is the MOU. As noted, a SOFA is a bilateral agreement, which is negotiated

66 See Office of Internal Oversight Services, above n 45.

67 UN Women, above n 24, at 114.

68 "UN: 'Rapid' justice done in Haiti UN rape crime" *Associated Press* (online ed, Boston, 21 March 2012).

69 Commentary on art 7 of "Responsibility of States for internationally wrongful acts" in *Report of the International Law Commission: Fifty-third session A/56/10* (2001) at 102, [7]. See further Burke, above n 18, at 286–291.

between the United Nations and the mission host state. It governs the conditions of the presence of the United Nations in the host state and its activities there, dealing with issues such as freedom of movement, jurisdiction, and dispute resolution. An MOU, between the United Nations and the troop-contributing country (TCC), is again a bilateral agreement legally defining the conditions under which troops, and sometimes formed police units, are deployed to the United Nations operation. It deals with issues such as TCC reimbursement, discipline, command and control, investigations, jurisdiction, SEA prohibitions and so forth. The United Nations has a Model SOFA and a Model MOU, which it uses as templates when negotiating MOUs and SOFAs with each state. NATO and other types of overseas deployments also use these types of legal agreements for the deployment of foreign forces overseas, although of course their provisions differ according to what is agreed by the parties involved. The United Nations SOFAs and MOUs provide that military contingent personnel are subject to the exclusive criminal jurisdiction of the contributing country.⁷⁰ The rationale for this broad immunity was largely related to recruitment concerns with respect to those falling outside the CPI or Charter directly.⁷¹ Both of these bilateral agreements are legally binding. The conferring of immunities is clearly premised on functionality, so as to prevent any hindrances from the host state. Sometimes there is a delay or failure to negotiate SOFAs, although over recent years the Security Council has required the provisional application of its model SOFA. Anything set under the terms of the MOU obviously has no legal implications for the host state. There is no direct legal agreement between host states and the sending states.⁷²

The United Nations Model MOU was revised significantly in 2007 in an attempt to strengthen measures aimed at preventing SEA and holding perpetrators to account. Such revisions included, for instance, the requirement that the sending state exercise its investigative, criminal or disciplinary jurisdiction, as appropriate, when allegations of SEA arise. The revised MOU incorporates United Nations standards on SEA set out in the Secretary-General's 2003 Bulletin as prohibited conduct, and they emphasise certified training and command responsibility.⁷³ Rationales for the grant of exclusive criminal jurisdiction are partly related to sending state command and control structures and requirements, their laws and constitutions, the protection of peacekeepers, troop deployments and politics. The Secretary-General cannot simply waive this immunity: only the sending state can do this.

70 See United Nations Legal Counsel "Question of Privileges and Immunities of the United Nations, of Representatives of Member States and of Officials of the Organization: Statement made by the Legal Counsel at 1016th meeting of the Sixth Committee of the General Assembly" [1967] *United Nations Juridical Yearbook* 311 at 314.

71 *Report of the Secretary-General: Summary Study of the Experiences derived from the Establishment and Operation of the Force A/3943* (1958) at [163].

72 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (opened for signature 21 March 1986, not yet in force), art 34.

73 *Report of the Secretary General: Model status-of-forces agreement for peace-keeping operations A/45/594* (1990) [Model SOFA].

Where no SOFA exists, technically no immunity arises, although the United Nations may require, through passing a Security Council Resolution, the provisional application of the Model SOFA, and some argue these provisions may constitute customary international law.⁷⁴ It should be borne in mind that these instruments may also need legislative acts so as to transpose them into national law. Department for Peacekeeping Operations (DPKO) and Department of Field Support (DFS) Standard Operating Procedures on Implementation of the amendments relating to conduct and discipline in the Model MOU between the United Nations and TCCs have also been drawn up.⁷⁵

It ought to be noted that the grant of exclusive criminal jurisdiction to TCCs will not constitute immunity from jurisdiction outside the host state.⁷⁶ Indeed, a proviso to this effect has been inserted in recent SOFAs and MOUs with respect to United Nations operations, albeit with questionable impact thus far in dealing with sexual crimes by peacekeepers.

II THE WAY FORWARD

A Functionality and Jurisdictional Frameworks

According to Jenks:⁷⁷

The current regime of international immunities has been evolved as a result of thorough appraisal by governments of the functional needs of effective international organizations. *It is these functional needs which constitute both the justification for and the measure of international immunities.*

The theoretical and legal basis for the grant of immunities to United Nations peacekeepers is a functional necessity. Immunities in this context are immunities *ratione materiae* as opposed to personal immunities, and are linked to functions as opposed to personal benefit. International law elsewhere is increasingly moving towards greater limitations of jurisdictional immunities granted to state representatives and others, in light of their being used on occasion to shield perpetrators of abhorrent crimes from being held to account criminally. A series of articles by Klabbers shed an interesting light on functionalism and its appropriateness for the regulation of the United Nations and its system of immunities, given its failings in the realms of control of international organisations, particularly in the context of wrongful acts.⁷⁸ Here, I argue that functionalism can play a useful role

74 See Dieter Fleck "The Legal Status of Personnel Involved in United Nations Peace Operations" (2013) 95 *International Review of the Red Cross* 613.

75 The author is in the process of trying to obtain access to this document from the United Nations.

76 "District Court of Haifa, The Government of Israel against Papa Coli Ben Dista Saar: Judgment of 10 May 1979" [1979] UNJY 205 at 206 (case summary).

77 Wilfred Jenks *International Immunities* (Stevens, London, 1961), at xxxvii–xxxviii (emphasis added).

78 See for example Jan Klabbers "Transformation of International Organizations Law: A Rejoinder" (2015) 26 *EJIL* 975; and Jan Klabbers "The Emergence of Functionalism in International Institutional Law: Colonial Inspirations" (2014) 25 *EJIL* 645.

if effectively applied. However, the current system of jurisdictional immunities applied de jure and de facto, in the context examined here, comes much closer to absolute immunity departing from the functional basis on which it is premised. If functionality is the basis for immunities afforded to peacekeepers, then we need to look to their functions in considering the limitations of immunities. Moreover, these immunities should be tied to the existence of other effective mechanisms for holding peacekeepers committing serious criminal offences to account.

1 United Nations Officials and Experts on Mission

As noted, the GLE was established by the United Nations in 2006 to advise as to how to ensure the accountability of United Nations officials and experts on mission with respect to criminal acts committed during peacekeeping operations. With respect to United Nations officials and experts on mission, a primary issue is jurisdictional gaps. It is often the case that a state's criminal laws will simply not apply to nationals who are United Nations officials or experts on mission and are committing SEA in a foreign territory. This was discussed extensively by the GLE, who in essence saw a few ways of dealing with this, namely:⁷⁹

- (1) to request states to reform their criminal laws so that they can apply extraterritorially to this type of conduct;
- (2) to support the host state so that it can exercise its jurisdiction; or
- (3) to draw up some form of a convention on criminal accountability (it drew up a *sample* convention).

With respect to the extraterritorial jurisdiction problem, all that has really occurred since was a request by the Secretary-General for states to provide him with information on their criminal laws and how they would apply to nationals committing, or alleged to have committed, sexual abuse in mission host states (ie the extraterritoriality of these laws). Some states gave varying levels of detail on their criminal laws and their extraterritorial application. Some responses were more detailed than others, but quite a number were vague or related to international or transnational crimes.⁸⁰ SEA would likely fall outside these latter categorisations. Moreover, no information was provided by a majority of states. The General Assembly has adopted a number of Resolutions requesting states to reform their criminal laws so that they can apply to criminal sexual acts by nationals who are United Nations officials or experts on mission.⁸¹ With respect to military contingents, state law travels with them, and while it might be military law in many cases, the issue of extraterritorial jurisdiction does not arise. Of course, serious difficulties may arise with respect to conducting investigations and courts

⁷⁹ See *Report of the Group of Legal Experts*, above n 32.

⁸⁰ See for example *Criminal Accountability of UN Officials and Experts on Mission: Report of the Secretary-General A/63/260* (2011).

⁸¹ *Criminal Accountability of UN Officials and Experts on Mission* GA Res 67/88, A/Res/67/88 (2013).

martial extraterritorially, mutual legal assistance, cooperation between the United Nations and the host state and so forth.

Not all acts prohibited by the United Nations' zero-tolerance policy might necessarily be criminal under national or international laws. The GLE limited its considerations to conduct that might actually be considered criminal. That stated, what constitutes a crime will differ according to the laws of each state and their elements. The foremost recommendation made by the GLE was that the United Nations should endeavour to assist the host state with the exercise of its criminal jurisdiction, rather than relying on external states to get around the extraterritorial jurisdiction issue. Where the host state is unable to exercise its jurisdiction, it notes that other states need to step in and exercise extraterritorial criminal jurisdiction over the individual. The GLE states that in this scenario the host state might, nevertheless, be capable of offering assistance in gathering evidence, arresting the individual and so forth. The GLE emphasises that jurisdiction is not indivisible.⁸² The exercise of jurisdiction by other states may be met with difficulties such as evidence meeting admissibility standards in national courts, extradition issues and the fact that instigating criminal investigations and procedures in a foreign state may prove burdensome, problematic and dangerous, particularly where a conflict is ongoing. Mutual legal assistance and extradition proceedings may also require dual criminality between states. The reasons for the GLE's preference for the host state exercising its own jurisdiction are many, not least because the crime is committed in that state, making jurisdictional claims easy to establish. Moreover, it allows for easier access to witnesses and evidence, and it enables the local community to see justice being carried out.⁸³

2 *Military contingent: Limitations of Immunities and Concurrent formulations*

We need to bear in mind that at least at present, the United Nations does not have a criminal law capacity. The only action the United Nations can take with respect to any of the categories of United Nations peacekeeping personnel is administrative, such as suspending an individual (civilian), barring an individual from United Nations operations, or financial. With respect to military personnel, actions are limited to the repatriation of the alleged perpetrator, which in effect removes them from the crime scene, potentially making any investigation even more difficult, and they may have already been rotated out of host state territory. Moreover, similar problems arise with regard to civilian personnel, such as access to witnesses and evidence, evidence meeting admissibility standards for subsequent prosecution in national courts, dual criminality requirements, communication of the outcome to the victim, and transparency. While states are required to exercise their jurisdiction under the legally binding MOU, this in reality remains at their discretion and there is no enforcement mechanism. As is clear from United Nations statistics and Secretary-General reports, states have not been compliant in many cases in responding to United Nations requests for information regarding action taken against

82 *Report of the Group of Legal Experts*, above n 32.

83 At 10–11.

alleged perpetrators. Apart from cases that have been very public and followed extensively by the media (for example, the CAR and Haiti incidents), there is little transparency in the process or information on actions taken.⁸⁴

As I have suggested in previous writings,⁸⁵ if the United Nations were to reform its Model SOFA and specific SOFAs with host states, along with MOUs with TCCs, it could alter the immunity provisions to provide for a more limited form of immunity in line with functional necessity. Where an offence is related to official duties, this could fall within the remit of TCCs' criminal jurisdiction, but sexual offences, which in no way relate to official duties, could be excluded and fall to host state jurisdiction or to some form of hybrid or international/internationalised court in the host state, where feasible. Qualifications of immunity are found in other SOFAs, such as the NATO SOFA. The NATO SOFA provides for both exclusive and concurrent jurisdiction, primary and secondary, depending on whether the act is considered a military or criminal offence. Exclusive jurisdiction arises for each state when the act violates the criminal laws of only one of these states. Concurrent jurisdiction, primary and secondary, arises where an act is criminal under the laws of both states. The state deploying troops has primary jurisdiction where an act relates to official duties or affects the force only, and the host state otherwise has primary jurisdiction. The host state may waive that primary right to jurisdiction if it wishes to permit the state with the secondary jurisdiction to exercise its jurisdiction, namely in giving 'sympathetic consideration' to a request of the sending state (which it often will do).⁸⁶ NATO officials have been prosecuted in host states under these terms.⁸⁷ NATO forces deploy to military operations with NATO International Military Police, a combination of national military police from troop-contributors. They are responsible for the preliminary investigation of crimes by NATO troops.⁸⁸ The NATO SOFA applies to stationed or friendly visiting forces (NATO often uses different jurisdictional frameworks for deployments outside NATO states), and was concluded in the framework of a treaty. A United States reservation to the NATO SOFA is that where a soldier is to be tried by a host state, the commanding officer will review its laws for procedural safeguards, and request a waiver of jurisdiction where they prove inadequate. If the trial goes ahead, a United States

84 United Nations Conduct and Discipline Unit "Statistics" (2016) <cdu.unlb.org>.

85 See further, Burke, above n 18; and Odello and Burke, above n 30.

86 Agreement between Parties to the North Atlantic Treaty Regarding the Status of Their Forces 199 UNTS 67 (signed 4 April 1949, entered into force 19 June 1951), art 7. See further Chris Jenks "A Sense of Duty: The Illusory Criminal Jurisdiction of the US/Iraq Status of Forces Agreement" (2010) 11 San Diego International Law Journal 411, at 424.

87 David Nauta "The Role of NATO in the Exercise of Criminal Jurisdiction by States" (2012) 29 NATO Legal Gazette 13.

88 NATO *STANAG 2085: NATO Combined Military Police* (4th ed, 24 February 1988); NATO *Allied Procedural Publication 12: NATO Military Police Doctrine and Procedures* (28 October 2002); and Nauta, above n 87, at 18.

representative must be in attendance.⁸⁹ The NATO SOFA also has quite a detailed framework for dealing with issues of mutual legal assistance, the division of jurisdiction at a custodial phase, arrest and detention and so forth. Nevertheless, the NATO SOFA presents an interesting jurisdictional framework that could also be used for crimes by United Nations military peacekeepers and reflects a better balance between TCC interests in protecting armed forces from a possibly unfair trial, and host state sovereignty and the rights of its citizens to justice. Indeed, jurisdiction is dealt with in a similar manner in a number of other agreements governing the status of foreign forces in host states, primarily friendly.⁹⁰ I dealt with this in greater detail in a 2011 article.⁹¹ This notion has since also been recommended by the CAR Panel, who suggest negotiating with TCCs some form of subsidiary jurisdiction for the host state.⁹²

B Alternative Accountability Mechanisms

The Secretary-General issues an annual report on SEA by United Nations peacekeepers. In the Secretary-General's 2015 Report, he made a series of more substantive proposals for addressing SEA than in previous years. He went into greater detail in terms of statistics in relation to SEA, substantiation rates and actions taken by member states with respect to allegations. The report suggests a number of initiatives to better address SEA, which to a large extent build on the 2006 Report of the GLE aimed at addressing SEA by United Nations officials and experts on mission.⁹³

First, it should be noted that SEA allegations against United Nations peacekeepers for the 2014 reporting period dropped from previous years, with 52 allegations reported, but rose again to 69 during 2015. In 2016 so far there have been a further 21 known allegations recorded by the United Nations.⁹⁴ A breakdown of these allegations is set out in the Secretary-General's report. Nevertheless, as highlighted over recent months, particularly in relation to CAR, SEA remains a significant and inadequately addressed issue in the context of United Nations and other forms of peace operations,

89 International Security Advisory Board *Report on Status of Forces Agreements* (16 January 2015) at 17, n 10.

90 See also Agreement regarding the status of the United Nations forces in Japan 214 UNTS 51 (signed 19 February 1954, entered into force 11 June 1954); Agreement on questions relating to the temporary presence of Soviet forces in the territory of the German Democratic Republic 285 UNTS 105 (signed 12 March 1957, entered into force 27 April 1957); and Agreement concerning the legal status of Soviet forces temporarily stationed in the territory of the Hungarian People's Republic (signed 27 May 1957, entered into force 16 August 1957).

91 Róisín Burke "Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity" (2011) 16 *Journal of Conflict and Security Law* 63.

92 Deschamps, Jallow and Sooka, above n 2, at xi.

93 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24.

94 Office of Internal Oversight Services "Allegations for All Categories of Personnel Per Year: Sexual Exploitation and Abuse" (at 31 March 2016) United Nations Conduct and Discipline Unit <cdu.unlb.org>.

and there is likely to be a greater push for reform at the United Nations level consequentially. The Secretary-General's 2015 Report contains several pages of proposed actions to better deal with SEA. These stem from the assessments of a team of experts set up in 2013 to examine how SEA was being dealt with in the United Nations Organisation Stabilisation Mission on the Democratic Republic of the Congo (MONUSCO), the United Nations Stabilisation Mission in Haiti (MINUSTAH), the United Nations Mission in Liberia (UNMIL) and the United Nations Mission in the Republic of South Sudan (UNMISS), and a subsequent working group which reviewed the report of the experts meeting several times in 2014. This resulted in far-reaching recommendations by the working group to reinvigorate the Secretary-General's zero-tolerance policy in the areas of prevention, enforcement and remedial action. Ongoing consultations are likely to be held with states on the proposed initiatives set out in the Secretary-General's 2015 Report.

I would like to highlight some aspects of the Secretary-General's 2015 Report, which may be of particular interest going forward. In terms of prevention, the report notes that an e-learning programme is being developed by the DFS which will target all categories and levels of United Nations personnel, military and civilian, from the ordinary rank and file troops to senior level mission management.⁹⁵ The Secretary-General suggests that uniformed personnel could acknowledge their commitment to United Nations standards of conduct through statements akin to letters signed by United Nations staff under an employment contract. The implications of this for military contingents or formed police units would be primarily symbolic. Moreover, in the remit of pre-deployment training the Secretariat makes core training materials available to TCCs and Police Contributing Countries (PCCs). The Secretary-General is now requesting that United Nations member states provide the Secretariat with a certificate of compliance with the delivery of these trainings, some of which relate to training on SEA.⁹⁶ Other recommendations which are likely to be discussed at the United Nations level, derived from the report, include: increased command responsibility;⁹⁷ withholding of service medals; repatriation of entire contingents or formed police units where SEA is a serious problem within the unit; rendering personnel ineligible for exceptional premiums; making member states with a pattern of non-compliance ineligible for the premium awarded to key enabling states; suspension of payments which could be diverted to a trust fund established for victims;⁹⁸ and termination of deployment of troops from particular member states where there is a pattern of non-

95 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [37].

96 At [38]; and UN Women, above n 24, at 117. See also *Report of the High-level Independent Panel*, above n 28.

97 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [51].

98 At [64].

compliance with United Nations standards and the MOU.⁹⁹ Additionally, the Secretary-General proposes discussing with member states the appointment of an individual, on a temporary basis, at a senior level to deal with SEA, possibly as a SRSG.¹⁰⁰ The Secretary-General intends to establish a trust fund for SEA victims, not to compensate them, but to provide them with support and assistance.¹⁰¹ Other suggestions also supported by the High Level Review Panel with respect to United Nations' officials include the withholding of accumulated annual leave and repatriation grants and placing individuals on administrative leave without pay until investigations are completed. The contention is that, should an allegation be found true, this money could feed into the trust fund for victims of SEA.¹⁰²

Here, however, I would like to focus briefly on enforcement measures, and more specifically on the possible legal and practical ramifications of changes with respect to investigations and prosecutions and the possibility of a convention and/or some form of international or internationalised court structure. Jurisdiction may arise at different phases, namely investigative, prosecutorial and custodial.¹⁰³

1 Team of experts: rapid response

The Secretary-General intends to create an expert team tasked with responding to SEA in missions or regions. TCCs and PCCs will be requested to contribute officers with appropriate expertise for this purpose. This response team may include military officers, United Nations police officers (including members of formed police units) and medical officers. The intent is that this team will maintain a roster of personnel able to travel within a field mission/region on an expedited basis. Team members may otherwise continue in their regular assignments in mission areas. National investigative officers sent by TCCs or host state judicial authorities may call upon the response team to support investigations.¹⁰⁴ The High Level Review Panel on Peace Operations and the Global Study also supports this proposal.¹⁰⁵ This is in line with the revised Model MOU. The Secretary-General report stipulates that DFS will develop standard operating procedures for the response team and outline the support that might be provided to national investigative officers and judicial authorities in the host state.

99 At [54].

100 At [73].

101 At [76].

102 UN Women, above n 24, at 117.

103 See Burke, above n 18, at 233.

104 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [44]–[46].

105 UN Women, above n 24, at 116.

As background to this development, administrative investigations of United Nations staff members, and probably of experts on mission, will generally fall to the United Nations OIOS unless a state's laws apply extraterritorially and it decides to act against a national.¹⁰⁶ Article 7*quater* of the revised Model MOU provides that the TCC has primary responsibility for investigations of misconduct by personnel deployed as part of a military contingent; the OIOS only has a secondary administrative investigative role where TCCs do not act. The revised Model MOU recommends the deployment of national investigative officers. In the present investigative system, the revised Model MOU enables the United Nations to initiate two types of investigative measures where the TCC has not yet acted, or does not act at all, but only until it does so. In this scenario any evidence gathered must be given to the TCC. The United Nations OIOS may, in essence, conduct a simplified investigation or preliminary inquiry so that some evidence may be preserved while awaiting a TCC response. The TCC has 10 working days to respond. If there is no TCC response, the OIOS may conduct a full administrative investigation. Even if this investigation suggests serious sexual offences, the United Nations can only hand over the evidence and report to the TCC; its role ends there.¹⁰⁷

The Secretary-General in his 2015 Report on SEA proposed that national investigative officers be included within national contingents, as this would avoid delays in their deployment as a result of which evidence of SEA may be lost.¹⁰⁸ This recommendation is also reflected in the Global Study.¹⁰⁹ The idea of joint UN/TCC investigations has been considered in the past, wherein TCCs would provide a roster of national legal experts or National Investigations Officers, who could be deployed quickly when serious sexual misconduct is alleged against peacekeepers. Zeid in his report in 2005 suggested that the officer should be a military law expert. Not all states were willing to proceed with this in United Nations discussions shortly after the Zeid Report. The deployment of national legal officers for investigations is voluntary under the revised Model MOU. It seems that the response team would also be based on voluntary contributions of national investigative officers, possibly undermining prospects of evidence meeting admissibility standards in national jurisdictions. National investigative officer deployment, as I have argued elsewhere, ought to be obligatory under MOUs signed with TCCs and police contributing states.¹¹⁰ Nevertheless, there may be certain advantages of

106 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [74]. The Secretary-General will seek resources to establish a SEA Coordination Unit within the Conduct and Discipline Unit, which is often the first body through which complaints must be filtered at the United Nations level.

107 Burke, above n 18, at 52–53; and *COE Manual*, above n 21, at [7]. See generally Office of Internal Oversight Services, above n 45.

108 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [49].

109 UN Women, above 24, at 117.

110 Burke, above n 18, at 50.

the deployment of the response teams, including the capacity to deal rapidly with SEA as it arises, with a likely specialised expertise in the area of sexual offences, but also in bolstering national capacity to investigate and enhancing the credibility of the investigation. That stated, even United Nations investigative credibility and oversight, including that of OIOS, has been cast into doubt with the recent CAR allegations and the manner of response documented in the CAR Panel Report.

In light of the above, I think the Secretary-General's proposal of establishing a response team gives rise to a number of questions which need to be discussed at the United Nations level by member states and the Secretariat. First, where would this proposed team of rapidly deployable experts fit within the current system and would they alter it? Would their involvement be mandatory and where would it fit with the role of the OIOS and the United Nations' Conduct and Discipline Unit (CDU) (which is currently supposed to be the first point of contact with respect to allegations)? What would the relationship of the team be to state investigations, in particular as it relates to troops? When in the process would the team of experts be deployed: for the purpose of the preliminary fact-finding inquiry or afterwards, bearing in mind that action must be taken swiftly in dealing with SEA in order to preserve evidence? Would a request have to be made by the TCC or host state authorities for the assistance of the team of experts, or could this be mandatorily required and perhaps joint investigation embedded in the terms of MOUs and SOFAs? Could the Justice Rapid Response/UN Women initiative play a role as it maintains a sexual and gender-based violence roster? It is likely that some of these questions will have to be teased out at the United Nations level in the months to come. It is also probable that states will be reluctant to have any interference with the investigation of troops, although many acknowledge that the system as it stands is not producing adequate results.

As highlighted consistently by the Secretary-General in his annual reports on SEA and by the CDU's compilation of statistics on its website, states are not always responsive to United Nations requests for information on action taken with respect to nationals accused of SEA. The Secretary-General in his 2015 Report on SEA therefore proposed the imposition of a six-month deadline for completion of investigations, including the production of investigative reports, with respect to all United Nations investigations into SEA, subject to extenuating circumstances. He requested that member states conducting investigations into SEA commit to the same deadline, again subject to extenuating circumstances.¹¹¹ This is further supported in the Global Study.¹¹² Investigations otherwise too often go on for prolonged periods, evidence is lost, victims and their communities hear little of the outcome and, too often, allegations are not adequately acted on.

111 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [48].

112 UN Women, above n 24, at 117.

2 *Hybrid or Internationalised Court*

Some form of hybrid tribunal has also been suggested by a number of commentators to deal with crimes by peacekeepers, including by the GLE.¹¹³ The Global Study suggests a reconsideration of the hybrid option, wherein the United Nations would offer support to the host state in exercising its investigative and prosecutorial jurisdiction. This would, of course, require host state consent. Such a body could be established in an agreement between the host state and the United Nations which could be embedded in the SOFA. This could assist in getting around the difficulties associated with host state prosecutions, and indeed impediments faced by other states. A hybrid court could help ensure that procedures are in line with human rights standards, provide a capacity-building function, get around dual criminality concerns, allow for procedures to be carried out close to the local population and allow for greater access to witnesses and evidence. United Nations peacekeepers are required to respect host state laws.¹¹⁴ However, such an option is resource intensive and would require host state consent generally. It would also have to be determined what laws would apply and what types of offences could be covered. Moreover, it would simply take time to establish. The Global Study goes further, favouring the establishment of an international tribunal by treaty between states with jurisdiction to prosecute all categories of peacekeeping personnel.¹¹⁵ The difficulty, of course, with this option is that it would prove resource intensive, and is highly unlikely to gain the political support of member states, particularly if it also covers military personnel.

I have discussed the possibility of the establishment of some form of tri-hybrid mechanism elsewhere, where the sharing of jurisdiction might be possible: involving the United Nations, the host state and TCC or home state.¹¹⁶ In brief, as noted by the GLE, jurisdiction is not indivisible, and states may take on different roles in the criminal justice process, from investigation through to prosecution either by ad hoc agreement or supported by a treaty. This could operate on the basis of complementarity, where the state with the primary ability to exercise its jurisdiction cannot or will not exercise it adequately. Moreover, the United Nations and its investigative body, the OIOS, or other such entity as might be established, could play an official supportive role in the gathering of evidence. The difficulties with trials in host states of course will vary depending on the state, its legal system and stability levels.

113 For a more detailed account of this see Burke, above n 18, at 240–251; and *Report of the Group of Legal Experts*, above n 32.

114 See for example *COE Manual*, above n 21, at annex H, reg 2(j); and *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission*, above n 48.

115 UN Women, above n 24, at 118.

116 Burke, above n 18.

3 *Reporting on action taken*

The Secretary-General notes that under the current legal framework, member states shall ensure that claims that their uniformed personnel have engaged in SEA are forwarded to appropriate national authorities. This is set out clearly in the revised Model MOU. The Secretary-General notes that states are then required to inform the Secretary-General on a regular basis of case progress. The difficulty is that states too often do not comply with this obligation and the United Nations has no enforcement power, irrespective of the fact that the MOU is a binding legal document. The provision requiring state reporting to the United Nations is simply too unspecific, and there are no real repercussions. The Secretary-General in his 2015 Report on SEA stipulated that he expects states to respond to these requests by including the following information: "(a) details of the applicable legal framework in the national jurisdiction; (b) the procedures applied in the case at hand; and (c) the decision of the adjudicator and its underlying reasons".¹¹⁷ It remains to be seen how this will be enforced.

A recent development, however, has been the adoption by the Security Council of Resolution 2272 in March 2016.¹¹⁸ Pursuant to this resolution, entire contingents may be sent home due to repeated failures of TCCs to end SEA by their troops, and repeated failures to investigate and prosecute where warranted. It is not clear how this resolution will be implemented, but it may have serious consequences for TCC and United Nations operations, particularly where larger contingents are involved. Nevertheless, I would argue that this measure is likely to operate as a significant deterrent for would-be perpetrators of sexual abuse or exploitation given the financial and reputational implications and peer pressure. The adoption of the resolution has been objected to by some who argue that the crimes of a few should not result in the punishment of innocent parties. If this is a concern, it is simply a matter for TCCs to effectively investigate and prosecute where warranted as allegations arise. The difficulty will be determining when allegations of SEA are sufficiently widespread or systematic to call for the repatriation of a whole contingent, or when a state's action taken against perpetrators is inadequate. If past examples are in any way indicative, the threshold for determining that a state has taken adequate action is likely to be low.

4 *Convention on Criminal Accountability*

While only having United Nations officials and experts on mission in mind, the GLE suggested that a draft Convention be drawn up to deal with sexual offences and other serious crimes by peacekeepers.¹¹⁹ It recommended that an extradite or prosecute type provision be inserted into the

117 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [53].

118 *Resolution 2272 (2016): Adopted by the Security Council at its 7643rd meeting, on 11 March 2016* SC Res 2272, S/Res/2272 (2016).

119 *Report of the Group of Legal Experts*, above n 32, at 17–19.

Convention.¹²⁰ A broad range of jurisdictional bases allowing states to assert jurisdiction over peacekeepers, where relevant, could be inserted into such a Convention so as to allow for greater prospects of accountability. A Convention would assist with getting around difficulties such as those relating to prosecution or extradition, admissibility of evidence gathered in the host state,¹²¹ mutual legal assistance issues, the ability to gather evidence and would provide greater clarity on what conduct is considered criminal. This is equally of relevance to all categories of United Nations peacekeepers. The difficulties with the Convention idea are that it would likely take years to negotiate, and states may simply not be willing sign or ratify it, in particular if it covers their armed forces. It should be emphasised that the draft Convention was merely intended to provide an example of what one might resemble. It would be for states, with the support of the United Nations Secretariat, to negotiate an appropriate text and coverage, such as whether it should be limited to a finite list of criminal offences and crimes meeting a certain threshold.

The Secretary-General in his 2015 Report on SEA wanted member states to reconsider the possibility of a Convention on SEA at the 70th session in the framework of the working group of the Sixth Committee.¹²² The need to reconsider this option is reiterated in the Global Study.¹²³ The first issue that arises here is who and what might be covered within the remit of such a convention and whether it is likely to gain traction with states. Secondly, would it create a triple or two-tiered system (that is, would there be one set of legal standards for nationals committing sexual offences in the host state and who are subject to the host state legal system; another set of standards for nationals of states not buying into the convention, if there is extraterritorial reach; and another for nationals of states ratifying such a convention)? That stated, any convention that may come about if governments chose to move the issue forward during the 70th and subsequent sessions is likely to focus only on United Nations officials and experts on mission, to the exclusion of military contingent personnel. The reasons for this are multi-fold, but are largely political and due to states' unwillingness to have any external interference with the jurisdictional and disciplinary control they maintain over their troops. The issue is not related to a lack of a mechanism to deal with these personnel, but rather a lack of application of the mechanisms that do exist and turning a blind eye. With respect to United Nations officials and experts on mission, as noted previously, the difficulty may be partly political but predominantly is due to the existence of jurisdictional gaps. This appears to be the argument that has been put forward within the United Nations system for focusing on the criminal accountability of United Nations officials and experts on mission in the context of any convention going forward.¹²⁴

120 At 17.

121 At 10–11.

122 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [57].

123 UN Women, above n 24.

124 Suggested by the GLE. See *Report of the Group of Legal Experts*, above n 32, at 9, n 8.

The problem is that the revisions to the MOU clearly have not resolved SEA and accountability of military peacekeepers. Moreover, as has become more than apparent over the past year with respect to the CAR allegations, any argument that United Nations officials and experts on mission are the bulk of the problem is an urban myth, diverting attention from the larger cohort of perpetrators.

In the meantime, akin to a number of WPS resolutions and prior Secretary-General reports, the Secretary-General in his 2015 Report on SEA continued to encourage states to amend national legislation to permit the extraterritorial application of their criminal laws with respect to nationals in the context of SEA on United Nations missions. He also urged states to amend administrative rules, regulations and codes governing police and military contingents to recognise all forms of SEA as misconduct.¹²⁵ As already noted, states differ with respect to the extraterritorial reach of their laws, which is particularly problematic with respect to United Nations officials and experts on mission as, unlike military contingent personnel, their laws may not necessarily travel with them. A convention of course, if states signed, could help rectify this. Some states still contend that consideration of a convention is not timely, in part given the lack of information on and clarity regarding how SEA is being dealt with currently within the United Nations system, and on the actual extraterritorial reach of state laws.¹²⁶ It ought to be noted, however, that the convention option has been on the table for nearly a decade now, leaving one to wonder when exactly it might not be considered premature for states to push forward on the issue. States, particularly those in the Security Council, now need to take leadership in dealing with SEA by peacekeepers. It should be borne in mind that the system under which these issues are actually dealt with in the United Nations is not just a matter of the Secretariat acting, rather to a large extent it requires political discussions amongst United Nations member state representatives in their various committees; this renders procedures lengthy. What we have instead is a multitude of repetitive United Nations resolutions on states making their criminal laws applicable to nationals committing criminal conduct extraterritorially, but with no enforcement of this.

5 Other Measures

The Secretary-General's 2015 Report on SEA also recommended that TCCs and PCCs consider instituting on-site court-martial proceedings, in order to promote transparency and accountability.¹²⁷ Pakistan did this with respect to Pakistani police accused of the gang-rape of a child in Haiti.¹²⁸ Some TCCs may not have the capacity or the necessary domestic legislation to conduct onsite courts-martial or other proceedings and distance may render prosecution in TCCs difficult.

125 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [58].

126 See also Odello and Burke, above n 30.

127 *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [60].

128 "UN: 'Rapid' justice done in Haiti UN rape crime", above n 68.

Finally, a further development is that the United Nations Secretariat has developed a DNA sample collection protocol and provided field missions with DNA paternity kits and guidance for their use. The Secretary-General in his 2015 Report on SEA noted that, where national legislation permits, the Secretariat can facilitate collection and transmission of samples. The Secretary-General is of the view that states are under a duty to facilitate paternity claims involving military and police contingents, even if individuals are no longer in service when a paternity claim is made. The Secretary-General requests that states provide the United Nations with contact details for an appropriate focal point within their legal system to receive claims, and advise on paternity and child support claims. Moreover, the Secretary-General requests that states inform the United Nations on outcomes of paternity claims and that they notify the claimant as appropriate.¹²⁹ In the past, numerous babies have been fathered by United Nations peacekeepers and the mothers are often abandoned and left destitute. They often have little capacity to obtain child support from the fathers, and both the mothers and their babies are stigmatised by their communities.

III CONCLUSION

With respect to United Nations officials and experts on mission, the issue appears partly to be one of a jurisdictional gap, but not on account of the immunities governing such personnel under the Charter or the CPI (save in the CAR human rights officer type scenario). Increasing the accountability of such personnel is really a matter of creating alternatives. With respect to military contingent personnel, the SOFA does not create a jurisdictional gap as state laws (military and/or criminal) follow the soldier on deployment. However, this means little if these laws are not adequately enforced. The immunities granted should be restricted given that they nevertheless lead to the impunity of military personnel when the sending state cannot or will not act. While the problem presenting itself differs between military and civilian personnel, alternatives should be put in place to ensure the accountability of both. Opening possibilities for outsiders to exercise jurisdiction over military personnel may well be met with greater reluctance from states for the reasons already set out above than they would with respect to United Nations officials or experts on mission, not least of which are issues of control, their laws and state sovereignty. With respect to jurisdiction there is greater call for more effective means of implementing functionality as a limitation lest, as argued by Orakhelashvili, it degenerate into absolute immunity, which is not supported by the Charter.¹³⁰

The Secretary-General in his Report on SEA, the High-Level Independent Panel on United Nations Peace Operations and the Global Study on the implementation of Security Council Resolution 1325 all support the naming and shaming of states failing to take action against nationals alleged to

¹²⁹ *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [70]–[72].

¹³⁰ Orakhelashvili, above n 52.

have perpetrated SEA and failing to respond to Secretariat requests for information on action taken.¹³¹ Rapid response teams, a convention and hybrid or internationalised courts are alternatives, the feasibility of which should be fully explored. At the October 2015 Security Council Open Debate on WPS, and indeed in many subsequent discussions at United Nations Headquarters, most member states have been very vocal about the need for criminal accountability of peacekeepers of all categories for SEA amounting to criminal conduct.¹³² The issue is one of translating these words into actual measures to ensure that this occurs.

131 UN Women, above n 24, at 116; *Special measures for protection from sexual exploitation and sexual abuse: Report of the Secretary-General*, above n 24, at [55]; and *Report of the High-level Independent Panel*, above n 28, at [286].

132 Peace Women "Security Council Open Debate: Women and Peace and Security; October, 2015" (13 October 2015) <peacewomen.org>.

