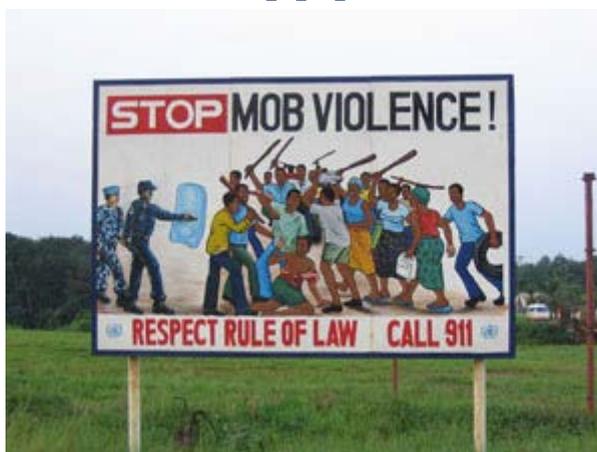


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Troop-discipline and sexual offences by UN military peacekeepers: The UN's response - moving beyond the current status quo?

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TROOP-DISCIPLINE AND SEXUAL OFFENCES BY UN MILITARY PEACEKEEPERS: THE UN'S RESPONSE - MOVING BEYOND THE CURRENT *STATUS QUO*?

Róisín Burke*

United Nations peacekeepers have done much in the way of promoting international peace and security since they were first established. In 1988 they were awarded the Noble Peace Prize for their contribution to peace. At present there are 15 peacekeeping operations deployed across the world, consisting of 119,348 personnel, 82,377 of which are troops.¹ UN mission mandates have varied from disarmament, humanitarian assistance, monitoring of ceasefires, election monitoring, institutional reform, protection of UN personnel and equipment, investigate human rights violations, mine-clearing, assist in the repatriation of refugees and internally displaced persons, etc. Many of these activities have required them to be in close proximity to civilian populations. However, the reputation of the UN has become tainted by the conduct of a minority of its peacekeepers. Since the 1990s there have been numerous reports and allegations of sexual exploitation and abuse (SEA) being perpetrated by UN peacekeepers, ranging from transactional sex, child pornography, trafficking to rape and other forms of SEA. Reportedly a high proportion of the victims were children. While the UN has taken a 'zero-tolerance' approach towards SEA allegations continue to arise. Not only is such conduct deplorable, in particular when involving children, it is particularly grave given that it violates the trust placed in these peacekeepers by the populations they have been sent to protect, leading many authors, the UN Secretary General and others to conclude that this conduct, where serious in nature, is not merely an ordinary criminal offence, bringing it closer to an international crime.² Moreover, such conduct is seriously detrimental to the standing of the UN and its ability to achieve mission mandates. UN peacekeepers complicit in SEA are rarely held criminally to account.

There are several categories of personnel deployed on UN peacekeeping operations including UN officials, experts on mission (which includes military observers and liaison officers) and UN military contingents, all of which have

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¹ See DPKO website <<http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>>

² See Section IV of paper, 49.

different legal status and relationships with the UN. This paper is solely concerned with UN military contingents. It should be noted, however, that all categories of UN peacekeepers have been complicit in SEA and, per capita, the incidence of SEA by civilian peacekeepers is higher.³ Nevertheless, UN military contingents constitute approximately 70% of all personnel currently deployed on UN operations and since being officially recorded allegations of SEA have predominantly related to military personnel. Furthermore, much focus is currently placed by the UN on criminal accountability of UN officials and experts on mission, primarily due to jurisdictional difficulties, but the issue of accountability of UN military contingent personnel for SEA has very much been put to the side, seemingly considered as now largely resolved. This is largely due to the 2007 revisions to the Model *Memorandum of Understanding between the United Nations and the Member States Contributing Personnel and Equipment to the United Nations Peacekeeping Operations* (revised MOU).⁴

Section I of this paper will first touch briefly on the issue of jurisdiction, a primary contributory factor to the lack of adequate accountability of UN military contingents complicit in SEA. Section II will discuss UN standards of conduct relevant to SEA and the difficulties they pose. A significant portion of this paper will be devoted to the UN's response to SEA by its peacekeepers, focusing on UN military contingents. Section III will examine major reports, UN response strategies and initiatives that have emerged or established over recent years aimed at preventing and responding to SEA in mission. Amongst the most significant measures taken were the 2007 revisions to the MOU. The impact of the response to date on SEA by troops will be analysed with particular focus on the MOU. It will be argued that while the UN's response has been fairly robust and does appear to be having an impact overall on SEA by military contingent personnel in terms of prevention and in particular on less serious incidents, there is still a need for a more robust approach when it comes to

³ Nicola Dahrendorf, *Sexual Exploitation and Abuse: Lessons Learned Study. Addressing Sexual Exploitation and Abuse in MONUC*, UN DPKO: Best Practices Unit (March 2006).

⁴ *Standard Memorandum of Understanding between the United Nations and the Member States Contributing Personnel and equipment to the United Nations peacekeeping operations States*, 46th sess, Agenda Item 74, UN Doc. A/46/185 (23 May 1991) ('TCA 1991'); For the text of the revised MOU see, *2008 Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions* UN Doc. A/C.5/63/18, Chapter 9 ('2008 COE Manual/Revised Model MOU').

criminal accountability. However, part of the buck seems to stop with troop-contributing countries (TCCs) given that they have exclusive criminal and disciplinary jurisdiction over their troops and it is their responsibility to ensure accountability. Bearing this in mind, Section IV will make a number of tentative suggestions on how accountability might be improved where TCCs prove unwilling or unable to genuinely investigate and prosecute.

I JURISDICTIONAL IMMUNITIES

UN peacekeepers are granted immunity from host State jurisdiction under various legal instruments. The extent and form of immunity granted depends on the category in which the peacekeeper falls. The UN has a Model Status of Forces Agreement (SOFA)⁵ and Model MOU, on the basis of which specific SOFAs and MOUs are negotiated with individual states. UN SOFAs are bi-lateral agreements negotiated between the UN and the host States. Amongst other issues they set out the legal relationship between the UN operation and the host State and the status of personnel deployed. SOFAs invariably provide that members of UN military contingents are subject to the exclusive criminal jurisdiction of the troop-contributing country (TCC) with respect to crimes committed in host State.⁶ Furthermore, under the terms of the SOFA peacekeepers are required to respect local law.⁷ As will be discussed presently, the exclusive criminal jurisdiction of the TCC is reiterated in the UN Model MOU, negotiated between the UN and the TCC. The MOU generally defines the conditions under which personnel are contributed to UN operations. There are a number of reasons for the grant of such broad jurisdictional immunity to UN military contingents, not least the possibility of the host State having a dysfunctional legal system and the fact that criminal and disciplinary control over troops is very much seen by states as integral to the functioning of their armed forces and a matter of state sovereignty.⁸

⁵ UN, *Model Status of Forces Agreement between the United Nations and Host Countries* GA 45th Sess Agenda Item 76, UN Doc A/45/594 (9 October 1990) ('Model SOFA')

⁶ *Ibid* para 47(b).

⁷ *Ibid* para. 6.

⁸ Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Martinus Nijhoff, The Hague, 1964) 24.

Unlike UN officials and experts on mission, UN military contingents remain in the employ of the TCC while deployed abroad and not the UN. Under the Convention on Privileges and Immunities the UN SG can waive the immunity of UN officials and experts on mission,⁹ but not that of military contingents. UN Rules and regulations, including administrative issuances, such as SG Bulletins, directly govern UN staff. In contrast military contingents are generally solely subject to the laws, regulations and criminal and disciplinary jurisdiction of the TCC, unless UN rules are incorporated into the TCCs' laws.¹⁰ Therefore the SG solely has the authority to take administrative action and repatriate perpetrators of SEA.¹¹

Immunity from host State jurisdiction is justified solely on the basis of functional necessity of the UN. It is not intended to be for the personal benefit of military contingent members. While the UN does not always succeed in negotiating a SOFA with host States, the practice in more recent years has been for the SC to declare the Model SOFA applicable in the interim. As I have argued elsewhere, the UN could plausibly modify or qualify the immunities granted under the terms of the SOFA, and take narrower approach with respect to the broad jurisdictional immunity granted to UN military contingents.¹² It might also be borne in mind that the immunity granted to these personnel is only via the host State's criminal jurisdiction and not that of other States or bodies with a jurisdictional claim.

The exercise of exclusive jurisdiction by TCCs is not without its problems, in particular where states are reluctant to proceed with a proper investigation and prosecution. The UN has no power to force to act. Where perpetrators of SEA are not held to account, this leads to a perception of immunity amongst host State populations. This in turn can have a negative impact on the mission, its relationship with the local population and UN efforts to promote rule of law (RoL) locally. Even where TCCs do go ahead with an investigation or prosecution real difficulties may arise in accessing witnesses and evidence given distances between the TCC and host

⁹ Article V, Section 10 and Article VI, Section 23, *Convention on Privileges and Immunities of the United Nations*, adopted 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946).

¹⁰ See further Róisín Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' (2011) 16(1) *Journal of Conflict and Security Law*, 63, 89.

¹¹ *Compilation of Guidance and Disciplinary Directives on Disciplinary Issues for all Categories of Personnel Serving in United Nations Peacekeeping and Other Field Missions*, DPKO/MD/03/0099, paras 23-24.

¹² See generally, Burke, 'Status of Forces', above n 10, 63-104.

State, security concerns, lack of infrastructure, possible dual criminality requirements, etc. Furthermore, where perpetrators are not tried in the host State, which is generally the case, victims cannot see justice been done.¹³ Victims are often not informed of the outcome. Added to this the deterrent effect of any prosecution on would-be perpetrators is undermined.

II STANDARDS OF CONDUCT

1 *SG's 2003 Bulletin*

As previously noted, the UN has taken a 'zero-tolerance' approach to SEA, including the solicitation of prostitutes. Significantly, in response to the UN Office of Internal Oversight Services (OIOS) and NGO reports on SEA by humanitarian workers and peacekeepers in West Africa,¹⁴ in 2003 the SG promulgated a Bulletin on *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* ('SGB 2003').¹⁵ 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 '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.'¹⁶ These definitions were incorporated into Annex F of the revised Model MOU applicable to national contingents, discussed below. They potentially incorporate a broad range of conduct from rape, sex with minors, trafficking, child pornography, to the patronizing of prostitutes and possibly even cases bordering on ordinary sexual relationships.¹⁷ This paper is primarily concerned with serious

¹³ There have been at least two incidents where 2 major TCCs have used onsite courts martial to deal with perpetrators of SEA. Prince Zeid statement, UN SCOR, 5379th mtg, UN Doc S/PV.5379, 23 February 2006, 6.

¹⁴ *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa, Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, UN GOAR, 57th sess, Agenda Item 122, UN Doc A/57/465 (11 October 2002); *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa*, GA Res 57/306, UN GAOR, 57th sess, Agenda Item 122, UN Doc A/RES/57/306 (22 May 2003).

¹⁵ *Secretary General's Bulletin - Special Measures for Protection from Sexual Exploitation and Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003) ('SGB 2003')

¹⁶ *Ibid.*

¹⁷ For a discussion on the complexity of issues that arise in relation to sexual relationships between peacekeepers and local civilians and the degree of agency that may or may be genuinely exercised by women or girls in peacekeeping mission areas, see further, Paul Higate, 'Gender and Peacekeeping Case Studies: The DRC and Sierra Leone', *ISS Monograph* No. 91 (Institute for Security Studies, Pretoria, March 2004) 22-23, 43-44.

incidents of SEA, such as non-consensual sex and SEA of minors.

Section 2 of the Bulletin provides that UN forces have a special duty of care towards women and children. Under Section 3 SEA is defined as serious misconduct. Sex with anyone under the age of 18 is strictly prohibited, (unless lawfully married and the person over the age of majority in their country of citizenship)¹⁸, as is the exchange of goods, money, services, employment or other forms of assistance for sexual activities. Mistaken belief as to the age of a child is not a defence. Section 3(e) provides that sexual relationships between peacekeepers and ‘beneficiaries of assistance’ are ‘strongly discouraged’ given ‘inherently unequal power dynamics’, however, it fails to elaborate on what exactly this means.¹⁹ It appears that the nature of the relationship between a peacekeeper and beneficiary falls to be determined by the Head of Mission.²⁰ The SGB 2003 refers to the possibility of criminal prosecution of UN staff for SEA.²¹ Furthermore, it places an onus on staff to report any ‘concerns or suspicions’ concerning other staff members.²²

While it is beyond the scope of the present paper to discuss in detail the problems posed by the range of conduct covered by the SGB, it does seem that it needs to be further defined. It has been argued that the SGB 2003’s focus is somewhat misplaced.²³ Firstly, not all conduct seemingly prohibited by the Bulletin is in violation of international or national laws, making these rules extremely difficult to enforce in reality, in particular with respect to members of military contingents.²⁴ Arguably it defines ‘sexual exploitation’ in an overly inclusive manner, allowing little room for differentiation between fraternizing with locals and soliciting sex workers,

¹⁸ *SGB 2003*, UN Doc ST/SGB/2003/13, Section 4(4).

¹⁹ Simic it is critical of the failure to give any detail on what type of power dynamic might be considered ‘unequal’. Olivera Simic, ‘Rethinking ‘sexual exploitation’ in UN peacekeeping operations’ (2009) 32(4) *Women’s Studies International Forum*, 288, 293; Furthermore, as noted by Durch, Andrews and England, it might be useful to clarify what it is to be a ‘beneficiary of UN assistance’, in particular given that there may be a thin line between some sexual relationships and sexual exploitation. William Durch, Katherine Andrews and Madeline England, with Matthew Weed, *Improving Accountability Criminal Accountability in United Nations Peace Operations, Report from the Project on Rule of Law in Post-Conflict Settings*, Stimson Centre Report No 65(1) (June 2009) 42 (‘Stimson Report’) 23

²⁰ *SGB 2003*, UN Doc ST/SGB/2003/13, Section 4(5)

²¹ *Ibid* Section 3(2)(d).

²² *Ibid* Section 3(2)(e).

²³ See eg, Simic, ‘Rethinking ‘sexual exploitation’’, above n 19, 288-295.

²⁴ Conduct not constituting a criminal offence might nevertheless amount to a disciplinary infraction under national disciplinary codes where a contingent Commander has passed an order requesting troops to refrain from such conduct. Peter Rowe, ‘United Nations Peacekeepers and Human Rights Violations: the Role of Military Discipline’ (201) 51 *Harvard International Law Journal*, 69, 76-77

and sexual activity of a non-consensual nature such as rape and forced prostitution.²⁵ Prostitution is not illegal in all States and certainly there are concerns about how this policy may interfere with relationships that on the face of them appear ordinary and consensual.²⁶ Furthermore, the age of consent differs from country to country. Failure to further stratify or better distinguish between the types of conduct covered by the Bulletin definition may in effect trivialize serious incidents of SEA. There is a clear tension in what Higate terms the ‘victim/perpetrator’ dichotomy’ reflected in the UN’s zero-tolerance approach to SEA. As Higate observes, ‘it is important to recognize and acknowledge that women are more than victims, and that men in these contexts have the potential to be more than perpetrators.’²⁷ Otto opines that the Bulletin fails to take into account agency of women and young girls in the realm of survival sex, and in doing so it subverts attention from the need to address more complex underlying factors such as poverty, social justice issues and gender inequalities.²⁸

Up until recently the SGB 2003 was not directly applicable to UN military contingents. In 2006, therefore, a Group of Legal Experts (GLE 1) was established to examine how to make the Bulletin binding on members of UN military contingents until such time as a MOU was negotiated and the possible standardization of norms across all categories of UN peacekeepers.²⁹ We will return to the conclusions reached by GLE 1 in section III, part 2. The fact remains that States generally can only be bound by UN rules or administrative issuances if they legally agree to be bound.³⁰

²⁵ SGB 2003, UN Doc ST/SGB/2003/13; See further. Simic, ‘Rethinking ‘sexual exploitation’’, above n 19, 288-295.

²⁶ See further, Simic, ‘Rethinking ‘sexual exploitation’’, above n 19, 288-295.

²⁷ Higate, above n 17, 62.

²⁸ Diane Otto, ‘Making sense of zero-tolerance policies in Peacekeeping sexual economies’, in Munro and Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Glasshouse Press, London, 2007) 259, 267-270; Simic takes the view that ‘the ‘zero tolerance policy’ treats women as passive and helpless objects who do not have the agency to decide whether or not to be involved in any form of sexual relationship.’ Simic, ‘Rethinking ‘sexual exploitation’’, above n 19, 294

²⁹ Press Release, Secretary General, Secretary-General Appoints Legal Expert Group Aimed at Strengthening Peacekeeping Zero-tolerance Policy on Sexual Exploitation, UN Doc SG/A/1023, PKO/148, 13 October 2006.

³⁰ Ibid; Geert-Jan Alexander Knoop, *The Prosecution and Defense of Peacekeepers under International Criminal Law* (Transnational, Ardsley, NY, 2004) 96; *A comprehensive strategy to eliminate future sexual exploitation and abuse*, UN GAOR, 59th sess, Agenda Item 77, UN Doc A/59/710 (24 March 2005) (Zeid’s Report’) para 22.

The content of the SGB 2003, as of 2007, was largely incorporated into the revised Model MOU,³¹ which will be addressed in Section III, part 7.

2 *Codes of Conduct*

In addition to the SGB 2003, UN standards of conduct explicitly prohibit SEA, in particular of children, as set out in the *Ten Rules: Code of Personal Conduct for Blue Helmets* ('Ten Rules: Code of Conduct')³² and *We Are United Nations Peacekeepers*.³³ Military contingents are issued pocket cards titled 'We Are United Nations Peacekeeping Personnel.' The rules set out in these documents are very general in nature and are little more than 'Guidelines', at least until recent revisions to the MOU.³⁴ The Ten Rules: Code of Conduct, issued in 1993, provide that peacekeepers 'should not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population of United Nations staff, especially women and children.'³⁵ Commaraswamy criticizes the use of the terms 'immoral acts' given that it tends to trivialize sexual exploitation and trafficking of women and children by peacekeepers.³⁶ 'We are United Nations Peacekeeping Personnel' provides that peacekeeping personnel should accept 'special constraints' being placed on their public and private lives; and undertake to '[t]reat the inhabitants of the host country with respect, courtesy and consideration'; report SEA; never to discredit the UN with their behavior; never to '[c]ommit any act that could result in physical, sexual or psychological harm or suffering to members of the local population, especially women and children'; nor 'Commit any act involving sexual exploitation and abuse, sexual activity with children under 18, or exchange of money, employment, goods or services for sex.' Finally the card provides that personnel are to comply with the 'guidelines' of IHL. Oswald, Durham and Bates are critical of the

³¹ For the text of the revised MOU see, COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18.

³² UN Department of Peacekeeping Operations, *Ten Rules: Code of Personal Conduct for Blue Helmets* <<http://www.un.org/depts/dpko/training/tes-publications/books/peacekeeping-training/pocketscards/tenin.pdf>> ('Ten Rules: Code of Conduct')

³³ UN Department of Peacekeeping Operations, *We Are United Nations Peacekeepers* <<http://www.un.org/depts/dpko/training/tes-publications/books/peacekeeping-training/pocketscards/unjin.pdf>>.

³⁴ Elizabeth Defeis, 'UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' (2008) 7(2) *Washington University Global Studies Law Review*, 185, 196.

³⁵ Ten Rules: Code of Conduct, above n 32.

³⁶ Elisabeth Rehn and Ellen Johnson Sirleaf, *Women War Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-Building* (New York, UNIFEM, 2002) 69, 72.

failure of the cards to refer the Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law issued in 1999 (SGB 1999),³⁷ given that in terms of IHL obligation the Bulletin is worded more strongly and given that We are United Nations Peacekeeping Personnel has since been incorporated into the revised MOU,³⁸ as will be discussed in Section II, part 7. These standards of conduct contained in these documents are weak and until recently were not legally binding on UN military contingents. Moreover, some suggest that they were therefore not taken sufficiently seriously or prioritized by some military personnel, who were far more likely to be concerned about their national military codes of conduct.³⁹

MONUSCO (formerly MONUC) has put in place a specific Code of Conduct on SEA, which goes a bit further in terms of the prohibitions. It precludes any form of 'sexually humiliating, degrading or exploitive behaviour; any type of sexual activity with children (persons under the age of 18 years)...use of children or adults to procure sexual services for others; exchange of money, employment, goods or services for sex with prostitutes or others; any sexual favour in exchange of assistance provided to the beneficiaries of such assistance, such as food or other items provided to refugees'; and 'visits to brothels and or places which are declared off limits.'⁴⁰ However, this Code of Conduct again is little more than a guidance document, given that it is not legally binding on contingents, and the standards can only really be enforced by TCCs. Higate noted that at least in the past generally what was retained by many peacekeepers from the content of the Code was that sex with those under 18 is prohibited. Moreover, he noted that some peacekeepers perceived this as going against local norms, whereas at the time the legal age of consent was 18 in the DRC.⁴¹ Nevertheless, putting in place a mission-specific Code of Conduct on SEA does place increased emphasis on the importance of the issue and may contribute to a greater awareness. Each peacekeeper, including military contingent members, is given a copy of this Code. This practice should be adopted for all UN missions.

³⁷ *Secretary-General's Bulletin - Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SBG/1999/13 (6 August 1999) ('SGB 1999').

³⁸ Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the law of UN peace operations*, (Oxford University Press, 1st ed, 2010) 199.

³⁹ Higate above n 17, 26, 50.

⁴⁰ SGB 2003, UN Doc ST/SBG/2003/13.

⁴¹ Higate above n 17, 26; The legal age of consent in the DRC has since been increased to 18.

III UN RESPONSE

In response to the numerous allegations of SEA made against UN peacekeepers throughout the 1990 and 2000s, the UN has instigated a number of initiatives and reforms many of which are based on recommendations made in a 2005 report by Prince Zeid Ra'ad Zeid Al-Hussein,⁴² outlined below. Others stemmed off UN Groups of Legal Experts' recommendations and inter-agency taskforces established to examine the problem. On the basis of Zeid's Report in particular the UN GA adopted Resolution 57/306 wherein it called on the SG and TCCs to adopt measures to prevent SEA by peacekeepers.⁴³ It requested the SG to collect data on investigations into SEA by both peacekeepers and other humanitarian personnel and to report on action taken.⁴⁴ It also recognized that it is the joint responsibility of the UN and TCCs to ensure perpetrators are held to account.⁴⁵ This Section will first address in brief the recommendations made in Zeid's report. It will then outline the more significant initiatives and reforms that have since taken place to prevent SEA; enforce UN standards of conduct; and to provide some form of remedial measures. The UN's response has focused on: 1) prevention, through raising awareness of UN standards of conduct, training and improvement of welfare and recreation; 2) enforcement, through improved complaints mechanisms; case tracking; revisions to the MOU and mission specific measures; and 3) remedial measures, including through the establishment of a victim support system. Among the most significant actions taken with respect to SEA and other serious misconduct by UN military contingents was the revision of the MOU in 2007, discussed below.

A *Prince Zeid's Report – Identifying the Problem*

Following numerous allegations of SEA made against peacekeepers on the MONUC operation in the DRC, in July 2004 the Secretary General requested Prince Zeid to conduct a comprehensive examination of SEA with regards to the MONUC operation. The resultant report was published in March 2005.⁴⁶ It highlighted several areas in

⁴² *Zeid's Report*, UN Doc A/59/710.

⁴³ Brett Schaefer, 'United Nations Peacekeeping: The U.S. Must Press for Reform: Backgrounder', (No 3182, The Heritage Foundation, 18 September 2008) 8 <<http://www.heritage.org/research/reports/2008/09/united-nations-peacekeeping-the-us-must-press-for-reform>>

⁴⁴ GA Resolution 57/306, UN Doc A/RES/57/306 para 10.

⁴⁵ *Ibid* para 9.

⁴⁶ *Zeid's Report*, UN Doc A/59/710.

need of reform across the various categories of UN peacekeeping personnel and made far-reaching recommendations as to what measures should be taken by the UN and TCCs to tackle SEA by peacekeepers, including UN military contingents. The report addressed the issue under four main headings, in terms of present practical and legal difficulties:

1 *Current rules on Standards of conduct - The need to establish a common set of rules for all UN peacekeeper;*

Zeid pointed out the need to establish a uniform standard of conduct and common set of rules applicable to all five categories of UN peacekeepers. Zeid recommended that the SGB 2003 be made applicable to all UN peacekeepers, and that the standards set out in the ‘Ten Rules: Code of Personal Conduct for Blue Helmets’ and ‘We are United Nations Peacekeepers’ be incorporated into the MOU with each TCC in order to make these standards binding on members of military contingents.⁴⁷ As previously noted, the content of the latter document and the Bulletin have now largely been incorporated into the revised MOU.⁴⁸ He further recommended that the SGB 2003 standards be issued to peacekeepers in the form of a pocket card.⁴⁹

2 *Reform of the investigative procedure*

Zeid highlighted the problem of duplications in investigations, including the preliminary investigation and the investigation of Boards of Inquiry (BOI).⁵⁰ He recommended the establishment of a permanent professional investigative body, separate to the DPKO, in order to avoid bias or potential cover-ups. He proposed that a military law expert from the TCC whose national is under investigation be part of the investigative team in order to avoid inadmissibility of evidence. An expert from the TCC could ensure that evidence is gathered in accordance with TCC laws.⁵¹ Other recommendations included the use of on-site courts martial, and that TCCs whose

⁴⁷ *Zeid’s Report*, UN Doc A/59/710, para 27.

⁴⁸ Under the revised MOU ‘We are United Nations Peacekeepers’ now applies not only to military contingents but all those deployed as part of a contingent by TCCs.

⁴⁹ *Zeid’s Report*, UN Doc A/59/710, para 27.

⁵⁰ When an allegation is first made a preliminary investigation is conducted. If it appears serious misconduct has taken place then a Board of Inquiry will investigate further into the matter.

⁵¹ *Zeid’s Report*, UN Doc A/59/710, para 33.

laws do not presently permit such, reform their laws; fingerprinting; fiber analysis; DNA testing and paternity testing.⁵²

3 *Organizational managerial and command accountability*

Zeid proposed that managers and commanders be made accountable for implementing UN programmes and policies.⁵³ This he recommended should include further training; an effective community outreach programme; enhanced data-collection; and the tracking of investigations and allegations so that senior managers are aware of their type and frequency and to prevent perpetrators from being re-hired.⁵⁴ Additionally, he noted the need for increased emphasis on management's role and commanders' role in preventing and addressing SEA and that they be subjected to a performance appraisal in this respect.⁵⁵ He recommended that those who fail to carry through on their duties in this regard be removed.⁵⁶ In light of the lack of female peacekeepers, in particular in the military component of UN operations, Zeid noted that an increase in the number of females deployed could have a positive effect on reduction of SEA and at the very least encourage reporting.⁵⁷ Other proposals included the provision of victim assistance, medical and psychological;⁵⁸ the possible establishment of a voluntary trust fund to be funded by perpetrators;⁵⁹ improved recreational facilities for peacekeepers;⁶⁰ curfews for peacekeeping personnel; mobile patrols and off-limits areas.⁶¹ An important recommendation was that the military police component monitoring the military be from a TCC different to the military component.⁶²

4 *Individual financial, disciplinary and criminal accountability*

In addressing the issue of individual accountability, Zeid noted that TCCs were frequently reluctant to admit that their soldiers had done wrong and therefore to take action against them. He suggested that TCCs could be held accountable for the

⁵² Ibid paras 31-5.

⁵³ Ibid see generally Section IV.

⁵⁴ Ibid para 62.

⁵⁵ Ibid, paras 60-61.

⁵⁶ Ibid paras 61, 65.

⁵⁷ Ibid para 43.

⁵⁸ Ibid paras 53, 54.

⁵⁹ Ibid, para 56.

⁶⁰ Ibid, para 51.

⁶¹ Ibid, para 63.

⁶² Ibid para. 48

behavior of their troops and for taking disciplinary action against perpetrators.⁶³ With regard to members of military contingents he recommended that guilty soldiers' daily allowance be paid into a trust fund,⁶⁴ including that of those who father babies to local women and children. Furthermore, he suggested that the UN assist mothers of peacekeeper babies to make child support claims that could be forwarded to the respective TCC to be processed in accordance with its laws.⁶⁵ Zeid also recommended that the SG obtain assurances from TCCs that they will exercise criminal jurisdiction over troops when criminal or disciplinary issues arise, and that this be provided for in the MOUs. Formal assurances were supposed to have been obtained in the past from TCCs, but the practice was discontinued.⁶⁶ A further recommendation was that the MOU provide that TCCs ensure their troops be required to respect local laws.⁶⁷ The report, however, emphasized that the UN cannot obligate the TCC to prosecute as this would interfere with its sovereignty. Consequentially it can only require it to submit the case to the appropriate national authorities and to report on any outcome.⁶⁸

B *Group of Legal Experts – Norm Standardization*

The measures taken to address SEA, to some extent, have taken a different trajectory to criminal accountability of UN officials and experts on mission, given the different legal status of the various categories of UN personnel and their relationship with the UN. SEA by UN military peacekeepers has therefore been dealt with in part separately by the UN to similar conduct by UN officials and experts on mission. This to a large extent is due to jurisdictional concerns. Two separate Groups of Legal Experts [GLE] were established in 2006. The first's [GLE I] terms of reference required it to examine how to make the standards set out in the SGB 2003 binding on members of UN military contingents prior to the negotiation of a MOU,⁶⁹ given that the revised version had not yet been adopted and that MOUs are not always negotiated prior to the deployment of troops. It also looked at the standardization of

⁶³ Ibid para 80

⁶⁴ Ibid, para 75.

⁶⁵ Ibid paras 75 and 77.

⁶⁶ Ibid para 78.

⁶⁷ *Report of the Group of Legal Experts on making the standards contained in the Secretary-General's bulletin binding on contingent members and standardizing the norms of conduct so that they are applicable to all categories of peacekeeping personnel*, UN GAOR, 61st sess, Agenda Item 33, UN Doc A/61/645 (18 December 2006) ('GLE I Report')

⁶⁸ Ibid, para 80.

⁶⁹ UN Doc SG/A/1023, PKO/148, 13 October 2006; See GLE I Report, UN Doc A/61/645.

norms of conduct across all categories of UN peacekeepers.⁷⁰ The second group [GLE II] explored the legal aspects of criminal accountability of UN officials and experts on mission.⁷¹ Both groups submitted their reports in 2006. Additionally, the Model MOU was already in the process of being revised.⁷² Military contingents were dealt with separately given that it was felt that unlike UN officials and experts on mission, no jurisdictional gap arises when it comes to dealing with offences by these personnel, given that they are subject to the exclusive criminal jurisdiction of the TCC. The report of GLE I will be discussed here in brief. While military contingents were not considered by GLE II some of the suggestions made in its report will be explored in Section IV of this paper.

GLE I noted that work was already underway to make standards contained in the SGB 2003 binding through revising the MOU. However, cognizant of the delays that often occur prior to the negotiation of a MOU,⁷³ it questioned how these standards could be made binding in this earlier period. The GLE suggested that the SG could require TCCs to ensure their troops abide by the SGB 2003 through the issuing of a *note verbale* or through Guidelines issued in making administrative arrangements.⁷⁴ The GLE argued that the Bulletin is actually binding on military personnel give the ability of the SG to take administrative measures against perpetrators, such as repatriation.⁷⁵ However, this is solely an administrative as oppose to a legal measure.

The GLE considered the possibility of making SGB 2003 binding through the use of a SC Resolution under Chapter VII UN Charter but noted that it would be difficult to justify how SEA by peacekeepers threatens international peace and security.⁷⁶ It then considered the capacity of mission Force Commanders (FC) to issue

⁷⁰ See GLE I Report, UN Doc A/61/645.

⁷¹ Report of the Group of Legal Experts, *Ensuring the Accountability of United Nations Staff and Experts on Mission with Respect to Criminal Acts Committed in Peacekeeping Operations*, UN GAOR, 60th sess, Agenda Item 32, UN Doc A/60/980 (16 August 2006) ('GLE II Report'); For developments in relation to this issue see further: <<http://www.un.org/law/criminalaccountability/index.html>>.

⁷² For the text of the revised MOU see Chapter 9, COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18.

⁷³ The negotiation of the MOU can often take several months, even after the deployment of the contingent. GLE I Report, UN Doc A/61/645, para 12.

⁷⁴ Ibid para. 14.

⁷⁵ Ibid paras 19-22.

⁷⁶ Ibid paras 23, 24..

directives covering mission specific measures, such as curfews; out limits areas; etc. Such measures have been taken in many missions. However, they are only enforceable under the direction of the contingent commander given the nature of the command and control structures of UN operations.⁷⁷ The GLE then correctly observed that the Bulletin could be made enforceable by TCCs through incorporating the prohibitions into national laws.⁷⁸ It emphasized the authority of the contingent commander under TCCs' military laws to require that soldiers abide by the standards issued by the UN.⁷⁹

With respect to norm standardization across all categories of UN peacekeepers the GLE noted that they are deployed on different terms and that standardization of norms in this context is neither necessary nor practical. It noted however, that where conduct is prejudicial to the operation and UN credibility, such as SEA, norms should be equally applicable to all categories of personnel, but that such standardization would not result in a simultaneous standardization of disciplinary regimes and sanctions.⁸⁰ The GLE observed that the norms contained in the Ten Rules and We are United Nations Peacekeepers are weak as they are only issued as pocket guides, therefore it recommended that they should be issued as a SG Bulletin.⁸¹ However, as discussed previously SG Bulletins are limited in their direct application to military contingents as administrative issuances.⁸² Alternatively, it recommended the drawing up of a new pocket guide applicable to all peacekeepers, which would incorporate some of the norms set out in the SGB 2003.⁸³ However, the problems with these pocket guides or cards, as noted by the GLE itself, and pointed to above, is that they are non-binding and at times not prioritized by troops. Currently norms are attached as annex H to the revised MOU, which is legally binding on TCCs.

C PSEA Taskforce and Focal Points

An Inter-agency Standing Committee Taskforce on SEA was established in 2002, which transitioned into the Executive Committees on Humanitarian Affairs and Peace

⁷⁷ Ibid paras 27-31.

⁷⁸ Ibid para 32.

⁷⁹ Ibid paras 33-38.

⁸⁰ Ibid paras 46, 47.

⁸¹ Ibid para 33.

⁸² See Section II, part 1.

⁸³ GLE I Report, UN Doc A/61/64, paras 56-59.

and Security (ECHA/ECPS) United Nations and Nongovernmental Organization Task Force on Protection from Sexual Exploitation and Abuse, in February 2005 (PSEA Taskforce).⁸⁴ It is both a UN and non-UN members Committee. Its purpose is to develop tools and policies to help prevent SEA and to develop responses in mission areas, including through engagement with UN and non-UN entities, and the local civilian population. Furthermore, it provides advice and training for UN staff and SEA focal points.⁸⁵ The work of the Taskforce revolves around four main pillars: ‘(a) engagement with and support of local populations; (b) prevention; (c) response systems, including victim assistance; and (d) management and coordination.’⁸⁶ The Taskforce is co-chaired by the UN Department of Field Support (DFS) and the Office for Coordination of Humanitarian Affairs (OCHA). Amongst its initiatives was the development of a website with links to documents and interviews with SEA focal points in missions; information on action taken to date; best practices; information on the development of community-based complaints mechanisms; training materials and other guidance.⁸⁷ The work of the Taskforce is a particularly important initiative in terms of developing a more coordinated response to SEA by humanitarian personnel and peacekeepers both within and beyond the UN.

SEA focal points have been appointed to UN missions to provide senior mission management advice on how to meet UN requirements under the SGB 2003. They are responsible for the development of mission SEA action plans. These focal points are supposed to conduct SEA training, awareness-raising initiatives, and coordinate, develop and monitor SEA related efforts in mission.⁸⁸

⁸⁴ See further Taskforce website <<http://www.un.org/en/pseataaskforce/achievements.shtml>>

⁸⁵ See Taskforce website

<http://cdu.unlb.org/ECHAECPS_TaskForce_on_Protection_from_Sexual_Exploitation_and_Abuse.aspx>; See further, *Comprehensive report prepared pursuant to General Assembly resolution 59/296 on sexual exploitation and sexual abuse, including policy development, implementation and full justification of proposed capacity on personnel conduct issues, Report of the Secretary-General*, UN GAOR, 60th sess, Agenda Item 136, UN Doc A/60/862 (24 May 2006).

⁸⁶ *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010) para 17.

⁸⁷ See further Taskforce website <www.un.org/psea/taskforce>

⁸⁸ A Guide for PSEA focal point training is available at

<http://www.un.org/en/pseataaskforce/docs/psea_focal_point_training_guide.pdf>

D *Conduct and Discipline Unit and Teams*

A significant UN initiative was the establishment in of a Conduct and Discipline Unit (CDU) and Teams (CDTs) in 2005,⁸⁹ in part aimed at creating a single channel for SEA complaints. CDTs have now been deployed to the majority of UN missions.⁹⁰ They are overseen by the CDU at UN headquarters. Their role is to act as a repository for misconduct allegations.⁹¹ They report to the Head of Mission on allegations of misconduct received against peacekeeping personnel, including military contingents.⁹² The CDU is now the first to receive allegations of SEA in the field. While the CDTs do not carry out investigations they will look at allegations in order to categorize them. Category I relates to incidents considered ‘serious misconduct’, under which all incidents of SEA fall, and category II lesser misdemeanors. They then make recommendations as to whether investigation is warranted. They monitor disciplinary issues and ensure that UN standards of conduct are properly interpreted and applied; provide advice to the Mission Head on such issues; handle complaints and data management; raise local awareness of complaints mechanisms and inform local communities of the UN's zero-tolerance policy; and provide feedback to victims on the outcome of investigations.⁹³

The CDTs have engaged in a number of campaigns aimed at increasing community awareness of SEA in some mission areas, which have included poster campaigns (this is important as some victims may be illiterate).⁹⁴ In 2007 an anti-prostitution project was piloted in seven UN missions, including the DRC where it

⁸⁹ For more information on the role of the CDU and CDTs see, *Comprehensive report of conduct and discipline including full justification of all posts, Report of the Secretary-General*, UN GAOR, 62nd sess, Agenda Item 140, UN Doc A/62/758 (20 March 2008) (‘SG CDU Report’) The CDU/CDTs formally came under the DFS in 2007.

⁹⁰ *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010) para 27.

⁹¹ *Report on the Activities of the Office of Internal Oversight Services: Strengthening Investigations*, 62nd sess, UN Doc A/62/7/Add.35, Annex II (8 March 2008) para. 6.

⁹² SG CDU Report, UN Doc A/62/758.

⁹³ *Ibid* paras 34, 35.

⁹⁴ Such awareness raising initiatives have been implemented in the DRC, Sudan (UNMIS), Timor Lester (UNMIT), Liberia (UNMIL), Haiti (MINUSTAH) and Côte d’Ivoire (UNOCI). See CDU website <<http://cdu.unlb.org/UNStrategy/Prevention.aspx>>; In 2009 the in-mission CDTs in UNMIT, MINUSTAH, MONUC, UNMIL, UNOCI AND UNMIS conducted a major media and communications campaign aimed at increasing community awareness with respect to SEA. *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010) para 28 (c). 17

focused on minors. An important initiative was the setting up of ‘reinsertion’ centres in the DRC to provide minors with alternatives to prostitution through providing some social and economic support.⁹⁵

The CDU in coordination with DFS has developed an integrated training service.⁹⁶ Pre-deployment training manuals have been issued to TCCs and training modules developed aimed at three levels of UN personnel, in order to improve awareness of SEA and procedures for addressing it and its consequences.⁹⁷

The creation of CDU/CDTs is a positive development in terms of having a central point charged with receiving and tracking allegations of SEA and overseeing misconduct issues. That stated some problems have been identified. For instance, a 2009 OIOS internal audit report on the performance of the CDT in Liberia noted that its database at the time suffered from inaccuracies; that the CDT’s hotline for making complaints was often ineffective given lack of local knowledge on how to use answering machines, resulting in incomplete messages being left (although it is understood that locked drop-in-boxes may now be in use); and the length of time it was taking the CDT to examine allegations of misconduct involving military personnel, which as of 2009 could apparently take anywhere between 12 to 673 days.⁹⁸

Since 2006 the UN has recorded data on allegations of SEA and other forms of misconduct by its peacekeepers, albeit with limited internal access (therefore excluding victims and general public) and for the purpose of ensuring perpetrators are not re-hired. Nevertheless, the CDU has published at least some statistics on SEA allegations; whether allegations have been substantiated; progress of investigations; whether the victim was a minor; and category of personnel complicit. Significant improvements were made to the CDU website with respect to accessibility to statistics on SEA and some related documents, over the period of 2009 and in

⁹⁵ See further <<http://monusco.unmissions.org/Default.aspx?tabid=2583>>

⁹⁶ SG CDU Report, UN Doc A/62/758., para 36.

⁹⁷ Office to Monitor and Combat Trafficking in Persons, *Stopping Human Trafficking, Sexual Exploitation, and Abuse by International Peacekeepers* (12 June 2007) US Department of State <<http://www.state.gov/g/tip/rls/tiprpt/2007/86207.htm>>.

⁹⁸ OIOS, Internal Audit Division, *Audit of the Conduct and Discipline Unit in UNMIL*, Assignment No. A/2008/626/01 (16 April 2009) para. 37. The CDU’s procedures may well since have been improved.

particular during 2010.⁹⁹ Information on the type of SEA, age of victim, action taken or the nationality of accused persons is still not publically accessible. There is also little information on outcomes of investigations and any subsequent criminal or disciplinary action taken. Such information would allow for a more comprehensive assessment of the impact of UN efforts aimed at tackle SEA. In 2008 DFS established a Misconduct Tracking System, a global database aimed at tracking misconduct by peacekeepers. Again the system is confidential and access is limited.¹⁰⁰

The CDT on the MONUC operation opened three sub-offices in Goma, Bukavu and Bunia in the DRC in 2009. An increase was recorded in the number of allegations of SEA during that year, although the number dropped in 2010.¹⁰¹ This could indicate a number of things, either that there was an increase in SEA by peacekeepers or that reporting mechanisms have become more accessible to victims.¹⁰² However, at the same time there was also an increase in the number of UN troops deployed in the area.¹⁰³

E *UN Security Council Resolutions*

The SC has passed a number of significant resolutions relevant to SEA by UN military contingents. That stated these resolutions are primarily linked to sexual violence in armed conflicts. The SG has emphasized that sexual violence is not synonymous with rape but ‘also encompass sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity, which may, depending on the circumstances, include situations of indecent assault, trafficking, inappropriate medical examinations and strip searches.’¹⁰⁴ Certain acts of SEA by UN peacekeepers may be considered sexual violence.

⁹⁹ See CDU statistics <<http://cdu.unlb.org/Statistics/OverviewofStatistics.aspx>>

¹⁰⁰ See CDU website <<http://cdu.unlb.org/Statistics/OverviewofStatistics.aspx>>

¹⁰¹ *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010) para 4.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ *Implementation of Security Council Resolutions 1820(2009) and 1888(2009), Report of the Secretary General*, UN GAOR and SCOR, 55th sess, Agenda Item 33, UN Doc A/65/592-S/2010/604 (24 November 2010) para 4.

In 2000 the Windhoek Declaration and Namibia Plan of Action on Mainstreaming a Gender Perspective on Multidimensional Peace Support Operations called for the need for gender mainstreaming in peacekeeping operations, including the appointment of a Gender focal points in missions.¹⁰⁵ SC Resolution 1325, issued in 2000, called for an end to violence against women during armed conflict and the need to increase women's participation in peacemaking and conflict prevention. The Resolution called on states to end impunity 'and to prosecute those responsible for genocide, crimes against humanity, and war crimes, including those related to sexual and other violence against women and girls.'¹⁰⁶

While Resolution 1325 has to date only had limited effect on improving the situation of women in armed conflicts generally,¹⁰⁷ it represents a significant step forward in terms of gender mainstreaming efforts in UN peacekeeping.¹⁰⁸ Many initiatives have been instigated on the basis of Resolution 1325, including the increased deployment of women, both military and civilian, on UN peacekeeping missions; and the employment of gender advisors and focal points. These developments are significant in terms of tackling SEA by UN peacekeepers. Operational guidelines have been developed for missions on the implementation of the Resolution.¹⁰⁹ Notably, in 2005 only 1.36% of troops deployed on UN missions as part of a military contingent were female; and 2.01% of experts on mission. This has gradually increased, as of 2010 females constituted 2.43% of all UN troops; 4.14% of all UN experts on mission; and 8.7% of deployed police.¹¹⁰ As of June 2008 there

¹⁰⁵ See CDU website <<http://cdu.unlb.org/Documents/KeyDocuments.aspx>>

¹⁰⁶ SC Res 1325, UN SCOR, 55th Sess, 4213th mtg, UN Doc S/RES/1325 (31 October 2000) ('SC Resolution 1325') 1, 3. The SG submits an annual report for debate in the SC on the implementation of Resolution 1325 at international, regional and national levels to implement the Resolution and proffers recommendations.

¹⁰⁷ Donald Steinburg, 'UN Resolution on Women, Peace and Security: Anniversary Worth Celebrating?' *Reuters UK* (19 June 2009) <<http://blogs.reuters.com/great-debate-uk/tag/security-council-resolution-1325/>>.

¹⁰⁸ See, *Women and Peace and Security, Report of the Secretary-General*, UN Doc S/2008/622 (25 September 2008). Higate notes that men and women experience conflict differently, therefore gender mainstreaming aspires 'to ensure that the concerns of men and women are factored into the planning, design, implementation, monitoring and evaluation of all policies and programs' of UN operations. Higate, above n 17, 4.

¹⁰⁹ [2006] *Yearbook of the United Nations*, 84.

¹¹⁰ DPKO/OMA Statistical Report on Female Military and Police Personnel in UN Peacekeeping Operations prepared for the 10th Anniversary of the SCR 1325, United Nations DPKO/OMA <www.un.org/fr/peacekeeping/documents/gender_sres1325_chart.pdf>; Statistics on police are only available from 2009.

was one female Head of Mission on UN operations (Liberia).¹¹¹ These numbers are still clearly inadequate, and although the UN has plans to increase the number of female civilian peacekeepers to 20% and military to 10% by 2014 this is dependent of TCCs contributing this figure.¹¹² Having women on peacekeeping forces may help counter societal and force attitudes that foster gender inequality, which has been identified as key to countering SEA. There are arguments that the presence of women may promote better conduct among male peacekeepers,¹¹³ as might better gender education.¹¹⁴ Furthermore, the presence of female peacekeepers may assist in engaging vulnerable groups and NGOs in the local community; encourage reporting; and generally help create an environment less conducive to such abuse.¹¹⁵

On the basis of Resolution 1325 Gender Units have been deployed to UN missions to promote, facilitate, monitor and support the incorporation of gender perspectives and gender equality into all aspects of the peacekeeping missions. They are further mandated to provide training on gender mainstreaming and to advise mission management on the incorporation of gender perspectives in planning. Gender Units work with numerous stakeholders, such as local NGOs, in implementing their mandate and in addressing the specific needs of local women. As of May 2008 there were gender advisors as part of a Gender Unit deployed to 20 UN missions.¹¹⁶ They have been involved in training activities for peacekeepers in relation to gender and children and the establishment of links with local NGOs aimed at better implementation of SEA/VAM, the SEA victim assistance strategy, which I will turn to momentarily.¹¹⁷ However, these units often consist of one or two staff, making it difficult for them to be effectual. Gender focal points have also been established on

¹¹¹ *Women and Peace and Security, Report of the Secretary-General*, UN Doc S/2008/622 (25 September 2008) paras 51, 53.

¹¹² Fionnula Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, *On the Frontlines: Gender, War and the Post-Conflict Process*, (Oxford University Press, 2011) 127.

¹¹³ See generally, Ní Aoláin, Haynes and Cahn, above n 112, 126-12; See further, Olivera Simic, 'Towards Combating Male Sexual Violence in Peacekeeping Operations' (2010) 17(2) *International Peacekeeping*, 188, 190.

¹¹⁴ See, Ní Aoláin, Haynes and Cahn, above n 112, 127.

¹¹⁵ United Nations, *Report of the Special Committee on Peacekeeping Operations and its Working Groups, 2005 substantive session (New York, 31 January-25 February 2005), 2005 resumed session (New York, 4-8 April 2005)*, GAOR, 59th sess, UN Doc A/59/19/Rev.1, para 12 ('Special Committee on Peacekeeping Operations Report'); See also, Higate, above n 17, 60.

¹¹⁶ See, *Gender and Peacekeeping; Some Facts*, PeaceWomen
<<http://www.peacewomen.org/un/pkwatch/facts.html>>

¹¹⁷ *Gender Mainstreaming in Peacekeeping Operations: Progress Report*, Gender Unit, DPKO (2005) 14, 15. <http://www.peacewomen.org/portal_resources_resource.php?id=1268>

various UN missions, whose role it is to advise, advocate and support senior management on UN operations on gender mainstreaming, and monitor progress in this regard.¹¹⁸

In 2008 the SC adopted Resolution 1820 on sexual violence against civilians in armed conflict, in which it reaffirms the UN's commitment to its SEA zero-tolerance policy.¹¹⁹ It requests the SG to further strengthen efforts aimed at addressing SEA and calls on TCCs to prevent SEA and ensure accountability, including through 'pre-deployment and in-theater awareness training...'¹²⁰ In 2009 the SC passed Resolution 1888, which builds on the above mentioned and other SC Resolutions relevant to sexual violence, gender and armed conflict.¹²¹ It reiterates the UN's SEA zero-tolerance policy and the need for TCCs to prevent it and ensure accountability.¹²² It again calls on states to deploy greater numbers of female military and police personnel to UN missions.¹²³

The UN SC has placed significant emphasis on training as key to countering SEA by peacekeepers. In SC Resolution 1894 it requests TCCs to train their troops on the UN's zero-tolerance policy.¹²⁴ Finally, SC Resolution 1960 requests the SG to continue efforts targeted at SEA by peacekeepers, including through training and the development of mission specific procedures.¹²⁵ Numerous country-specific SC resolutions have also emphasized the UN's zero-tolerance policy against SEA and urged States to take further action to prevent and respond to SEA, in particular through pre-deployment training.¹²⁶

¹¹⁸ Minna Lyytikäinen, 'Gender Training for Peacekeepers: Preliminary Overview of United Nations Peace Support Operations' (Working Paper) UNISTRAN (2007) 9. < http://www.uninstran.org/jdata/test/world/documents/wp_4.pdf>

¹¹⁹ SC Res 1820, UNSCOR, 5916th mtg, UN Doc S/RES/1820 (19 June 2008) para 6.

¹²⁰ *Ibid*, para 7.

¹²¹ SC Resolution 1325, UN Doc S/RES/1325; SC Res 1612, UNSCOR, 5235th mtg, UN Doc S/RES/1612 (26 July 2005); SC Res 1820, UNSCOR, 5916th mtg, UN Doc S/RES/1820 (19 June 2008); SC Res 1882, UNSCOR, 6176th mtg, UN Doc S/RES/1882 (4 August 2009); See also SC Res 1889, UNSCOR, 6196th mtg, UN Doc S/RES/1889 (5 October 2009)

¹²² SC Res 1888, UNSCOR, 6195th mtg, UN Doc S/RES/1888 (30 September 2009) para 21.

¹²³ *Ibid*, para 19.

¹²⁴ SC Res 1894, UNSCOR, 6216th mtg, UN Doc S/RES/1894 (11 November 2009) para 23.

¹²⁵ SC Res 1960, UNSCOR, 6453th mtg, UN Doc S/Res/1960 (16 December 2010) para 16.

¹²⁶ See eg, SC Res 1769, UNSCOR, 5727th mtg, UN Doc S/RES/1769 (31 July 2007); SC Res 1769, UNSCOR, 6239th mtg, UN Doc S/RES/1898 (14 December 2009).

F Training

Lack of adequate training has been seen as a significant contributory factor to SEA by UN peacekeepers. Significant efforts have been made to improve training of military contingents on issues such as gender, SEA, local cultures and UN standards of conduct, as a preventative measure. Some of these efforts have been mentioned already. States are required to ensure that their troops deploying on UN missions receive adequate pre-deployment training on UN standards of conduct, as set out in Annex H to the revised MOU, in addition to mission-specific rules and regulations and local laws.¹²⁷ The TCC must also ensure contingent commanders receive adequate training to properly maintain troop discipline, with the assistance of the UN.¹²⁸ Training is run at national, regional or sub-regional levels, generally peacekeeping training centres. Both UN and state actors are involved in various aspects of training. The CDU has devised training modules on SEA to support this. Pre-deployment training on SEA is mandatory for all UN peacekeepers. That stated, it is not always possible for the UN to verify that it is actually carried out by TCCs¹²⁹ and the time spent on it may well vary.

The CDU is also training instructors on a Core Pre-deployment Training Module on Conduct and Discipline.¹³⁰ Mandatory, in-mission training is being delivered by CDTs on SEA prevention, in cooperation with the Integrated Mission Training Cells (IMTC).¹³¹ The DFS has further developed new pre-deployment training and induction training materials in an effort to prevent SEA.¹³² The UN has even produced a video for training purposes ‘To Serve with Pride: Zero Tolerance for Sexual Exploitation and Abuse.’¹³³

¹²⁷ COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18, Article 7 *bis*, paras 7.3 -7.4.

¹²⁸ COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18, Article 7 *ter*, paras 7.7 -7.8..

¹²⁹ US Department of State, Trafficking in Persons Report (June 2007) 231.

¹³⁰ See CDU website < <http://cdu.unlb.org/UNStrategy/Prevention.aspx>>; Links to these tools, and information on the activities of the Committee can be found on the PSEA Taskforce website <<http://www.un.org/en/pseataaskforce/tools.shtml>>

¹³¹ Such awareness raising initiatives have been implemented in the DRC, Sudan (UNMIS), Timor Lester (UNMIT), Liberia (UNMIL), Haiti (MINUSTAH) and Côte d’Ivoire (UNOCI). See CDU website <<http://cdu.unlb.org/UNStrategy/Prevention.aspx>>

¹³² *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010) para 15.

¹³³ The video is available on the CDU website <<http://cdu.unlb.org/CommunicationsCentre/Video.aspx>>

One of the difficulties posed by in-mission training, particularly at DPKO level, is time constraints and frequent troop rotations. A further issue pointed to by Higate, is that despite training the notion of ‘gender’ is not always well understood by peacekeepers, and that given the dearth of other important issues addressed during induction training, gender training may not be well retained by some peacekeepers.¹³⁴ Ní Aoláin, Haynes and Cahn suggest that there ought to be a gender training assessment of peacekeepers prior to commencing active duty.¹³⁵ Such an assessment could be useful both with respect to gender, SEA and UN standards of conduct across the board.

G *Victim Assistance*

In addition to preventative and punitive measures, the UN is taking important steps to address the needs of the victims of SEA. In 2006, 21 UN and 24 non-UN entities have endorsed a Statement of Commitment on Eliminating Sexual Exploitation and Abuse by UN and non-UN personnel at a High-level Conference on Elimination of SEA in New York.¹³⁶ The Special Committee on Peacekeeping Operations requested the SG to prepare a victim assistance strategy, resulting in *A Comprehensive strategy on assistance and support to victims of sexual exploitation and abuse by United Nations staff or related personnel* (SEA/VAM or Victim Assistance Mechanism), which was approved by the UN GA Res 62/214 as of March 2008.¹³⁷ In 2009 an implementation guide to SEA/VAM was produced for the UN, acting in coordination with NGOs.¹³⁸ The Strategy is not intended to replace legal or financial responsibility of perpetrators of SEA; nor is it an acknowledgement by the UN of responsibility. Its purpose is to provide medical, legal, social and psychological support to victims depending on their needs, through the use of existing programs and services.¹³⁹ Support may also include

¹³⁴ Higate, above n 17, 19.

¹³⁵ Ní Aoláin, Haynes and Cahn, above n 112, 122-124.

¹³⁶ *Special Committee on Peacekeeping Operations Report*, UN Doc A/59/19/Add.1, paras 34-35.

¹³⁷ The General Assembly has now adopted the, *United Nations Comprehensive Strategy on Assistance and Support to Victim Exploitation and Abuse by United Nations Staff and Related Personnel*. GA Res 62/214, UN GOAR 62nd sess. (7 March 2008) Annex (‘SEA/VAM’)

¹³⁸ *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010) para 22.

¹³⁹ *Ibid*; *SEA/VAM*, GA Res 62/214, UN GAOR, 62nd sess, Agenda Item 116, UN Doc A/RES/62/214 (7 March 2008) paras 6-7; *Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, Report of Secretary-General*, UN GAOR, 64th sess, Agenda Item 113, UN Doc

emergency shelter, food, clothes and other such necessities, where appropriate.¹⁴⁰ The strategy covers complainants, victims and children born as a result of SEA.¹⁴¹ The provision of needed medical assistance is independent of substantiation of the allegation where it is needed. It does not however provide financial compensation. It also states that where possible the UN will provide assistance in pursuing paternity claims at TCC level.¹⁴² The TCC is now under an obligation to ‘seek to facilitate’ paternity claims under Article 7 *sixiens* revised MOU.¹⁴³

The PSEA Taskforce is a central player in efforts to make SEA/VAM operational, through the provision of guidance on the implementation of the strategy in the field.¹⁴⁴ A key element put forward by the Taskforce is the maintenance of an inter-agency network, overseen by the Resident Coordinator in the field in order to assist execution of the Strategy.¹⁴⁵ The SG, in his report on the implementation of SEA/VAM, noted that there is much work still to be done in missions to establish networks to enable it to function properly.¹⁴⁶ Training has been provided to some mission personnel on operationalizing SEA/VAM.¹⁴⁷ Efforts have been made to bring local and international NGOs and host Governments on board. It is too soon to assess the impact of SEA/VAM but should it operate effectively it will provide an important support structure for victims of SEA, although it in no way obviates from the need to hold perpetrators to account.

A/64/176, (27 July 2009) para. 6

¹⁴⁰ *Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, Report of Secretary-General*, UN GAOR, 64th sess, Agenda Item 113, UN Doc A/64/176, (27 July 2009) para 7.

¹⁴¹ GA Res 62/214, UN GAOR, 62nd sess, Agenda Item 116, UN Doc A/RES/62/214 (7 March 2008) para 5. The distinction between a ‘complainant’ and ‘victim’ rests on substantiation of an allegation.

¹⁴² *Ibid*, paras 6-8 & 10

¹⁴³ COE Manual/Revised Model MOU, UN Doc A/C.5/63/18.

¹⁴⁴ *Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, Report of Secretary-General*, UN GAOR, 64th sess, Agenda Item 113, UN Doc A/64/176, (27 July 2009) para 11.

¹⁴⁵ *Ibid* para 12.

¹⁴⁶ The UN has adopted a phased approach in addressing this, first focusing on a number of countries, seven where a UN peacekeeping operation has been deployed and later the wider development community. The piloted missions include MONUC, MINUSTAH, UNOCI, UNMIS, MINUCAR, UNAMID and UNMIL. *Ibid* paras. 14, 15-20.

¹⁴⁷ *Ibid* para 13.

H *Mission specific and other measures*

Other mission specific measures have been put in place in various UN missions such as deeming certain areas ‘off-limits’; the imposition of curfews; telephone hotlines; a policy of non-fraternization; awareness-raising measures such as poster campaigns and radio broadcasts; and requiring peacekeepers to wear their uniform at all times. Many UN missions now have language on SEA incorporated into their mandates.¹⁴⁸ Improved recreational facilities for peacekeepers also forms part of the UN’s strategy to eliminate SEA,¹⁴⁹ given the view that the lack of such facilities contributes to SEA.¹⁵⁰ The SG undertook a comprehensive review of the welfare and recreational needs of all categories of personnel.¹⁵¹ Among the issues identified was the need for improved access to communication to enable ordinary members of military contingents to contact their families;¹⁵² the creation of leave centres both in and outside mission areas;¹⁵³ sporting and other recreational facilities; and opportunities for social and cultural interaction.¹⁵⁴ A welfare allowance is paid to TCCs to provide for recreational and welfare resources for their troops. TCCs are now being more closely monitored with respect to the spending of this allowance on troops welfare. Moreover, Article 7ter of the revised MOU now requires this of TCCs.¹⁵⁵ The impact of this particular initiative on SEA is difficult to isolate from other reforms,¹⁵⁶ but it certainly seems likely that these improvements will help occupy troops in their free time.

¹⁴⁸ See eg. SC Res 1996, UN SCOR, 6576 mtg, UN Doc SC/RES/1996 (8 July 2011) para 23 (UNMISS, South Sudan); SC Res 1925, UN SCOR, 6324 mtg, UN Doc SC/RES/1925 (28 May 2010) para 15 (MONUSO, DRC); SC Res 1769, UNSCOR, 5727 mtg, UN Doc SC/RES/1967 (31 July 2007) para 16.

¹⁴⁹ See, *Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel, Report of Secretary-General*, UN GAOR, 64th sess, Agenda Item 113, UN Doc A/64/176, (27 July 2009).

¹⁵⁰ *Zeid’s Report*, UN Doc A/59/710, paras 50-51; *Report of the Special Committee on Peacekeeping Operations*, 64th sess, UN Doc A/64/19 (22 February-19 March 2010) para. 62.

¹⁵¹ *Comprehensive review of the welfare and recreation needs of all categories of peacekeeping personnel, Report of the Secretary-General*, GAOR, 62nd sess, Agenda Item 34, UN Doc A/62/663 (24 January 2008); See also GA Res 59/300, UN GAOR, 59th sess, Agenda Item 77, UN Doc A/RES/59/300 (30 June 2005).

¹⁵² *Comprehensive review of the welfare and recreation needs of all categories of peacekeeping personnel, Report of the Secretary-General*, GAOR, 62nd sess, Agenda Item 34, UN Doc A/62/663 (24 January 2008) para 31.

¹⁵³ *Ibid* para 38.

¹⁵⁴ *Ibid* para 47.

¹⁵⁵ COE Manual/Revised Model MOU, UN Doc A/C.5/63/18.

¹⁵⁶ *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, UN GAOR, 55th sess, Agenda Item 134, UN Doc A/65/742 (18 February 2011) para 23.

I *Investigative and disciplinary procedures and the Revised MOU*

1 *Past investigative procedures*

As highlighted in brief above a number of problems arose with investigative procedures in the past, which contributed to impunity of perpetrators of SEA, including timeliness, lack of transparency and overlap of investigations. Amongst the difficulties encountered by the Office of Internal Oversight Services (OIOS), the UN's primary investigative body, when investigating SEA, have been the inability or unwillingness of victims to identify perpetrators; victims of SEA reporting it weeks or months following its occurrence; and frequent troop rotations. This causes problems with investigation as alleged perpetrators may have already been rotated out of the area and it makes obtaining evidence or examining the crime scene problematic.¹⁵⁷ Past reports indicated that troops were rotated out of mission areas when investigations of SEA were still ongoing.¹⁵⁸ Rotation of witnesses, investigators, and other persons relevant to investigations has also been an issue in the past.¹⁵⁹ If the perpetrator is rotated out of the area it becomes almost impossible for the OIOS to conduct an administrative investigation.¹⁶⁰ Furthermore, ages of victims may be difficult to ascertain due to lack of birth certificates or medical examination to verify.¹⁶¹

In 2003 the UN issued Directives for Disciplinary Matters Involving Military Members of National Contingents to provide guidance on procedures to be followed by the UN in case of a breach of mission standards of conduct by military

¹⁵⁷ Erling Grimstand, *Review of Investigations Division OIOS, submitted to the Under Secretary-General of the OIOS* (26 June 2007) 68-69; See also, *Working paper by Ms. Hampson on the scope of the activities and accountability of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations*, UN Doc E/CN.4/Sub.2/2005/42 (7 July 2005) para 60 ('Hampson Report'); *OIOS Investigation into Allegations of SEA in MONUC, Report of the Secretary-General*, UN GAOR, 59th sess, Agenda Items 114, 118, 127, UN Doc A/59/661 (5 January 2005) paras 9, 44.

¹⁵⁸ *Special measures for protection from sexual exploitation and sexual abuse and comprehensive report prepared pursuant to General Assembly resolution 59/296 on sexual exploitation and sexual abuse, including policy development, implementation and full justification of proposed capacity on personnel conduct issues, Report of the Advisory Committee on Administrative and Budgetary Questions*, 61st sess, Agenda Items 123, 132, UN Doc A/61/886 (7 May 2007); Sarah Martin, 'Must Boys Be Boys? Ending Sexual Exploitation and Abuse in UN Peacekeeping Missions', *Refugees International* (October 2005) 22

<www.refugeesinternational.org/sites/default/files/MustBoysbeBoys.pdf>

¹⁵⁹ Hampson Report, above n 157, para 61.

¹⁶⁰ Grimstand, *Review of Investigations Division*, above n 157, 69.

¹⁶¹ Grimstand, *Review of Investigations Division*, above n 157, 70.

contingents.¹⁶² The Directives provide that the UN may conduct a preliminary investigation into allegations of serious misconduct when they arise, including SEA.¹⁶³ If the preliminary investigation suggests that serious misconduct may have occurred a Board of Inquiry (BOI) is to be established.¹⁶⁴ However, the Directives are not binding on military contingents.¹⁶⁵ The procedures set out therein are solely administrative, and the UN's power to take action against perpetrators is limited to the administrative measure of repatriation. The TCC is supposed to undertake its own investigation, which the Directives do not impact on.¹⁶⁶ The content of these Directives has been criticized for being 'obtuse and unintelligible' for ordinary military personnel.¹⁶⁷ What adds to confusion is that they are now outdated given the 2007 revisions to the Model MOU, outlined below. For instance, the definition of 'serious misconduct' set out in the Directives is not applicable to military contingents. Annex F of the revised MOU contains the applicable definition.¹⁶⁸ The Directives' definition is broader in scope and includes acts, omissions, negligence; injury not only of body or property, but also of mind; and not only SEA but also sexual harassment. 'Serious misconduct' under Annex F is defined as, 'misconduct, including criminal acts, that result in, or is likely to result in, serious loss, damage or injury to an individual or to a mission. Sexual exploitation and abuse constitute serious misconduct.'¹⁶⁹ As Oswald, Durham and Bates note these Directives must now be read in light of revisions to the Model MOU.¹⁷⁰ The Directives need to be revised to reflect changes to the Model MOU.

¹⁶² UN's Directives for Disciplinary Matters Involving Military Members of National Contingents, UN Doc DPKO/MD/03/00993, July 2003
<http://unclef.com/en/pseataforce/docs/public_information_guidelines_for_allegations_of_misconduct_.pdf>; Reprinted in Oswald, Durham and Bates, above n 38, 387-391.

¹⁶³ Ibid.

¹⁶⁴ *Report on the Activities of the Office of Internal Oversight Services, Report of the Secretary-General*, UN GAOR, 65th sess, Agenda Item 141, UN Doc A/65/271 (Part I) (9 August 2010) paras 16-17.

¹⁶⁵ See Oswald, Durham and Bates, above n 38, 385.

¹⁶⁶ Ibid.

¹⁶⁷ Ray Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?', in Roberta Arnold (ed.), *Law Enforcement within the Framework of Peace Support Operations* (Martinus Nijhoff, 2008) 229.

¹⁶⁸ See Oswald, Durham and Bates, above n 38, 385.

¹⁶⁹ COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18.

¹⁷⁰ See Oswald, Durham and Bates, above n 38, 386.

There has been some progress at UN level in attempting to address some of the above issues. GA Resolution 59/287 gave the OIOS responsibility within the UN system for investigating all allegations of SEA, including by UN military contingents.¹⁷¹ Again this must be read in light of the 2007 revisions to the MOU, which limit the investigative role of the UN, as will be discussed presently. Nevertheless, some of the issues surrounding investigations by the OIOS should be highlighted here given that when allegations of SEA are made against members of military contingents preliminary investigation will often fall to the OIOS where the TCC does not immediately act. The sole purpose of the preliminary investigation is to establish facts and make recommendations. The OIOS has no authority to enforce these recommendations. One of the primary criticisms of OIOS investigations, at least in the past, is that given that they are purely administrative, they are not geared to dealing with criminal matters. This means that much of the evidence gathered by the OIOS may not meet the evidentiary requirements of national courts and may therefore be inadmissible in subsequent criminal prosecutions.¹⁷² That stated, the OIOS has emphasized that while it does not conduct criminal investigations:

...best practices standard techniques were employed for collecting evidence, such as ensuring chain of custody, consideration of forensic issues, disk imaging for internal use in disciplinary action and DNA sampling for paternity. While the techniques employed might indeed be consistent with techniques of national authorities, given that OIOS was not an agent of a national authority (with sovereign authority), questions regarding the veracity of evidence, its admissibility, the standard of proof and conclusiveness could arise in the jurisdiction in which the information generated was to be used.¹⁷³

The OIOS's capacity to deal with such investigations has since been strengthened.¹⁷⁴

The fact remains, however, that TCCs may not permit unspecified authorities to

¹⁷¹ GA Res 59/287, UN GAOR, 59th sess, Agenda Item 107, UN Doc A/RES/59/287 (21 April 2005).

¹⁷² Anthony Miller, 'Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations' (2006) 39 *Cornell International Law Journal*, 71, 83-4; See also Investigations Division, Office of Internal Oversight Services, Investigations Manual, March 2009 ('OIOS Investigative Manual')

<<http://pbpu.unlb.org/pbps/Pages/PUBLIC/ViewDocument.aspx?docid=752>> ; See also, Dahrendorf, above n 3, 21.

¹⁷³ *Report of the Ad hoc Committee on criminal accountability of United Nations officials and experts on mission*, UN GAOR, 63rd sess, UN Doc A/63/54 (7-9 and 11 April 2008) para 18.

¹⁷⁴ GA Res 59/287, UN GAOR, 59th sess, Agenda Item 107, UN Doc A/RES/59/287 (21 April 2005); *Report on the Activities of the Office of Internal Oversight Services, Report of the Secretary-General*, UN GAOR, 58th sess, UN Doc A/58/364 (11 September 2003); See also GA Res 59/300, UN GAOR, 59th sess, Agenda Item 77, UN Doc A/RES/59/300 (30 June 2005).

conduct criminal investigations.¹⁷⁵ Furthermore, evidentiary requirements in TCC courts for offences such as rape and sex with minors may be difficult to meet even in the domestic context. A further complication is that UN investigators do not have subpoena powers.¹⁷⁶

Zeid recommended that a professional investigative capacity be established within the UN to investigate allegations of SEA and other misconduct of a similar gravity.¹⁷⁷ In December 2007 a report was issued on Strengthening Investigations¹⁷⁸ in which a number of proposals for restructuring the OIOS's Investigations Division were made. The GA in principle endorsed these proposals in 2009.¹⁷⁹ Significantly, this led to the repositioning of OIOS investigation centres to regional hubs, namely New York, Vienna and Nairobi, as part of a 3-year pilot project.¹⁸⁰ OIOS resident investigators have also been sent to MONUC, UNMIL, UNMIS, MINUSTAH, UNMIT, UNIFIL and UNOCI.¹⁸¹ This has the advantage of rapid deployment of investigative teams from the UN-side at least when allegations arise.¹⁸² The OIOS has also commenced creating specialist investigative teams in recognition of the fact that those investigating SEA must have expertise in investigating sex crimes and 'have access to modern forensic methods'. Such expertise is particularly pertinent when dealing with sexual offences against children.¹⁸³ The OIOS has implied that SEA allegations involving non-consensual sex and SEA of minors are prioritized for investigation.¹⁸⁴ Statistics on SEA for 2010 revealed that of the 85 cases reported for that year 51% involved non-consensual sex and 35% of those involved minors.¹⁸⁵

¹⁷⁵ *Report of the Ad hoc Committee on criminal accountability of United Nations officials and experts on mission*, UN GAOR, 63rd sess, UN Doc A/63/54 (7-9 and 11 April 2008) para 17.

¹⁷⁶ Stimson Report, above n 19, 42

¹⁷⁷ Zeid's Report, UN Doc A/59/710, para 36.

¹⁷⁸ *Review of the efficiency of the administrative and financial functioning of the United Nations, Strengthening Investigations, Report of the Secretary-General*, UN GAOR, 62nd sess, Agenda Items 126, 128, 140, UN Doc A/62/582 (12 December 2007) ('SG Report – Strengthening Investigations')

¹⁷⁹ GA Res 63/287, UN GAOR, 63rd sess, Agenda Item 132, UN Doc A/RES/63/287 (13 August 2009).

¹⁸⁰ UN Office of Internal Oversight Services, Booklet, p 12 <www.un.org/Depts/oios/documents/oios_booklet_e.pdf> ('OIOS Booklet')

¹⁸¹ *Ibid* 12

¹⁸² SG Report – Strengthening Investigations, UN Doc A/62/582.

¹⁸³ *Ibid* para 43; See also OIOS Booklet, above n 180, 12

¹⁸⁴ SG Report – Strengthening Investigations, UN Doc A/62/582, para. 61; OIOS Investigative Manual, above n 172, para. 1.3.

¹⁸⁵ See CDU website. <<http://cdu.unlb.org/CommunicationsCentre/PressReleasesandStatements.aspx>> 30

The OIOS Investigation Division commenced a basic investigations training course on SEA in 2009 for those involved in such investigations at UN level.¹⁸⁶ In 2010 the OIOS developed a ‘training the trainer’ module for OIOS staff on investigating SEA to enable these persons to conduct further training of others. Additionally training on the investigation of SEA was provided to some MONUC and UNMIL staff.¹⁸⁷ TCCs ought to be required to nominate national investigative officers who should be required to receive similar training, in particular given the unique environment in which such abuse occurs.

2 *Model MOU*

As noted the UN negotiates agreements with states contributing troops to UN operations. These are bi-lateral in nature and set out the financial, logistic, administrative and other conditions regulating the relationship between the UN and TCCs. In the past this was done through the exchange of letters. In the case of UNEF I, for instance, the SG sent a uniform letter to ten TCCs. This in addition to the responding letters in effect constituted the Participating State Agreements, which were to be read in conjunction with the SOFA and the Regulations issued to the force.¹⁸⁸ Akin to the SOFA the UNEF Participation Agreements reaffirmed the exclusive criminal jurisdiction of TCCs over military contingents, based on the understanding that were a crime to be perpetrated by a member of their contingents the TCC would exercise its criminal jurisdiction.¹⁸⁹ Under the UNEF I Force Regulations members of military contingents were to remain subject to TCC military laws with respect to disciplinary offences.¹⁹⁰

In 1990 the UN drew up a *Model Agreement between the United Nation and Member States contributing personnel and equipment to United Nations peacekeeping operations* (Troop-contribution Agreement or ‘TCA’ - the precursor to the MOU),¹⁹¹ which served as a template for the negotiation of specific MOUs with TCCs. The Model MOU was based on

¹⁸⁶ *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010) para 28(f).

¹⁸⁷ See CDU website. <<http://cdu.unlb.org/CommunicationsCentre/FeaturedNews.aspx>>

¹⁸⁸ *Summary study of the experiences derived from the Force, Report of the Secretary-General*, UN GAOR, 13th sess, UN Doc A/3943, para. 130. For the text of the letter see Annex 1 of the Report. See also Derek Bowett, *United Nations Forces* (London: Stevens & Sons, 1964), at 112.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, 113-114

¹⁹¹ TCA 1991, UN Doc A/46/185.

past practice for previous missions and their relevant agreements between the UN and TCCs.¹⁹² The document has been subject to various revisions over the years and was renamed a MOU.¹⁹³ Most pertinent for our purposes are the revisions made in 2007 aimed primarily at tackling SEA by persons deployed as part of a military contingent on UN operations.¹⁹⁴

3 2007 revisions to the MOU

In a 2005 Special Committee of Peacekeeping Operations report a series of recommendations were made for tackling SEA, including making the general content of the SGB 2003 binding on UN military contingents.¹⁹⁵ The General Assembly subsequently issued Resolution 59/300 on 22 June 2005, approving these recommendations and requesting the SG to devise a revised draft model MOU, taking into account the recommendations made in the Special Committee on Peacekeeping Operations report;¹⁹⁶ Zeid's Report;¹⁹⁷ and GA Resolution 59/287 on strengthening the UN's internal investigative functions.¹⁹⁸ The Special Committee proposed a revised draft Model MOU in

¹⁹² TCA 1991, UN Doc A/46/185, para 1

¹⁹³ For 1997 version of TCA/MOU see, *Reform of the Procedures for Determining Reimbursement to Member States for Contingent-owned Equipment*, Note by the Secretary General, UN GAOR, 51st sess, Agenda Item 140, UN Doc A/51/967 (27 August 1997) Annex ('Contribution Agreement between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation]') ('TCA 1996'); The text of the MOU was also revised in 1997 but was never adopted. There was no mention of jurisdiction, prohibited conduct. See also the 1996 version of the TCA. *Reform of the Procedures for Determining Reimbursement to Member States for Contingent-owned Equipment*, Note by the Secretary General, UN GAOR, 50th sess, Agenda Item 138(a), UN Doc A/50/967 (9 July 1996) Annex ('Contribution Agreement between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation]').

¹⁹⁴ COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18.

¹⁹⁵ *Special Committee on Peacekeeping Operations Report*, UN Doc A/59/19/Add.1, para 39.

¹⁹⁶ *Ibid*, para 39; *Revised Draft Model Memorandum of Understanding between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation]*, Note by the SG, UN GAOR, 61st sess, Agenda Item 33, UN Doc A/61/494 (3 October 2006) ('SG Note – Revised MOU').

¹⁹⁷ *Special Committee on Peacekeeping Operations Report*, UN Doc A/59/19/Add.1.

¹⁹⁸ GA Res 59/287, UN GAOR, 59th sess, Agenda Item 107, UN Doc A/RES/59/287 (21 April 2005).

the form of amendments to the Model MOU in June 2007.¹⁹⁹ The GA endorsed the revised MOU on 24 July 2007.²⁰⁰ It now provides the framework for all new MOUs.²⁰¹

Revisions to the model MOU have been made across several key areas, including investigative procedures; command responsibility; state assurances to exercise jurisdiction; and follow-up, as outlined below. The revisions to the MOU place increased emphasis on TCC responsibility for ensuring troop discipline and for exercising their jurisdiction where misconduct arises. Revised Article 3 provides that a central purpose of the MOU is to ‘specify United Nations standards of conduct for personnel provided by the Government.’²⁰² While the revisions of the model MOU are substantial, they do not go as far as had been envisaged by Prince Zeid, the UN Special Committee on Peacekeeping Operations²⁰³ and the SG.²⁰⁴

(a) *Standards of Conduct*

As noted, SEA, in particular of children, is prohibited under UN standards of conduct, including the *Ten Rules: Code of Conduct, We Are United Nations Peacekeepers*²⁰⁵ and the SGB 2003.²⁰⁶ While they have generally been accepted by TCCs until recent revisions to the MOU the former two documents were referred to as ‘Guidelines’, suggesting they are non-binding.²⁰⁷ Furthermore, as previously noted, the SGB 2003 does not directly apply to military contingents. UN military contingents can generally only be bound by UN rules or administrative issuances if their States legally agree to

¹⁹⁹ *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session*, UN GAOR, 61st sess, UN Doc A/61/19 (Part III) (12 June 2007) Annex; For the text of the revised MOU see COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18.

²⁰⁰ GA Res 61/267 B, UN GAOR, 61st sess, Agenda Item 33, UN Doc A/RES/61/267 B (15 June 2007); See also *Letter dated 11 January 2006 from the Chairman of the 2004 Working Group on Contingent-Owned Equipment*, UN GAOR, 60th sess, Agenda Item 136, UN Doc A/C.5/60/26 (11 January 2006); *Comprehensive review of the strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations*, UN GAOR, 61st sess, Agenda Item 33, UN Doc A/C.4/61/L.21 (28 June 2007).

²⁰¹ COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18; *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2007 resumed session*, UN GAOR, 61st sess, UN Doc A/61/19 (Part III) (12 June 2007) Annex

²⁰² What was proposed in an earlier draft version of the revised MOU was 'to provide for the maintenance of discipline and good order among such personnel and the investigation of, and accountability for violations. SG Note – Revised MOU, UN Doc A/61/494.

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²⁰⁴ *Zeid's Report*, UN Doc A/59/710 SG Note – Revised MOU, UN Doc A/61/494; *Special Committee on Peacekeeping Operations Report*, UN Doc A/59/19/Add.1, Chapter II.

²⁰⁵ For the text of these documents see CDU website, <<http://cdu.unlb.org/>> 1

²⁰⁶ SGB 2003, UN Doc ST/SGB/2003/13.

²⁰⁷ Miller, above n 172, 82; Defeis, above n 34, 185, 196.

them being bound.²⁰⁸ Deen-Racsmany observes that mission-specific *aide mémoire* or guidelines appear to have been relied on in the past to list standards of conduct applicable to personnel, which were referred to in an annex to prior MOUs. As such they were non-binding.²⁰⁹

One of the major purposes of revising the MOU was to make UN standards of conduct binding on UN military contingents and other personnel deployed as part of a military component, by incorporating these standards into a binding legal instrument between the UN and TCC.²¹⁰ The revised MOU therefore effectively incorporates the content of the Bulletin, along with ‘We Are United Nations Peacekeepers’ under Annex H, although the latter document was modified and renamed ‘We Are United Nations Peacekeeping Personnel’, broadening the scope of persons it applies to.²¹¹ Furthermore, under the revised Model MOU the TCC is required to issue UN standards in a binding manner under the TCC’s relevant disciplinary codes.²¹² Annex F contains definitions of SEA, reflecting the SGB 2003. These revisions strengthen the status of UN standards of conduct somewhat but they remain very broadly worded in terms of what is actually prohibited.²¹³ This could give rise to difficulties when it comes to taking criminal action against perpetrators. In terms of defining SEA the revised MOU suffers from much the same problems as SGB 2003. Rather loose references are made in Annex H to peacekeepers undertaking to respect local laws, customs, practices, religion, traditions and gender issues; to ‘treat inhabitants with respect, courtesy and consideration’; to act with integrity; to report SEA; and never to discredit the UN through their conduct; ‘[c]ommit any act involving sexual exploitation and abuse, sexual activity with children under 18, or exchange of money, employment, goods or services for sex’; ‘[b]ecome involved in sexual liaisons that

²⁰⁸ Press Release, *Secretary-General, Secretary-General Appoints Legal Expert Group Aimed at Strengthening Peacekeeping Zero Tolerance Policy on Sexual Exploitation*, UN Doc SG/A/1023 (13 October 2006); Knoops, above n 30, 96.

²⁰⁹ Zsuzsanna Deen-Racsmany, ‘The Amended UN Model Memorandum of Understanding: A New incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?’ (2011) 16(2) *Journal of Conflict and Security Law*, 1, 9-11.

²¹⁰ See, COE Manual/Revised Model MOU, UN Doc. A/C.5/63/18.

²¹¹ *Special measures for protection from sexual exploitation and sexual abuse*, Report of the Secretary-General, UN GAOR, 61st sess, Agenda Items 123, 135, UN Doc A/61/957 (15 June 2007) 9.

²¹² SG Note – Revised MOU, UN Doc A/61/494, 4.

²¹³ Marco Odello, ‘Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers’ (2010) 15(2) *Journal of Conflict and Security Law*, 347, 358

could affect our impartiality or the well-being of others’; or ‘[e]rode confidence or trust’ in the UN.²¹⁴

The 1990 TCA provided that the UN peacekeeping operation shall observe and respect the ‘spirit and principles’ of IHL.²¹⁵ In 1999 the SG issued a Bulletin on Observance by UN forces of IHL (SGB 1999).²¹⁶ The Bulletin requires respect for the ‘fundamental principles and rules of international humanitarian law’ that are ‘applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.’²¹⁷ The TCA, while referring only to the ‘principles and spirit’ of IHL, specified that the standards to be observed included at very least the four Geneva Conventions, their Additional Protocols and the UNESCO Convention on the Protection of Cultural Property.²¹⁸ The wording of this requirement appears to have been watered-down in the revised MOU. In Annex H it is merely provided that peacekeepers must comply with the ‘Guidelines’ of IHL.²¹⁹ It seems unfortunate that the revised MOU did not incorporate instead a reference to the SGB 1999.²²⁰ Given that the MOU is binding on TCCs and thereby their soldiers, the protection of women and children from SEA, where troops engage in armed conflict, could have been strengthened by reference to the Bulletin. Reference is also made in the revised MOU to the need to comply with ‘the applicable portions’ of the UDHR. It does not elaborate further on what these might be.

Under Article 7*bis* of the revised MOU TCCs are now required to ensure that their contingents are required to respect UN standards of conduct that are incorporated in Annex H.²²¹ TCCs must ensure troops are fully versed on these through pre-deployment training and the UN in turn must provide induction, in-mission and mission-specific training, such as on local laws and regulations.²²² As discussed above, considerable efforts have been made at UN level in this regard.

²¹⁴ *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18

²¹⁵ *TCA 1991*, UN Doc. A/46/185, Section X, para 28.

²¹⁶ *SGB 1999*, UN Doc ST/SGB/1999/13.

²¹⁷ *Ibid.*

²¹⁸ *TCA*, UN Doc. A/46/185, para. 28.

²¹⁹ See revised Model MOU, Annex H. *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18.

²²⁰ See further Oswald, Durham and Bates, above n 38, 199.

²²¹ *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18, Article 7*bis*, para 7.2.

²²² *Ibid* Article 7*bis* paras 7.3-7.4.

(b) Investigations

As previously noted, a number of difficulties arose in the past with respect to investigative procedures into cases of misconduct by UN peacekeepers. Prior to the revisions there was a system of parallel but separate investigations, one by the UN and the other by TCC where it choose to carry one out. At UN level since 2003 such investigations were guided by the UN Disciplinary Directives under which a preliminary investigation was first conducted, and later where allegations were found to be credible, a BOI. The UN and the TCC did not necessarily share evidence gathered or the outcome reports of investigations. The system led to duplication in efforts and inadmissibility of evidence in TCC courts. The revised MOU attempts to clarify some of these procedures.

A new Article 7*quater* provides that the TCC has primary responsibility for investigations of misconduct by personnel deployed as part of a military contingent, relegating the OIOS to a secondary role where TCCs do not act. The possibility of joint UN/TCC investigations had previously been explored, wherein TCCs would provide a roster of national prosecutors or experts or National Investigations Officers, who would be rapidly deployable where serious misconduct arises. The idea was that a list of such personnel could be attached to the MOU. This proposal is in line with recommendations made in Zeid's report, although he also suggested that the officer should preferably be a military law expert.²²³ In consultations with States in 2005/2006 some voiced opposition to this proposal. Ultimately it was not pursued. TCCs were reluctant to be obligated to make such officers available and preferred a voluntary option, which is reflected in the revised MOU.²²⁴ It is this author's contention that the deployment of such officers should have been made obligatory under the MOU where TCCs did not commence their own investigation, then at very least evidence gathered by the OIOS in its investigation would be more likely to meet evidentiary requirements in TCCs courts. A system of parallel but separate investigations, by the UN and TCCs, was proposed by the SG in an earlier draft of the revised model MOU, which would have allowed the UN greater independence from

²²³Zeid Report, UN Doc A/59/710, para. 34.

²²⁴ See commentary on sample Article 7 *quater*. SG Note – Revised MOU, UN Doc A/61/494.

TCCs in going ahead with an investigation.²²⁵ Ultimately this was also not followed through in the final version.

An important insertion in the revised MOU is the grant of authority to the UN to initiate investigations into allegations of SEA where the TCC is ‘unable or unwilling’ to do so. As stated previously, while the OIOS is charged with conducting administrative investigations into SEA with respect to UN staff, investigation into such conduct by military personnel is now firstly the premise of the TCC.²²⁶ Article 7*quater* solely permits the UN to conduct a preliminary fact-finding investigation to preserve evidence where the TCC does not initiate one and only until such time as the TCC commences its own investigation. A preliminary fact-finding inquiry, as defined under Annex F ‘may involve the collection of written statements, it will not normally include the interviewing of witnesses or other involved persons.’²²⁷ Should the UN commence such a fact-finding exercise it should have a TCC representative partaking.²²⁸ Presumably the UN can go ahead with this part of the investigation where the TCC does not provide a representative. A report on this preliminary fact-finding inquiry must then be furnished to the TCC. From this point the TCC has ten working days to notify the UN that it will commence an investigation. Where it fails to do so it will be considered ‘unable or unwilling’. The OIOS may then commence its own ‘*administrative*’ investigation, which again should include a representative of the TCC on the investigative team, should it choose to provide one.²²⁹ As noted previously, discussions with TCCs in 2005/2006 revealed that some did not wish to be required to send a National Investigations Officer to mission areas.²³⁰ The TCC is required to ensure contingent Commanders and in turn contingent members cooperate with any UN investigation.²³¹ Reciprocal obligations are imposed on the UN both through the sharing of information, and facilitating and assisting investigations.²³² Furthermore, the UN is required to lend administrative, logistical and even financial

²²⁵ See Oswald, Durham and Bates, above n 38, 386; SG Note – Revised MOU, UN Doc A/61/494.

²²⁶ *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18; *Report of the Special Committee on Peacekeeping Operations*, 64th sess, UN Doc A/64/19 (22 February-19 March 2010) para 50; SG Report – Strengthening Investigations, UN Doc A/62/582, para 60; See also SG CDU Report, UN Doc A/62/758, para. 26.

²²⁷ *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18, Annex F, para 29.

²²⁸ *Ibid* Article 7*quater*, para 12.

²²⁹ *Ibid* Article 7*quater*, para. 7.13.

²³⁰ See further SG Note – Revised MOU, UN Doc A/61/494, 13-14.

²³¹ *COE Manual/Revised Model MOU*, UN Doc A/C.5/63/18, Article 7*quater*, para 7.14.

²³² *Ibid* Article 7*quater*, paras 7.16-7.18.

or other support, as appropriate, to TCC investigations.²³³ On completion of the UN investigation or if the TCC decides to commence its own investigation at any stage, the UN simply must hand over any findings and evidence to the TCC.²³⁴

Significantly, Article 7*quater* of the revised MOU provides that the UN is responsible for attaining the cooperation of other TCCs and the host State authorities, in order to allow the relevant TCC to conduct a proper investigation in the mission area. Cooperation includes issues such as access to witnesses and victims.²³⁵ Commencing an investigation in the host State without its express consent would violate its sovereignty. Article 44 Model SOFA provides for the cooperation between the UN and host State in carrying out ‘investigations into offences in respect of which either or both have an interest, in the production of witnesses and in the collection and production of evidence, including the seizure of and, if necessary, the handing over of items connected with an offence.’²³⁶

The UN’s role is now largely limited to the provision of investigative and logistical support to investigations conducted by the TCC. The limitation of the investigative role previously played by the OIOS with respect to military contingents is at least one negative development.²³⁷ Input from the UN in these investigations is important not least given perceptions of impartiality and given that under the SOFA the UN undertakes to maintain good order and discipline and to ensure its peacekeepers respect host State laws. Arguably, TCC investigations into misconduct by their troops may lack sufficient independency and impartiality. Moreover they may not be effectively carried out.²³⁸ Conversely, the TCC has greater access to rotating troops and the full cooperation of the contingent is more likely.²³⁹ Furthermore, investigations conducted by TCCs are more likely to meet evidentiary requirements in national courts. A system of joint UN/TCC investigations, defined by the terms the MOU, would have had the advantage of drawing on the positive aspects of both TCC

²³³ Ibid Article 7*quater*, para. 7.21.

²³⁴ Ibid Article 7*quater*, para. 7.13

²³⁵ Ibid, Article 7*quater*, para. 7.17.

²³⁶ SG Note – Revised MOU, UN Doc A/61/494; *Model SOFA*, UN Doc A/45/594.

²³⁷ Statement on behalf of the Group of 77 and China by Ambassador Mohamad Yousif Ibrahim Abdelmannan of the Permanent Mission of Sudan to the United Nations, on agenda item 132; Overview of the Financing of the United Nations Peacekeeping Operations: 63rd Sess of the Fifth Committee of the GA (18 May 2009) para 12.

²³⁸ Hampson Report, above n 157, para 64.

²³⁹ Machiko Kanetake, ‘Whose Zero Tolerance Counts? Reassessing a Zero Tolerance Policy against Sexual Exploitation and Abuse by UN Peacekeepers’ (2010) 17 *International Peacekeeping*, 200, 206. 38

and UN investigations. Indeed, as will be argued presently, it could be possible to take this further and allow the host State to play even a limited role in joint investigations, which could have a positive capacity-building effect.²⁴⁰

(c) *State Assurances*

Where on investigation allegations of misconduct are found to be credible, TCCs are required under the revised MOU to take action and forward the case to appropriate national authorities. Article 7ter of the 2007 revised Model MOU asserts that TCCs are to give assurances to the UN that they will exercise their jurisdiction, both criminal and disciplinary, over their troops where offences are alleged to have been committed, and to report to Mission Head on the outcome.²⁴¹ The need for the SG to seek such assurances is set out in Article 48 Model SOFA. A footnote to Article 48 provides that these assurances will be incorporated into MOUs with TCCs.²⁴² While such assurances were inserted in seminal mission documents the practice was subsequently discontinued.²⁴³ Indeed in the 1991 Model TCA²⁴⁴ contained a similar provision.²⁴⁵ As noted, Zeid recommended the reinstatement of this practice.²⁴⁶

An earlier draft of the MOU put forward by the SG had considered granting TCCs exclusive criminal jurisdiction on the proviso that they actually exercise it.²⁴⁷ Proposals were put forward that the TCC be required to submit progress reports to UN on progress of a case every 120 days until resolved,²⁴⁸ yet this was not followed through in the final revised MOU. Zeid had suggested that States be required to provide a report to the UN outlining their reasons for a decision not to prosecute. In terms of ensuring TCCs' decisions not to proceed are genuine such reporting could go a long way. As is evident from the statistics on the CDU website, while TCCs are

²⁴⁰ See Section IV, p 55

²⁴¹ *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18, Article 7quinquies.

²⁴² *Model SOFA*, UN Doc A/45/594; A similar stipulation can be found in other international legal instruments such as Article 14, *Convention on Safety of United Nations and Associated Personnel*, GA Res 49/59, UN GAOR, 49th sess, Agenda Item 141 UN Doc A/RES/49/59 (17 February 1995).

²⁴³ *Zeid's Report*, UN Doc A/59/710, para. 78.

²⁴⁴ The terms "Contribution Agreement" were replaced with "Memorandum of Understanding" in 1997. There was no reference to jurisdiction in the 1997 version of the MOU, however this version was not ultimately adopted by the GA. TCA 1997, UN Doc A/51/967.

²⁴⁵ TCA 1991, UN Doc A/46/185, paras 25, 28; Deen-Racsmany notes that it nevertheless was relied on occasionally by UN bodies. See further Deen-Racsmany, above n 209,10, fn 44.

²⁴⁶ *Zeid's Report*, UN Doc A/59/710, para 778; SG Note – Revised MOU, UN Doc A/61/494.

²⁴⁷ See Deen-Racsmany, above n 209, 19.

²⁴⁸ See further, SG Note – Revised MOU, UN Doc A/61/494, 14-15.

supposed to provide feedback to the UN on action taken against those complicit in SEA, responses have only been forthcoming in a minority of incidents.²⁴⁹ With respect to SEA allegations made across all UN missions since 2007 the UN has issued 350 *notes verbales* to TCCs requesting information on action taken, eliciting only 99 responses, an approximate 28% response rate. In 2011 alone the UN issued 74 requests for information on action taken, receiving only 25 responses from TCCs, approximately 43%.²⁵⁰ This may suggest that responses are showing an upward trend, but not necessarily, with their being at approximately 34% (2007), 11.6% (2008), 17% (2009), 39% (2010) and 43% (2010).²⁵¹ It is a cause of concern that TCCs are not responding to these *notes verbales* as it suggests: 1) that adequate action might not have been taken against alleged perpetrators; 2) it demonstrates that some TCCs are reluctant to follow through on their obligations under the revised MOU; 3) it leaves the UN unable to communicate the outcome to the victim, the victim's community, and indeed other would be perpetrators; and 4) it creates a continued perception of impunity at local level and indeed amongst other peacekeepers, undermining deterrence.

A further problem with the revised MOU, is that where TCCs have stated they are going ahead with an investigation and they do not report back to the UN, there is little the UN can do to monitor whether the investigation has been carried out effectively, which has an impact on two levels: 1) it leaves doubt as to whether an investigation has been effectively carried out in order to determine whether the allegation can be substantiated and forwarded to appropriate national authorities for prosecution; 2) it may skew UN statistics on SEA and monitoring of the extent of the problem and impact of measures taken to date.²⁵²

²⁴⁹ *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General*, UN GAOR, 64 sess, Agenda Item 33, UN Doc A/64/573 (22 December 2009) para 84; In a 2010 report the Special Committee on Peacekeeping Operations indicated that some states had provided feedback on action taken and encouraged others to increase efforts expeditiously but it does not further elaborate. *Report of the Special Committee on Peacekeeping Operations*, 64th sess, UN Doc A/64/19 (22 February-19 March 2010) para 53.

²⁵⁰ See CDU website

<<http://cdu.unlb.org/Statistics/UNFollowupwithMemberStatesSexualExploitationandAbuse.aspx>>

²⁵¹ There is no detail as to category of personnel, type of conduct or actual action taken.

²⁵² *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, UN GAOR, 55th sess, Agenda Item 134, UN Doc A/65/742 (18 February 2011) para 41.

(d) *Command Responsibility*

The Special Committee on Peace Operations and Zeid emphasized the importance of managerial and command responsibility and leadership in preventing SEA.²⁵³ A significant insertion in the revised Model MOU is the increased onus placed on contingent Commanders to ensure the proper conduct and discipline of their troops.²⁵⁴ A new Article 7ter requires the TCC to ensure that national contingent commanders are given the requisite authority to take disciplinary action against troops violating UN standards of conduct, mission-specific rules and regulations, and even local law,²⁵⁵ and that the Commander actually take necessary measures to ensure compliance.²⁵⁶ The contingent Commander must inform the FC of any serious misconduct or disciplinary issues arising and action taken.²⁵⁷ Both the TCC and UN are responsible for providing effective training to these commanders, in order for them to carry out these duties effectively.²⁵⁸

Failure of contingent Commanders to cooperate with UN investigations, to exercise ‘effective command and control’ or to ‘[i]mmediately report to appropriate authorities or take action in respect of allegations of misconduct that are reported to him...’ is now an aspect of their performance appraisal.²⁵⁹ Moreover, action may be taken against said Commander at national level,²⁶⁰ although the MOU does not elaborate on what such appropriate action might be, leaving this provision rather weak and ambiguous.²⁶¹ What was initially proposed in a 2006 draft of the revised MOU went further in terms of the contingent Commander’s responsibility and consequences for failure to meet those obligations, such as requiring the repatriation of the Commander and that TCCs make these failures of the Commander, ‘an offence or disciplinary infraction under its laws or disciplinary codes...punishable by appropriate penalties which take into account its grave nature’²⁶² and that the TCC

²⁵³ *Report of the Special Committee on Peacekeeping Operations*, 64th sess, UN Doc A/64/19 (22 February-19 March 2010) paras 48, 52.

²⁵⁴ See *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18, Article 7ter.

²⁵⁵ *Ibid* Article 7ter, para 7.5.

²⁵⁶ *Ibid*

²⁵⁷ *Ibid* Article 7ter, para. 7.6.

²⁵⁸ *Ibid* Article 7ter, paras 7.7-7.8.

²⁵⁹ *Ibid* Article 7sexiens, para 7.25.

²⁶⁰ *Ibid*

²⁶¹ *Ibid*

²⁶² See further, SG Note – Revised MOU, UN Doc A/61/494, 8-10.

‘prosecute or take disciplinary action against a contingent commander...’.²⁶³ This would have put increased pressure on Commanders to prevent and respond to SEA.

(e) Paternity Claims

A final important insertion in the revised MOU under Article 7*sexiens*, is the requirement that the TCC, ‘to the extent of its national law, seek to facilitate...’ paternity claims, provided through the UN or the host State authorities, against members of its contingent and forward them to its appropriate national authorities.²⁶⁴ Such claims must be accompanied by evidence, such as a DNA sample of the child. This provision is in line with recommendations made in Zeid’s report in response to the problem of ‘peacekeeper babies’ and need to provide mothers with some form of child support. UN staff rules already facilitate such claims but there was previously no equivalent for military contingent members.²⁶⁵ Again this provision is watered down in comparison to earlier proposals, such as legal assistance being provided to the victim where she cannot afford to pursue a child support claim,²⁶⁶ although such assistance is provided for under SEA/VAM.²⁶⁷

(f) Impact?

All new MOUs concluded between the UN and TCCs are now in line with the revised Model MOU. The DFS is in the process of drawing up guidance for TCCs on its implementation.²⁶⁸ TCCs may still be in the process of amending domestic legislation or procedures to meet the requirements set by the revised MOU.²⁶⁹ It remains to be seen if these revisions will have any real impact on accountability of members of UN military contingents for SEA, particularly given that some states opposed the

²⁶³ Ibid.

²⁶⁴ *COE Manual/Revised Model MOU*, UN Doc. A/C.5/63/18, Article 7*sexiens*, para. 7.2; Generally there will be a need for a court order from host State authorities for such claims to be pursued in the TCC. See para 4 of commentary on previous SG 2006 sample draft MOU. SG Note – Revised MOU, UN Doc A/61/494, 8-10.

²⁶⁵ *Secretary-General’s Bulletin, Family and Child Support Obligations of Staff Members*, UN Doc ST/SGB/1999/4 (20 May 1999)

²⁶⁶ Zeid’s Report, UN Doc A/59/710, para 77; SG Note – Revised MOU, UN Doc A/61/494.

²⁶⁷ GA Res 62/214, UN GAOR, 62nd sess, Agenda Item 116, UN Doc A/RES/62/214 (7 March 2008) (SEA/VAM Annexed)

²⁶⁸ Recommendation 14, *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations, Report of the Secretary-General*, UN GAOR, 64 sess, Agenda Item 33, UN Doc A/64/573 (22 December 2009) .

²⁶⁹ Deen-Racsmany suggests that problems with being unable to substantiate allegations may be partly due to MOU investigative procedures not yet being properly implemented or their being inadequate. Deen-Racsmany, above n 209, 29.

revisions, and that there is no assessment system of the manner TCCs meet their obligations under the MOU.²⁷⁰ In practice justice depends on the willingness of TCCs to follow through on their assurances to exercise their jurisdiction.

Figures on allegations of SEA by UN military personnel, which notably include military observers and liaison officers, in addition to military contingents, have decreased over recent years as is evident from both the CDU website and SG reports,²⁷¹ although figures have fluctuated from year to year and these statistics are not always comparable. Moreover, as UK Save the Children and others have noted, such conduct tends to be chronically under-reported.²⁷² According to official UN statistics, SEA remains a significant problem with 56 allegations made against military personnel in 2007, 49 (2008), 55 (2009), 41 (2010) and 38 (2011).²⁷³ In the SG's 2011 report he notes that approximately 36 % of the allegations made against military personnel in 2010 alone involved non-consensual sex and sex with minors.²⁷⁴ Figures for 2008 were just over 70% and 50% in 2009.²⁷⁵ While this represents a decline, figures remain unacceptably high. Of course in each year a significant portion of these allegations may be found to be unsubstantiated, not necessarily because they

²⁷⁰ See *U.N. Peacekeepers Need Formal Discipline* (30 May 2007) United Press Int'l <http://www.upi.com/International_Intelligence/Briefing/2007/05/30/un_peacekeepers_need_formal_discipline/1507>

²⁷¹ The statistics on the CDU website and those in the SG reports do not always correspond.

²⁷² Corinna Csáky, *No One to Turn To: The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers*, Save the Children UK (2008); Lutz, Gutmann and Brown, on the basis of a study they conducted on UN peacekeepers and HIV/AIDs in Haiti, noted that of 1166 uniformed police and military personnel interviewed in Haiti, 90% expressed desire to be tested for HIV/AIDS despite statistics on SEA in mission been relatively low. 7% reported having had sex in mission, and 29 % on leave. Catherine Lutz, Matthew Gutmann and Keith Brown, *Conduct and Discipline in UN Peacekeeping Operations: Culture, Political Economy and Gender*, Report submitted to the Conduct and Discipline Unit, Watson Institute for International Studies (19 October 2009) 11. Indeed when you consider some of the areas to which troops may be deployed, such as remote parts of the DRC, the lack of infrastructure, in addition to societal factors; ongoing conflict; and other impediments one might speculate that such factors do not encourage reporting of SEA. Nevertheless reporting mechanisms have been made more accessible to victims.

²⁷³ *Observations and Recommendations on cross-cutting issues related to peacekeeping operations*, Report of the Advisory Committee on Administrative and Budgetary Questions, UN GAOR, 65th sess, UN Doc A/65/743 (21 April 2011) Table 5.

²⁷⁴ Drawing on SG reports, the Stimson centre notes that of 221 substantiated allegations of SEA made against UN military personnel between 2005-2008 TCCs informed the UN of action taken against only 13% of those involved. Stimson Report, above n 19, 28.

²⁷⁵ See, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137, 146, UN Doc A/64/669 (18 February 2010); *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 63rd sess, Agenda Items 123, 132, UN Doc A/63/720 (17 February 2009).

are false, but often due to difficulties in obtaining evidence, accessing witnesses and identifying perpetrators.²⁷⁶ Substantiation rates from 2008-2010 ranged from 51%-63%.²⁷⁷ Many investigations are still pending. The Special Committee on Peace Operations has stated that disaggregation of data according to allegation type would allow for a more comprehensive analysis of trends in relation to SEA.²⁷⁸ Some attempts at such disaggregation can be seen in SG reports but are more limited on the CDU website.

The drop in allegations of SEA against military personnel could be due to any number of factors beyond the revisions to the MOU. The SG in his most recent report on SEA by peacekeepers stated that a major reason for the drop in allegations might be put down to enhanced training, both pre-deployment and in-mission; the moving of military camps further from civilians; and routine FC briefings.²⁷⁹ Indeed the very presence of CDTs in the field is likely having a deterrent effect.

The MOU does clarify procedures for dealing with SEA. Revisions with respect to command responsibility are an important step forward, as are the revisions on paternity claims, although both might have been more strongly worded. Nevertheless, the standards of conduct set out in the revised MOU remain rather ambiguous, as do its references to IHL and human rights. Furthermore, the role of the UN in investigations has been reduced. For the purpose of UN administrative investigations, it would be useful for the UN to undertake a review of applicable investigative standards, procedures, and evidentiary requirements of TCCs. A database could be maintained on such,²⁸⁰ and made accessible to all those investigating SEA by peacekeepers. Durch, Andrews and England argue that

²⁷⁶ *Observations and Recommendations on cross-cutting issues related to peacekeeping operations*, Report of the Advisory Committee on Administrative and Budgetary Questions, UN GAOR, 65th sess, UN Doc A/65/743 (21 April 2011) para. 104

²⁷⁷ See *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, UN GAOR, 55th sess, Agenda Item 134, UN Doc A/65/742 (18 February 2011); *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 64th sess, Agenda Items 137 and 146, UN Doc A/64/669 (18 February 2010); *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the Secretary-General*, UN GAOR, 63rd sess, Agenda Items 123, 132, UN Doc A/63/720 (17 February 2009).

²⁷⁸ *Report of the Special Committee on Peacekeeping Operations*, 64th sess, UN Doc A/64/19 (22 February-19 March 2010) para 59.

²⁷⁹ *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, UN GAOR, 55th sess, Agenda Item 134, UN Doc A/65/742 (18 February 2011).

²⁸⁰ Stimson Report, above n 19, 44.

investigative procedures need to be more transparent in order to reinforce credibility, bearing in mind issues of confidentiality.²⁸¹ Better still it might be worthwhile to reconsider joint UN/TCC investigations and the mandatory deployment of a National Investigative Officer, where SEA or other serious criminal conduct arises. All those involved in such investigations should have some prior training in investigating sexual offences, in particular those involving children. As will be suggested in Section IV, part I some input from the host State at the investigative phase could also be considered given that it will likely have superior local knowledge, it could help surmount linguistic and cultural barriers and secure its general cooperation. UN involvement in investigations would increase transparency and perceptions of impartiality and ensure that the investigation is being carried out effectively.

What appears to continue to be highly problematic is that some TCCs remain reluctant to respond to UN requests for information on action taken against alleged perpetrators, despite revisions to the MOU.²⁸² The difficulties with this were pointed to above. In 2004, when the problem of SEA was still very fresh, at least in terms of publicity, a senior member of UN MONUC commented: '[t]he United Nations has no authority to follow through any of the investigations currently made. At most, after a lengthy process, they can repatriate an individual, but they cannot see those cases followed through in the country or origin.'²⁸³ It is not apparent that much has changed in this regard. In practice justice for victims depends on the willingness of TCCs to follow through on their assurances to effectively exercise their jurisdiction. There remains no system of state sanction for failure to meet their obligations under the MOU. One possible way around this would be for the UN to instigate a system of trial and indeed investigation monitoring, which will be considered further in brief in Section IV, part II.

A further difficulty with prosecution by TCCs is that where action is taken against perpetrators the charge or penalty may not reflect the gravity of the offence.²⁸⁴

²⁸¹ Ibid 42-43.

²⁸² *Special measures for protection from sexual exploitation and sexual abuse, Report of the Secretary-General*, UN GAOR, 55th sess, Agenda Item 134, UN Doc A/65/742 (18 February 2011) para 21; Stimson Report, above n 19, 28.

²⁸³ See, Kate Holt, 'Abuse by U.N. Troops in DRC May Go Unpunished', *London Independent* (London) 12 July 2004.

²⁸⁴ Hampson Report, above n 157, para 64.

Furthermore, sanction for violation by troops of standards set out in the revised MOU relies heavily on TCC discretion; the content of domestic military codes and regulations; and the ease of conducting investigations abroad. Dual criminality requirements may also work as an impediment. Ages of consent, definition of crimes and their elements, permissibility of prostitution, and other factors may well differ between the TCC and host State.

It is worth bearing in mind that one of the primary reasons for revising the MOU was to get States to exercise their criminal or disciplinary jurisdiction over their troops when they commit offences against the local population they have been sent to protect. Zeid suggested that it might be effective to name and shame TCCs that repeatedly fail to inform the UN of action taken against members of their military contingents complicit in serious misconduct, in particular SEA, while maintaining confidentiality with respect to individuals.²⁸⁵ It is this author's contention that the UN should further consider this proposal if TCCs response rates remain low or where they do not carry through on their obligations under the revised MOU. Additionally, TCCs ought to be required to submit a report to the UN on case progress every 120 days and where they decide not to prosecute they should submit a report to the UN setting out the reasons for this decision. This would increase transparency and foster greater credibility in the process. The revisions to the MOU may be having some deterrent effect on troops but this does not necessarily mean that there has been any increase in soldiers held to account when serious incidents of abuse occur. The question that arises is where TCCs fail to meet their obligations under the MOU, what are the alternatives?

J *Conclusion - measures taken by the UN to address SEA*

SEA, in particular less serious incidents, has seen a downward trend, so UN reforms and initiatives taken across the board do appear to be having an impact. Serious incidents of SEA, however, remain prevalent. That stated it is likely that many occurrences of SEA go unreported. Moreover, measures taken by the UN may possibly have driven it underground to some extent.²⁸⁶ As noted by OIOS, the receipt of a case for investigation in the first instance is demonstrative of failures in attempts

²⁸⁵Zeid's Report, UN Doc A/59/710, para 82.

²⁸⁶ Higate, above n 17, 49

to prevent SEA.²⁸⁷ Those who sexually exploit or abuse women and children need to be held accountable, this need is compounded when the international community's peacekeepers are found to be complicit in such abuse given that it undermines the broader project of protection of the rights of women and children.

The UN has taken a broad array of incremental measures to prevent SEA and take action against perpetrators. Thus far the issue is not yet resolved with respect to any category of peacekeepers. On review of the above initiatives the UN does seem to be giving considerable attention to the issue, although some flaws still need to be ironed out, such as the implementation of SEA/VAM. Responses to SEA appear now to be better coordinated, not least through efforts of the PSEA Taskforce and the CDU/CDTs. There is evidently an increased awareness in the UN of the gender aspects of peacekeeping and the need for gender mainstreaming, which is of direct relevance to SEA. However, the number of females deployed to peacekeeping operations remains inadequate. Training on multiple levels has been central to the UN's strategy to counter SEA and it does seem to have had an impact. Mission specific measures and better recreational facilities have also likely played a role in terms of prevention. Many of the UN's efforts have centred on prevention and admittedly prevention is better than the cure, but when SEA does occur there also needs to be accountability. It is this aspect that I am concerned with.

A real difficulty is getting TCCs to effectively investigate and prosecute those complicit in SEA. At a 2009 meeting of the UN Sixth Committee the Congolese representative pointed out:

despite all the rhetoric on the subject of criminal accountability, in practice impunity was assured all down the line. Host States were often bound by headquarters agreements and had no manoeuvring room; at best, they could refer suspects to the United Nations. Since the United Nations could not punish them, they were sent back to their countries of origin, which often did not want to publicly admit the misconduct of their nationals and were therefore reluctant to prosecute them.²⁸⁸

He stated that in late July 2009 five 'Blue Helmets' on the MONUC operation, in the DRC, were apprehended by the Congolese Republican Guard raping a girl in Kinshasa. He stated that despite confessions nothing seems to have come out of it in

²⁸⁷ SG Report – Strengthening Investigations, UN Doc A/62/582, para 59.

²⁸⁸ UN, Summary Records of the Sixth Committee, UN Doc A/C.6/64/SR.7 (10 November 2009) para 39.

terms of punishment.²⁸⁹ The system for holding UN military contingent personnel actually legally to account for SEA remains in a state of semi-inertia and remains inherently weak, despite UN efforts. TCC have to come on board if criminal accountability is to be ensured or some other system than the present one needs to be put in place.

IV HOW TO MOVE FORWARD?

As previously noted, a GLE was established by the UN in 2006 to examine the legal aspects of criminal accountability of UN officials and experts on mission (GLE II).²⁹⁰ The group made a number of recommendations in terms of mechanisms for holding UN officials and experts on mission to account, covering issues such as mutual legal assistance, extradition, a possible Convention (it attached a sample draft), hybrid courts, and host State capacity-building. As discussed these personnel are legally distinct from military contingents and they give rise to separate concerns, in particular in terms of jurisdiction and immunities.²⁹¹ That stated, as has been illustrated above, TCCs do not always appear willing to investigate and prosecute their soldiers when SEA allegations arise, therefore this section will touch briefly on possible alternatives for ensuring criminal accountability, including one of the options put forward by the GLE, namely a hybrid court. This will be followed by a brief discussion of another possibility, namely on-site courts martial and trial monitoring, supported by transnational legal networks and/or UN bodies already involved in dealing with SEA or RoL on UN operations. I have dealt with the possibility of a hybrid/tri-hybrid court and transnational legal networks more substantially in another paper; therefore here I will just briefly touch on key features.²⁹² The aim is not to provide a comprehensive analysis of the issue or solution but to make some tentative suggestions that might stimulate further discussion on criminal accountability of UN military contingents.

²⁸⁹ Ibid, para. 40.

²⁹⁰ GLE II Report, UN Doc A/60/980. See also, *Report of the Ad Hoc Committee on Criminal Accountability of United Nations Officials and Experts on Mission*, UN GAOR, 62nd sess. UN Doc A/62/54, (9–13 April 2007) para 21; The GLE's report and recommendations made therein ARE still under consideration by the UN. See further <<http://www.un.org/law/criminalaccountability/index.html>> last accessed 24 August 2011

²⁹¹ See further, Burke, above n 10, 63-104.

²⁹² See further, Róisín Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse: The ICC or a Tri-hybrid Court', in Morten Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsah, forthcoming, 2012) 60-87.

The gravity of UN peacekeeper complicity in SEA rests on the breaches of their fundamental ‘duty of care’ towards local civilian populations;²⁹³ the violation of the ‘position of trust’ in which they have been placed;²⁹⁴ and related responsibility to protect these persons.²⁹⁵ UN peacekeepers, including military contingent personnel, represent the international community. SEA seriously undermines UN credibility and its ability to promote rule of law (RoL). As such the UN has noted that it is not merely an ordinary criminal offence.²⁹⁶ Any attacks on UN peacekeeper are considered particularly heinous on account of their special status, as representatives of the international community.²⁹⁷ This should apply equally when they violate the rights of local civilians,²⁹⁸ in particular children. Some TCCs do not seem to be taking the issue of criminal accountability for SEA sufficiently seriously. Where TCCs prove unwilling or unable to prosecute some alternative approach for holding perpetrators to account seems necessary.

1 *Hybrid Courts*

GLE II proposed, amongst other options, the creation of a hybrid court located in the host State criminal justice system and supported by international personnel.²⁹⁹ This in its view could have a positive capacity-building effect on host State counterparts involved in the investigative and trial process.³⁰⁰ Its reasons revolved around respect for host State sovereignty and local laws; practical issues such as access to witnesses and evidence; reduction of costs and delays; and greater proximity of trial to local communities, allowing them to see justice been carried out.³⁰¹ It also noted that jurisdiction can be divided among different states at different phases of the criminal justice process, namely the investigative, prosecutorial, judicial and custodial phases.

²⁹³ *Zeid’s Report*, UN Doc A/59/710, Secretary-General statement, Introduction.

²⁹⁴ *Criminal Accountability of United Nations Officials and Experts on Mission, Note by the Secretariat*, UN GAOR, 62nd sess, Agenda Item 82, UN Doc A/62/329 (11 September 2007) para. 32.

²⁹⁵ Odello, above n 213, 380.

²⁹⁶ GLE II Report, UN Doc A/60/980, paras 117-121, 122; *Criminal Accountability of United Nations Officials and Experts on Mission, Note by the Secretariat*, UN GAOR, 62nd sess, Agenda Item 82, UN Doc A/62/329 (11 September 2007) para. 32.

²⁹⁷ *Criminal Accountability of United Nations Officials and Experts on Mission, Note by the Secretariat*, UN GAOR, 62nd sess, Agenda Item 82, UN Doc A/62/329 (11 September 2007) paras. 32-33.

²⁹⁸ Burke, ‘UN Military Peacekeeper Complicity in Sexual Abuse’, above n 293, 61.

²⁹⁹ GLE II Report, UN Doc A/60/980, paras 29-33.

³⁰⁰ *Ibid* paras.38-39.

³⁰¹ *Ibid* para 27(b).

Therefore it argued that other States could assist the host State in the exercise of jurisdiction where its criminal justice system is not adequate, for instance by repatriating a perpetrator to allow him/her to serve a custodial sentence in the home State.³⁰² It noted that any sharing of jurisdiction could be provided for by treaty or *ad hoc* arrangements with individual States.³⁰³

In recent years there has been a proliferation of hybrid courts/tribunals, including the Extraordinary Chambers in the Courts of Cambodia (ECCC),³⁰⁴ the Regulation 64 Panels in Kosovo,³⁰⁵ the East Timor's Special Panels of the Dili District Court,³⁰⁶ and the Special Court for Sierra Leone³⁰⁷ and most recently the Lebanon tribunal,³⁰⁸ some under domestic legislation,³⁰⁹ and others by treaty,³¹⁰ UN executive mandate³¹¹ or subsidiary of an *ad hoc* tribunal.³¹² They may be created through a domestic or international process.³¹³ Hybrid courts are essentially domestic courts with internationalized elements. They have had various balances of domestic and international personnel, and generally have jurisdiction over a mixture of international and domestic criminal offences.³¹⁴ However, as noted by GLE II, there is no requirement that a hybrid Court deal with any international crimes.³¹⁵

³⁰² Ibid paras 33, 40-43.

³⁰³ Ibid, para. 92, fn 73.

³⁰⁴ David Cohen, '“Hybrid” Justice in East Timor, Sierra Leone and Cambodia: “Lessons Learned” and Prospects for the Future' (2007) 43 *Stanford Journal of International Law*, 8.

³⁰⁵ See further, Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes* (Springer, 2008) 343-344.

³⁰⁶ UNTAET, UN Reg No. 2000/11, Section 10(1) (6 March 2000).

³⁰⁷ UN Security Council, *Statute of the Special Court for Sierra Leone* (16 January 2002) available at: <<http://www.unhcr.org/refworld/docid/3dda29f94.html>> last accessed on 28 August 2011.

³⁰⁸ Fidelma Donlon, 'Hybrid Courts', in William Schabas and Nadia Bernaz (eds), *Handbook of International Criminal Law* (Routledge, 2010) 85, 94-95.

³⁰⁹ Ibid, 90.

³¹⁰ The Special Tribunal for Lebanon and the Special Court for Sierra Leone.

³¹¹ East Timor's Special Panels of the Dili District Court.

³¹² Regulation 64 Panels.

³¹³ Elizabeth Bruch 'Hybrid Courts: Examining Hybridity through a Postcolonial lens' (2010) 28 *Boston University International Law Journal*, 6.

³¹⁴ GLE II Report, UN Doc A/60/980, paras 78-81; See further, Laura Dickenson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law*, 295; Cohen, above n 304; Tanaz Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals' (2007-2008) 39 *Columbia Human Rights Law Review*, 471; Etelle Higonnet, 'Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform' (2006) 23, *Arizona Journal of International and Comparative Law*, 347.

³¹⁵ GLE II Report, UN Doc A/60/980, para. 81. As is the case with the Special Tribunal for Lebanon. 50

A central feature of hybrid courts is that they can be adapted to suit particular situations; there is no one formula. They can draw on the positive aspects of international and domestic courts, catered towards the particular circumstances for which they have been established, in terms of structure, jurisdiction, composition of personnel and applicable law. This could be useful in dealing with SEA by UN peacekeepers, including military contingents. A mixture of TCC laws (as opposed to host State) and international standards could be drawn on, taking into account the standards set out in Annex H of the MOU (although as noted above these need to be clearer in terms of conduct actually prohibited). Moreover not all acts currently covered by UN definitions of SEA will constitute criminal offences in domestic or international law.³¹⁶ Any tribunal hypothetically established should only deal with serious incidents of SEA and perhaps other serious criminal offences. I will return to this momentarily.

As noted by GLE II, an advantage of hybrid tribunals is that they can play a capacity-building role, in particular in states in the process of reforming their judicial systems, which is the case for a number of states where UN operations are deployed. Interactions between domestic professionals and their international counterparts at the investigative, prosecutorial, judicial phases can allow for mutual learning. When it comes to dealing with serious incidents of SEA by UN peacekeepers and perhaps other crimes of a similar gravity, a hybrid justice mechanism could play such a role to a limited extent. A further advantage of involvement of international personnel is that it may help create perceptions of impartiality, fairness of procedures and lend legitimacy to the process.³¹⁷ Furthermore, they can ensure that IHRL standards are adhered to, including the rights of the accused. In dealing with UN military contingents complicit in SEA these factors would equally apply.

However, TCCs would never allow their soldiers to be prosecuted by a hybrid tribunal involving the host State and international personnel, not least given fears that their rights might be violated and as mentioned states view criminal and disciplinary jurisdiction over troops as key to command and control.³¹⁸ A variant on what was

³¹⁶ Most incidents of SEA by UN peacekeepers will not rise to the level of war crimes or crimes against humanity.

³¹⁷ See further, Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 67.

³¹⁸ See, eg, Ahluwalia, above n 3, 24.

suggested by GLE II could be to establish a ‘tri-hybrid’ court, with input from the TCC, international and perhaps even host State personnel. It could draw on a mix of TCC law and international standards and/or the standards set out in the MOU or better still a Convention on the issue.³¹⁹ As I have suggested elsewhere, such a system could operate on the basis of complementarity, only exercising jurisdiction where TCCs prove unwilling or unable to ‘genuinely’ investigate or prosecute.³²⁰ A tri-hybrid model could allow for the division of jurisdiction and thereby roles amongst the UN, the TCC, and host State at any given stage of the investigative and trial process, as appropriate. Indeed the TCC could retain sole jurisdiction over the majority of the process (certainly the custodial element) but as was noted by GLE II, there is no reason why an international element (or possibly also the host State) could not be inserted in only one or more of the phases of the criminal process.³²¹ In particular, the insertion of an international element at the investigative phase could prove beneficial in terms of ensuring an impartial and effective investigation. The OIOS could also of course play a supportive role at the investigative phase. This is in line with earlier proposals for a joint UN/TCC investigative capacity.³²² Consideration could also be given to whether this might be appropriate at the judicial or prosecutorial phases.³²³ Input from the host State could also be advantageous in particular at the investigative phase given knowledge of the local culture, languages, terrain and the security situation.³²⁴ Moreover, involving the host State at least at some phases of the proceedings, would be in line with SOFA requirements that UN peacekeeping personnel respect local laws.³²⁵

The international element could be drawn from a permanent standby capacity within the UN, having a list of rapidly deployable personnel with appropriate training.³²⁶ TCC could also maintain a roster of such personnel.³²⁷ As noted previously, the UN has already contemplated rosters of rapidly deployable National

³¹⁹ See Burke, ‘UN Military Peacekeeper Complicity in Sexual Abuse’, above n 293, 60-87.

³²⁰ *Ibid*, 74

³²¹ GLE II Report, UN Doc A/60/980, paras 77, 89.

³²² See Section III, part 9, 37-38.

³²³ Burke, ‘UN Military Peacekeeper Complicity in Sexual Abuse’, above n 293, p 67.

³²⁴ *Ibid* 76.

³²⁵ *Model SOFA*, UN Doc A/45/594, para. 6.

³²⁶ Burke, ‘UN Military Peacekeeper Complicity in Sexual Abuse’, above n 293, 73.

³²⁷ *Ibid*, 74.

Investigative Officers from TCCs, albeit the proposal was not pursued.³²⁸ Host State involvement, in particular where some institutional capacity exists, could be subject to arrangement with the UN. This could allow for building and sharing of expertise in dealing with SEA.³²⁹ This could prove valuable in mission states, such as the DRC, where there is a high incidence of rape and relative impunity for such. That stated, capacity building through hybrid courts is a long-term goal and has not always been the most successful endeavor in the past³³⁰ and could prove difficult.³³¹ Furthermore, one could foresee difficulties related to cultural and linguistic differences, differences in legal traditions, etc.³³² A tri-hybrid could also plausibly play a role in promoting RoL in the host State, working in parallel with UN mission RoL components, where they exist.³³³ Indeed its very existence could have a RoL promoting effect, in demonstrating that impunity for sexual offences by any individuals will not be condoned.

The tri-hybrid model could draw on State jurisdiction, it could be underpinned by a treaty or alternatively Articles 25 and 29 UN Charter enable the SC to establish bodies necessary for performing its functions, a decision State would be obliged to adhere to.³³⁴

The tri-hybrid court could locate at least part of the trial process in the host State and not solely the investigative phase, where possible, and where host State consent can be obtained. This should apply equally where TCCs actually exercise their jurisdiction. Proximity to the area in which a crime is alleged to have been committed would allow greater access to witnesses, victims and evidence, in addition to allowing the local community to see justice been carried out. Where possible locals attendance

³²⁸ Section III, part 9, 37 of the paper.

³²⁹ Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 66.

³³⁰ Elena Baylis, 'Reassessing the Role of International Criminal Law: Rebuilding National Through Transnational Networks' (2009) 50, *Boston College Law Review*, 1, 18; See also, Olga Martin-Ortega and Johanna Herman, *Hybrid Tribunals and the Rule of law: Notes from Bosnia and Herzegovina and Cambodia*, JAD-PbP Working Paper No. 7, May 2010, 1, 15-21.

³³¹ See further Stimson Report, above n 19; Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 70

³³² See further, Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 66-67, 69-70

³³³ Jane Stromset, 'Pursing Accountability for Atrocities After Conflict' (2007) 38(2) *Georgetown Journal of International Law*, 226.

³³⁴ *Charter of the United Nations*, 1 UNTS XVI (24 October 1946); Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 71.

at trials should be facilitated. Furthermore, were the proceedings are conducted in the host State, their possible deterrent effect on potential perpetrators, not only amongst UN peacekeepers, or military but also other persons in the host State, would likely be greater.³³⁵

Of course the establishment of such a system would likely be met with resistance by TCCs and host States, in addition to other practical and legal obstacles. First it would require host State and TCC agreement and cooperation. This could in part be dealt with by the SOFA and MOU. Serious difficulties would arise in determining the applicable law, the court's jurisdiction, composition and rules of procedure and evidence, which would require the agreement of any State involved.³³⁶ Consideration would have to be given to establishing an appellate capacity, and whether such a system could allow for victim participation as a civil party, with the possibility of allowing them to make claims for compensation. Furthermore, crimes by military contingent personnel may require the application of civilian or military laws. In terms of serious incidents of SEA conduct covered could be agreed between states prior to deployment or perhaps set out in a treaty.³³⁷ Indeed GLE II, while examining criminal accountability of UN officials and experts on mission drew up a sample draft Convention on the issue, which includes a set of crimes that could potentially be covered.³³⁸

GLE II's draft Convention provides two possible provisions on crimes that could be covered, phrasing them in the alternative. The first provision covers crimes which 'correspond to: (a) Murder; (b) Wilfully causing serious injury to body or health; (c) Rape and acts of sexual violence; (d) Sexual offences involving children.'³³⁹ The second alternative provision covers 'crimes of international violence against the person and sexual offences punishable under national law...by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] years, or by a more severe penalty.'³⁴⁰ Therefore whether an act of SEA comes under the Convention

³³⁵ Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, p 67.

³³⁶ GLE II Report, UN Doc A/60/980, para 83.

³³⁷ Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 68

³³⁸ GLE II Report, UN Doc A/60/980.

³³⁹ Article 3 of sample draft Convention, GLE II Report, UN Doc A/60/980, Annex.

³⁴⁰ GLE II Report, UN Doc A/60/980, paras 39, 41.

would depend on TCC laws.³⁴¹ Notably, it does not include sexual exploitation as set out in the SGB 2003, reflecting the fact that not all conduct that may come under this definition would be considered criminal under domestic or international laws. In contrast sexual exploitation as set out in the SGB is incorporated to a large extent into the revised MOU.³⁴² The proposed sample provisions in the draft Convention have also been criticized for being too vague.³⁴³ Odello points out the implications of this are that they simply would not meet the strict requirements of national laws.³⁴⁴ Moreover, the GLE has also recognized that this lack of specificity could violate the principle of legality.³⁴⁵ Nevertheless, a Convention could also be useful in setting out crimes that fall within the jurisdiction of any hybrid or tri-hybrid court dealing with crimes by UN military contingents. However, more detail on conduct prohibited would be helpful. O'Brien posits that at very least the list of gender crimes set out in the Rome Statute ought to be incorporated.³⁴⁶ I contend the scope of conduct covered would need to be much broader, for instance it might cover transnational criminal offences, trafficking and sex with children.

Part of the usefulness of a Convention is that it could cater specifically towards serious crimes by peacekeepers in peacekeeping environments. For instance, the adoption of international procedures for the protection of witnesses and victims might be better suited than national laws in the context of extraterritorial criminal offences committed by peacekeepers in conflict or post-conflict environments. There may be many other advantages of a Convention,³⁴⁷ however it is beyond the scope of the present paper to deal with these. What is clear is that getting States to negotiate such a Convention would prove notoriously difficult and lengthy, in particular if it covers military contingents. Moreover, it might be of limited effect if TCCs do not become party to it, which would likely be the case. Equally negotiations with states on the

³⁴¹ Odello, above n 213, 369.

³⁴² Section II, part 9 of paper; See further Deen-Racsmany, above n 209, 1, 16.

³⁴³ Odello, above n 213, 369.

³⁴⁴ Ibid 369.

³⁴⁵ *Report of the Ad Hoc Committee on Criminal Accountability of United Nations Officials and Experts on Mission*, UN GAOR, 62nd sess. UN Doc A/62/54, (9–13 April 2007) para 23.

³⁴⁶ Melanie O'Brien, 'Issues of the Draft Convention on Criminal Accountability of UN Officials and Experts on Mission' in Noëlle Quénivet and Shilan Shah-Davis (eds) *International Law and Armed Conflict: Challenges in the 21st Century* (TMC Asser Press, 2010) 57, 72.

³⁴⁷ Ibid, see generally, 57-75;para. 41 - A/C.6/64/SR.

possible establishment of any hybrid or tri-hybrid court dealing with military personnel would likely prove unfruitful.³⁴⁸

The hybrid/tri-hybrid model poses other difficulties. As noted, the protection of victims and witnesses would have to be considered, which could give rise to particular difficulties when considering possible distances between TCCs and host States, and the security situation in the host State. Consideration would have to be given to where to locate various phases of the criminal justice process and the infrastructural, personnel and resource requirements. The system would likely prove costly, if the costs of previous hybrids are anything to go by.³⁴⁹ The ECCC for instance cost an estimated \$78.4 million from 2006 to December 2009 alone.³⁵⁰ The use of existing bodies within the UN including the OIOS and possibly RoL components, where they exist in missions, could perhaps help mitigate some of these costs, in particular if focus was only placed on shared jurisdiction at the investigative stage.

Finally, the question of jurisdiction would have to be overcome. As it currently stands the SOFA and MOU grant exclusive criminal jurisdiction to TCCs over military contingents and any imposition by the host State or indeed the UN at any phase of the criminal process would impinge on this and would have to be provided for in these documents. States would likely prove unwilling to allow this to occur. Yet modification of these documents is I contend at least theoretically possible. As noted in Section I, the purpose of the immunity granted to UN military contingents is so that the UN can function in the host State unimpeded, and not for the personal benefit. Where conduct, such as SEA, can in no way be linked to official duties, as I have argued elsewhere, these documents could provide for a more restricted or 'qualified' form of immunity, perhaps allowing for complementary jurisdiction to be exercised by a tri-hybrid court over a predetermined set of offences. Beyond this particular set of crimes the TCC could retain exclusive criminal jurisdiction, such as with respect to on-duty offences. Such a system could allow a tri-hybrid court to exercise partial jurisdiction over troops with respect to a particular set of offences, including serious incidents of SEA, where TCCs prove unwilling or unable to

³⁴⁸ Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 70.

³⁴⁹ Dickenson, above n 314, 307.

³⁵⁰ See ECCC website, < <http://www.eccc.gov.kh/en/faq/how-much-will-trials-cost?>>

prosecute.³⁵¹ If necessary, the SOFA and MOU could provide for a system of waiver of exclusive jurisdiction of the TCC by the FC or SG. Although never acted on, such a system of waiver of TCC jurisdiction over peacekeepers is contemplated in the Statute of the SCSL.³⁵² GLE II noted the possibility of the SG waiving immunity of an official or expert on mission for a particular part of the criminal process, for example the investigative part but not for the other parts.³⁵³ A similar approach could conceivably be taken with respect to UN military contingents, if provided for in the SOFA and MOU. There may well be a need for different approaches when dealing with different TCCs and host States.

B *Trial monitoring and onsite courts martial*

As was clear from the reactions of some states with respect to the ICC, some, if not most, states would be unlikely to buy into any system that interferes with their jurisdiction over their soldiers.³⁵⁴ An alternative approach, as I have suggested elsewhere, would be to draw on transnational legal networks³⁵⁵ or the various bodies within the UN already dealing with SEA and RoL. The utility and influence of such transnational legal networks has been a topic of recent interest in academic and indeed non-academic circles.³⁵⁶ If TCCs must retain exclusive criminal jurisdiction over UN military contingents, international legal professional networks or UN staff could informally influence the criminal justice process through lending their assistance to TCC counterparts at various phases of the criminal justice process, be it through

³⁵¹ On the reasoning behind this argument see further, Burke, 'Status of forces', above n 10, 63-104.

³⁵² Article 1 notes the primary jurisdiction of sending states over peacekeepers but provides that where they failed to exercise it genuinely, 'the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.' Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex ('Statute of the Special Court for Sierra Leone').

³⁵³ GLE II Report, UN Doc A/60/980, paras 90-92.

³⁵⁴ See eg, David Scheffer, 'International Criminal Court: the Challenge of Jurisdiction', Ambassador at Large for War Crimes Issues, US Department of State, Address at the Annual Meeting of American Society of International Law, Washington (26 March 1999); David Scheffer, 'The United States and the International Criminal Court' (1999) 93 *American Journal of International Law*, 12, 18-19.

³⁵⁵ Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 71-72.

³⁵⁶ See eg, Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43, *Virginia Journal of International Law*, 78-79; Jenia Iontcheva Turner, 'Transnational Networks and International Criminal Justice', (2007) 105 *Michigan Law Review*, 985; Baylis, above n 330, 1-85.

technical support, legal advice, training, etc.³⁵⁷ In effect the OIOS already plays such a role where TCCs seek its assistance at the investigative phase. As already recommended, joint UN/TCC investigations should be required, even if led by the TCC. The adoption of such an approach might share some of the advantages of a hybrid court and it would likely prove much easier to get states to buy in, given that there can be no perceived impingement on their sovereignty.

In Zeid's report he recommended the use of onsite courts martial when dealing with UN military contingent personnel complicit in serious criminal offences, including sexual.³⁵⁸ Zeid has subsequently criticized the rather cursory examination given to this proposal.³⁵⁹ The advantages of conducting the investigative and trial process in the host State were highlighted above, in terms of proximity to victims, witness and evidence, reduction of costs and delays, possible access of communities to trials, etc. The UN and TCCs should revisit the use of onsite courts martial, where feasible.³⁶⁰ That stated conducting investigations and courts martial in mission would require host State consent. Odello posits that this might be partly resolved by Article 47(b) of the SOFA.³⁶¹ Additionally, at present not all TCCs laws may permit the use of onsite courts martial, with certain criminal offences been reserved for civilian courts.³⁶² The use of civilian courts to deal with SEA by UN military peacekeepers may add to difficulties in holding perpetrators to account, in particular given distances, costs, delays, getting civilian personnel to host state when security concerns might be high, etc. Onsite courts martial tend to be more flexible. Rowe suggests that the SG could encourage states to change their domestic laws to allow for the use of onsite courts martial.³⁶³

When dealing with serious criminal conduct, here SEA, by UN military contingents, a formalized system of trial monitoring through each phase of the proceedings could be established. Trial monitoring could be conducted by UN staff or

³⁵⁷ Burke, 'UN Military Peacekeeper Complicity in Sexual Abuse', above n 293, 71-72.

³⁵⁸ Zeid's Report, UN Doc A/59/710, paras 35-36.

³⁵⁹ Prince Zeid statement, UN SCOR, 5379th mtg, UN Doc S/PV.5379, 23 February 2006, 6.

³⁶⁰ Murphy argues that while onsite courts martial should be standard, troop rotations may serve as a barrier. Ray Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' (2006) 13(4) *International Peacekeeping*, 531, 542.

³⁶¹ Odello, above n 213, 383; See also, UN, *Summary Study of the experience derived from the establishment and operation of the force*, UN GAOR, 13th sess, Agenda Item 65, UN Doc A/3526 (8 February 1957) para. 137.

³⁶² Rowe, above n 24, 79; Deen-Racsmay, above n 209, 32.

³⁶³ *Ibid* 80

supported by transnational legal networks by prior arrangement with the UN and TCC. This would have the advantage of overcoming some states reluctance to respond to UN requests for information on action taken. This system would increase transparency and confidence in the process. TCCs would be far more likely to effectively investigate and prosecute when being monitored by the international community. Such trial monitoring is conducted by the OSCE for instance with respect to the '11bis cases' referred back to domestic courts by the ICTY,³⁶⁴ but there are many examples. Periodic reports could then be made available to the UN on the progress of a case and any irregularities. The UN could put pressure on the TCC where irregularities arise that are suggestive of an unwillingness, or perhaps inability, to effectively investigate or prosecute. In the case of inability assistance could be provided. As discussed in Section IV, part 9, the TCC should provide a report to the UN where it chooses not to proceed with a prosecution where an allegation has been substantiated, explaining this decision. Where a TCC fails to genuinely investigate and prosecute the UN should consider whether it should continue to accept contingents from that State. Furthermore, the UN should consider naming and shaming said State. In line with what was suggested in Zeid's report, when it comes to SEA by military contingent personnel where at all feasible every endeavor should be made to facilitate onsite courts martial so that victims can see justice been done.

V CONCLUSION

Although substantial preliminary reforms have been made and the revisions to the MOU have made some advancements the incidence of SEA is still unacceptably high, and it is not clear that the reforms have been adequate in terms of ensuring criminal accountability of UN military contingent members perpetrating serious incidents of SEA. Serious incidents of SEA by UN military peacekeepers cannot simply be regarded as ordinary criminal offences. There needs to be a more robust system for ensuring effective investigation and prosecution of perpetrators. The proposals put forward here are of course in need of further exploration in terms of factual and legal considerations. The intent is solely to stimulate further debate on the issue of accountability of UN military contingent members for SEA. While I note the fear that an over-zealous accountability regime might discourage some states from contributing

³⁶⁴ OSCE, *Background Report: Domestic War Crimes Proceedings 2006* (3 August 2007) 18.

personnel to UN missions, given the broader impact of SEA on the promotion of RoL in mission, serious cases must be properly and transparently addressed.