

**THE ACCOUNTABILITY OF AND FOR UNITED NATIONS
PEACEKEEPERS:**

A STUDY OF THE THEORY, NORMS AND PRACTICE

by

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LLB, LLM

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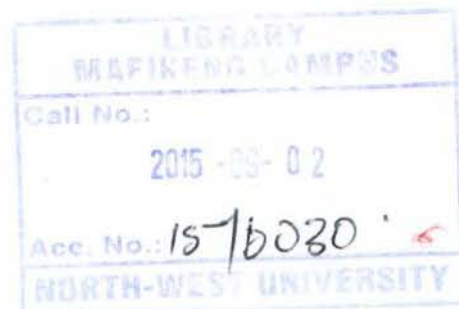


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DECLARATION BY CANDIDATE

I, Kesolofetse Olivia Lefenya, declare that this study entitled: 'The Accountability of United Nations Peacekeepers: A Study of The Theory, Norms and Practice', for the degree of Doctor of Laws (LLD) at the North-West University, has not previously been submitted for a degree at this or any other university, that it is my own work in design and execution and that all materials contained herein have been duly acknowledged.

.....

KESOLOFETSE OLIVIA LEFENYA

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DEDICATION

I dedicate this work to all the victims of sexual exploitation and sexual abuse across Africa, the innocent who became further victims at the hands of UN peacekeepers, UN peacekeepers who were expected to protect them. This study was carried out in the hope that the UN finds it imperative to thoroughly deal with this scourge of inhumane acts by its own personnel. I also hope that African states would find sustainable solutions to prevent the circumstances that facilitate these atrocities in the first place, to save the mothers and children in Africa.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography 25 May 2000

Protocol I Additional to the Geneva Convention of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts of 08 June 1977

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Protocol to the African Charter on Human and Peoples' Rights of Women in Africa 11 July 2003

Rome Statute of the International Criminal Court 17 July 1998

United Nations Charter of 26 June 1945

United Nations Convention Against Transnational Organised Crime of 15 November 2000

Universal Declaration on Human Rights of 10 December 1948

Vienna Convention on the Law of Treaties of 22 May 1969

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Charter of the International Military Tribunal 08 August 1945

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 26 June 1987

Convention on the Rights of the Child 20 November 1989

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 2 December 1949

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in armed Forces in the Field of 12 August 1949

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1945

Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949

Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949

International Convention on Civil and Political Rights 16 December 1966

International Covenant on Economic, Social and Cultural Rights 16 December 1966

International Convention on the Elimination of all Forms of Racial Discrimination 21 December 1965

International Convention for the Protection of All Persons from Enforced Disappearance 20 December 2006

LIST OF ABBREVIATIONS

CA	Contribution Agreement
CIVPOL	Civilian Police
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DFS	Department of Field Support
DUF	Directive on the Use of Force
DOMREP	Dominican Republic
DPKO	Department of Peacekeeping Operations
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee for the Red Cross
IMT	International Military Tribunal
GA	General Assembly
GA Res	General Assembly Resolution
GC	Geneva Conventions
GC IV	Fourth Geneva Convention
IDP	Internally Displaced Persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IRRC	International Review of the Red Cross
MINUGUA	United Nations Verification Mission in Guatemala
MINUSMA	United Nations Multidimensional Integrated Stabilisation Mission in Mali
MINURCA	United Nations Mission in the Central African Republic
MINURCAT	United Nations Mission in the Central African Republic and Chad
MINURSO	United Nations Mission for the Referendum in Western Sahara

MIPONUH	United Nations Civilian Police Mission in Haiti
MINUSTAH	United Nations Stabilisation Mission in Haiti
MONUC	United Nations Mission in the Democratic Republic of Congo
MONUSCO	United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
NGOs	Non-Governmental Organisations
OHCHR	Office of the High Commissioner for Human Rights
OIOS	Office of Internal Oversight Services
ONUC	United Nations Operation in Congo
ONUSCA	United Nations Observer Group in Central America
ONUMOZ	United Nations Operation in Mozambique
ONUSAL	United Nations Observer Mission in El Salvador
PKF	Peacekeeping Forces
RI	Refugees International
ROE	Rules of Engagement
SAYIL	South African Yearbook of International Law
SC	Security Council

SCSL	Special Court for Sierra Leone
SC-UK	Save the Children United Kingdom
SG	Secretary-General
SOFAs	Status of Force Agreement
TCC	Troop Contributing Countries
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNAID	Joint United Nations Programme on HIV and AIDS
UNAMA	United Nations Assistance Mission for Iraq
UNAMIC	United Nations Advance Mission in Cambodia
UNAMID	United Nations Agency on Disaster Management
UNAMIR	United Nations Mission for Rwanda
UNAMSIL	United Nations in Sierra Leone
UNASOG	United Nations Aouzou Strip Observer Group
UNAVEM	United Nations Angola Verification Mission
UNCRO	United Nations Confidence Restoration Operation in Croatia
UNDPKO	United Nations Department of Peacekeeping Operations
UN Doc	United Nations Document

UNDOF	United Nations Disengagement Observation Force
UNEF I	First United Nations Emergency Force
UNEF II	Second United Nations Emergency Force
UNFICYP	United Nations Force in Cyprus
UNGOMAP	United Nations Good Offices Missions in Afghanistan and Pakistan
UNICEF	United Nations Children's Fund
UNIFIL	United Nations Interim Force in Lebanon
UNIKOM	United Nations Iraq-Kuwait Observation Mission
UNISFA	United Nations Interim Security Force for Abyei
UNITAF	Unified Task Force Somalia
UNHCR	United Nations High Commissioner for Refugees
UNHR	United Nations Human Rights
UNMEE	United Nations in Ethiopia and Eritrea
UNMIBH	United Nations Mission in Bosnia Herzegovina
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIH	United Nations in Haiti
UNMIS	United Nations in Sudan

UNMISS	United Nations Mission in the Republic of South Sudan
UNMISET	United Nations Mission of Support in East Timor
UNMIT	United Nations Integrated Mission in East Timor
UNIIMOG	United Nations Iran-Iraq Military Observer Group
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNMOT	United Nations Mission of Observers in Tajikistan
UNMOP	United Nations Mission of Observers in Prevlaka
UNOCI	United Nations Operation in Cote d'Ivoire
UNOIOS	United Nations Office of Internal Oversight Services
UNOGIL	United Nations Observation Group in Lebanon
UNOMIG	United Nations Observer Mission in Georgia
UNOMIL	United Nations Observer Mission in Liberia
UNOMUR	United Nations Observer Mission Uganda-Rwanda
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Development Force
UNIPOM	United Nations India Pakistan Observer Mission
UNPROFOR	United Nations Protection Force
UNPSG	United Nations Civilian Police Support Group
UNTAET	United Nations Transitional Administration in East Timor

UNSAS	United Nations Standby Arrangements System
UNSF	United Nations Security Force
UNSC	United Nations Secretary-General
UNSCOB	United Nations Special Committee on the Balkans
UNSMIH	United Nations Stabilisation Mission in Haiti
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
UNTAG	United Nations Transition Assistance Group
UNTEA	United Nations Temporary Executive Authority
UNTMIH	United Nations Transition Mission in Haiti
UNTSO	United Nations Truce Supervision Organisation
UNPKO	United Nations Peacekeeping Operations
UNYOM	United Nations Yemen Observation Mission
US	United States
WW I	First World War
WW II	Second World War

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(ACHPR) 120

ABSTRACT

The UN is an international organisation which has its roots dating as far back as 1917, when its predecessor was called the League of Nations. Concerned states met in Geneva around 1940 to craft a way-forward for the weakened League, thereby agreeing to form a new international organisation, the UN at the end of the Second World War (WWII). The UN adopted its founding document, referred to as the UN Charter of 1945. The main purpose of the UN is the maintenance of international peace and security. Peacekeeping is an adaptation of the provisions of Chapter 1, article 2 of the UN Charter, which vests the organisation with the mandate to work towards a world free from wars and other violent conflicts.

In recent years, UN peacekeeping missions have been associated with gross human rights violations, resulting from sexual exploitation and sexual abuse by UN peacekeepers themselves.

This dissertation examines selected cases in Africa, including the Democratic Republic of Congo, Liberia, Sudan, Eritrea-Ethiopia, Somalia, Sierra-Leone and Ivory Coast, as much as they may be relevant to the thrust of the study. Although there is broad consensus in the international community that erring members of the peacekeeping forces be held accountable, what remains particularly problematic is that innocent civilian lives are being destroyed through self-interest, lust, dysfunctional local legal systems, lack of uniform rules of conduct and misconduct, lack of effective investigative systems in host countries, and lack of effective planning systems by victims, among other factors. The study makes a modest attempt at addressing these critical challenges on the accountability of UN peacekeeping forces in the 21st century context.

CHAPTER ONE: INTRODUCTION

1.1 Background to the study

Borne out of the destruction resulting from World War II in which millions of people died, the United Nations (UN) was formed, in the words of the Preamble to the Charter, "to save succeeding generations from the scourge of war".¹ This underscores that the central mission of the UN is intimately linked to the core drive of International Humanitarian Law (IHL), to alleviate unnecessary human misery caused by war. Against this background, it is useful to reflect on the purposes of the UN, which include first and foremost,

to maintain international peace and security, to take collective measures to prevent and remove threats to the peace, to bring about the peaceful resolution of disputes in conformity with principles of justice and international law, and to promote and encourage respect for human rights.²

These drives are as relevant nowadays as they were when they were drafted in 1945, and they go to the heart of the UN's work to avert armed conflict, and to create environments conducive to peace and respect for human rights.³

The Charter of the UN was signed in San Francisco on 26 June 1945 and is the founding document for all the work of the UN. The Charter gives the UN Security Council the primary obligation for the maintenance of international peace and security. In fulfilling this obligation, the Security Council may adopt a range of methods, including the establishment of UN peacekeeping operations. There are a range of methods the Security Council could take. Article 40 of the UN Charter provides provisional measures to prevent an exacerbation of the situation. Article 41 of the UN Charter extends the Security Council's options by giving it the opportunity

¹ Preamble to the UN Charter.

² *Ibid* at article 1.

³ O'Brien 29th Annual Seminar for Diplomats on IHL 14 March 2012 3.

to decide what methods not involving the use of armed force are to be employed. These may include whole or limited interruption of economic relations and means of communication and the severance of diplomatic relations.⁴

The biggest invention of the UN Charter is that article 42 states that the Security Council can implement the necessary military methods if it is of the view that the methods provided in article 41 would be, or have already proved to be inadequate. This occurs with the involvement of armed forces from member states of the UN.⁵ Peacekeeping, although not clearly provided for in the Charter, has grown into one of the main gears used by the UN to achieve this drive.⁶

Previously, there have been a number of reported cases of human rights exploitations and commissions of crimes against humanity by UN peacekeepers during peacekeeping missions. During the past ten years, several cases of serious human rights abuses committed by peacekeepers against people who should be protected by them have arisen.⁷

One of the initial reports of violence against local populations, including murder, torture, rape and other sexual violence was recorded in Somalia in 1992 and 1997. Canadian, Belgian and Italian peacekeeping troops were alleged to have been involved in these outrages. For example, certain Italian peacekeepers were suspected to have pinned a man to the ground and shocked his genitals with wires from a radio generator, while other Italian troops were alleged to have bound a woman to an armoured truck and raped her with a flare gun. Belgian peacekeepers were suspected to have roasted a boy over an open fire until his clothes caught fire

⁴ Abrisketa *Journal of International Law of Peace and Armed Conflict* 86.

⁵ *Ibid.*

⁶ UNPKO *Principles and Guidelines* 13.

⁷ A detailed account of these cases shall be discussed in Chapter 4 below.

alight.⁸ A total of sixty-eight claims against soldiers with the UN Mission in the Democratic Republic of Congo (MONUC) have been recorded by 2003, among them child prostitution ring run out of MONUC airport in Bunia and the rape of minors by Nepalese MONUC soldiers in the Ndromo camp. A senior Tunisian MONUC officer has been suspected of imploring a minor for sexual relations; while there have been repeated accusations against Pakistani, Moroccan and Uruguayan troops.⁹ There are many other reported cases of a similar nature which shall not be dealt with here because of constraints of space.

While peacekeepers are expected to uphold principles of humanitarian law and prevent human rights abuses, especially during the existence of peacekeeping operations, the trend has been that peacekeepers violate those principles themselves.

UN peacekeeping personnel, whether military, police or civilian, should act in accordance with International Human Rights Law (IHRL) and understand how the application or their responsibilities intersect with human rights law and norms. Peacekeeping personnel should endeavour to ensure that they do not become culprits of human rights abuses. They must be able to recognise human rights violations or abuse, and be prepared to react appropriately within the limits of their command and their competence. UN peacekeeping personnel must respect human rights in their relations with associates and with local people, both in their public and in their private lives. Where they commit exploitations, they must be held answerable.¹⁰

⁸ Du Plessis and Pete *African Security Review* 7.

⁹ *Ibid* at 8.

¹⁰ *Op cit* 6 at 14-15.

Navi Pillay, the UN High Commissioner for Human Rights, has stressed that providing humanitarian access and ensuring answerability for violations of universal human rights and humanitarian law were not only moral necessities, but also legal requirements.¹¹

UN peacekeepers must have a clear understanding of the principles and rules of IHL and observe them in situations where they apply. IHL is intended to protect persons who do not participate, or are no longer participating in hostilities; and it preserves the fundamental rights of civilians, victims and non-combatants in armed conflict.¹² In contrast, IHL is not applicable to UN peacekeeping operations, but customary rules of IHL are applicable to UN peacekeeping operations. In 1999, the UN Secretariat issued out a Bulletin on the Observance by UN forces of IHL.¹³ The Secretary-General has set out fundamental principles and rules of IHL applicable to UN forces conducting operations under UN command and control.¹⁴ Section 7 of the Secretary-General's Bulletin provides as follows:

the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: violence to life or physical integrity, murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishment; reprisals, the taking of hostages; rape, enforced prostitution, any form of sexual assault and humiliation and degrading treatment; enslavement and pillage.

The core purposes of UN peacekeeping operation are to:

- 1) Create a secure and stable environment while strengthening the state's ability to provide security, with full respect for the rule of law and human rights;

¹¹ Briefers highlight 'Prevailing Disrespect for IHL' SC/11097/Rev.1 19 August 2013.

¹² *Op cit* 6 at 15.

¹³ Secretary-General's Bulletin on the Observance by UN Forces of IHL ST/SGB/1999/13.

¹⁴ *Op cit* 6 at 16.

- 2) Facilitate the political process by promoting dialogue and reconciliation and supporting the establishment of legitimate and effective institutions of governance; and
- 3) Provide a framework for ensuring that all UN and other international actors pursue their activities at the country-level in a coherent and coordinated manner.¹⁵

Civilian security must remain at the core of UN peacekeeping operations. Of utmost importance and relevance to this study, is objective number 1 that of creating a secure and stable environment while strengthening the state's ability to provide security, with full respect for the rule of law and human rights.

Both sides of the peace operations comparison, military and civilian personnel, must be extremely aware that their action must be subject to independent scrutiny.¹⁶ As the Brahimi Report noted:

The majority of UN personnel embody the spirit of what it means to be an international civil servant, travelling to war-torn lands and dangerous environments to help improve the lives of the world's most vulnerable communities. They do so with considerable personal sacrifice, and at times with great risk to their own personal safety and mental health. They deserve the world's recognition and appreciation.¹⁷

While there have been many incidents of exemplary action during peace operations, there are minor incidents where agents of the international community have taken the advantage of the susceptibility of those that they seek to assist, through dishonesty, criminal activity and favouritism, actions which not only demolished the trust and confidence of affected groups but also damaged central beliefs of the mandate of peace operations, as well as the underlying values of humanitarian

¹⁵ *Op cit* 6 at 23.

¹⁶ Darwil S *The Rule of Law in Peace Operations* 57.

¹⁷ Brahimi L *et al* Report of the UN Panel on Peace Operations A/55/305 S/2000/809 par 271.

assistance. At its centrality, this mirrors a heavily twisted power relationship between the members of the peace operation and those they seek to assist that is structurally unjust and therefore prone to abuse, if not strictly monitored in accordance with the universal norms of the rule of law.¹⁸

1.2 Problem Statement

UN peacekeeping has developed over the past years with its primary duty being the maintenance of international peace and security. UN peacekeeping finds its foundation from Chapters VI and VII of the UN Charter. The Security Council must endeavour to enable the peaceful settlement of differences among the states concerned. States have the responsibility to seek peaceful resolutions to their disagreements, whether through negotiation, inquiry, mediation, conciliation, or arbitration (article 33). If the perpetuation of the difference is likely to endanger international peace and security, states are under the responsibility to submit their differences to the Security Council. The Security Council would then take a decision based somewhere between Chapter VI, focused on a peaceful settlement and Chapter VII, based on peace enforcement. Currently the elements of traditional peacekeeping and peace enforcement are combined in one mandate and are known as hybrid operations.¹⁹

Chapter VII is applicable in cases of threats to the peace, breaches of the peace, and acts of aggression. UN peacekeeping operations that are currently on the field are based on Chapter VII. The first article of Chapter VII is article 39. It provides that the Security Council has exclusive competences and authority to identify a situation as a breach of peace and then impose measures. The Security Council decides on

¹⁸ *Op cit* 16 at 57.

¹⁹ *Op cit* 4 at 86.

the existence of a threat to the peace which opens the route to large-scale intervention under Chapter VII.²⁰

In the past, there have been growing reports on the exploitative actions of UN peacekeepers, actions conflicting with their primary duty. As this study reveals, there have been numerous formal and anecdotal reports of sexual exploitation and sexual abuse by UN peacekeepers during their missions. These acts were inflicted on the most vulnerable members of the society, the society that peacekeepers are expected to protect and assist. Innocent women and girls have been victims of sexual abuse at the hands of UN peacekeepers.

In the midst of all these, there is a set of rules applicable to UN peacekeeping forces during armed conflict, rules which must be applied by peacekeepers during their operations, whilst conflicts continue. Yet, these rules or laws of war or IHL are not being observed or respected or applied by UN peacekeepers. In addition to IHL rules, IHRL also offers protection to civilians during and after conflict but this is also not being observed or respected by UN peacekeepers. Against this backdrop, the question remains, can UN peacekeepers be held accountable for atrocities or crimes against humanity they commit during and after hostilities? To rephrase the question, is there a legal basis for holding UN peacekeepers accountable for these unlawful acts under the present regime of IHL?

Finally, this thesis examines whether the UN, as an international organisation, can be held accountable for crimes committed by its own personnel during peacekeeping missions.

²⁰ *Op cit* 4 at 86.

1.3 Aims and objectives of the Study

This thesis, among others, investigates various reports of incidents of sexual abuse and sexual exploitation in several states, perpetrated by UN peacekeepers during peacekeeping missions. The thesis also assesses the extent to which IHL is applicable to UN peacekeepers, given the fact that IHL was traditionally not applicable to the UN as an international organisation. It therefore meant that UN peacekeepers were immune from prosecution for crimes resulting from violations of IHL. The thesis examines the extent to which this situation occurs amidst positive obligations that require UN peacekeepers to protect the local population from serious human rights or humanitarian violations.

Following from the foregoing concerns, this thesis analyses and evaluates whether peacekeepers can be held individually responsible or accountable for violations they commit in the course of their field operations. It also evaluates whether the contributing states can be held liable in terms of the principle of state liability.

In pursuing the aims enumerated above, this study:

1. discusses the nature and origins of UN peacekeeping missions and operations over the years;
2. analyses the legal provisions of IHL and IHRL and their applicability to UN peacekeeping operations and further;
3. gives an account of the different incidents of violations of IHL and IHRL occasioned by peacekeeping personnel within the UN structures;
4. determines or ascertains the accountability of UN peacekeepers for violations of IHL and IHRL; and

5. recommends a strategy of how peacekeeping missions should be regulated when faced with problems of crimes committed during the existence of such missions given the fact that international instruments regulating peacekeeping missions are inadequate and ineffective.

1.4 Significance of the Study

Civilian populations often find themselves in very vulnerable situations or positions, especially when their areas or countries are inflicted by violence. They depend on peacekeeping forces for their daily survival. They also depend on IHL and IHRL for daily legal protection. Peacekeepers often defeat their core mandate by violating the very same laws that they must uphold and implement, through sexual abuse, sexual exploitation of civilians and corruption.

Bearing in mind the core mandate or rationale of peacekeeping, in terms of the UN Charter, UN peacekeepers have a responsibility to protect innocent civilians against violations of their human dignity and freedoms. It is also the responsibility of peacekeepers to ensure that civilians receive protection in terms of IHL and IHRL. It is not for peacekeepers to violate those legal principles, which they themselves must uphold. This is because UN peace operations remain bound by international law to which they would not be bound by if they were acting independently of the UN.

But because peacekeepers have dismally failed to carry out their core mandate, that of protecting civilians, instead, they have continuously failed the United Nations Department of Peacekeeping Operations, by engaging in acts of sexual abuse and sexual exploitation with civilians. Given that, they must be held individually accountable and responsible for their heinous acts.

In addition to that, peacekeepers must be subjected to prosecution immediately after an allegation of sexual abuse or any violation of human rights has been reported. They must be prosecuted within the host state, where the alleged offence took place. This will ensure closure on the part of the victim, this will ensure that justice is not delayed and denied but carried out; it will ensure that peacekeepers are held individually responsible and accountable for their own actions. It will also ensure that the legal system of the host state is being respected as there will be consistency in judgments and sentencing, since all decided cases will have binding effect on latter cases involving similar questions of law.

In the event where the host state is unable to prosecute these alleged perpetrators or peacekeepers, such cases must be referred to the International Criminal Court (ICC). The ICC has jurisdiction to hear these matters, since it has jurisdiction over war crimes or crimes against humanity. It is my submission therefore, that violation of IHL obligations by peacekeeping forces during peacekeeping missions is a gross violation, which amounts to crimes against humanity, and the ICC has jurisdiction over such matters. When cases are heard by the ICC, there will be an assurance of fairness and justice on the part of the victim. There will also be consistency in judgments and sentencing because of the binding effect of previous judgments on latter cases. The principle of the rule of law will also be upheld. This research therefore argues that in instances where peacekeepers violate the law, they must be punished for such violations, meaning they must be held accountable for their actions.

Troop-contributing countries and host states must also be held accountable in terms of the principle of state responsibility for their failure to protect civilians against atrocities committed by third parties. The UN as an international organisation vested

with a very clear legal mandate of protecting civilians and also as a 'master' of peacekeeping forces, has a responsibility to protect ordinary civilians. This study emphasizes the urgent need of the UN to take responsibility for actions committed by its 'servants'. It is my submission therefore that the UN, troop-contributing countries, host states and individual peacekeepers be held jointly accountable for atrocities committed to civilians.

Perhaps because of the multifaceted consequences of armed conflicts, very scanty scholarship exists on the abusive conducts of peacekeepers. The underpinning premise of this study is therefore the need to bring peacekeepers under the spotlight of legal scrutiny, as objects and subjects of the very IHL norms that they were created to protect. This is the point of departure for this thesis.

1.5 Theoretical Framework/Literature Review

Until relatively recently, the scrutiny of the conducts of peacekeeping forces did not engage the attention of scholars as much as finding solutions to the incessant hostilities and armed conflicts that marked the Cold War era, and their attendant consequences. The implication of this situation was the obfuscation of the conduct of peacekeeping forces from the spotlight of critical writers. Although the accountability of peacekeeping forces is indeed an incipient theme, some notable discussions have emerged in identifying the theoretical parameters for assessing the conducts of peacekeeping personnel.

Kent argues that through special arrangements, peacekeepers enjoy certain immunities related to their responsibilities. These peacekeepers must therefore respect the laws and customs of the host nation and must be seen to be doing so. Thus, whether they are soldiers, police or civilians (including humanitarian workers),

all peacekeepers are compelled to conduct themselves with professionalism and integrity. It is mandatory upon them to upkeep international human rights standards, respect local populations and cultures, as well as augment the credibility of the mission.²¹

Peacekeepers, be they soldiers, police or civilian staff, are responsible for preserving the central principles of the UN which are professionalism, integrity and respect for diversity. These values are forever compromised when peacekeepers commit acts such as those currently reported in MONUC, where the majority of the accusations relate to sex with people under the age of 18, and 13% of all cases involved rape. The UN and its peacekeepers also compromise their ability to legitimately advise on human rights standards and rule of law issues when their own personnel do not abide by the same standards.²² Thus, it is essential that all future arrangements include a legal duty for member states to take fitting action, including disciplinary sanctions, against those that commit acts of sexual manipulation and abuse. Kent also reiterates that there is the need for the implementation of crystal clear procedures to ensure accountability to victims, balanced with a fair judicial review to properly manage the investigation. People remain vulnerable until the rule of law is re-established and institutions are in place to assist and support them. However, only once accountable and crystal clear response strategies are in place to avert and protect local populations from sexual manipulation and abuse through IHL, will the UN send a message that it does not tolerate or condone such behaviour.²³

²¹ Kent *African Security Review* 86.

²² *Ibid* at 87.

²³ *Op cit* 21 at 91.

Du Plessis and Pete agree with Kent on the issue of accountability, but also indicate that impediments usually exist.²⁴ They are of the opinion that usually in peacekeeping operations, Status-of Forces Agreements (SOFAs) are concluded between the UN and the host state, and contribution agreements are concluded between the UN and the troop contributing states which, to some extent, relieve peacekeeping members from the criminal jurisdiction of the host state. These agreements normally provide that the troop-contributing states will exercise criminal jurisdiction over the troops that they contribute. This means that peacekeepers who commit crimes while on duty in another country are liable to prosecution for those crimes in terms of the (military) criminal law of their own state. The problem of course, is that different states may have different views on which, if any, crimes committed by their troops they have to prosecute.²⁵

In the same breadth, Mindzie says that the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are answerable to laws that are publicized, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. The rule of law has various aims and requires methods that will ensure adherence to principles of the supremacy of the law, equality before the law, accountability to the law, the impartiality of justice, the separation of powers, participation in decision-making, legal certainty, the protection of human rights and procedural and legal transparency.²⁶

Of much importance here are the principles of accountability to the law and the protection of human rights, which are the objectives of this research. Currie and de

²⁴ *Op cit* 8 at 5.

²⁵ *Op cit* 8 at 6.

²⁶ Mindzie *Transitional Justice in Sriram and Pillay Peace versus Justice* 120-121. .

Waal have argued that accountability to the law means that government must explain its laws and actions if required to do so and may be required to explain them.²⁷ In this instance, not only government is required to explain its laws and actions, but organs of state, in particular, peacekeepers must also explain their actions if required to do so. The two scholars also agree that accountability includes the idea of justification but requires even more. It requires a readiness to make amends for any fault or error and the taking of steps to prevent their repetition in future.²⁸ If peacekeepers are held accountable under the strict provisions of IHL, then such an action will prevent the other peacekeepers from committing the same offences or violations, fully knowing and understanding the consequences of their actions.

Govindjee and Vrancken in their work *Introduction to Human Rights Law* are of the opinion that because human rights are an essential part of being a human being, all individuals on earth should enjoy the same protection irrespective of where they live. However, this equal protection requires among almost 200 states that differ often widely in their geographical, historical, cultural, social, economic and political circumstances.²⁹ In most cases, consensus is reached through treaties or in conventions where there is more than one state involved. Because IHL is applicable to more than one state, it will be much more easy for states to agree on holding peacekeepers accountable using IHL as an instrument to protect human rights at a broader or general level.

The Secretary-General in his Bulletin contends that in cases of violations of IHL, members of the military personnel of a UN force are subject to prosecution in their

²⁷ Currie and De Waal *Constitutional Law* 75.

²⁸ *Ibid* at 90.

²⁹ Govindjee and Vrancken *Human Rights Law* 18.

national courts.³⁰ Most of the time, very few peacekeepers face prosecution in their national courts. If prosecuted they are given less harsh sentences, whereas they should be prosecuted at an international tribunal dealing specifically with violations of IHL. The problem with national courts is that some will impose very harsh sentences while others impose very light sentences for the same offence. This is true because there is no consistency in sentencing throughout nations, and that defeats the general objectives of prosecution.³¹ The objective of prosecuting at an international level is that all would be criminals or perpetrators will be deterred from committing the same offence or violations and will be treated equally.

Mindzie further states that prosecutions aim at:

- 1) Bringing to justice those responsible for serious violations of human rights and humanitarian law;
- 2) put an end to such violations and prevent their recurrence;
- 3) secure justice and dignity for victims;
- 4) establish a record of past events;
- 5) promote national reconciliation;
- 6) re-establish the rule of law; and
- 7) contribute to the restoration of peace.³²

Justice should be the aim of accountability.

³⁰ *Op cit* 13 at section 4.

³¹ Own emphasis.

³² *Op cit* 26 at 121.

On the other hand, du Plessis and Pete unpacked the principle of complementarity. They argue that the principle ensures that the ICC operates as a system of international criminal justice which reinforces the national justice systems of states parties. The principle proceeds from the belief that national courts should be the first to act. It is only if the state party is unwilling or unable to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is then seized with jurisdiction. To enforce this complementarity principle, Article 18 of the Rome Statute requires that the prosecutor of the ICC must notify all state parties and states with jurisdiction over the case before beginning an ICC investigation on his own initiative without first receiving the approval of a chamber of three judges.³³

They further argue that the ICC's system of complementarity enables nations to expect that national criminal justice systems will play an important part in supporting the ICC to provide 'exemplary punishments', which will serve to restore the international legal order. The ICC will be effective when its existence operates to encourage domestic institutions to comply with their duties under IHL to investigate and prosecute all those guilty of international crimes, including peacekeepers.³⁴

Finally, du Plessis and Pete contend that accountability for serious crimes might be infused through prosecution, but that such a method ought to be regarded as an extreme method which signals the worrying catastrophe of peacekeepers to fulfil their guardian role.³⁵

³³ *Op cit* 8 at 12.

³⁴ In *The Prosecutor v Uhuru Muigai Kenyatta* ICC-01/09-01/11, the Prosecutor deployed a more consent-based approach. The Prosecutor deployed used domestic consent as a leverage and yardstick for the initiation of proceedings at the ICC. The Prosecutor agreed to with Kenyan authorities to prioritise domestic justice, subject to certain conditions. The conditions were specified in the Agreed Minutes, which set out clear benchmarks and timelines for investigations and prosecutions by the Kenyan authorities.

³⁵ *Op cit* 8 at 14.

All the writers considered above, except du Plessis and Pete, agree that peacekeepers must be held accountable for their actions. They are of the opinion that prosecution in peacekeepers' home countries is the only way that can be used to ensure that perpetrators are eventually held accountable. The above scholars also agree that the rule of law must prevail as it is a cornerstone of justice in most legal systems across the world. However, du Plessis and Pete have a different opinion on this issue. They are of the opinion that national courts must be the first to act. In the event where these courts are unable or unwilling to act, the ICC should be the court to hear those matters, because it is vested with jurisdiction based on the principle of complementarity.³⁶ In the case of *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe*,³⁷ it was submitted that the Movement for Democratic Change was a victim of discrimination by the judiciary, although such discrimination might have been caused by the lack of resources or manpower to deal with petitions. The lack of resources and manpower cannot exonerate the state from its obligations to respect and protect the rights enshrined in the Charter.³⁸

While cited scholars agree that peacekeepers must be held accountable for their actions through facing prosecution in their home countries, they fail to see the importance of prosecutions being held within host states or where violations occur. It is vital that victims of violations are given redress and that prompt investigations are carried out immediately when reports are made by the victims or when allegations are made. It is therefore submitted that perpetrators must not be repatriated to their

³⁶ In ICC-02/05-01/07-57, in the Situation in Darfur, the Court insisted on ICC jurisdiction, due to the absence of domestic investigations and prosecutions regarding its charges. The Court exercised pressure to secure the execution of the arrest warrants and emphasized, in particular, the duty of the ICC state parties to carry out requests for arrest and surrender of Omar Hassan Al Bashir. It derived legal obligations of compliance from the Security Council referral and made a finding of non-compliance based on inherent powers.

³⁷ *Zimbabwe Lawyers for Human Rights and Another v Zimbabwe* 2009 (AHRLR) 120 (ACHPR 2008).

³⁸ *Ibid.*

countries of origin for prosecution to forestall a delay and a denial of justice on the part of victims.

To subject peacekeepers to prosecution in their home states is not only cruel for the victims, but also unfair to the justice system. It is an erosion of the principle of rule of law at an international level. So far, different states have different views on violations committed by their troops they wish to prosecute.³⁹ Some states might not even prosecute at all; some will give lighter sentences and others heavy sentences, depending on the individual's state legal system. This apparent inconsistency will also deplete the principle of rule of law and criminal justice at large. It is argued therefore that the host state must prosecute perpetrators to ensure victim redress and justice at the end.

It has been a common trend that peacekeepers have been exempted from prosecution by local courts or host nation's courts because of agreements that have been entered into between the troop-contributing state and the host state. Host states must be allowed to prosecute peacekeepers in the event that there are allegations and such allegations can be proven. If peacekeepers are not brought to book within host states, the principle of rule of law is being defeated, victims do not get redress, justice is delayed and eventually denied, and there is no state or organisational or individual accountability. Victims' rights are not protected or respected, victims are left in distress. With reference to the Zimbabwean case again, the Commission held that the unwarranted delay in dealing with petitions constitute a violation of article 7(1)(d), as that affects the right to have one's case heard within a reasonable time (right to due process of the law). The complainants quoted the UN Human Rights Committee General Comment 13, where the Human Rights

³⁹ *Op cit* 8 at 6.

Committee held that the right to have one's case heard within a reasonable time included not only the time by which the trial should start, but also the time by which it should end and the judgment rendered both in first instance and on appeal.⁴⁰

Similarly in the Beninese case of *Tairou v Tribunal de Kandi*,⁴¹ the applicant had lodged with the High Court of Kandi, ten cases in 1992, and that as of 2005, none of these had been heard, and he therefore appealed to the Constitutional Court so that justice could be done. The Commission held that considering that article 7(1) of the African Charter of Human and Peoples' Rights states:

Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force, (d) the right to be tried within a reasonable time by an impartial court or tribunal.

The Commission further held that in this instance, eleven and five years after the appeals, the said cases had not yet been submitted to the Appeal Court, that these timeframes were peculiarly long and that subsequently, a violation of the aforesaid article 7 occurred.

Peacekeepers are anticipated to uphold the central business of their obligation which is to maintain peace and stability within war-torn states. Sexual abuse and manipulation, theft, torture and corruption are far from their core obligation. Civilians in war-ravaged areas are the most defenceless and therefore look up to peacekeepers for relief of any kind. It is shocking to see such people being taken advantage of, being tortured in any way, by the people whom they depend on for daily survival. Peacekeepers who find themselves as perpetrators of abuse must be

⁴⁰ *Op cit* 37 at 120.

⁴¹ *Tairou v Tribunal de Kandi* (2005) AHRLR 81 (BeCC 2005).

held responsible and accountable for their actions so as to put an end to the culture of impunity.

In addition to that, the establishment of a special tribunal, specifically dealing with violations of IHL and IHRL by peacekeepers can serve as a response to this dilemma of inconsistent prosecutions. That special tribunal should be based within a host state or an independent state or even within the UN structures. It will ensure consistency in sentencing, re-establish the rule of law and provide a warning that future transgressions will not be excused. Judgments that are passed by that tribunal will have a binding effect on latter cases with similar questions of law.

The Preamble to the Rome Statute states clearly that millions of children, women, and men have been victims of unimaginable atrocities which threaten the peace and well-being of the world. It further affirms that these "serious crimes must not go unpunished" and is, therefore determined to put an end to impunity for the perpetrators of these crimes and contribute to the prevention of such crimes.⁴² Article 7 of the Rome Statute provides that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, amounts to crimes against humanity.⁴³

Article 8(2) of the Rome Statute provides that grave breaches to the Geneva Conventions of 12 August 1949, for example: wilfully causing great suffering or serious injury to body or health, amounts to war crimes. Such crimes fall under the jurisdiction of the ICC and as such punishable under IHL and IHRL.

Extrapolating from the existing body of literature and the arguments emanating therefrom, one glaring lacuna in the literature is the lack of a coherent and logical

⁴² Rome Statute of the International Criminal Court.

⁴³ *Ibid* at article 7.

basis for subjecting peacekeepers to accountability for their wrongful acts. This thesis thus represents a modest effort at defining some pathways for the attainment of such a development in the law.

1.6 Research Hypothesis/ Research Questions

The plentitude of the hypothesis upon which this study is grounded is that if IHL rules are interpreted to cover and regulate peacekeeping operations/missions, peacekeepers would become accountable for crimes committed against civilians and persons not actively taking part in hostilities, during and after armed conflict.

In relation to the significance of this study, the following research questions are addressed:

- 1) To what extent do IHL and IHRL protect civilians against atrocities committed by UN peacekeepers?
- 2) Can UN peacekeepers be held individually accountable for violations of IHL and IHRL during and after armed conflict?
- 3) What is the legal basis for holding UN peacekeepers accountable for violations of IHL and IHRL during and after armed conflict?
- 4) What are the challenges that international tribunals would face in determining the UN and troop-contributing countries' accountability, for acts of sexual abuse and sexual exploitation, committed by its troops, during and after armed conflict?

1.7 Research Methodology

Research methods in social sciences are often divided into two main types: quantitative and qualitative methods. Quantitative research is explaining phenomena by collecting numerical data that are analysed using mathematically-based methods,

in particular statistics.⁴⁴ If the quantitative tradition represents the study of the social premised on the tenets of positivism, particularly tried and true scientific, hypothetic-deductive methods, then the qualitative tradition might best be described as (1) a critique of positivism as the reigning epistemology, and (2) recognition of the need for alternative ways to produce knowledge. The qualitative tradition therefore calls on inductive as well as deductive logic, appreciates subjectivities, accepts multiple perspectives and realities, recognises the power of research on both participants and researchers, and does not necessarily shy away from political agendas.⁴⁵

Qualitative research raises distinctive ethical issues because, it generally involves emergent and flexible research designs, and usually entails collecting relatively unstructured data in naturalistic settings.⁴⁶ This thesis adopts a qualitative method of research and such can be seen throughout this work. This research method includes desk-top literature studies, journal articles reading, internet searches, newspaper reading etc. This research entails an analytical literature study of the concepts of rule of law, state responsibility, organisational responsibility and individual responsibility.

The research embarks on an investigation into the history, nature and principles of UN peacekeeping operations, by way of a literature study. The research looks into the fragmented regulatory regime within the UN Department of Peacekeeping Operations, thereby having an insight into different international legal instruments underlying UN peacekeeping operations. The research looks into different existing non-governmental organisation (NGO) reports, which contain unstructured individual interviews of victims of sexual exploitation and sexual abuse by UN peacekeepers.

⁴⁴ Alliaga and Gunderson *Interactive Statistics* 2.

⁴⁵ O'Leary *Research Project* 113.

⁴⁶ Hammersley and Traianou *Ethics in Qualitative Research* 8.

Commentaries and responses from various international organisations are also looked into and captured within this research. This research embarks on uncovering the truths and trends about published reports on incidents of sexual exploitation and sexual abuse by UN peacekeepers.

Given the time and age technology faces, the internet as an efficient and vital source of information is used, but to a limited extent. NGO reports, organisational commentaries and responses, interview reports, newspaper reports were sought and obtained from the internet.

1.8 Outline of the study

This thesis consists of six inter-related chapters. Chapter one has laid down the foundation of the study, where the background of the study is outlined. The problem statement, aims and significance of the study are clearly stated. The chapter maps out the theoretical framework upon which this study is based. Lastly, it outlines the research hypothesis, research methodology and limitations to the study.

Chapter two breaks down the theory, nature, norms and principles of UN peacekeeping. It outlines the brief history of the UN as an international organisation, taking us through the origins and establishment of UN Peacekeeping forces. The study reflects on the early years of peacekeeping in 1947 through peacekeeping missions in the 1990s until the recent ones. The chapter concludes by elaborating on the UN peacekeeping principles. Chapter three of the study details principles of IHL and IHRL that are applicable to UN Peacekeeping missions. The rationale for this is that these two fields of law form the basis of achieving the sole purpose of UN peacekeeping, which is maintenance of world peace and security. Chapter three discusses the nature of IHL and IHRL and dissects the interplay between IHL and

IHRL, fully illustrating norms that are applicable to UN peacekeepers, especially during their operations.

Chapter four outlines various reported incidents of violations of IHL and IHRL by UN peacekeepers in various missions after 1992. Attention is given to incidents that took place in the DRC, the Ivory Coast, Eritrea, Sudan, Somalia, Sierra-Leone and Liberia. The reason for concentrating on these specific case studies is that, the issue of sexual exploitation and abuse by UN personnel became the focus of public attention in 2002 because of widely reported instances of such behaviour by humanitarian workers in West Africa. It is not the objective of this study to cover all incidents of sexual abuse involving peacekeepers in the whole world.

Chapter five discusses the accountability of UN peacekeeper for human rights violations they have committed. It does so by extrapolating the international principle of the rule of law from the very beginning, determining accountability on the part of the state, the UN as an international organisation, and lastly individual responsibility. The ICC as an international tribunal which is best suited to deal with crimes against humanity is also looked at, since these human rights abuses amount to crimes against humanity and war crimes. The chapter also looks at set or established legal precedents or court decisions from various international tribunals with similar questions of law. The chapter concludes by looking at various international instruments and their specific provisions on prosecutions and holding perpetrators accountable.

Chapter six concludes the study by making recommendations on how best to deal with this scourge of human rights abuses by UN personnel. The chapter makes recommendations to the UN, that an international instrument be drafted and adopted

by the international community. Such an instrument will specifically regulate UN peacekeeping operations, it will have provisions on acceptable and non-acceptable conduct during operations, establishment of tribunals which will deal with reported cases of human rights abuses by UN personnel, and issues of which states will better deal with these incidents are also discussed. The chapter also makes a recommendation that the Four Geneva Conventions be strengthened by adopting an Additional Protocol which deals specifically with peacekeeping operations and their relation to IHL.

1.9 Limitations to the Study

This study is limited in certain aspects. First, the term 'UN peacekeeping', as the title of the work indicates focuses on UN peacekeeping missions only, to the exclusion of other peacekeeping missions like the African Union or European Union missions. Secondly, the study also focuses on peacekeeping missions only, not peace-enforcement missions, as these two concepts cannot be used interchangeably, they are two distinct concepts.

Thirdly, the study is limited to seven African states only. The study could not have dealt with all other peacekeeping missions as the study risked becoming too broad, unwieldy, and eventually losing direction or focus. The reasons for choosing these seven African states are elaborated in detail in Chapter Four, dealing with those case studies.

Another factor of considerable weight is the scarcity of literary works scrutinising the conducts of peacekeeping personnel in Africa. This study had to collate numerous tangential documents, scanty reports as well as anecdotal evidence on the theme of this thesis. Despite these challenges, it is my hope that this modest effort would

stimulate interest in monitoring and reporting the acts of commission and omission of peacekeepers throughout the world.

1.10 Definition of technical terms

1.10.1 Accountability:

Accountability is the mechanism for ensuring conformity with standards of action. In any setting where rules are established to guide human activity, supervision of conformity with those rules is an essential condition for the stability of that environment. Those exercising substantial power and discretionary authority must be answerable (that is, subject to scrutiny, interrogation, and, ultimately, commendation or sanction) for its use. Without answerability, systems tend to become autocratic, despotic or dictatorial. Accountability is therefore a basic attribute of open, democratic societies.⁴⁷

1.10.2 Responsibility:

Responsibility is not synonymous with accountability. The person authorised to act is responsible. Responsible officials are held to account for their actions. An individual who exercises power while acting in the discharge of official functions is responsible for the proper exercise of the powers or duties assigned. Where the individual does so under the direction of a superior officer entrusted with supervisory authority, that superior officer is accountable for the manner in which that authority is or is not exercised.⁴⁸

1.10.3 Peacekeeping:

This is a practice designed to preserve the peace, however fragile, where fighting has been paused, and to assist in implementing agreements achieved by the

⁴⁷ Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia 380.
⁴⁸ *Ibid* at 381.

peacemakers. In the past, peacekeeping has developed from a mainly military model of observing cease-fires and the separation of forces after inter-state wars, to integrate a multifaceted model of many elements, military, police and civilian, working together towards one goal, to help lay the foundations for lasting peace.⁴⁹

1.10.4 Peace enforcement:

It involves the application, with the permission of the Security Council, of a range of forcible measures, including the use of military force. Such actions are approved to restore international peace and security in situations where the Security Council has resolved on the existence of a threat to the peace, breach of the peace or act of aggression. The Security Council may employ, where suitable, regional organisations and agencies for enforcement action under its authority.⁵⁰

1.10.5 Sexual abuse:

Actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.⁵¹

1.10.6 Sexual exploitation:

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.⁵²

1.10.7 Rule of law:

A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicized, equally

⁴⁹ *Op cit* 6 at 18.

⁵⁰ *Op cit* 6 at 18.

⁵¹ *Op cit* 13 at section 1.

⁵² *Op cit* 13 at section 1.

imposed, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well methods to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁵³

1.10.8 International humanitarian law:

That body of international law that governs conduct in times of international armed conflict and non-international armed conflict. It does not apply to situations of internal disorders and civil contention. The law is a collection of those international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from armed conflicts, and which for humanitarian reasons, limit the right of the parties to the conflict to use methods and means of warfare of their choice or protect persons and property that are or may be affected by the conflict.⁵⁴

1.10.9 International human rights law:

It is a system of international norms designed to protect and promote human rights of all peoples. These rights, which are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, are interconnected, interdependent and indivisible. They are often expressed and guaranteed by law, in the form of treaties, customary international law, general principles and soft law. Human rights entail both rights and obligations. IHRL lays down the duties of the state to act in a certain way or to

⁵³ UN Secretary General Report to the Security Council S/2004/616 para 6 23 August 2004 4.

⁵⁴ Ajala A *Background to International Humanitarian Law and its Implementation* 1.

abstain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.⁵⁵

1.10.10 Civilians

In international armed conflicts, a person not belonging to any of the following categories is considered as a civilian: (a) members of the regular armed forces, even if the latter belonging to a government or authority not recognised by the adverse power; (b) members of volunteer corps and resistance movements, (c) persons forming part of a *levee en masse*, (d) combatants in general.⁵⁶

1.11 Suggestions for further study

This study intends to provoke scholars to carry out further studies on the nature of peacekeeping forces, the root causes of problems of sexual exploitation and abuse associated with peacekeeping missions, how peacekeeping forces have tried to alleviate these problems, whether states which contribute to peacekeeping forces have adopted new means and methods of resolving these problems, what the UN, as an international organisation has done to eradicate these problems, whether the Geneva Conventions as the main source of the laws of war have made attempts to adopt or amend provisions relating to peacekeeping forces. Another area which still needs to be explored is whether the ICC has clarified the position of jurisdiction on the issue of crimes committed by peacekeepers during their operations, are there any cases decided by the ICC or any international tribunal on this issue of sexual exploitation and abuse by peacekeepers.

⁵⁵ UN Human Rights International Legal Protection of Human Rights in Armed Conflict 5.

⁵⁶ Verri P *Dictionary of the International Law of Armed Conflict* 30.

CHAPTER TWO: PEACEKEEPING IN THE UNITED NATIONS: ORIGINS AND PRINCIPLES

2.1 Introduction

It is of paramount importance that this thesis commences by dissecting the UN peacekeeping as a structure. The chapter breaks down the theory, nature, norms and principles of UN peacekeeping. The reason for this is that one must have a clear background understanding of UN peacekeeping and its underpinning principles, norms and standards. The chapter also takes us through various peacekeeping missions in the 1990s until the recent ones.

The first purpose of the UN as articulated in the Charter is to maintain international peace and security. This is done by the use of peacekeeping forces and other institutions. The concept of peacekeeping developed soon after the UN was founded, born of need as a largely improvised response to the times. Serving under the UN flag, military personnel from many countries have carried out duties which range from monitoring truce arrangements while peace agreements were being fashioned out to assisting troop withdrawals, providing buffer zones between opposing forces and helping implement final settlements to conflicts. With the end of the cold war, peace-keeping operations have grown in number and intricacy. Peacekeepers have been deployed in both favourable and unfavourable conditions: in circumstances where political good will exist and relative steadiness has been achieved after the parties have entered into negotiated settlements and in situations where the climate is one of continued hostility, obstruction and danger.⁵⁷

⁵⁷ UN Department of Public Information *The Blue Helmets* 3.

This chapter briefly looks into the history of the UN as an international organisation, the main purpose of the UN and its five main bodies. The chapter also deals with the origins and establishment of the UN peacekeeping forces. The different definitions of the concept "peacekeeping" shall also be looked at and the difference between peacekeeping and peace building shall also be outlined. The history of the UN peacekeeping forces shall also be scrutinised throughout the years, from the first peacekeeping mission to the recent ones. At the end, the chapter will detail the underlying principles of UN peacekeeping missions with the rules or code of personal conduct for blue helmets.

2.2 Brief history of the United Nations as an International Organisation

The UN is an international organisation which has its beginning from as far as 1945. Before the coming into being of the UN, there was an international body referred to as the League of Nations. The League came into existence after 1917, that is, after the First World War (WWI), which lasted from 1914 until 1919. It was an international organisation with a modest objective, that of maintaining world-wide peace within the framework of the fundamental principles of the Pact accepted by its members. These principles were to develop co-operation among nations and to guarantee those nations' peace and security.⁵⁸ The death of the League began around 1940, when the League was not able to avert further world conflict due to disaffection of part of its member states and the generation of the war itself.⁵⁹

The League resulted in being ineffective and leading to its downfall. Given the failures of the League to prevent the Second World War (WWII), concerned states

⁵⁸ Preamble to the League of Nations Covenant of 1919. www.un.org.ch accessed on 25 June 2012.

⁵⁹ The demise led to World War II in 1939.

met in Geneva around 1940 to craft a way forward for the collapsed League. The Atlantic Charter, issued on 14 August 1941, spoke of the creation of a wider and permanent system of general security, which would afford to all nations the means of dwelling in safety within their own boundaries at the war's end. On 1 January 1942, the twenty-six states which after the entry of United States and other countries into the war, had established the alliance against Axis,⁶⁰ reaffirmed this declaration and now named themselves the UN.⁶¹

The UN is therefore an international organisation created in 1945 after WWII by fifty (50) countries, committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Today, the UN has one hundred and ninety-three member states.

The UN also adopted its founding document, referred to as the UN Charter of 1945. This Charter can be referred to as the foundation or the Constitution of the UN. The main purpose of the UN is the maintenance of international peace and security. To this end, it shall take steps to settle disputes that might lead to a breach of the peace by peaceful means, and in conformity with the principles of justice and international law. It is also empowered to take collective effective measures for the prevention and removal of threats to the peace.⁶²

The UN has four main purposes, that is:

⁶⁰ The three principal partners in the Axis alliance were Germany, Italy and Japan. The Axis partners had two common interests, (1) territorial expansion and foundation of empires based on military conquest and the overthrow of the post WWI international order and (2) the destruction or neutralism. Accessed on www.ushmm.org/wlc/en/article.php?ModuleID=10005177.

⁶¹ Luard *History* 17.

⁶² *Op cit* 1 at article 1(1).

- 1) To keep peace throughout the world;
- 2) To develop friendly relations among nations;
- 3) To help nations work together to improve the lives of poor people, to conquer hunger, disease, illiteracy, and to encourage respect for each other's rights and freedoms; and
- 4) To be a centre for harmonising the actions of nations to achieve these goals.⁶³

The work of the UN stretches to every corner of the globe. Although best known for peacekeeping, peace building, conflict prevention and humanitarian assistance, there are many other ways the UN and its system (specialised agencies, funds and programmes) affect our lives and make the world a better place. The organisation works on a broad range of essential issues, from sustainable development, environment and refugees protection, disaster relief, counter terrorism, disarmament and non-proliferation, to promoting democracy, human rights, gender equality and the advancement of women, governance, economic and social development and international health, clearing landmines, expanding food production, and more, in order to achieve its goals and co-ordinate efforts for a safer world for this and future generations.⁶⁴

The organs charged with these tasks are the Security Council, the General Assembly (GA), and the Office of the Secretary-General (Secretariat). The UN has five main bodies, being the Office of the Secretary-General, the Security Council, the General Assembly, the Economic and Social Council (ECOSOC) and the International Court of Justice (ICJ).

⁶³ *Op cit* 1 at articles 1(1)-(4).

⁶⁴ Author unknown UN At a Glance <http://www.un.org/en/aboutun/index.shtml> accessed on 25 June 2012.

The Secretary-General (Secretariat) carries out the day-to-day work of the organisation. It services the other principal organs and carries out tasks as varied as the issues dealt with by the UN which includes administering peacekeeping operations, surveying economic and social trends, and preparing studies on human rights among others.⁶⁵

The General Assembly (GA) is the main deliberative organ of the UN and is composed of representatives of all member states.⁶⁶ The work of the UN year-round derives largely from the mandates given by the General Assembly.

The Economic and Social Council (ECOSOC) established by the UN Charter, is the principal organ to co-ordinate the economic, social and related work of the UN and the specialised agencies and institutions. Voting in the Council is by simple majority, each member has one vote.⁶⁷

The International Court of Justice (ICJ) located at The Hague in the Netherlands, is the principal judicial organ of the UN. It settles legal disputes between states and gives advisory opinions to the UN and its specialised agencies. Its statute is the integral part of the UN Charter.⁶⁸

The Security Council is the executive body of the UN⁶⁹ and has its primary obligation, under the UN Charter, maintenance of peace and security throughout the world.⁷⁰ Whenever there is disorder, war, conflict, armed or unarmed, it is the responsibility of the Security Council to ensure that peace prevails in such situations, and that no human rights are violated or abused. The Security Council has other

⁶⁵ *Op cit* 1 at article 97 and 98.

⁶⁶ *Op cit* 1 at article 9(1).

⁶⁷ *Op cit* 1 at article 67(1).

⁶⁸ *Op cit* 1 at article 96(1) and (2).

⁶⁹ Dugard *International Law* 479.

⁷⁰ *Op cit* 1 at article 24.

subsidiary bodies, which carries out that mandate of peace and security. Those bodies are the UNAID, and others. One of those bodies is the UN Peacekeeping Operations. As the name says it all, theirs is to keep peace, not destroy it.

The Security Council was founded in 1945 and its permanent members reflect the power relations of that time. It is composed of fifteen (15) members: five permanent members and ten non-permanent members elected by the General Assembly for a term of two years.⁷¹ The Security Council is empowered to take decisions binding on all member states of the UN.⁷² Chapter VI of the Charter permits the Security Council to address disputes which in its judgement do not threaten international peace, within the meaning of Chapter VII, but which, if continued, are likely to endanger the maintenance of international peace and security.⁷³ In such a case, the Security Council, acting under article 36(1), may recommend appropriate procedures or methods of adjustment for resolving the dispute.⁷⁴ Article 43 of the Charter provides that all members of the UN, in order to contribute to the maintenance of international peace and security, accept to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rites of passage, necessary for the purpose of maintaining international peace and security. Armed forces that would be made available will eventually constitute a peacekeeping force. That peacekeeping force shall not be on a permanent basis, but will be set up as and when necessary.⁷⁵

Despite the failure to set up a permanent UN force under article 43 above, both the General Assembly and the Security Council have undertaken peacekeeping

⁷¹ *Op cit* 1 at article 23 (1)-(2).

⁷² In terms of article 25 of the UN Charter, member states agree to accept and carry out the decisions of the Security Council.

⁷³ *Op cit* 1 at articles 33 and 36.

⁷⁴ *Op cit* 69 at 480-481.

⁷⁵ Own emphasis.

operations in many troubled spots of the world over the years.⁷⁶ These operations, involving contingents from different countries, have been established in terms of *ad hoc* agreements between the UN and the states contributing the contingents. Where UN forces or observers are stationed in a territory, the UN enters into an agreement with the host state providing for privileges, immunities and facilities for the UN.⁷⁷ The Charter does not explicitly provide for such operations, which have been created by the Security Council, acting either under Chapter VI of the Charter or under its general powers in article 24. In the *Certain Expenses Case*,⁷⁸ the ICJ upheld the lawfulness of such operations, in terms of implied powers in the Charter. The Court first considered article 17(2) of the Charter, which provides: 'The expenses of the organisation shall be borne by the members as apportioned by the General Assembly.' The Court concluded that the phrase 'expenses of the organisation' refers to all expenses incurred by the UN in the furtherance of purposes enunciated in its Charter. Because the Suez and Congo operations were conducted pursuant to Charter purposes, that is, the maintenance of international peace and security, the costs were apportionable by the General Assembly.

The Court construed provisions of the Charter (articles 24 and 43), as giving the Security Council primary but not exclusive responsibility for the maintenance of international peace and security. The Charter was found to have conclusively demonstrated that the General Assembly was also to be concerned with such matters (article 10 and 14). In essence the Court concluded that, absent specific restrictions, the General Assembly could exercise peace-keeping powers equivalent

⁷⁶ *Op cit* 69 at 490.

⁷⁷ See for example the agreement between the United Nations and South Africa according To Immunities and privileges to members of UNOMSA; GN 114 GG 15470 of 4 February 1994.

⁷⁸ *Certain Expenses of the United Nations* 1962 ICJ Reports 151 at 168, 177.

to those of the UN as a whole. In the present case, the only relevant restriction was article 11(2), which provides that when action is necessary the General Assembly must refer the question to the Security Council. In this context, the majority interpreted 'action' to mean coercive or enforcement action. On the other hand, the Suez and Congo operations were set up with the consent of the nations concerned and involved solely peace-keeping functions. Therefore, the Court concluded that the operations did not constitute enforcement action prohibited by article 11(2).⁷⁹ The Court held that, provided peacekeeping forces operate with the consent of the host state, they do not constitute enforcement action. Any action directed against a non-consenting state, however, would constitute enforcement action and require compliance with the provisions of Chapter VII.⁸⁰

In this respect, it is worth noting that more recent peacekeeping operations have been established by the Security Council under the Chapter VII powers of the UN Charter, that is, in situations that constitute 'threats of the peace'. This allows the mission to use action as may be necessary to carry out its mandate.⁸¹ Out of the six operations currently based on Chapter VII, only the UN Mission in Liberia (UNMIL) is not expressly authorised to use all necessary means to carry out its mandate. Although the original mandate of the UN Interim Force in Lebanon (UNIFIL) did not include such authorisation, Security Council Resolution 1701 of 11 August 2006, dramatically expanded the operation (from 2000-15000), and amended its mandate to include authorisation 'to take all necessary action'.⁸²

⁷⁹ Enforcement action is action with respect to threats to the peace, breaches of the peace, and acts of aggression in terms of Chapter VII of the UN Charter, Para 164 of the ICJ Report.

⁸⁰ *Op cit* 69 at 491.

⁸¹ *Op cit* 1 at article 42.

⁸² Saura *Hastings Law Journal* 483.

2.3 Origins and Establishment of the UN Peacekeeping Forces

From the onset, clarity must be sought as to what the meaning of the concept of peacekeeping is. It must also be stressed that this work/study will make use of the concept peacekeeping and not peace building as these two are not synonymous. The term peacekeeping has undergone some modifications in its conceptualisation since it was first coined by the UN. Peacekeeping is an adaptation of the provisions of Chapter 1, article 2 of the UN Charter, which vests the organisation with the mandate to work towards a world free from wars and other violent conflicts. The UN thus defines peacekeeping operations as:

Noncombat military operations undertaken by outside forces with the consent of all major belligerent parties and designed to monitor and facilitate the implementation of an existing truce agreement in support of diplomatic efforts to reach a political settlement.⁸³

Another definition given by the UN says:

An operation involving military personnel, but without enforcement powers, undertaken by the UN to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and cooperation. While they involve the use of military personnel, they achieve their objectives not by force or arms, thus contrasting them with the enforcement action of the UN under article 42 of the Charter.⁸⁴

The term 'peacekeeping' was coined to describe a type of military action, used as a tool in the UN system of collective security, which is consent based and tries to maintain or preserve peace with no or only a minimal use of force. It was designed as an alternative to enforcement action or enforcement measures which imply the

⁸³ United Nations Department of Peacekeeping Operations: Glossary of UN Peacekeeping Terms: <http://www.un.org/Dept/dpko/glossary> accessed on 05 July 2012.

⁸⁴ Hill and Malik *Peacekeeping* 17.

use of military force for the purpose of imposing the will of the enforcer on the addressee of the action.⁸⁵

Both the League of Nations and the UN Charter established a system of collective security where coercion exercised by the international community against a state threatening or breaking the peace has been an essential element. The system contains both non-military and military coercion. Non-military coercion (article 16(1)) was used under the League of Nations, the provision on military coercion (article 16(2)) not. The same double track approach to the preservation or restoration of peace through coercion was also used by the drafters of the UN Charter. Although the Charter did not repeat what was considered the major procedural flaw of the League of Nations Covenant, namely the requirement of unanimity in the Council, they created an equivalent, namely the right of veto of the permanent members of the Security Council.⁸⁶

In the case of the attacks by North Korea and China on South Korea in 1950, the Security Council did not take fully fledged enforcement action as provided by articles 42 and 43 of the Charter, but recommended that member states assist the victim and allowed coalition thus formed to use the flag of the UN.⁸⁷

The next attempt was a legal and political structure which would enable the General Assembly to take all those decisions the Security Council is entitled to take under Chapter VII of the Charter. The procedural provisions of the Uniting for Peace Resolution (calling an emergency special session) were used several times, but not the substantive part enabling the General Assembly to take measures equivalent to

⁸⁵ Simma *The Charter of the UN: A Commentary* 1175.

⁸⁶ *Ibid.*

⁸⁷ UNSC Res 83 UN Doc S/RES/83 27 June 1950; UNSC Res 84 UN Doc S/RES/84 7 July 1950.

enforcement action. A new concept was established where the use of military mechanisms is based on agreement and collaboration, not on the use of stronger force. This concept had already been used by the League of Nations and in the early days of the UN. Its breakthrough was the Suez crisis of 1956 when UN Secretary General, Hammarskjöld and the Canadian Foreign Minister Pearson designed UN Emergency Force as a buffer between Israel and Egypt. Despite considerable difficulties in the following years, the concept, which became known as peacekeeping, proved to be successful in the long run. Although being a military operation, it has to be distinguished from the enforcement action by the fact that it is not only based on UN decisions, but also on the agreement of the relevant parties and that the authorisation to use force is strictly limited, usually to self-defence.⁸⁸

The concept of peacekeeping, however, has continued to be used in many crises with somewhat varying mandates, in some cases with good, in others with insufficient success. It has been complemented, however, by two different developments, the use of military operations involving a higher degree of force undertaken by states with the authorisation (mandate) of the Security Council and regional military measures for the maintenance of peace and security, in particular in Africa.⁸⁹

Within the UN's initial conceptualisation, peacekeeping operations could be divided into two standard types, namely, peacekeeping forces and observer missions. Both types of operations are embarked upon under the same basic values but with slight differences. As Banseka observed, these defining principles include the agreement of the conflicting parties, impartiality and the non-use of force except for self-

⁸⁸ *Op cit* 85 at 1175.

⁸⁹ *Op cit* 85 at 1176.

defence.⁹⁰ In other words, under both types of operations, the UN seeks the consent of the warring factions before troops are deployed, and the peacekeeping personnel are expected to be neutral and impartial, and they are not authorised to use force except in self-defence. The notable difference however is that while peacekeeping forces are provided with light defensive weapons, observer missions are not armed.⁹¹

Traditionally, peacekeeping focused on the prevention of further escalation of violence, or maintenance of a *status quo* in order to buy time and space for diplomatic negotiations and third party interventions.⁹² Within that context, the major responsibilities of peacekeeping operations included the monitoring and enforcement of ceasefires, observations of frontier-lines and interposing between disputants.⁹³ Thus in most cases prior to the 1990s, peacekeeping operations were purely military operations. This conceptualisation of peacekeeping operations might have served the UN in its early decades and during the Cold War between the East and West blocs. However, since the end of the Cold War, the concept has undergone considerable changes; partly as a response to the changing nature of conflicts and partly as a result of greater flexibility in the UN Security Council.⁹⁴ Many of the post-Cold war operations have incorporated several new responsibilities, such as the monitoring and running of elections at the end of intra-state conflicts, protecting civilian populations from assault, protecting the so-called designated safe areas, ensuring demilitarisation of particular groups or regions, guarding weapons submitted or seized from conflicting parties, assuring the safe delivery of

⁹⁰ Barseka *New Era* 4.
⁹¹ Golwa *Peacekeeping* 56.
⁹² *Ibid.*
⁹³ *Op cit* 91 at 56.
⁹⁴ *Op cit* 91 at 57.

humanitarian aid and relief supplies, assisting in the reconstruction of governments and police functions after a civil war, reporting violations of the laws governing armed conflict and cease-fires.⁹⁵

Conversely, the International Peace Academy, for instance, defines peacekeeping as:

The prevention, containment, moderation and termination of hostilities, through the medium of a peaceful third party intervention, organised and directed internationally using multinational forces of soldiers, police and civilians to restore peace.⁹⁶

This definition, unlike that of the UN, permits various actions that may be undertaken during or around the standard operations, in order to prevent, contain, moderate or terminate hostilities and restore peace. Thus, the term peacekeeping is now construed to mean, any international effort concerned with placing in position, between two or more warring factions, a force charged with the responsibility of monitoring their compliance to a predetermined cease-fire agreement, in order to allow for negotiation and reconciliation of the differences that led to the conflict, and restoration of the state adversely impacted by the conflict.⁹⁷

According to the UN Peacekeeping Operations' Principles and Guidelines which have been inspired by the Agenda for Peace⁹⁸ document, and approved by the Department of Peacekeeping Operations and the Department of Field Support (DFS), the above two mentioned operations are defined in the following manner;

Peacekeeping is a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers. Over the years, peacekeeping

⁹⁵ Fetherston *Peacekeeping* 4.

⁹⁶ A definition of Peacekeeping Australian Peacekeeping Memorial available at <http://peacekeeping.nationalcapital.gov.au/definition.asp> accessed on 05 July 2012.

⁹⁷ *Op cit* 91 at 56.

⁹⁸ An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping A/47/277-S/24111 17 June 1992.

has evolved from a primarily military model of observing cease-fires and the separation of forces after inter-state wars, to incorporate a complex model of many elements: military, police and civilian, working together to help lay the foundations for sustainable peace.

Peace building involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundation for sustainable peace and development. Peace building is a complex, long-term process of creating the necessary conditions for sustainable peace. It works by addressing the deep-rooted, structural causes of violent conflict in a comprehensive manner. Peace building measures address core issues that affect the functioning of society and the State, and seek to enhance the capacity of the state to effectively and legitimately carry out its core functions.⁹⁹

In general terms, peacekeeping operations are deployed immediately after the cessation of hostilities, while peace building operations are often deployed at a later stage, when the security situation in the affected area(s) is less tense.¹⁰⁰ Finally, the directive of a peacekeeping operation addresses core issues that affect the functioning of society and the state, and seeks to enhance the capacity of the state to effectively and legitimately carry out its core functions, while the directive of a peacekeeping operation is generally less ambitious, as it aims mainly to preserve the peace in the short term and to assist in implementing agreements achieved by the parties involved in the conflict.¹⁰¹

2.4 Nature/ History of UN Peacekeeping

The history of UN Peacekeeping starts from the League of Nations era. Article 16 of the Covenant of the League of Nations provided for military enforcement measures. However, the three operations involving military components that were planned or executed during the time of the League of Nations did not constitute enforcement action, within the meaning of that provision. The first one related to the supervision of a plebiscite in the Polish-Lithuanian dispute about Vilna/Vilnius. These plans were

⁹⁹ *Op cit 6 at 18.*
¹⁰⁰ *Guttry Recent trends 31.*
¹⁰¹ *Ibid.*

not implemented. The second one was established as part of a short term League of Nations administration of Leticia at the border between Peru and Colombia, based on an agreement the two states. The third one was a multinational force created to maintain order during the plebiscite held in the Saar area in 1935, under the League of Nations administration according to article 49 of the Treaty of Versailles. These forces can be considered as predecessors, in particular, for peacekeeping forces established in the framework of an UN administration.¹⁰²

Various Secretaries-General have played a general and a decisive role in shaping the concept of peacekeeping. Later, Boutros-Ghali gave a major early development of the concept of peacekeeping. Later, Boutros-Ghali gave a major conceptual impetus with his reports 'Agenda for Peace' and 'Supplement to the Agenda for Peace'. An important step in the reflection on peacekeeping and development of a number of practical recommendations was the convocation, by the Secretary of a high-level commission tasked to review the UN peace and security activities, the Brahimi Report. The continuous effort to improve practice is summarised in a report of the Secretary-General entitled UNGA Peacekeeping Best Practice Report of the Secretary-General.¹⁰³

UN peacekeeping was born at a time when Cold War conflicts frequently paralysed the Security Council.¹⁰⁴ Peacekeeping was chiefly limited to maintaining cessation of hostilities and stabilising situations on the ground, as well as for providing crucial support for political efforts to resolve conflict by peaceful means.¹⁰⁵ Those missions

¹⁰² *Op cit* 85 at 1176.

¹⁰³ UNGA Peacekeeping Best Practice Report of the Secretary-General UN Doc A/62/593 18 December 2001.

¹⁰⁴ Dag Hammarskoldj and UN Peacekeeping
<http://www.un.org/en/peacekeeping/operations/dhanniversary/shtml> accessed on 03 September 2014.

¹⁰⁵ *Ibid.*

consisted of unarmed military observers and lightly armed troops with primarily monitoring, reporting and confidence building roles.¹⁰⁶

The UN was conceived as the successor to the failed League of Nations by the Western allies during the WWII. The calamitous loss of life and physical devastation caused by the war, coupled with the invention of the atomic bomb, and convinced international leaders that international organisation was more necessary than ever. Taking up the idea that great powers should play a legalised executive role in world politics, the main wartime allies, Britain, France, the Soviet Union and the United States (US) saw themselves as the 'four policemen' and initially conceived the UN as the vehicle through which they would police world affairs. The 'police' plus China were given special rights (permanent membership) of the Security Council and veto powers, but also bore 'the principal responsibility for action'. For all its problems, this combination of special rights and responsibilities, and the guarantee that the UN could never act against the interests of the great powers of 1945, guaranteed their continued participation in the new organisation and helped it survive the global chill of the Cold War.¹⁰⁷

The first victim of the Cold War was the proposal for the UN to have its own standing army to enforce the decisions of the Security Council. The Charter's drafters had originally considered the idea that, in order to avoid the uncertainty that had characterised the League's collective security system, the UN's member states would provide the organisation with a standing military force. This UN army would be politically directed by the Security Council and commanded by a UN Military Staff

¹⁰⁶ History of Peacekeeping: the early years: United Nations Peacekeeping
<http://www.un.org/en/peacekeeping/operations/early.shtml> accessed on 3 July 2012.

¹⁰⁷ Bellamy and Williams *Understanding Peacekeeping* 81.

Committee. These provisions are articles 42 and 43 of the UN Charter, and negotiations began in 1945 to establish the force.¹⁰⁸

2.4.1 *Peacekeeping: the early years*

From the beginning, the UN developed other ways of contributing to international peace and security. In 1947, the General Assembly responded to a complaint from the Greek government that its Yugoslav neighbour was actively assisting communist rebels engaged in a civil war against the government by despatching an observation mission, known as UNSCOB,¹⁰⁹ to report on cross-border movements. The following year, the Security Council also began to be engaged in two of the world's most pressing crises, the Palestinian conflict and the struggle over Kashmir. The UN sent off a mediator, Count Folke Bernadotte, a Swedish aristocrat who had played a dominant role in freeing Jews at the end of the WWII, to the Middle East to facilitate agreement between the Jews and Palestinians, but he was assassinated by what the Security Council labelled 'a criminal group of terrorists'.¹¹⁰ Bernadotte was replaced by Ralph Bunche. After months of careful and skilful diplomacy, in early 1949 Bunche secured a truce agreement that would be overseen by a UN Truce Supervision Organisation (UNTSO). Bunche was awarded the first Nobel Peace Prize for his efforts.¹¹¹

UNTSO is often cited as the organisation's first peacekeeping operation and it is certainly its longer-lasting. While it has maintained a presence in the Middle East

¹⁰⁸ *Ibid* at 82-83.

¹⁰⁹ UN Special Committee on the Balkans was established by the General Assembly by Resolution 109(II) on 21 October 1947.

¹¹⁰ UN Security Council Resolution 57, September 18 1948 provided that the Security Council was deeply shocked by the cowardly act committed by a criminal group of terrorists in Jerusalem while the UN representative was fulfilling his peace seeking mission in the Holy Land.

¹¹¹ Bellamy and Williams *Understanding Peacekeeping* 83.

through all the years of uproar, it has rarely been able to fulfil its directive on account of variable levels of cooperation from the belligerents and its own limited capabilities.¹¹²

UNTSO was initially established to support a Truce Commission for Palestine, established by the Security Council to oversee a ceasefire. The initial figure of around 572 observers deployed to monitor the truce was reduced after the conclusion of an armistice agreement in 1949, which produced a more stable truce. Since then, its size has fluctuated between thirty and a few hundred personnel. With its role limited to monitoring truce agreements, UNTSO has proven unable to prevent the periodic escalation of hostilities in the region, but it has played a valuable role as a source of independent information and training ground for peacekeepers.¹¹³

In 1950, the US led an intervention in Korea and that suggested that, unlike the League, the UN had the capacity to play a leading role in collective security.¹¹⁴ However, the unusual circumstances in which the intervention was authorised meant that it turned out to be the exception rather than the rule for UN operations during the Cold War. The intervention was facilitated by the Soviet Union's absence from the Security Council, which left it unable to use its veto power. Its absence was in protest at the Council's refusal to recognise the communists as the rightful government of China. When the Soviets returned to the Council, they ensured that the US could not continue to use the UN to legitimise its intervention in Korea. The Korean War was

¹¹² The peace operation is still in existence today and its groups can be seen in Southern Lebanon, Sinai Peninsula and Golan Heights.

¹¹³ *Op cit* 107 at 84.

¹¹⁴ The Korean War lasted from 1950 until 1953, it was between South Korea and North Korea, and the US led that UN intervention. See also www.history.navy.mil/photos/events/kowar/kowar.htm accessed on 09 July 2012.

the only explicit example of peace enforcement action against a sovereign state during the Cold War.¹¹⁵

After WWII, the world went into the cold war era of thinly masked animosity between the victors of the war: the United States of America and the Soviet Republic. This period saw the advent of many interstate wars and internal wars as countries and groups fought themselves at the behest of the world powers to propagate ideologies and spheres of influence. The 1950s and 1960s also saw the wars of independence in Africa and other countries of the developing world. In these areas, the instrument of peacekeeping was often used to stop such conflicts from developing into greater conflagrations. Thirteen of such operations had been established between 1948 and 1988 when the Berlin wall fell and marked the end of the Cold war. These operations performed responsibilities of monitoring cease fires, borders and buffer zones. The peacekeeping forces of this era were usually lightly armed troops of the contributing national contingents.¹¹⁶

The increase in the number of peacekeeping operations in the post-cold war world had been accompanied by a change in their very nature, more specifically their single function associated with traditional operations which had evolved into a multiplicity of tasks. Secondly, their application whose operations have been established to respond to their new breed of conflict in areas not previously recognised. Lastly, their composition whose peacekeepers now come from a medley of sources (military, civilian, police and diplomatic) nations and cultures.¹¹⁷

¹¹⁵ *Op cit* 107 at 83.

¹¹⁶ Babatunde *International Humanitarian Law Training and Credibility of UN Peacekeeping Operations*

¹¹⁷ Woodhouse and Ramsbotham *Peacekeeping* 128.

2.4.2 Peacekeeping: the 1990s

Between 1988 and 1993, peace operations underwent a three-way transformation. First, there was a quantitative transformation. During this period, the UN conducted more peace operations than it had undertaken in its previous forty years combined. Moreover, traditional peacekeeping contributors were augmented by a flood of new countries, including great powers such as the US, France and the UK, prepared to deploy their troops as UN peacekeepers. Secondly, there was a normative transformation catalysed by a growing belief among some member states that the remit for peace operations should be broadened to take in the promotion of a post Westphalian conception of stable peace.¹¹⁸ Finally, and as a result of the normative transformation, there was a qualitative transformation. The UN was asked to carry out more complex missions reminiscent of ONUC¹¹⁹ in the 1960s but on a far more regular basis. In places such as Cambodia, Bosnia and Somalia, the UN launched operations that were qualitatively different from earlier missions, marrying peacekeeping with the delivery of humanitarian aid, state-building programmes, local peacemaking and elements of peace enforcement. These missions were also much larger and more expensive than anything the UN had attempted before, with the important exception of ONUC.¹²⁰

¹¹⁸ The Peace of Westphalia was a series of peace treaties signed between May and October 1648 in Osnabruck and Munster, known today as Germany. The treaties resulted from the big diplomatic congress, thereby initiating a new system of political order in central Europe, later called Westphalian sovereignty, based upon the concept of a sovereign state governed by a sovereign and establishing a prejudice in international affairs against interference in another nation's domestic business. The treaty not only signalled the end of the perennial, destructive wars that had ravaged Europe, it also represented the triumph of sovereignty over empire, of national rule over the personal writ of the Habsburgs. The treaties' regulations became integral to the constitutional law of the Holy Roman Empire. *Op cit 107 at 93.*

¹¹⁹ UN Operation in the Congo from July 1960 to 1964 to ensure the withdrawal of Belgian forces in Congo.

¹²⁰ *Op cit 107 at 93.*

By 1995, the number of UN peacekeepers deployed around the world fell dramatically as member states expressed a preference for working through regional organisations and alliances, such as ECOWAS¹²¹ and NATO¹²², thus the Security Council became reluctant to create new missions. This ushered in a period of hesitant introspection at the UN, during which the organisation produced reports detailing its failings in Rwanda¹²³ and Bosnia.¹²⁴ These reports identified serious problems with the way in which the UN mandated, organised and conducted its peace operations and exposed gaps between the tasks peacekeepers were expected to fulfil in the post-Cold war era and the conceptual and material resources made available to them. The post-Cold war era was therefore a seminal time for the development of peace operations.¹²⁵

2.4.3 Recent Peacekeeping Missions

The end of the 1990s was characterised by a period of introspection where states became much more cautious about using peace operations as a tool of conflict management. This began to change in 1999 with high profile operations in Kosovo¹²⁶ and East Timor.¹²⁷ During the same year, the Security Council authorised new

¹²¹ Economic Community of West African States.

¹²² NATO (North Atlantic Treaty Organisation) is an Alliance of 28 independent member states formed in 1949, founded by article 10 of the North Atlantic Treaty which states that membership is open to any European state in a position to further the principles of the Treaty and to contribute to the Security of the North Atlantic Area.

¹²³ UNAMIR (UN Assistance Mission for Rwanda) was sent to assist in the Rwandan civil war around 1990, but failed due to limitations on the rules of engagement.

¹²⁴ The UNMIBH (UN Mission in Bosnia Herzegovina), failed in that the UN allowed the Bosnian Muslim 'safe area' of Srebrenica to be overrun in July 1995 by Bosnian Serbs, who then systematically killed thousands of the town's men and boys. See Crossette B *UN Details its failure to stop 95 Bosnia Massacre* New York Times November 16 1999.

¹²⁵ *Op cit* 107 at 94-95.

¹²⁶ UNMIK (UN Mission in Kosovo) was established by Resolution 1244 of 12 June 1999, which authorised the Secretary General to establish an international civil presence in order to provide an interim administration for Kosovo. By combining territorial administration and peace maintenance, UNMIK comprises a functional duality that combines global and domestic governance. See Murphy *UN Peacekeeping in Lebanon* 78.

¹²⁷ UNMISET (UN Mission of Support in East Timor) was established by Resolution 1410 of 2002 and aims to provide assistance to core administrative structures critical to the viability

missions to Sierra Leone¹²⁸ and the DRC.¹²⁹ This renewed demand for peace operations helped prompt the UN Secretary-General to commission a major report into the conduct and management of peace operations, and a panel of experts under the chairmanship of Lakhdar Brahimi made a series of recommendations which laid the groundwork for a new approach to UN peace operations.¹³⁰

In order to promote better management of peace operations the report made dozens of recommendations, which will be summarised below.

- 1) **Improving decision-making at UN headquarters:** The UN's reports on the failures in Rwanda and Srebrenica identified major problems with the way that key strategic decisions about peace operations were made. The Brahimi Report recommended that there must be more consultation between the Security Council, which mandates operations, and the troop-contributing countries that provide the personnel, and for the creation of a standing committee to facilitate this relationship.
- 2) **Mandating and resources:** Problems connected with unclear mandates and the gulf between an operation's mandate and the resources given to it were recurring themes in the 1990s that were highlighted in the inquiries into the exterminations in Rwanda and Srebrenica. The Brahimi Report recommended that the Department of Peacekeeping Operations should give genuine advice to the

and the political stability of East Timor, to provide interim law enforcement and public security and to assist in developing the East Timor Police Service, and contribute to the maintenance of the new country's internal and external security.

¹²⁸ UNAMSIL (UN Mission in Sierra Leone) was established by Resolution 1270 of 1999. Its mandate was to cooperate with the government of Sierra Leone and other parties to the Peace Agreement in the implementation of the Agreement.

¹²⁹ MONUC (UN Organisation Mission in the Democratic Republic of the Congo) was established by Resolution 1279 of 1999 and mandated to supervise the implementation of the Ceasefire Agreement.

¹³⁰ *Op cit* 17 at 1.

Security Council about the situation on the ground and the potential for a peace operation to work effectively.

3) **Rapid and effective deployment:** Once operations are mandated, the UN should be able to deploy its peacekeepers rapidly and effectively. One of the key problems that dogged UNPROFOR from the outset was that, by the time it deployed, the ceasefire it was supposed to monitor (between Croatia and Serb militia) had broken down and the conflict in Croatia had been surpassed by the explosion of war in Bosnia-Herzegovina. The Brahimi Report made a recommendation that the UN should have the ability to generate forces rapidly by using forces under the UN Standby Arrangements System (UNSAS), whereby member states are invited to nominate with fluctuating degrees of specificity forces that they are prepared to assign to UN duties in order to accelerate the composition of missions.

4) **Effectiveness of deployed forces:** on the question of how to improve the effectiveness of deployed peace operations, the Brahimi Report recommended that in order to avoid repeating the mistakes made in Rwanda, Bosnia, Angola and Somalia, the military component of a peace operation should be forceful enough to defend itself effectively, 'confront the lingering forces of war and violence' and protect civilians under its care. Peacekeepers who witness violence against civilians should be assumed to be authorised to stop it, within their means.¹³¹

In recent years there has been a decrease in the number of peace operations or missions that are deployed across all the continents. This is as a result of solidity being reached in many parts of the world, as compared to the period of the Cold war

¹³¹ *Op cit* 17 at 131-132.

and immediately after the Cold War. Of lately, the peacekeeping operations that are in existence are largely due to civil wars or unrests and frictions over international borders.¹³² There are currently sixteen (16) UN peace operations deployed across the four (4) continents. These include fifteen (15) peacekeeping operations and one special political mission in Afghanistan. They are all led by the Department of Peacekeeping Operations under the UN. These missions are based in Africa, Asia and the Pacific, Europe, Middle East and America.¹³³

2.5 Principles of UN Peacekeeping Missions

The two basic conceptual reports by the Secretary General on instruments for the maintenance of international peace and security, namely the Agenda for Peace 1992 and the Supplement to the Agenda for Peace 1995, envisage peacekeeping operations for three different phases: conflict prevention, conflict management during conflict, and post conflict peace-building. This is a formal categorisation. From a substantive point of view, the functions are characterised by a certain tension: on the one hand, peacekeeping operations are military operations, which seems to imply a certain use of force or at least a show of power. On the other hand, these operations are designed for a low profile use of power. Over time, the following specific functions have become typical elements of peacekeeping operations:

- Transparency and confidence building: observe groups;
- Separation of parties in conflict: interposition forces;
- Maintenance of order in failed states or post-conflict peace-building;
- Humanitarian assistance or protection of assistance operations;

¹³² Own emphasis.

¹³³ United Nations www.un.org/en/peacekeeping/operations/current.shtml accessed on 04 July 2012.

- Verification as part of post-conflict peace-building;
- Local disarmament, reintegration of fighters into normal life, demining;
- Assistance in the re-establishment of state functions (e.g., elections).¹³⁴

James provides a useful insight into the concept of peacekeeping, thereby assisting us in understanding the core principles of peacekeeping. He begins by stating that peacekeeping is composed of four essential elements which when taken together distinguish peacekeeping operations from enforcement and other forms of action. First, the personnel deployed as part of any peacekeeping operation have to be of a military nature.¹³⁵ In addition to many military observer missions during the Cold War, such as those deployed between India and Pakistan (UNMOGIP¹³⁶ and UNIPOM¹³⁷), there were a number of operations made up of military forces in the traditional sense composed of a number of battalions under the authority of a commander, such as the UNEF I,¹³⁸ UNFICYP¹³⁹ and ONUC.¹⁴⁰

The second characteristic of peacekeeping is concerned with principles of the operation itself. It is important to note that, for a peacekeeping operation to be successful it has to gain the trust of all the disputants. For this reason, despite the fact that a peacekeeping operation is military in structure, it has to be non-threatening.¹⁴¹ This is crucial for the simple reason that if the operation, for some reason or other, abandons its non-threatening posture then it will unavoidably become party to the dispute and hence lose its claim to be a peacekeeping body. In

¹³⁴ *Op cit* 85 at 1182.

¹³⁵ James *Peacekeeping* 1 in Hill and Malik *Peacekeeping* 15.

¹³⁶ UNMOGIP (UN Military Observer Group in India and Pakistan).

¹³⁷ UNIPOM (UN India Pakistan Observer Mission).

¹³⁸ UNEF I (UN Emergency Force).

¹³⁹ UNFICYP (UN Force in Cyprus).

¹⁴⁰ ONUC (UN Operation in the Congo).

¹⁴¹ *Op cit* 135 at 15.

such circumstances the mission will have crossed the fine line which separates peacekeeping from enforcement.¹⁴²

A second value of importance is that all peacekeeping operations can only employ force for the purpose of self-defence. As long as the host knows that the peacekeeping mission's arms will only be used in self-defence then this value will successfully complement the non-threatening stance adopted by the mission. Thirdly, peacekeeping operations are distinct from enforcement measures in the content of their mandates. Impartial peacekeeping forces or military observers are well-placed to possibly be able to resolve tensions in areas of crises. Once resolved they are responsible for the stabilisation of the situation which may then enable political negotiations to take place.¹⁴³

Finally, James goes on to state that the characteristics of peacekeeping operations have to do with the context within which they take place. Together with the two values of peacekeeping, they constitute the very core and crux of the activity. The context therefore includes the following provisions: firstly, the decision to establish a peacekeeping operation must be taken by a competent authority be it an international organisation such as the UN or a regional body. Secondly, the operation must have adequate support in the form of finances, personnel and equipment. Thirdly, the operation can only be established if the host state(s) has granted their consent to the presence of foreign troops on their territory. It has to be accepted that the withdrawal of this consent effectively signals the termination of the operation. This was the case in 1966, when the then President Nasser of Egypt

¹⁴² *Op cit* 135 at 15.

¹⁴³ *Op cit* 135 at 4-5.

withdrew his consent, thus hastily bringing UNEF I's mandate to an end.¹⁴⁴ Finally, a peacekeeping operation must have the political cooperation of all the parties to the dispute; otherwise it will not complete its mandate successfully. A clear example of the failure to cooperate with peacekeepers is provided by the case of UNYOM (1963-1964) when the Saudis and the Egyptians continued to violate their disengagement agreement, thus effectively preventing the mission to fulfil its mandate. In direct contrast to this was in the case of West Iran (UNTEA 1962-1963)¹⁴⁵ which was largely successful due to the cooperation extended by Indonesia to the Temporary Executive Authority.¹⁴⁶

Based on the abovementioned general elements or principles of peacekeeping missions in general, the UN has coined three principles that underpin UN peacekeeping missions. These principles are applicable to all UN peacekeeping missions and operations. Although the practice of UN peacekeeping has evolved significantly over the past six decades, three basic principles have conventionally served and continue to set UN peacekeeping operations apart, as a tool for maintaining international peace and security. These principles are consent of the parties, impartiality and non-use of force except in self-defence and defence of the mandate. These principles are inter-related and equally reinforcing. It is important that their meaning and relationship to each other are clearly understood by all those involved in the planning and conduct of UN peacekeeping operations, so that they are applied effectively. Taken together, they provide a navigation aid, or compass,

¹⁴⁴ *Op cit* 135 at 5-7.

¹⁴⁵ UNTEA (UN Temporary Executive Authority).

¹⁴⁶ *Op cit* 84 at 15-16.

for practitioners both in the field and at UN Headquarters.¹⁴⁷ The following paragraphs shall explain each principle in detail.

2.5.1 *Consent of the parties:*

UN peacekeeping operations are deployed with the consent of the main parties to the conflict.¹⁴⁸ This requires a commitment by the parties to a political process and their acceptance of a peacekeeping operation mandated to support that process. The consent of the main parties provides a UN peacekeeping operation with the necessary freedom of action, both political and physical, to carry out its mandated responsibilities. In the absence of such consent, a UN peacekeeping operation risks becoming a party to the conflict and being drawn towards enforcement action, and away from its intrinsic role of keeping the peace.¹⁴⁹

In the implementation of its mandate, a UN peacekeeping operation must continuously work to ensure that it does not lose the consent of the main parties, while safeguarding that the peace process moves forward. This requires that all peacekeeping personnel have a thorough understanding of the history and prevailing customs and culture in the mission area, as well as the capacity to assess the evolving interests and motivation of the parties.¹⁵⁰

The absence of trust between the parties in a post-conflict environment can, at times, make consent uncertain and unreliable. Consent, particularly if given

¹⁴⁷ *Op cit 6* at 31.

¹⁴⁸ The Security Council may take enforcement action without the consent of the main parties to the conflict, if it believes that the conflict presents a threat to international peace and security. This, however, would be a peace enforcement operation. It may also take enforcement action for humanitarian or protection purposes; where there is no political process and where the consent of the major parties may not be achievable, but where civilians are suffering. Since the mid-1990s, enforcement action has been carried out by *ad hoc* coalitions of member states or regional organisations acting under UN Security Council authorisation.

¹⁴⁹ *Op cit 6* at 32.

¹⁵⁰ *Op cit 6* at 32.

grudgingly under international pressure, may be withdrawn in a variety of ways when a party is not fully committed to the peace process. For instance, a party that has given consent to the deployment of UN operation may subsequently seek to restrict the operation's freedom of action, resulting in a *de facto* withdrawal of consent. The complete withdrawal of consent by one or more of the main parties challenges the foundation for the UN peacekeeping operation and will likely change the core assumptions and parameters underpinning the international community's strategy to support the peace process.¹⁵¹

The fact that the main parties have given their consent to the deployment of a UN peacekeeping operation does not necessarily imply or guarantee that there will also be consent at the local level, particularly if the main parties are internally divided or have weak command and control systems. The universality of consent becomes even less probable in volatile settings, characterised by the presence of armed groups not under the control of any of the parties, or by the presence of other spoilers.¹⁵² The peacekeeping operation should continuously analyse its operating environment to detect and forestall any wavering of consent. A peacekeeping operation must have the political and analytical skills, the operational resources, and the will to manage situations where there is an absence or breakdown of local consent. In some cases, this may require as a last resort, the use of force.¹⁵³

2.5.2 Impartiality:

UN peacekeeping operations must implement their mandate without fear or prejudice to any party. Impartiality is crucial to maintaining the consent and cooperation of the

¹⁵¹ *Op cit 6 at 32.*

¹⁵² Spoilers are individuals or parties who believe that the peace process threatens their power and interests, and will therefore work to undermine it.

¹⁵³ *Op cit 6 at 33.*

main parties, but should not be confused with neutrality or inactivity. UN peacekeepers should be unbiased in their dealings with the parties to the conflict, but not impartial in the execution of their mandate.¹⁵⁴

The need for even-handedness towards the parties should not become an excuse for inaction in the face of behaviour that clearly works against the peace process. Just as a good referee is impartial, but will castigate infractions, so a peacekeeping operation should not overlook actions by the parties that violate the undertakings of the peace process or the international norms and principles that a UN peacekeeping operation upholds.¹⁵⁵

Notwithstanding the need to establish and maintain good relations with the parties, a peacekeeping operation must scrupulously evade activities that might compromise its image of impartiality. A mission should not shy away from a rigorous application of the principle of impartiality for fear of misinterpretation or retaliation, but before acting it is always prudent to ensure that the grounds for acting are well-established and can be clearly communicated to all. Failure to do so may undermine the peacekeeping operation's credibility and legitimacy, and may lead to a withdrawal of consent for its presence by one or more of the parties. Where the peacekeeping operation is required to counter such breaches, it must do so with transparency, openness and effective communication as to the rationale and suitable nature of its response. This will help to reduce opportunities to manipulate the perceptions against the mission, and help to mitigate the potential backlash from the parties and

¹⁵⁴ *Op cit* 6 at 33.

¹⁵⁵ *Op cit* 6 at 33.

their supporters. Even the best and fairest of referees should anticipate criticism from those affected negatively and should be in a position to explain their actions.¹⁵⁶

2.5.3 Non-use of force except in self-defence and defence of the mandate:

The principle of non-use of force except in self-defence evolved during the first deployment of armed UN peacekeepers in 1956.¹⁵⁷ The notion of self-defence has subsequently come to include resistance to attempts by forceful means to avert the peacekeeping operation from honouring its duties under the mandate of the Security Council. UN peacekeeping operations are not an execution tool. However, it is widely understood that they may use force at the tactical level, with the approval of the Security Council, if acting in self-defence and defence of the mandate.¹⁵⁸

The situations into which UN peacekeeping operations are deployed are often characterised by the presence of militias, criminal gangs, and other spoilers who may actively seek to undermine the peace process or pose a threat to the civilian population. In such situations, the Security Council has given UN peacekeeping operations 'robust' mandates permitting them to 'use all necessary means' to deter forceful attempts to disrupt the political process, protect civilians under imminent threat of physical attack, and/or assist the national authorities in maintaining law and order. By proactively using force in defence of their command, these UN peacekeeping operations have succeeded in improving the security situation and creating an environment conducive to longer-term peace building in the countries where they are deployed.¹⁵⁹

¹⁵⁶ *Op cit 6* at 34.

¹⁵⁷ UNEF (UN Emergency Force) was mandated to supervise the withdrawal of invading forces in Suez in 1956.

¹⁵⁸ *Op cit 6* at 34.

¹⁵⁹ *Op cit 6* at 34.

Although on the ground they may sometimes appear similar, robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the Charter. Robust peacekeeping involves the use of force at the tactical level with the authorisation of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force at the strategic or international level, which is normally prohibited for member states under article 2(4) of the Charter, unless authorised by the Security Council.¹⁶⁰

A UN peacekeeping operation should only use force as a measure of last resort, when other methods of persuasion have been exhausted, and an operation must always exercise restraint when doing so. The ultimate aim of the use of force is to influence and deter spoilers working against the peace process or seeking to harm civilians and not to seek their military defeat. The use of force by a UN peacekeeping operation should always be calibrated in a precise, proportional and appropriate manner, within the principle of the minimum force necessary to achieve the desired effect, while sustaining consent for the mission and its mandate. In its use of force, a UN peacekeeping operation should always be mindful of the need for an early de-escalation of violence and a return to non-violent means of persuasion.¹⁶¹

The use of force by a UN peacekeeping operation always has political implications and can often give rise to unforeseen circumstances. Judgements concerning its use will need to be made at the appropriate level within a mission, based on a combination of factors including mission capability; public perceptions; humanitarian

¹⁶⁰ *Op cit* 6 at 35.

¹⁶¹ *Op cit* 6 at 35.

impact; force protection; safety and security of personnel and most importantly; the effect that such action will have on national and local consent for the mission.¹⁶²

The mission-wide Rules of Engagement (ROE) for the military and Directive on the Use of Force (DUF) for the police components of a UN peacekeeping operation will clarify the varying levels of force that can be used in various circumstances, how each level of force should be used, and any approvals that must be obtained by commanders. In the sensitive and potentially dangerous environments into which modern peacekeeping operations are often deployed, these ROE and DUF should be sufficiently robust to ensure that a UN peacekeeping operation retains its credibility and freedom of action to implement its mandate. The mission leadership should ensure that these ROE and DUF are well understood by all relevant personnel in the mission and are being applied uniformly.¹⁶³

In addition to these three basic principles, the UN through the Department of Peacekeeping Operations has developed Ten (10) Rules or Principles of Conduct for the Blue Helmets or UN Peacekeepers. They are as follows:

- 1) Dress, think, talk, act and behave in a manner befitting the dignity of a disciplined, caring, considerate, mature, respected and trusted soldier, displaying the highest integrity and impartiality. Have pride in your position as a peacekeeper and do not abuse or misuse your authority.
- 2) Respect the law of the land of the host country, their local culture, traditions, customs and practices.

¹⁶² *Op cit* 6 at 35.

¹⁶³ *Op cit* 6 at 35.

- 3) Treat the inhabitants of the host country with respect, courtesy and consideration. You are there as a guest to help them and in so doing will be welcomed with admiration. Neither solicit nor accept any material reward, honor or gift.
- 4) Do not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or UN staff, especially women and children.
- 5) Respect and regard the human rights of all. Support and aid the infirm, sick and weak. Do not act in revenge or with malice, in particular when dealing with prisoners, detainees or people in your custody.
- 6) Properly care for and account for all UN money, vehicles, equipment and property assigned to you and do not trade or barter with them to seek personal benefits.
- 7) Show military courtesy and pay appropriate compliments to all members of the mission, including other UN contingents regardless of their creed, gender, rank or origin.
- 8) Show respect for and promote the environment, including flora and fauna, of the host country.
- 9) Do not engage in excessive consumption of alcohol or traffic in drugs.
- 10) Exercise the utmost discretion in handling confidential information and matters of official business which can put lives into danger or soil the image of the UN.¹⁶⁴

These principles amount to soft law. They are vague standards, generated by declarations, adopted by diplomatic conferences or resolutions of international organisations such as the UN, they are envisioned to serve as guidelines to states in their conduct, but which lack the status of law.¹⁶⁵

¹⁶⁴ UN DPKO *Ten Rules of Code of Personal Conduct* 1998.

¹⁶⁵ *Op cit* 69 at 33.

UN peacekeeping operations continue to be guided by the basic principles of consent, impartiality and the non-use of force except in self-defence of the mandate. The experiences of the past fifteen years have shown that in order to succeed, UN peacekeeping operations must also be perceived as legitimate and credible, particularly in the eyes of the local population.¹⁶⁶ These characteristics shall be explained in the following paragraphs.

Legitimacy: International legitimacy is one of the most important assets of a UN peacekeeping operation. The international legitimacy of a UN peacekeeping operation is derivative from the fact that it is established after obtaining a mandate from the UN Security Council, which has key responsibility for the maintenance of international peace and security. The distinctively broad representation of member states who contribute personnel and funding to UN operations further strengthens this international legitimacy. So too does the fact that UN peacekeeping operations are directed by the UN Secretary-General, a neutral and well-respected international figure, committed to safeguarding the principles and purposes of the Charter.¹⁶⁷

The way in which a UN peacekeeping operation conducts itself may have a profound impact on its perceived legitimacy on the ground. The firmness and fairness with which a UN peacekeeping operation exercises its mandate, the caution with which it uses force, the discipline it imposes upon its personnel, the respect it shows to local customs, institutions and laws, and the civility with which it treats the local people all have a direct effect upon perceptions of its legitimacy.¹⁶⁸

¹⁶⁶ *Op cit* 6 at 36.

¹⁶⁷ *Op cit* 6 at 36.

¹⁶⁸ *Op cit* 6 at 36.



The perceived legitimacy of a UN peacekeeping operation is directly related to the quality and conduct of its military, police and civilian personnel. The bearing and behaviour of all personnel must be of the highest order, proportionate to the important responsibilities entrusted to a UN peacekeeping operation, and should meet the highest standards of efficiency, competence and integrity. The mission's senior leadership must ensure that all personnel are fully aware of the standards of conduct that are expected of them and that effective measures are in place to prevent misconduct. Civilian, police and military personnel should receive mandatory training on sexual exploitation and abuse; and this training should be on-going, as troops rotate in and out of peace operations. No form of sexual exploitation, abuse or any other misconduct must be accepted. Allegations of delinquency must be steadily and consistently dealt with in order to avoid undermining the legitimacy and moral authority of the mission.¹⁶⁹

It has been apparent that the perceived legitimacy of a UN peacekeeping operation's presence may erode over time, if the size of the UN 'footprint' and the behaviour of its staff become a source of local resentment; or if peacekeeping operation is not sufficiently responsive as the situation stabilises. Peacekeeping missions must always be aware of and respect national sovereignty. As legitimate and capable government structures appear, the role of the international actors may well need to diminish quickly. They should seek to promote national and local ownership, be aware of evolving local capacities, and be sensitive to the effect that the behaviour and conduct of the mission has upon the local population.¹⁷⁰

¹⁶⁹ *Op cit* 6 at 37.

¹⁷⁰ *Op cit* 6 at 37.

Credibility: UN peacekeeping operations are frequently deployed in volatile, highly strained surroundings characterised by the collapse or degradation of state structures, as well as animosity, violence, polarisation and distress. Lawlessness and insecurity may still be dominant at local levels, and opportunists who are willing to exploit any political and security vacuum will be present. In such environments, a UN peacekeeping operation is likely to be verified for weakness and division by those whose interests are threatened by its presence, particularly in the early stages of deployment.¹⁷¹

The credibility of a UN peacekeeping operation is a direct replication of the international and local communities' belief in the mission's ability to achieve its mandate. Credibility is a function of a mission's competence, effectiveness and ability to manage and meet expectations. Ideally, in order to be credible, a UN peacekeeping operation must deploy as rapidly as possible, be properly resourced, and strive to maintain a confident, capable and unified posture. Experience has shown that the early establishment of a credible presence can help to discourage spoilers and diminish the likelihood that a mission will need to use force to implement its mandate. To achieve and maintain its credibility, a mission must therefore have a clear and deliverable mandate, with resources and capabilities to match; and a sound mission plan that is understood, communicated and impartially and effectively implemented at every level.¹⁷²

The placement of a UN peacekeeping operation will generate high expectations among the local population regarding its capacity to meet their most pressing needs. A perceived failure to meet these expectations, no matter how unrealistic, may cause

¹⁷¹ *Op cit* 6 at 37.

¹⁷² *Op cit* 6 at 38.

a UN peacekeeping operation to become a focus for popular dissatisfaction, or worse, active opposition. The ability to manage these expectations throughout the life of a peacekeeping operation affects the overall credibility of the mission. Credibility, once lost, is hard to regain. A mission with low credibility becomes downgraded and ineffective. Its activities may begin to be perceived as having weak or frayed legitimacy and consent may be eroded. Critics and opponents of the mission may well exploit any such opportunities to this end. The loss of credibility may also have a direct impact on the self-esteem of the mission personnel, further eroding its effectiveness. Accordingly, the maintenance of credibility is fundamental to the success of a mission.¹⁷³

Promotion of national and local ownership: Multi-dimensional UN peacekeeping operations are increasingly involved in efforts to help countries developing from protracted internal conflict in re-building the foundations of a functioning state. The terms of the peace process and/or the Security Council mandate will shape the nature of a peacekeeping operation's role in the area. In some instances, state and local capacity may be so weak that the mission is required to temporarily assume certain functions, either directly, as in the case of transitional administration, or in support of the state. Other situations require less invasive support to state authority, and sometimes no such support at all. The nature and scale of a particular UN peacekeeping operation's role will depend on its directive, the seriousness of the situation on the ground, the resources the international community is willing to invest and an assessment of the availability of capable, credible and legitimate partners within the host nation. Each of these variables may change during the course of UN

¹⁷³ *Op cit* 6 at 38.

peacekeeping operation's lifetime and require adjustments in the peacekeeping operation's approach.¹⁷⁴

National and local ownership is critical to the successful implementation of a peace process. In planning and executing a UN peacekeeping operation's central activities, every effort should be made to promote national and local ownership and to foster trust and cooperation between national actors. Effective approaches to national and local ownership do not only strengthen the perceived legitimacy of the operation and support mandate implementation, they also help to ensure the sustainability of any national capacity once the peacekeeping operation has been withdrawn.¹⁷⁵

Partnerships with national actors should be struck with due regard to impartiality, wide representation, inclusiveness, and gender considerations. Missions must recognise that multiple different opinions will exist in the body politic of the host country. All opinions and views need to be understood, ensuring that ownership and participation are not limited to small exclusive groups. National and local ownership must begin with a strong understanding of the national context. This includes understanding of the political context, as well as the wider socio-economic context.¹⁷⁶

A mission must be careful to ensure that the rhetoric of national ownership does not replace a real understanding of the goals and expectations of the population, and the importance of allowing national capacity to re-emerge quickly from conflict to lead critical political and development processes. The mission will need to manage real tensions between the requirement, in some instances, for rapid transformational

¹⁷⁴ *Op cit* 6 at 39.

¹⁷⁵ *Op cit* 6 at 37.

¹⁷⁶ *Op cit* 6 at 39.

change from the *status quo ex ante*, and resistance to change from certain powerful actors who have a vested interest in maintaining the *status quo*. The ownership of change must be built first, through dialogue. Political, financial and other forms of international leverage may be required to influence the parties on specific issues, but those should only be used in support of the wider aspirations for peace in the community.¹⁷⁷

The activities of a multi-dimensional UN peacekeeping operation must be conversant by the need to support and, where necessary, build national capacity. Accordingly, any shift of national or local capacity should be avoided wherever possible. A multi-dimensional UN peacekeeping operation may be obliged, in the short-term, to take on important state-like functions, such as the provision of security and the maintenance of public order. However, these functions should be conducted in a consultative manner. The goal must always be to restore, promptly, the ability of national actors and institutions to assume their responsibilities and to exercise their full authority, with due respect for internationally accepted norms and standards. In building national capacity, women and men should have equal opportunities for training. Targeted efforts may need to address gender inequalities.¹⁷⁸

2.6 Summary

This chapter has laid the foundation of the concept of UN peacekeeping. It has commenced by briefly outlining the history of the UN as an international organisation. This history enabled us to understand the principles which underpin peacekeeping as a mission or operation. From the brief history of the League of Nations to the rise of the UN, it is very apparent that through the ages, nations have always had one

¹⁷⁷ *Op cit* 6 at 41.

¹⁷⁸ *Op cit* 6 at 40.

common agenda, and that is the maintenance of peace and stability. That is why the birth of the UN saw it paramount that a force with a mandate of peacekeeping be established through international consensus, a force which will uphold the core business of the UN Charter and the founding principles of the UN peacekeeping force itself.

Peacekeeping developed its own set of principles and operational norms which enabled UN forces to be perceived as both non-coercive and neutral with the operation in the Congo (1960-1964) being the only notable exception, these principles and norms were maintained throughout the Cold War, generally as a result of the understanding of the superpowers to the UN taking on any more responsibility than was absolutely necessary.¹⁷⁹

As stated earlier, the deployment of peacekeeping forces has decreased substantially in the past few years as compared to the high number of deployments around the 1950s and 1960s. This decrease is as a result of states being able to resolve their tensions or differences amicably and through non-use of force. Again, this decrease is as a result of states being aware of very strict international norms and standards on the preservation of life, humanity, respect and protection of human rights, alleviation of human suffering, liability and accountability for heads of state and international mandatory sanctions. States have realised that where armed conflict arises, the beneficiaries are civilians, those that are unable to protect themselves. It is for these reasons that deployment of peacekeeping forces is

¹⁷⁹ *Op cit* 84 at 211.

paramount in unstable situations, in situations where the vulnerable are bound to suffer.¹⁸⁰

The next chapter shall examine key legal instruments that form the basis of maintenance of world peace and security. These instruments are IHL and IHRL. The chapter will discuss the nature of IHL and IHRL, dissect the interplay between them, and look whether these instruments are applicable to UN peacekeeping operations or not.

¹⁸⁰ Own emphasis.

Table 1: UN Peacekeeping missions and operations since 1948.

YEAR	COUNTRY OF DEPLOYMENT	BRIEF DESCRIPTION
1948	Middle East	United Nations Truce Supervision Organisation (UNTSO)
1949	India & Pakistan	United Nations Military Observer Group in India and Pakistan (UNMOGIP)
1956	Suez Canal	United Nations Emergency Force (UNEF)
1964	Cyprus	UN Peacekeeping Force in Cyprus (UNFICYP)
1965	India & Pakistan	United Nations India-Pakistan Observation Mission (UNIPOM)
1965	Indo-Pakistani	United Nations Military Observer Group of India and Pakistan (UNMOGIP)
1965-1966	Dominican Republic	Mission of the Representative of the Secretary-General in the Dominican Republic (DOMREP)
1960	Congo	United Nations Operation in the Congo (ONUC)
1962-1963	West New Guinea	United Nations Security Force in West New Guinea (UNSF)
1958	Lebanon	United Nations Observation Group in Lebanon (UNOGIL)
1963	Yemen	United Nations Yemen Observation Mission (UNYOM)

1973	Suez	Second United Nations Emergency Force (UNEF II)
1974	Golan Heights / Syria	United Nations Disengagement Observer Force (UNDOF)
1978	Lebanon	United Nations Interim Force in Lebanon (UNIFIL)
1980	Iraq & Iran	United Nations Iran-Iraq Military Observer Group (UNIMOG)
1991	Pakistan- Afghanistan	United Nations Good Offices Mission in Afghanistan (UNGOMAP)
1991	Georgia- Abkhazian	United Nations Mission in Georgia (UNOMIG)
1991	Tajikistan	United Nations Mission of Observers in Tajikistan (UNMOT)
1991	Angola	United Nations Angola Verification Mission (UNAVEM I,II,III)
1992	Mozambique	United Nations Operation in Mozambique (ONUMOZ)
1991	Cambodia	United Nations Advance Mission in Cambodia (UNAMIC)
1992	Cambodia	United Nations Transitional Authority in Cambodia (UNTAC)
1989	Central America	United Nations Observer Group in Central America (ONUCA)

1991	El Salvador	United Nations Observer Mission in El Salvador (ONUSAL)
1996	Guatemala	United Nations Verification Mission in Guatemala (MINUGUA)
1991	Iraq & Kuwait	United Nations Iraq-Kuwait Observation Mission (UNIKOM)
1994	Aouzou Strip	United Nations Aouzou Strip Observation Group (UNASOG)
2000	Ethiopia	UNMEE: UN Mission in Ethiopia and Eritrea
1990	Yugoslavia	United Nations Protection Force (UNPROFOR)
1995	Croatia	United Nations Confidence Restoration Operation in Croatia (UNCRO)
1995	Yugoslavia	United Nations Preventive Deployment Force (UNPREDEP)
1995	Bosnia- Herzegovina	United Nations Mission In Bosnia Herzegovina (UNMIBH)
1996	Eastern Slavonia, Baranja and Western Sirmium	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES)
1996	Prevlaka	United Nations Mission of Observers in Prevlaka (UNMOP)

1998	Croatia	United Nations Civilian Police Support Group (UNPSG)
1990	Rwanda	United Nations Assistance Mission for Rwanda (UNAMIR)
1993	Uganda-Rwanda	United Nations Observer Mission Uganda-Rwanda (UNOMUR)
1991	Somalia	United Nations Operation in Somalia (UNOSOM I)
1992	Somalia	Unified Task Force (UNITAF)
1993	Somalia	United Nations Operation in Somalia (UNOSOM II)
1993	Liberia	United Nations Observer Mission in Liberia (UNOMIL)
2003	Liberia	United Nations Mission in Liberia (UNMIL)
1991	Haiti	United Nations Mission in Haiti (UNMIH)
1996- 1997	Haiti	United Nations Support Mission in Haiti (UNSMIH)
1997	Haiti	United Nations Transition Mission in Haiti (UNTMIH)
1997	Haiti	United Nations Civilian Police Mission in Haiti (MIPONUH)
2004	Haiti	United Nations Stabilisation Mission in Haiti (MINUSTAH)
2007	Sudan	United Nations Mission in Sudan (UNMIS)
2007	Darfur	African Union-United Nations Hybrid Operation in Darfur (UNAMID)

2007	Central African Republic	United Nations Mission in the Central African Republic and Chad (MINURCAT)
1998	Central African Republic	United Nations Mission in the Central African Republic (MINURCA)
1999	Sierra Leone	United Nations Observer Mission in Sierra Leone (UNOMSIL)
1999	Sierra Leone	United Nations Mission in Sierra Leone (UNAMSIL)
1999	DRC	United Nations Organisation in the Democratic Republic of Congo (MONUC)
2004	Ivory Coast	United Nations Operation in Cote d'Ivoire (UNOCI)
1989	Namibia	United Nations Transition Assistance Group (UNTAG)
1991	Morocco/ Western Sahara	United Nations Mission for the Referendum in Western Sahara (MINURSO)
1999	East Timor	United Nations Transitional Administration in Easter Timor (UNTAET)
2002	East Timor	United Nations Mission of Support in East Timor (UNMISET)
2006	East Timor	United Nations Integrated Mission in East Timor (UNMIT)
1999	Kosovo	United Nations Interim Administration Mission in Kosovo (UNMIK)

2010	DRC	United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (MONUSCO)
2011	Sudan	United Nations Interim Security Force for Abyei (UNISFA)
2011	South Sudan	United Nations Mission in the Republic of South Sudan (UNMISS)
2013	Mali	United Nations Multidimensional Integrated Stabilisation Mission in Mali (MINUSMA)

This table has been compiled by K O Lefenya.

CHAPTER THREE: INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL HUMAN RIGHTS LAW AND UN PEACEKEEPING MISSIONS



3.1 Introduction

In the previous chapter, this study traced the emergence of UN peacekeeping missions and operations over the past years. In today's world, various legal instruments regulate human conduct and state conduct on a number of issues. There are legal instruments that regulate UN peacekeeping missions and operations. Because the sole purpose of UN peacekeeping missions is the maintenance of world peace and security, it is of importance that an examination of those legal instruments that form the basis of achieving that purpose be conducted. The main instruments come under the purview of IHL and IHRL.

In the same breadth, this chapter also looks at whether these instruments are applicable to UN peacekeeping operations. There has been a debate regarding whether human rights instruments are applicable to UN peacekeeping operations, or whether UN peacekeeping operations make use of UN principles and guidelines applicable to UN forces only.¹⁸¹ In other words, there is a popular perception that UN peacekeepers are not expected to make use of IHRL and IHL in their operations, but only make use of principles and guidelines from the Department of Peacekeeping Operations. This chapter discusses the nature of IHL and IHRL and dissect the interplay between IHL and IHRL, illustrating IHL and IHRL norms that are applicable to UN peacekeepers, especially during their operations.

¹⁸¹ See Bothe M Peacekeeping in the Charter of the UN: A Commentary 648; Saura J Lawful Peacekeeping: Applicability of IHL to UN Peacekeeping Operations Hastings Law Journal Vol 58 479; Tristan F The Issue of IHL Applicability to Recent UN, NATO and AU Peace Operations (Libya, Somalia, DRC, Ivory Coast) found in Conference Proceedings Brussels 2013; Chapman P Ensuring Respect: UN Compliance with IHL Human Rights Brief Vol 17 Issue No1 2009 2-11; and Application of IHL and IHRL to UN-mandated forces: Report on the Expert Meeting on Multinational Peace Operations IRRC March 2004 Vol 86 No 853 207-212.

3.2 International Humanitarian Law

3.2.1 Introduction

IHL is a very important part of public international law relating to times of armed conflict. The rules that it establishes apply only in situations of armed conflicts. In one sense, it would mean the law of war setting out rules that all combatants must follow. In another sense, much broader however, IHL is better understood by its goal: to protect people who are no longer taking part in hostilities as well as to regulate the methods and means used to wage war. Its purpose is to limit the suffering that war causes by affording victims the maximum possible protection and assistance. IHL is therefore concerned with the reality of armed conflict globally: it does not address issues such as the grounds or possible justification under international law for going to war or embarking in armed conflict.¹⁸²

Its scope is limited *ratione materiae* to situations of armed conflict. IHL is part of *ius in bello* (the law on how force may be used), which has to be distinguished and separated from *ius ad bellum* (the law on the legitimacy of the use of force). The use of force is outlawed under the UN Charter.¹⁸³ Nevertheless, IHL has to be similarly applied by all sides to every armed conflict, regardless of whether their cause is justified. This parity between the belligerents also crucially distinguishes an armed conflict, to which IHL applies, from a crime, to which only criminal law and human rights law on law enforcement apply.¹⁸⁴

Conventionally, non-international armed conflicts were considered as purely internal matters for states, in which no international law provisions would apply. This view was drastically modified with the adoption of article 3 Common to the Four Geneva

¹⁸² Mutabazi *International Criminal Tribunal for Rwanda* UNISA Dissertations 13.

¹⁸³ *Op cit* 1 at article 2(4).

¹⁸⁴ *Op cit* 55 at 5.

Conventions of 1949. For the first time, the society of states agreed on a set of minimal guarantees to be respected during non-international armed conflict. Article 1 of Additional Protocol II also provides that Protocol II:

shall apply to all armed conflicts not covered by article 1 of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹⁸⁵

In internal armed conflicts, IHRL and IHL apply concurrently. IHL precedes the development of human rights law by the international community so that the former cannot be a specialisation of the latter. Some of its provisions have no equivalent in human rights law, in particular the rules on the conduct of hostilities or on the use of weapons.¹⁸⁶

In a criminal law perspective and particularly in the context of international prosecutions, the ICTY held that:

The role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the State and, conversely, its participation in the commission of the offence is no defense to the perpetrator. Moreover, international humanitarian law purports to apply equally to and expressly binds all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved and its agents.¹⁸⁷

IHL is also known as the 'law of war' or the 'law of armed conflict', and limits the means and methods of armed conflict. IHL is contained in the Four Geneva Conventions of 1949¹⁸⁸ and their two Additional Protocols of 1977, as well as in rules

¹⁸⁵ Sassoli and Bouvier *How Does Law Protect in War* 123.

¹⁸⁶ Common Article 3 to the Four Geneva Conventions and the 1977 Additional Protocol II.

¹⁸⁷ *Prosecutor v Kunarac* IT-96-23/1 Judgment 21 July 2000 (TC) para 470.

¹⁸⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; and Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 12 August 1949.

regulating the means and methods of combat. IHL also includes conventions and treaties on the protection of cultural property, the environment, as well as protection of victims of conflict. IHL which seeks to lessen the suffering of combatants and civilians in times of war, began to develop in the 19th century after the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864, and was well developed by the beginning of the 20th century.¹⁸⁹

3.2.2 IHL and UN Peacekeeping Missions

IHL is designed to protect persons who do not participate, or are no longer participating, in the hostilities, and it maintains the fundamental rights of civilians, victims and non-combatants in an armed conflict. It is relevant to UN peacekeeping operations because these missions are often deployed into post-conflicts environments, where violence may be on-going or conflict could reignite. In addition to that, in post-conflict situations, there is a big number of civilians who have been targeted by the belligerent parties, prisoners of war and other vulnerable groups to whom the Geneva Conventions or other humanitarian law would apply in the event of further hostilities.¹⁹⁰

This raises two issues, firstly, from a subjective perspective, whether the UN is bound by the rights and obligations laid down by the law of armed conflicts. Secondly, from a more objective perspective, the issue is the extent to which such international operations come within the scope of this legal regime.¹⁹¹

¹⁸⁹ The intervention by Western states in the Ottoman Empire in the 19th century served the dual purpose of protecting Christians against persecution and of weakening the Ottoman Empire.

¹⁹⁰ *Op cit* 6 at 15.

¹⁹¹ Porretto and Vite *Application of IHL* 17.

In its *Advisory Opinion* of 11 April 1949, *Relating to Reparation of Injuries Suffered in the Service of UN*,¹⁹² the ICJ made a preliminary observation that:

the UN has at the same time a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.¹⁹³

It recalled that the UN could not fulfil the intentions of its founders if it was deprived of international personality. When adopting the 1945 Charter, the states intended to get all the capacity needed to fulfil its purposes and exercise of functions. Indeed the UN has been given extensive tasks that are independent of the powers of its member states. For example, the UN has the power to take action in order to maintain peace, including the establishment of a UN army (in terms of article 43 of the Charter). Moreover, it has the power to arrange trusteeship agreements and supervise their implementation by the administering authority. In order to fulfil such responsibilities, the UN must possess a personality separate from that of its members, which it demonstrates through its own operational bodies. The court thus concluded that the organisation has the capacity to be bound by international rights and obligations.¹⁹⁴

When applied to the specific area of concern for this study, this reasoning supports the argument that the UN, as such, can be bound by the norms of IHL; in other words, the UN has subjective capacity. Given that, in accordance with its purposes (in this case, the maintenance of international peace and security), and its functions (i.e. the power to use military force), the UN is likely to become involved in

¹⁹² *Advisory Opinion Relating to Reparation of Injuries Suffered in the Service of UN* 11 April 1949 Reports.

¹⁹³ *Ibid* at para 179.

¹⁹⁴ *Op cit* 191 at 18.

confrontations amounting to armed conflict; the necessary conclusion is that the law governing this type of situation is applicable to the organisation.

The UN commitment to respect for IHL has developed over years. At first, the organisation acknowledged the general importance of this body of rules by regularly recognising that troops deployed under the UN authority must respect the principles and spirit of general international conventions applicable to the conduct of military personnel.¹⁹⁵

This commitment was made part of several sets of UN military ROE, in the model that serves as the basis for agreements between the UN and member states contributing to peacekeeping operations and the Model Status of Forces Agreement. The latter model defines the relations between the UN and the state in which the forces are operating or the host state.¹⁹⁶ By later agreeing to formalise this commitment in a number of other contexts, the UN has shown its willingness to respect the principles and spirit of IHL Conventions as founded in henceforth well-established practice.¹⁹⁷

Thus, IHL is applicable to the extent that it gives concrete effect to the 'principles and spirit', formula and that the specific provisions or the treaties in question can be materially applied to the forces of an international organisation. This extensive interpretation of the 'principles and spirit' of IHL Conventions is confirmed by current practice.¹⁹⁸ In particular, several decisive documents examined below have gone beyond this cautious expression to express wider acceptance of IHL. Accordingly, it

¹⁹⁵ *Op cit* 13 at section 3.

¹⁹⁶ *Shraga African Journal of International Law* Vol 94 2000 407.

¹⁹⁷ *Op cit* 191 at 21.

¹⁹⁸ *Op cit* 191 at 22.

is now clear that the sources applicable to the international forces are both customary and conventional.¹⁹⁹

3.2.3 *The Convention on the Safety of UN and Associated Personnel of 9 December 1994*

The 1994 Convention on the Safety of UN and Associated Personnel touches on this question in passing. It provides that the Convention:

shall not apply to UN operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the UN...to which the law of international armed conflict applies.²⁰⁰

In addition, it contains a saving clause to the effect that nothing in the Convention shall affect:

the applicability of the IHL and universally recognized standards of human rights, as contained in international instruments in relation to the protection of UN operations and UN and associated personnel or the responsibility of such personnel to respect such law and standards.²⁰¹

The Convention seems to indicate that all the relevant rules of IHL should apply in full to both UN authorised and UN commanded operations.²⁰² The unqualified references to the law of international armed conflict read with those of IHL contained in international instruments, implies that the reference is not limited to customary law.²⁰³

3.2.4 *The Secretary-General's Bulletin of 12 August 1999*

The most notable development in this area was the Bulletin entitled Observance by UN forces of IHL. It entered into force on the 12 August 1999. As its first clause

¹⁹⁹ *Op cit* 191 at 22-23.

²⁰⁰ Article 2(2) of the Convention on the Safety of UN and Associated Personnel.

²⁰¹ *Ibid* at article 20(a).

²⁰² *Op cit* 191 at 23.

²⁰³ *Op cit* 191 at 23.

indicates, the Bulletin sets out fundamental principles and the rules of IHL that are applicable to UN forces conducting operations under UN command and control.

The principles are divided into five categories:

- 1) Protection of the civilian population;²⁰⁴
- 2) Means and methods of combat;²⁰⁵
- 3) Treatment of civilians and persons *hors de combat*;²⁰⁶
- 4) The treatment of detained persons;²⁰⁷ and
- 5) Protection of the Wounded, the sick and medical and relief personnel.²⁰⁸

From a legal perspective, this Bulletin is an administrative guideline adopted by the Secretary-General in his capacity as chief of UN operational and strategic command. The Bulletin is binding on UN forces, since the Secretary-General has the power to prescribe administrative rules for all the organisation's personnel.²⁰⁹ Indeed, given that they are provided to the UN by their country of origin, members of these forces become representatives of the organisation.²¹⁰

The UN promises to ensure that its force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of all military personnel. The UN also promises to ensure that members of the military personnel of the force are fully conversant with the principles and rules of those

²⁰⁴ *Op cit* 13 at section 5.
²⁰⁵ *Op cit* 13 at section 6.
²⁰⁶ *Op cit* 13 at section 7.
²⁰⁷ *Op cit* 13 at section 8.
²⁰⁸ *Op cit* 13 at section 9.
²⁰⁹ *Op cit* 13 at article 1(1).
²¹⁰ *Op cit* 182 at 13 .

international instruments. The responsibility to respect the said principles and rules is applicable to UN forces even in the absence of a status-of-force agreement.²¹¹

Section 4 states that in cases of violations of IHL, members of the military personnel of a UN force are subject to prosecution in their domestic courts.²¹² The UN force shall make a clear distinction at all times between civilian objects and military objectives. Military operations shall be directed only against combatants and military objectives. Attacks on civilians or civilian objects are prohibited.²¹³ Section 7 provides for treatment of civilians and persons *hors de combat*. The following acts against any of the persons mentioned in section 7(1) are prohibited at any time and in any place:

- 1) Violence to life or physical integrity;
- 2) Murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- 3) Collective punishment;
- 4) Reprisals;
- 5) The taking of hostages;
- 6) Rape;
- 7) Enforced prostitution;
- 8) Any form of sexual assault and humiliation and degrading treatment;
- 9) Enslavement; and
- 10) Pillage.

²¹¹ *Op cit* 13 at section 3.

²¹² *Op cit* 13 at section 4.

²¹³ *Op cit* 13 at section 5.

Women shall be especially protected against any attack, in particular against rape, enforced prostitution or any form of indecent assault. Children shall be the object of special respect and shall be protected against any form of indecent assault.²¹⁴

3.2.5 UN Security Council Resolution 1327 of 13 November 2000

The Secretary-General's contribution has been confirmed by the Security Council practice, which uses terms that are derived from the Bulletin. Thus, Resolution 1327 of 13 November 2000, on the strengthening of the UN peacekeeping operations:

urges the parties to prospective peace agreements, including regional and sub-regional organisations and arrangements, to co-ordinate and cooperate fully with the UN from an early stage in negotiations, bearing in mind the need for any provisions for a peace-keeping operation to meet minimum conditions, including...compliance with the rules and principles of international law, in particular IHL, human rights and refugee law.²¹⁵

The Security Council's reference to the 'rules and principles of international law, in particular IHL' is directly derived from the Secretary-General's Bulletin. Thus, the above comments relating to the content of the Bulletin also apply to Resolution 1327. This additional step is important because a principal intergovernmental body has now confirmed principles previously set out in a purely internal administrative document. Therefore, the normative value of these rules and principles is strengthened.²¹⁶

The characteristic of the peacekeeping forces which directly raises the question of applicability of IHL is that its members are armed. It would be useful here to cite the relevant paragraph of the report that the Security Council requested of the Secretary-

²¹⁴ *Op cit* 13 at section 7(3) and (4).

²¹⁵ *Op cit* 191 at 24.

²¹⁶ *Op cit* 191 at 25.

General when it was contemplating setting up the UN Interim Force in Lebanon (UNIFIL) on 19 March 1978.²¹⁷

The Force will be provided with weapons of a defensive character. It shall not use force except in self-defence. Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council. The force will proceed on the assumption that the parties to the conflict will take the necessary steps for compliance with the decisions of the Security Council.

3.2.6 Position of International Committee of the Red Cross (ICRC)

The ICRC as a custodian of IHL remains very clear on its position. Both the ICRC and the International Conference of the Red Cross and Red Crescent have repeatedly articulated their opinion on the applicability of IHL to the peacekeeping forces. Several examples of these pronouncements, made at various times and in different forms are cited below.

There is a Memorandum entitled Application and Dissemination of the Geneva Conventions, of 10 November 1961, addressed to states party to the Geneva Conventions and Members of the UN, in which the ICRC draws the attention of the UN Secretary-General to the necessity of ensuring application of the Conventions by UN forces. Since the UN, as such, is not party to the Conventions, the ICRC, considers that each state remains individually responsible for the application of these treaties whenever it provides a contingent for a peacekeeping force. In consequence, the state should do what is necessary, especially by issuing appropriate instructions to the troops before they are posted abroad. The Memorandum also stressed that by virtue of article 1 common to the Four Geneva Conventions, which also entails the High Contracting parties to ensure respect for the Conventions, the states providing contingents:

²¹⁷ Report of the Secretary-General S/1261 1 1999 2.

should each, where necessary, use their influence to ensure that the provisions of humanitarian law are applied by all contingents concerned, as well as by the unified command.

Resolution XXV (Application of the Geneva Conventions by the UN Emergency Force) adopted by the 20th International Conference of the Red Cross (Vienna, 1965), made three recommendations. Of these, two of them propose:

- 1) That appropriate arrangements be made to ensure that armed forces placed at the disposal of the UN observe the provisions of the Geneva Conventions and be protected by them; and
- 2) That the authorities responsible for the contingents agree to take all necessary measures to prevent and suppress any breaches of the said Conventions.

Similarly, in a letter addressed to the UN Secretary-General, when a peacekeeping force was set up in Lebanon (UNIFIL), the President of the ICRC referred to the contents of the above-mentioned Memorandum and Resolution, and also extended an opinion on relations between the peacekeeping force and the ICRC, both of which were operating on the same territory but under different mandates. He wrote:

the ICRC knows that it can count on the UN and the forces it has deployed in Lebanon to facilitate freedom of movement for ICRC delegates and to guarantee, as far as possible, their safety in the regions where they have to conduct their humanitarian activities in accordance with the Geneva Conventions.²¹⁸

Members and staff of the ICRC have, in many instances, reaffirmed the position of the institution. For example, the obligation on the UN forces to observe the fundamental principles of the Geneva Conventions can hardly be questioned today. Concerning the Protocols, it would seem in any case that the UN should take

²¹⁸ Alexandre Hay, ICRC President 10 April 1978.

account of the principles which inspired the Protocols.²¹⁹ Lastly, it is uncontested that the UN is bound by the customary rules of IHL when engaged in hostilities.²²⁰

To sum up the position of the ICRC on the applicability of IHL to peacekeeping forces and its observance by these forces, it stresses that:

- 1) The fundamental principles and customary rules of IHL are applicable and must be observed;
- 2) To ensure this, the states providing contingents are under an obligation to issue appropriate instructions to their troops and the UN is under the same obligation with respect to the unified command;
- 3) Any breaches of IHL must be repressed by the national authorities of the contingent concerned; and
- 4) Since there is a certain complementarity between the ultimate objectives of their respective mandates, the peacekeeping forces should co-operate with the ICRC, but in no case hinder its activities or question its competence.²²¹

In a letter of 23 October 1978 to the President of ICRC (in reply to a letter from the President dated 10 April 1978), in which the UN Secretary General stressed that:

the principles of humanitarian law must, should the need arise, be applied within the framework of the operations carried out by the UN Forces.²²²

On the other hand, it is important to highlight the position of the UN on the applicability of IHL to UN peacekeeping forces. On the legal side, following discussions within the UN on the possibility of the organisation becoming party to the instruments of IHL, the conclusion was reached that certain provisions of the

²¹⁹ Yves *International Review of the Red Cross* 283.

²²⁰ Dietrich *UN forces and international humanitarian law Studies and Essays on international humanitarian law and Red Cross principles in honour of Jean Pictet*, Christophe Swinarski ICRC, Martinus Nijhoff Geneva The Hague 1984 526.

²²¹ Palwankar *Applicability of IHL to UN Peacekeeping Forces* 230.

²²² *Ibid* at 231.

Convention could not apply to or be applied by the UN.²²³ Moreover, since there is no definition or even mention of peacekeeping forces in IHL instruments, these forces might appear as combatants. It would also have to be determined whether the UN may, or may not be considered a 'power' for purposes of acceding to the Conventions. Then there is the problem that might arise should the same force comprise troops from states party to Protocol I and states that are not party to this Protocol.²²⁴

On the political side, a request from the UN for accession to the IHL treaties, or even an attempt to arrive at a general declaration on the applicability of IHL to the peacekeeping forces (in the form of a resolution by the General Assembly), would create the risk of opening a delicate debate on the Protocols. On the other hand, a request to accede to the Conventions alone would be detrimental to the promotion of IHL as a whole.²²⁵

There is also the 'Interoffice Memorandum' addressed on 24 May 1978 by Mr Guyer and Mr Urquhart to all commanders of UN forces then operative, and a Memorandum dated 30 October 1978, from the Commander in Chief of the UN forces to all commanders at General Staff and contingent level.²²⁶

The other is the letter also dated 23 October 1978, addressed by the UN Secretary-General to the permanent representatives of troop contributing countries to the UN Interim Force in Lebanon (UNIFIL). This letter points out that in situations where

²²³ Articles 27-28 of the Fourth Convention Relating to Occupation; articles 49, 50, 129, 146 of the Fourth Convention, relating to the repression of grave breaches.

²²⁴ *Op cit* 221 at 230.

²²⁵ *Op cit* 221 at 199.

²²⁶ This memorandum specifies that, in cases where the forces have to use their weapons in accordance with their mandate, the principles and spirit of the rules of IHL should apply, as laid down in the Geneva Conventions of 1949, the Additional Protocols of 1977 and elsewhere.

members of such forces have to use their weapons in self-defence, in conformity with guideline D, the principles and spirit of IHL as contained, *inter alia*, in the Geneva Conventions and the Protocols of 8 June 1977, shall apply. To this end, troop contributing countries must ensure that their troops fully understand the principles of IHL and the measures to be taken to ensure their observance. The UN, for its part, undertakes, through the chain of command, the tasks of supervising the effective compliance with the principles of humanitarian law by members of its peacekeeping forces.²²⁷

In short, the position of the UN with regard to the applicability of IHL to the peacekeeping forces is not entirely adequate. Admittedly, there have been some declarations in the past, but these were selective and contained no more than a commitment to respect the principles and spirit of IHL. The UN could therefore also examine the most appropriate means of ensuring the application of the most relevant rules of IHL to its forces, including those relative to the methods and means of warfare, to different categories of protected persons, to respect for the distinctive emblems (in this case, the Red Cross and the Red Crescent), and to medical personnel and transports.²²⁸

Finally, it should be noted that although the soldiers within the UN forces are bound by the commitments made by their states of origin, the UN has always insisted on the fact that during the exercise of their mandate these troops are under the sole authority of the organisation and that of their respective countries.²²⁹ It would also be of high importance to ensure that dissemination activities are carried out in the host country, by delegates working on the spot or by ICRC specialists in dissemination to

²²⁷ *Op cit* 221 at 231.

²²⁸ *Op cit* 221 at 231.

²²⁹ *Op cit* 221 at 230.

the armed forces. Here, as on other occasions, it could be stressed that the application of and respect for IHL are in the interest of the members of the peacekeeping forces themselves, for in certain situations they could find themselves caught up in an armed conflict or even be incarcerated by one of the parties to the conflict. It would then be easier for them to have recourse to the whole system of protection and responsibilities provided for in the IHL treaties.²³⁰

3.3 International Human Rights Law

3.3.1 Introduction

IHRL is a system of international norms designed to protect and promote human rights of all persons. These rights, which are intrinsic in all human beings, whatever their nationality, place of residence, sex, nationality or ethnic origin, colour, religion, language, or any other status, are interrelated, interdependent and indivisible. They are often expressed and guaranteed by law, in the form of treaties, customary international law, general principles and soft law. Human rights entail both rights and obligations. IHRL lays down the responsibilities of the state to act in a certain way or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.²³¹

Protection of human rights of an individual against her or his own government is a post-World War II development. The League of Nations period saw three important developments in the international protection of human rights: the mandates system established in 1919 as a sacred trust of civilisation to promote the welfare of people not yet able to stand on their own under the vigorous conditions of the modern world; the International Labour Organisation (ILO), created in 1919 to improve the working

²³⁰ *Op cit* 221 at 232.

²³¹ *Op cit* 55 at 5.

conditions of employees; and the minority treaties, designed to safeguard the rights of ethnic, religious, and linguistic minorities in the Balkans and Eastern Europe.²³²

Despite these characteristics of international law aimed at promoting the welfare of individuals, minorities, and undeveloped peoples, until 1945, international law was largely concerned with states at that stage, the only subjects of international law, and also with relations between states. The prevention on intervention in the domestic affairs of states, enshrined in the Covenant of the League of Nations, was respected as a guiding principle. It was this principle which ensured that states failed to intervene in Germany before 1939 despite being aware of the massacres committed by the Nazis against their own nationals.²³³

The large scale of massacres committed by the Nazi regime intensely changed the nature of international law. This experience compelled political leaders to accept the need for a new world order in which the state was no longer free to treat its own nationals as it pleased. This new order was proclaimed by the UN Charter, which recognised the promotion of human rights as a principal goal of the new world organisation, and by the London Charter of 1945, which made provision for the trial of the major Nazi war leaders.²³⁴

The commitment of the UN to human rights was made clear in the Preamble to the Charter which reaffirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. Ironically, the Preamble was in large measure drafted by South Africa's Prime Minister, General Smuts, who, as President of the Commission on the General Assembly, played a prominent role

²³² Shaw *International Law* 271.

²³³ *Op cit* 191 at 321.

²³⁴ *Op cit* 191 at 321.

in the formation of the UN. The Charter itself contains a number of references to human rights. Article 1 includes among others the purposes of the UN the promotion and encouragement of human rights, while article 13 obliges the General Assembly to commence studies and make recommendations for promoting human rights. Of paramount importance are articles 55 and 56. Article 55 obliges the UN to promote universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, and in article 56 all members pledge themselves to joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in article 55.²³⁵

In 1946, the UN ECOSOC established a Commission on Human Rights, whose first task was to draft an International Bill of Rights, comprising a declaration and a multilateral treaty. The first step was to draft the Universal Declaration on Human Rights (UDHR), which was later approved by the General Assembly on 10 December 1948, by forty-eight votes in favour, none against and eight abstentions.²³⁶

3.3.2 IHRL and UN Peacekeeping Missions

IHRL is a fundamental part of the normative framework for UN peacekeeping operations. The UDHR, which sets the cornerstone of international human rights standards, emphasises that human rights and fundamental freedoms are universal and guaranteed to everybody. UN peacekeeping operations should be carried out in full respect of human rights and should seek to advance human rights throughout their mandates and responsibilities.²³⁷

²³⁵ *Op cit* 1 at articles 55 and 56.

²³⁶ *Op cit* 191 at 325.

²³⁷ *Op cit* 6 at 14.

From the outset, it must be borne in mind that the personnel of an international organisation are independent of their respective governments, as well as any other member state of the organisation. The concept of 'international personnel' is rather wide, as it includes not only international officials *stricto sensu*, but also, for example, members of national armed forces placed at the disposal of the organisation by states, as well as consultants and experts in those missions. Such personnel are recruited by the organisation and exercise their duties in the name of the organisation. Their status is thus regulated by the organisation's 'internal law', which guarantees their independence from other government's influence. If the organisation conducts an operation, its internal law will generally apply to implementation actions. This is a consequence of the internationally established principle of autonomy.²³⁸

The main question concerning the applicability of customary international human rights law to the UN has arisen because of UN involvement in peacekeeping operations. UN peacekeeping personnel, whether military, police or civilian, should act in accordance with IHRL and understand how the implementation of their tasks intersects with human rights. Peacekeeping personnel should strive to ensure that they do not become perpetrators of human rights abuses. They must be able to protect and recognise human rights. They must be able to recognise human rights violations or abuse, and be prepared to respond appropriately within the parameters of their mandate and their capability. UN peacekeeping personnel should respect human rights in their dealings with colleagues and with local people, both in their

²³⁸ *Op cit* 191 at 44.

public and in their private lives. Where they commit abuses, they should be held answerable.²³⁹

The UN systematically includes human rights components in its peace missions established by the Security Council. These components, central to the mission but reporting also to Office of the High Commissioner for Human Rights (OHCHR), are required to respond to concerns of both IHRL and IHL. For example, MONUC was mandated to:

assist the government in the promotion and protection of human rights, investigate human rights violations and cooperate with efforts to ensure that those responsible for serious violations of human rights and IHL are brought to justice.²⁴⁰

The human rights component of the UN Mission in Sudan (UNMIS) was established

to ensure an adequate human rights presence, capacity, and expertise within UNMIS to carry out human rights promotion, civilian protection, and monitoring activities.²⁴¹

UNMIS and OHCHR regularly circulate reports on their monitoring and investigations of respect for international human rights and humanitarian law, particularly in the region of Darfur. For example, in 2008, they recommended that the Government of Sudan should

carry out an impartial, transparent, and timely investigation into the attacks on villages and towns in the northern corridor and bring to justice those who were involved in serious human rights violations or crimes under international law.²⁴²

Human rights components with similar mandates have been established in the UN Assistance Mission in Afghanistan (UNAMA) and for Iraq, the UN Assistance Mission for Iraq (UNAMI) with their respective reports referring to both IHRL and IHL.²⁴³ In its

²³⁹ *Op cit* 6 at 15.

²⁴⁰ Security Council Resolution 1565 of 1 October 2004.

²⁴¹ Security Council Resolution 1590 of 24 March 2005 para 4(a)(ix) extended by Resolution 1706 of 31 August 2006.

²⁴² Ninth Periodic Report.

²⁴³ UNAMI 2007 www.ohchr.org/Documents/Countries/jan-to-march2007_engl.pdf.



2008 Annual Report on the Protection of Civilians in Armed Conflict, UNAMA recalled that, once an insurgent is *hors de combat*, international human rights standards to which the state is party or which form part of customary international law are applicable. Members of the pro-Government military forces are also accountable for violations of IHL and international human rights norms.²⁴⁴ In 2007, UNAMI stated that:

armed groups from all sides continued to target the civilian population. In doing so, these groups frequently violated the sanctity of places of religious worship, such as mosques to store weapons and ammunition, occupied civilian buildings such as schools, and disregarded the protected status of health facilities and health professionals in violation of IHL and IHRL.²⁴⁵

Legal writers²⁴⁶ have applied the case law of the ICJ, especially the *Reparations*,²⁴⁷ *Interpretation of the agreement between the World Health Organisation and Egypt*²⁴⁸ and *the Legality of the Nuclear Weapons*²⁴⁹ cases to human rights norms, in order to conclude that the UN is bound by general international law rules in this area. Arguments have been based specifically on the 'internal law' of the organisation. In particular, it has been argued that the UN must respect such norms simply because the promotion of human rights is included in the Charter. Article 1(3) specifies, among the purposes of the organisation, the promotion and encouragement of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. It may be protested that this is a pure programme provision, since its aim is simply to achieve international cooperation in solving social

²⁴⁴ Anon 2009
http://www.unama.unmissions.org/Portals/UNAMA/human%20rights/UNAMA_09february-Annual%20Report_PoC%202008_FINAL_11Feb09.pdf.

²⁴⁵ Human Rights Report 1 January to 31 March 2007.

²⁴⁶ See the works of Anisi Bedjaoui *Commentary on Article 1 of the UN Charter* 1985 26 and Megret F and Hoffmann F *The UN as Human Rights Violator: Some Reflection on the UN Changing Human Rights Responsibilities* Human Rights Quarterly Vol 25 2003 319.

²⁴⁷ *Op cit* 192 at 177.

²⁴⁸ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion 20 December 1980 Reports 89.

²⁴⁹ *Legality of the Use of Nuclear Weapons Advisory Opinion* 08 July 1996 Reports 226.

and economic problems as well as the promotion and encouragement of certain human rights and procedures for their protection.²⁵⁰

Article 55(c) of the Charter, which requires the UN to promote:

universal respect for, and observance of, human rights and fundamental freedoms,

is also quite generic, as it does nothing to specify the substance of this commitment. The verb to promote is not particularly compelling, as much as other verbs used in the Charter to define the organisation's mission with respect to human rights: 'to encourage, or to assist'.²⁵¹ An obligation to promote the respect and realisation of human rights is not similar to an obligation to 'safeguard' or to 'protect'; the latter carried more weight than the former²⁵²

However, the fact that the Charter only requires the UN to oversee respect for human rights by other international subjects, especially states, does nothing to diminish the value and meaning of the norms referred to in Articles 1 and 55. Their inclusion in the Charter was the first recognition of human rights at the international level, despite the abovementioned imperfection and weakness. The responsibility and powers thus conferred on the organisation have allowed human rights to be gradually withdrawn from the state's reserved realm, to become a subject of 'international interest'. According to the logic adopted by the founders of the Charter, the responsibility for respect and implementation of human rights lies exclusively with states.²⁵³

²⁵⁰ Bedjaoui *Commentary on Article 1 of the UN Charter* 1985 26.

²⁵¹ Megret and Hoffman *Human Rights Quarterly* 319.

²⁵² *Op cit* 191 at 47.

²⁵³ *Op cit* 191 at 47.

Finally, UN practice shows that the organisation aims to ensure that its members of staff benefit from fundamental guarantees similar to those set out in domestic human rights protection. This practice obtained strong support from the ICJ in its judgment on the effects of the UN Administrative Tribunal.²⁵⁴ Accordingly, on balance, the most appropriate conclusion appears to be that the organisation has a double responsibility with respect to international human rights. Firstly, the organisation must conduct and promote positive, concrete action in favour of the respect and enjoyment of human rights. Secondly, the organisation itself must protect, implement and safeguard these rights when it exercises public authority, as it is directly bound by international obligations in such cases.²⁵⁵

3.4 Conflation of Applicable Regimes

IHL and IHRL overlap, but as they were not necessarily meant to do so originally, it is necessary to apply them concurrently and to reconcile them. As Bothe writes:

Thus, triggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a greater number of issue related regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus the question arises whether there is conflict and tension or synergy between various regimes.²⁵⁶

It is clear that, in the domain of humanitarian law and human rights law, the principle of effectiveness determines the scope of applicability. IHL applies whenever there is

²⁵⁴ ICJ *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, Advisory Opinion, 13 July 1954 Reports 57. The Court held that the General Assembly has not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the UN in favour of a staff member of the UN whose contract of service has been terminated without his assent. Since the organisation becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member, it follows that the General Assembly, as an organ of the UN, must likewise be bound. This conclusion is confirmed by the provisions of the Statute of the Tribunal itself, which makes it clear that payment of compensation awarded by the Tribunal is an obligation of the UN as a whole or, as the case may be, of the specialised agency concerned.

²⁵⁵ *Op cit* 191 at 47.

²⁵⁶ Bothe *The Historical Evolution* 37.

armed conflict and human rights rules apply whenever there is effective exercise of public authority, regardless of the exact legal basis for these situations.²⁵⁷

IHL and IHRL have different sources and rules but they are both premised on respect for human dignity and therefore are separate parts of a single order committed to respect for human rights in armed conflicts.²⁵⁸ This is confirmed by the jurisprudence of the *ad hoc* criminal tribunals for the former Yugoslavia²⁵⁹ and Rwanda,²⁶⁰ the ICC²⁶¹ and the ICJ. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,²⁶² the ICJ rejected Israel's argument that humanitarian law as *lex specialis* alone was applicable to its administration of the occupied Palestinian territory. Instead, it held that Israel's conduct in the occupied Palestinian territory was to be judged in accordance with norms of both humanitarian and human rights law.²⁶³

IHL was principally based on the mutual expectations of two parties at war and notions of chivalrous and civilians behaviour. It did not emanate from a struggle of rights claimants, but from a principle of charity, *inter arma caritas*. The primary

²⁵⁷ *Op cit* 191 at 43.

²⁵⁸ Prevost *International Human Rights and Humanitarian Law* 2002.

²⁵⁹ Furundzija IT-95-17/1-T10 (Trial Chamber of ICTY, Judgment, 10 December 1998) 121 ILR 213, 260; (1998) 38 ILM 317. Anto Furundzija was found guilty by the Trial Chamber on the counts of torture, and outrages upon personal dignity as violations of the laws or customs of war.

²⁶⁰ In the case of *Prosecutor v Akayesu* para 616, the list of serious violations which is provided in article 4 of the Statute is taken from Common Article 3, which contains fundamental prohibitions as a humanitarian minimum of protection for war victims, and article 4 of Additional Protocol II, which equally outlines fundamental guarantees. The list in article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognised as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.

²⁶¹ In the case of *Prosecutor v Lubanga* No ICC-01/04-01/06-8, Thomas Lubanga was convicted for his role in organizing the practice in Eastern Congo. He might well have been charged not only with the war crime of recruitment but also the crime against humanity of persecution, and certainly with the crime against humanity of other inhumane acts.

²⁶² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports, paras 102-13.

²⁶³ *Ibid* at 532.

motivation was a principle of humanity, not a principle of rights, and its legal development was made possible by the idea of exchange between states in the treatment of other states troops.²⁶⁴ Considerations of military strategy and reciprocity have traditionally been central to its development. Moreover, while human rights were internal affairs of states, humanitarian law, by its very nature, took its roots in the relation between states, in international law.²⁶⁵

After WWII, protection of civilians in the Fourth Geneva Convention, *albeit* for a large part only those of the adverse or third parties, added a dimension to humanitarian law that drew it much closer to the idea of human rights law, especially with regard to civilians in detention. In addition, the revolutionary codification of Common Article 3 to the Geneva Conventions for situations of non-international armed conflict brought humanitarian law closer to human rights law, because it concerned the treatment of a state's own nationals. The drafting histories of the two branches appear to show that the process of expansion of the UDHR and the Geneva Conventions were not mutually inspired.²⁶⁶

The UDHR completely avoids the question of respect for human rights in armed conflicts, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions.²⁶⁷ During the drafting of the UDHR, the question of the impact of war on human rights was touched on only in exceptional cases. Paragraph two of the Preamble describes respect for human rights as a condition for the maintenance of peace.²⁶⁸ This is *jus contra bellum*. There was a

²⁶⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field August 12 1949.

²⁶⁵ Droege *The Interplay between IHL and IHRL* 313.

²⁶⁶ *Ibid.*

²⁶⁷ Schindler *International Review of the Red Cross* 7.

²⁶⁸ Report of the Drafting Committee to the Commission on Human Rights, suggestions submitted by the representative of France (R Cassin) doc E.CN 4/21 48; 68.

shift towards *jus in bello* when a few delegates indicated in passing, in a secondary way, that the rights envisaged by the Declaration assumes a state of peace. In the long debates in the Third Committee of the UN, for example, Jimenez de Arechaga expressed the view that human rights have to

govern, in times of peace, an international community based on the principles of the UN.²⁶⁹

A similar comment was made by Campos Ortiz, the Mexican delegate, in the plenary meetings of the Third Session of the UN General Assembly, when he used the expression 'in a peaceful world'.²⁷⁰ Only the delegate of Lebanon, Mr Azkoul, explicitly went further speaking on article 26 of the Draft, he said that fundamental human rights, as set out in the Declaration, should also be guaranteed in time of war.²⁷¹

At the end of the conference, it was proposed that a reference to 'universal human law' be included in the preamble. The borrowing from the 1948 Declaration is particularly evident here. Several delegates also emphasised that the Fourth Convention, on the protection of civilians, should be taken together with the UDHR, and that the establishment of such a link in the preamble would be welcome. The Australian delegate, Hodgson, said it would be sufficient to refer to the preamble of the Declaration, without drafting a new one for the Convention on Prisoners of War (POW). He made similar comments regarding the preamble for the Convention on civilians, adding dryly that the conference was not called upon to re-write the 1948 Declaration.²⁷²

²⁶⁹ UN Doc A/C 3/SR.116 268.

²⁷⁰ 'In a peaceful world, it was essential to ensure respect for human rights'. UN General Assembly, Plenary sessions, Third session 181st meeting 886.

²⁷¹ UN Doc A/C 3/SR.152 639.

²⁷² Kolb *International Review of the Red Cross* 324 3.

After that, at the UN, states slowly acknowledged that human rights were relevant in armed conflict. In 1953 already, the General Assembly invoked human rights in the context of the Korean conflict.²⁷³ After the attack of Hungary by Soviet troops in 1956, the Security Council called upon the Soviet Union and the authorities of Hungary to respect the Hungarian people's enjoyment of fundamental human rights and freedoms.²⁷⁴ The situation in the Middle East triggered the will to discuss human rights in situations of armed conflict. Later, in 1967, the UN Security Council considered that essential and inalienable human rights should be respected even during the vicissitudes of war, after the six day war when Israel occupied some territories²⁷⁵

A year later, the Tehran International Conference on Human Rights marked the definite step by which the UN accepted the application of human rights in armed conflict. The first Resolution of the International Conference, entitled Respect and Enforcement of Human Rights in the Occupied Territories, called on Israel to apply both the UDHR and the Geneva Conventions in the occupied Palestinian territories.²⁷⁶ This was then followed by the Resolution entitled Respect for Human Rights in Armed Conflict which affirmed that even during the periods of armed conflicts, humanitarian principles must prevail. It was reaffirmed by the General Assembly Resolution 2444 of 19 December 1968 with the same title. That Resolution requested the Secretary-General to draft a report on measures to be adopted for the protection of all individuals in times of armed conflict. The two reports of the Secretary-General concluded that human rights instruments, particularly the

²⁷³ GA Res 804 (VIII) UN Doc A804/VIII of 3 December 1953.

²⁷⁴ GA Res 1312 (XIII) UN Doc A38/49 of 12 December 1958.

²⁷⁵ GA Res 237 UN Doc A237 of 14 June 1967.

²⁷⁶ Final Act of the International Conference on Human Rights UN Doc A/Conf 32/41 of 22 April -13 May 1968.

International Covenant on Civil and Political Rights (ICCPR), which had not even entered into force at that time, afforded a more comprehensive protection to persons in times of armed conflict than the Geneva Conventions only.²⁷⁷ The Secretary-General even mentioned the state reporting system under the Covenant which he thought might be valuable during periods of armed conflict, already anticipating the future practice of the Human Rights Committee.²⁷⁸

Pursuant to the two reports of the Secretary-General, the UN General Assembly affirmed in its Resolution on Basic Principles for the Protection of Civilian Populations in Armed Conflict, that

fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.²⁷⁹

It was around this period that one observer wrote:

The two bodies of law have met, are fusing together at some speed and ...in a number of practical instances the regime of human rights is setting the general direction and objectives for the revision of the law of war.²⁸⁰

In 1968, there was an International Conference on Human Rights, which saw the adoption of Resolution XXIII.²⁸¹ The Conference considered that peace is the underlying condition for the full observance of human rights and war is their negation, and it believed that the purpose of the UN is to prevent all conflicts and to institute an effective system for the peaceful settlement of disputes. The Conference requested the General Assembly to invite the Secretary-General to determine the

²⁷⁷ Report on Respect for Human Rights in Armed Conflict UN Doc A/7729 of 20 November 1996.

²⁷⁸ *Op cit* 265 at 315.

²⁷⁹ GA Resolution 2675 (XXV) Principles for the Protection of Civilian Populations in Armed Conflict UN Doc A/8028 Basic of 9 December 1970.

²⁸⁰ Draper *The Relationship between the Human Rights Regime and the Laws of Armed Conflict* 1 Israel Yearbook on Human Rights 1971 191.

²⁸¹ Human rights in Armed Conflicts. Resolution XXIII adopted by the International Conference on Human Rights, Teheran 12 May 1968.

need for additional international humanitarian conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts, the prohibition and limitation of the use of certain methods and means of warfare.²⁸²

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law from 1974 to 1977 was a reaction to the UN process. The ICRC, in particular, could now relaunch the process of development of IHL for better protection of civilians not only in international, but also in non-international armed conflict. The Diplomatic Conference and the two Additional Protocols of 1977 owed an undeniable debt to human rights, in particular by making some rights which are derogable under human rights law non-derogable as humanitarian law guarantees. Both Additional Protocols acknowledge the application of human rights in armed conflict. While the ICRC did not follow this route in the early stages of the discussion, it later accepted that human rights continue to apply simultaneously with IHL in times of armed conflict.²⁸³ Since then, the application of human rights in armed conflict is recognised in international law, even if the detail of their interaction remains a matter of discussion.²⁸⁴

Quite naturally, Common Article 3 to the Four Geneva Conventions also gave rise to references to human rights. The Special Committee nominated by Committee II of the Conference had proposed, for the Convention on POW, a third paragraph containing a kind of Marten's clause. It was agreed in the Special Committee that, even when a person did not benefit under the provisions of the Convention, that person would nevertheless remain safeguarded by the principles of the rights of man

²⁸² Resolution XXIII of 12 May 1968.

²⁸³ Sandoz *et al* *Commentary on the Additional Protocols* 1987 para 4429.

²⁸⁴ *Op cit* 265 at 316.

as derived from the rules established among civilised nations. In the view of the Danish delegate, Cohn, article 3 should not be interpreted in such a way as to deny individuals of any rights they may have acquired from other sources, in particular human rights.²⁸⁵

At the time of the adoption of the Geneva Conventions and the UDHR, sometimes literature that relates to the law of war referred to human rights. However, it never failed to stress the continuing cleavage between the two branches, although the similarity of their aims gives the impression of being closely related. Such is the case for the rules contained in the Fourth Convention Relative to the Protection of Civilian Persons in Time of War. Commentaries, including the most recent, place these rules close to human rights because they are concerned with the protection of individuals who do not have any military status. This also applies to Article 3 Common to the Four Conventions, which lays down certain standards of treatment in non-international armed conflicts; these rules resemble human rights guarantees.²⁸⁶ In 1949, a British author considered that Article 3 Common to the Four Conventions should be understood as imposing “such obligations as will ensure, even in internal conflicts, the observance of certain fundamental human rights”. He concluded by stating that the entire Fourth Convention is at par with the fundamental human rights proclaimed by the UDHR.²⁸⁷

After determining that human rights are applicable to all situations of armed conflict, how can their relationship with IHL be described? The simultaneous application of both bodies of law has the potential to offer greater protection to the individual but many problems may arise. With an increase in specialised branches of international

²⁸⁵ *Op cit* 265 at 3.

²⁸⁶ Quentin-Baxter *Australian Yearbook of International Law* 101.

²⁸⁷ Gutteridge *British Yearbook of International Law* 325.

law, different regimes overlap, complement, or contradict each other. Human rights and humanitarian law are but one example of this phenomenon.²⁸⁸

The ICJ has found three situations relevant to the relationship between humanitarian and human rights law:

some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.²⁸⁹

The Court confirmed the applicability of international human rights law to situations of military occupation.²⁹⁰ After a year, the Court delivered a binding judgment in the case of *DRC v Uganda*,²⁹¹ where it applied international human rights law to an occupation citing the findings from its 2004 Wall Advisory Opinion.

The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.²⁹²

Other international courts have applied the human rights treaties over which they have jurisdiction to situations of armed conflict. The European Court of Human Rights has applied the European Convention on Human Rights to the conflict in the Russian Federation²⁹³ and to Turkish occupation of Northern Cyprus.²⁹⁴ The Inter-

²⁸⁸ *Op cit* 256 at 37.

²⁸⁹ *Op cit* 262 at para 106.

²⁹⁰ *Op cit* 262 at para 106-113.

²⁹¹ *Armed Activities on the Territory of the DRC v Uganda* ICJ Reports 19 December 2005.

²⁹² *Ibid* at para 216.

²⁹³ *Isayeva, Yusupova and Bazayeva v Russia* Application No 57947/00; 57948/00; 57949/00 24 February 2005.

²⁹⁴ *Cyprus v Turkey* Application No 25781/94 10 May 2001.

American Court on Human Rights has also applied international human rights law in a conflict situation

The Court considers that it has been proved that, at the time of the facts of this case, an internal conflict was taking place in Guatemala. As has previously been stated, instead of exonerating the state from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations.²⁹⁵



Indeed, rights that are exclusively matters of humanitarian law, for instance, are those of POW. The Geneva Convention III and Protocol I are both brimming with detailed provisions for the protection of prisoners of war in international conflicts. Article 4 of Convention III defines categories of persons entitled to prisoner of war status and describes the treatment that must be afforded prisoners of war. The basic principle holds that persons recognised as 'combatants' under the 1949 Conventions and the 1977 Additional Protocol are entitled to be treated as prisoners of war upon arrest by an adverse party in armed conflict. The text provides that 'prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - a) That of being commanded by a person responsible for his subordinates;
 - b) That of having a fixed distinctive sign recognizable at a distance;

²⁹⁵ Inter-American Court of Human Rights *Bamaca Velasquez v Guatemala* Judgment 25 November 2000 para 207.

- c) That of carrying arms openly;
- d) That of conducting their operation in accordance with the laws and customs of war.²⁹⁶

Under Article 5 of Convention III, where there is even a speck of doubt whether persons having committed a belligerent act and having fallen into the hands of the enemy fall within any of the categories enumerated in article 4, such persons are treated as *prima facie* entitled to the status of prisoner of war until such time as the question of status has been resolved by a competent tribunal.

Some of the provisions that relate to POWs and IHL only, are the following. Article 13 of the Convention III sets out the basic standard of treatment. It states that prisoners of war must at all times be humanely treated. In particular, prisoners of war must not be unlawfully killed or endangered physically mutilated or subjected to medical or scientific experiment not justified by the medical needs of the individual concerned. Article 13 expressly prohibits reprisals against prisoners of war, and requires that they be protected from violence, intimidation, insults and public curiosity. Article 15 requires that prisoners receive free maintenance and the medical attention that their state of health requires.²⁹⁷

Human rights are such rights as freedom of expression or the right to assembly. Rights that are matters of both bodies of law are such rights as freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to life, a number of economic and social rights, and rights of persons deprived of liberty.²⁹⁸

²⁹⁶ Article 4 of Geneva Convention III.

²⁹⁷ Manooher and Eckert *Cornell International Law Journal* 66.

²⁹⁸ *Op cit* 265 at 336.

It is common knowledge that human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing. This approach is meant to affirm the possibility of simultaneous application of both bodies of law. The concept of complementarity is a policy rather than a legal nature. To form a legal framework in which the interplay between human rights and humanitarian law can be applied, legal methods of interpretation can provide some helpful tools. This leads to two main concepts: the concept of complementarity in its legal understanding in conformity with the Vienna Convention on the Law of Treaties and the concept of *lex specialis*.²⁹⁹

IHL and IHRL complement one another. While both aim to protect individuals, they do so in different situations and in different ways. IHL is concerned with situations of armed conflict. However, the focus of IHRL is to ensure that organs of state do not violate the rights of individuals in peacetime. Even in times of armed conflict; however, some human rights must be respected under all circumstances, while others may be suspended by the state. It should also be noted that IHRL does not consist of norms designed to limit the means and methods of warfare, which is one of the key objectives of IHL.³⁰⁰

Conversely, human rights law covers several realms which are not covered by humanitarian law (for example, the political rights of individual persons). Despite their overlapping, human rights law and humanitarian law remain distinct branches of public international law.³⁰¹

²⁹⁹ *Op cit* 265 at 337.

³⁰⁰ *Op cit* 182 at 14.

³⁰¹ Gasser Date Unknown <http://www.humanitarianlaw.htm>.

Complementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values, they can influence and reinforce each other mutually. In this sense, complementarity reflects a method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties which allows, in interpreting a norm, to take into account relevant rules of international law applicable in relations between the parties. This principle, in a sense, enshrines the idea of international law understood as a coherent system.³⁰² It sees international law as a regime in which different sets of rules cohabit in harmony. Thus, human rights can be interpreted in the light of IHL and *vice versa*.³⁰³

Normally, the relationship between human rights law and humanitarian law is described as a relationship between general and specialised law, in which humanitarian law is the *lex specialis*. The principle of *lex specialis* is an accepted principle of interpretation in international law. It stems from a Roman principle of interpretation, according to which in situations especially regulated by a rule, this rule would move the more general rule (*lex specialis derogat leges generalis*). One can find the *lex specialis* principle in the works of early writers such as Vattel or Grotius.³⁰⁴ Grotius writes:

What rules ought to be observed in such cases (i.e., where parts of a document are in conflict). Among agreements which are equal...that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general.³⁰⁵

As the highest international judicial tribunal, the ICJ has used the principle of *lex specialis* to describe the relationship between the right to life in human rights and in

³⁰² McLachlan The Principle of systemic integration and article 31(3)(c) of the Vienna Convention 54 ICLQ 2005 279-320.

³⁰³ *Op cit* 265 at 521-522.

³⁰⁴ *Op cit* 265 at 522.

³⁰⁵ Grotius *De Jure Belli Ac Pacis* section XXIX.

international humanitarian law in its first two decisions on the matter, the advisory opinions on the *Nuclear Weapons* and on the *Wall* case. Among international human rights bodies, the Inter-American Commission has followed the jurisprudence of the ICJ³⁰⁶ but other human rights bodies have not. The African Commission on Human and Peoples Rights and the European Court of Human Rights have not yet expressed a position on the matter. The Human Rights Committee has also pronounced itself on the relationship, but clearly avoided the use of the *lex specialis* formulation and instead found that both spheres of law are complementary, not mutually exclusive.³⁰⁷ The ICJ itself has not repeated the passages on *lex specialis* in its judgment on *Congo v Uganda*, which asks a question whether to maintain the *lex specialis* approach.³⁰⁸

Of note is that the court in *Nuclear Weapons* case, did not really examine the relationship between IHL and IHRL as regimes. It studied the relationship between one particular IHRL norm, the right to life and that the right to life as it is formulated in article 6 of the *ICCPR* and the relevant rules of IHL. It was these specific rules that were held to be *lex specialis*, in that, in times of armed conflict, they could help interpret the 'arbitrary' part of article 6 of the *ICCPR*. Though the court decision was thus framed in terms of one particular problem and one particular set of norms, it nonetheless understandably incited an academic extrapolation to the relationship between IHL and IHRL as a whole. The *Nuclear Weapons* opinion was thus understood as saying that IHL defines what IHRL means in wartime, IHRL

³⁰⁶ *Coard v The United States of America Case* 10.951 Inter-American Commission HR, OEA/serL/V/II 106doc.3rev 1999 para 42.

³⁰⁷ General Comment No 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant 10 UN Doc CCPR/C/74/CRP4/Rev 6 2004.

³⁰⁸ *Op cit* 291 at para 216.

guaranteeing no less but also no more rights to individuals affected by armed conflict than IHL.³⁰⁹

The ICJ in the *Wall* case also stated that

More generally, the court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the *ICCPR*. As regards the relationship between IHL and the IHRL, there are thus three possible situations, some rights may be exclusively matters of IHL, others may be matters of IHRL, yet others may be matters of both these branches of international law. In order to answer the question put to it, the court will have to take into consideration both these branches of international law, namely human rights law and as *lex specialis*, IHL.³¹⁰

As opposed to *Nuclear Weapons*, the court here does refer to IHL as *lex specialis* to IHRL, that is, it considers not only some particular norms, but also one regime to be special to the other. To say therefore that the two spheres of law are complementary, not mutually exclusive may be perfectly true, but it is equally unhelpful in providing practical solutions to actual cases. The complementarity claim is only an answer to the equally broad counter claim, that the two regimes are mutually exclusive. To the extent that the latter was for many years the default position, and admittedly, it was so, as a matter of actual practice, the complementarity claim does have a purpose. However, beyond that, it does not solve anything.³¹¹

For years, it was held that the difference between IHRL and IHL was that the former applied in times of peace and the latter in situations of armed conflict. Modern international law, however, recognises that this distinction is incorrect. Indeed, it is widely recognised nowadays by the international community that since human rights obligations derive from the recognition of inherent rights of all human beings and that these rights could be affected both in times of peace and in times of war, IHRL

³⁰⁹ *Op cit* 249 at para 25.

³¹⁰ *Op cit* 262 at para 106.

³¹¹ *Op cit* 262 at para 107.

continues to apply in situations of armed conflict. Moreover, nothing in human rights treaties indicates that they would not be applicable in times of armed conflict. As a result, the two bodies of law are considered complementary sources of obligations in situations of armed conflict.

For example, the Human Rights Committee, in its General Comments Nos 29 (2001) and 31 (2004), recalled that the *ICCPR* applied also in situations of armed conflict to which the rules of IHL were applicable.³¹² The Human Rights Council, in its Resolution 9/9, further acknowledged that human rights law and IHL were complementary and mutually reinforcing. The Council considered that all human rights required protection equally and that the protection provided by human rights law continued in armed conflict, taking into account when IHL applied as *lex specialis*.³¹³ The Council also echoed that effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation, and that effective protection against violations of their human rights should be provided, in accordance with IHRL and applicable IHL.³¹⁴

3.5 Summary

This chapter has shown that IHL and IHRL are customarily two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Yet, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law overlap substantially in practice. The most frequent examples are situations of

³¹² See General Comments Nos 29 (2001) on states of emergency (art 4, para 3), and 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para 11.

³¹³ See Chapter 2 of the UN Human Rights documents on the discussion on *lex specialis*.

³¹⁴ *Op cit* 55 at 6.

occupation or non-international armed conflicts where human rights law complements the protection provided by humanitarian law.³¹⁵

IHRL and IHL share the goal of protecting the dignity and humanity of all. Over time, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council has considered that, in armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict. Although different in scope, IHRL and IHL offer a series of protections to persons in armed conflict, whether civilians, persons who are no longer participating directly in hostilities or active participants in the conflict. Indeed, as has been recognised, *inter alia*, by international and regional courts, as well as by UN organs, treaty bodies and human rights special procedures, both bodies of law apply to situations of armed conflict and provide complementary and mutually reinforcing protection.³¹⁶

In general, human rights law enshrines the more general rules, but is broader in its scope of application. It can often benefit from the more narrowly applicable, but often more precise rules of humanitarian law. On the other hand, human rights law has become progressively specific and refined through a vast body of jurisprudence and the details of interpretation can influence the interpretation of humanitarian law, which has less interpretative jurisprudence at its disposal.³¹⁷

One can say that human rights law and humanitarian law have in common that they seek to protect people from abusive behaviour by those in whose power they are, state authorities in the case of human rights law, a party to the conflict in the case of

³¹⁵ *Op cit* 265 at 310.

³¹⁶ *Op cit* 55 at 1.

³¹⁷ *Op cit* 265 at 341.

humanitarian law. Thus, the protection of persons in the power of the authorities constitutes an area of considerable overlap between human rights and humanitarian law, judicial guarantees, treatment of persons, economic and social rights. In these situations, there is a considerable overlap.³¹⁸

The Charter has given the UN a mandate to maintain peace and international security,³¹⁹ while giving a key responsibility of promoting and encouraging respect for human rights and fundamental freedoms for all.³²⁰ Yet the specific *corpus* of norms that establishes a common measure between these two objectives is the law of armed conflict, which contains rules for the protection of the human person that are specially adapted to wartime. There would thus be a violation of the equilibrium intended by the Charter if international peace and security were maintained without also recognising that the forces carrying out this mission are subject to the law of armed conflicts.³²¹

Based on the above extrapolation, it is very apparent that UN peacekeeping missions or operations must uphold the basic principles of IHL and IHRL in their daily activities. There is no other organisation which is better positioned to uphold, promote and protect IHL and IHRL than the UN through its structures. It therefore means that UN peacekeeping operations must be central players in the implementation of the rules of IHL and IHRL.³²²

The next chapter shall detail how the mission and vision of UN peacekeeping forces have been eroded by the incidents of gross violations of IHL and IHRL. The chapter will outline reported and unreported incidents or cases where UN peacekeeping

³¹⁸ *Op cit* 265 at 341.

³¹⁹ *Op cit* 1 at article 1(1).

³²⁰ *Op cit* 1 at article 1(3).

³²¹ *Op cit* 191 at 20.

³²² Own emphasis.

personnel have abused human rights of civilians in various states, over the years, simply taking advantage of the most vulnerable, those who need protection from them.

The chapter will also show the reaction of the UN Security Council towards those atrocities, and the reactions of the international community at large. The chapter will not touch on the accountability of these UN Peacekeepers or their sending state, but only on the heinous incidents themselves.

CHAPTER FOUR: INCIDENTS OF VIOLATIONS OF IHL AND IHRL BY PEACEKEEPERS

4.1 Introduction

At the end of November 2001, allegations of peacekeepers and aid workers engaged in sexual abuse and exploitation appeared and grabbed the world's attention. These claims were made in a report by two consultants, one a UNHCR consultant and another an independent consultant, who had been commissioned by the UN High Commission for Refugees (UNHCR) and Save the Children-UK (SC-UK) to study the question of sexual exploitation and violence in the refugee communities in Guinea, Liberia, and Sierra Leone.³²³

Kofi Annan, the then Secretary-General of the UN observed,

Sexual exploitation and abuse by humanitarian staff cannot be tolerated. It violated everything the UN stands for. Men, women and children displaced by conflict or other disasters are among the most vulnerable people on earth. They look to the UN and its humanitarian partners for shelter and protection.³²⁴

The UN Secretary-General at the time again had lashed out:

I am afraid there is clear evidence that acts of gross misconduct have taken place. This is a shameful thing for the UN to have to say, and I am absolutely outraged by it.³²⁵

After those first official reports, a series of investigations and reports were made by both NGOs and the UN.³²⁶ The UN Department of Peacekeeping Operations went to the extent of promulgating guidelines to alleviate the imminent problem, but that did not assist.³²⁷ Despite promulgating a series of guidelines for UN peacekeeping during their operations or missions, these men and women have over the years

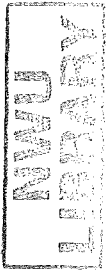
³²³ Ndulo *Berkeley Journal of International Law* 141.

³²⁴ UN Doc A/57/465 11 October 2002.

³²⁵ UN Secretary General *Sexual Abuse in Peacekeeping Report* Press Release 24 March 2005 <http://www.un.org/News>.

³²⁶ Detailed discussions are found in sections 4.2-4.8 of this Chapter.

³²⁷ *Op cit* 13 and UN Staff Regulations and Staff Rules ST/SGB/2009/6 27 May 2009.



continued to abuse their powers, thereby committing serious acts of gross misconduct, violating human rights of the most vulnerable, defeating the purpose and mission of peacekeeping. Over the years, the UN personnel have never stepped back from committing acts of sexual misconduct; allegations of sexual exploitation and abuse within UN peacekeeping missions continued to appear.³²⁸

As years went by, there have been numerous reports on how UN peacekeeping officials have violated IHL and IHRL during peacekeeping operations. This chapter outlines various reported incidents of violations of IHL and IHRL by UN peacekeepers in various missions. The first official report was released in 1992,³²⁹ but that does not mean that before 1992 there were no incidents of such violations. Possibilities are, those incidents were never reported officially, no investigations took place, and there was no international pressure to investigate and report those incidents. They were probably simply shoved under the carpet. Given that, this chapter deals with those reports that came after 1992.

This chapter examines selected cases as it is not the objective of this study to cover all incidents of sexual abuse involving peacekeepers in the entire world. The chapter thus focuses mainly on selected case studies in Africa. The issue of sexual exploitation and abuse by UN personnel became the focus of public attention in 2002 because of widely reported instances of such behaviour by humanitarian workers in West Africa.³³⁰ No country, society or community is spared from such abuses. The foundations of sexual exploitation and abuse are embedded in unequal power relationships. It represents a multifaceted problem requiring responses from a broad

³²⁸ *Op cit* 21 at 85.

³²⁹ Prince Zeid Ra'ad Zeid Al-Hussein SC Report 2005 A/59/710.

³³⁰ Miller *Cornell International Law Journal* 78.

range of actors and a shift in the organisational culture and approach of humanitarian agencies.³³¹

The case studies are based on reports from various NGOs, the ICRC, civil society groups and the UN as well as other anecdotal pieces of evidence that support the thrust of this chapter. Again, it is because Africa has been a stage of all social ills, and history has shown that it has experienced the most grievous human rights abuses and manipulations in years, as compared to other continents.³³²

The chapter specifically looks into incidents that took place in the Democratic Republic of Congo, Ivory Coast, Eritrea-Ethiopia, Sudan, Sierra Leone, Somalia and Liberia. The main reason for concentrating in these countries is that there was wide international outcry after those countries reported the incidents. In early 2004, the international media reported on the sexual exploitation and abuse of young Congolese women and girls by UN peacekeepers in the MONUC. The public outcry that followed these reports led to an investigation by the UN Office of Internal Oversight Services (UN-OIOS). The investigation found serious problems of sexual exploitation and sexual abuse in the Mission.³³³ Also in the Ivory Coast, the allegations reached escalating numbers in a short period of time. In August 2007, in Ivory Coast, 800 peacekeepers were suspended from their duties on allegations of engaging in sex with minors.³³⁴

³³¹ Inter-Agency Standing Committee Report of the Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises 1.

³³² Global Rights Annual Report 2011 2.

³³³ *Op cit* 323 at 142.

³³⁴ Parsons 2007 <http://www.alertnet.org/thenews/newsdesk/N20327686.htm>.

The UN has constantly attempted to hide or downplay abuses within its operations, preferring the cloak of secrecy to the harsh light of public scrutiny.³³⁵ As in the Congo case, the leadership of the UN has been extraordinarily slow in publicly acknowledging the scale of the problem in the Sudan or even admitting that criminal activities had taken place. The allegations relating to the Sudan first surfaced in May 2006, but were immediately dismissed at that time, as baseless rumours. It was only after *The Telegraph* report was released that the UN admitted to repatriating four Bangladeshi peacekeeping personnel in connection with the allegations. With regard to the Congo scandal, it took the Secretary-General several months to accept full responsibility after initial reports in *The Independent* published extensive abuse by UN personnel.³³⁶

From the onset, it is important to define key concepts that are going to be largely used in this chapter, to avoid confusion on the interpretation or meaning of those concepts, because they may vary from country to country or from scholar to scholar. These concepts are sexual abuse and sexual exploitation. Sexual abuse is defined as:

actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.³³⁷

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.³³⁸

³³⁵ Gardiner and Groves 2007
<http://www.heritage.org/research/internationalorganisations/wm1314.cfm>.

³³⁶ *Ibid.*

³³⁷ *Op cit* 13 at section 1.

³³⁸ *Op cit* 13 at section 1.

On the same note, sexual exploitation has been defined by children who were interviewed by UNHCR and SC-UK as

when them big man go loving with small girl for money. Them big men can go loving to small girls, they can call girl when she walking along the road, and then the girl go and they go in house and lock the door. And when the big man has done his business he will give the small girl money or gift.³³⁹

Peacekeepers, be they soldiers, police or civilian staff, are responsible for upholding the core values of the UN: professionalism, integrity and respect for diversity. These values are irreversibly compromised when peacekeepers commit acts such as those currently reported in MONUC, where the majority of the allegations relate to sex with people under the age of 18, and 13% of all cases involved rape.³⁴⁰ The UN and its peacekeepers also compromise their ability to legitimately advise on human rights standards and rule of law issues when their own personnel do not abide by the same standards.³⁴¹

Allegations of sexual exploitation and abuse cast a dark shadow over the positive impacts that UN peacekeepers have made and compromise their mission to secure the peace. However, it is essential that a thorough and honest discussion of the problem of sexual exploitation and abuse by peacekeepers occurs to ensure that peacekeeping missions are able to accomplish their goal, that of protecting the vulnerable.³⁴²

While peacekeepers are sent into post-conflict zones to provide protection to the most susceptible, the cruel irony is that some use this position of trust to target the

³³⁹ UNHCR and SC-UK *Sexual Violence and Exploitation* 3.

³⁴⁰ UN OIOS A/59/661 5 January 2005.

³⁴¹ *Op cit* 21 at 87.

³⁴² Martin *Must boys be boys* ii.

vulnerable. Frequently, women and children offer sexual intercourse, to these peacekeepers as a method of survival.³⁴³ The recent observation by the UN's internal investigatory body that there was a pattern of sexual exploitation and abuse by uniformed personnel involving women and girls in the MONUC is a major problem. Some UN peacekeepers and aid workers reportedly abuse their position of power to gain sexual favours from these vulnerable groups. This type of abuse may be anything from a violent rape to coercive sex in exchange for money, goods or services.³⁴⁴

The following discussion will outline some of the reported incidents of sexual exploitation in the given countries. It must be noted that the incidents are not exhausted; only a few have been cited, to the interest of the scope of the chapter and the work at large.

4.2 Case Study 1: Democratic Republic of Congo (DRC)

In early 2004, abuses by peacekeepers in the MONUC, made global headlines and were subsequently the subject of UN Security Council meetings and US Congressional hearings.³⁴⁵ Between May and September 2004, MONUC received 72 allegations of sexual exploitation and abuse (68 against military and 4 against civilian personnel), which were subsequently investigated by the OIOS.³⁴⁶

Bunia, located in the Ituri regions in the war-torn eastern DRC, was under blockade by warring rebel groups in 2003. Residents of nearby villages and of the town itself

³⁴³ *Ibid* at 1.

³⁴⁴ *Op cit* 21 at 86.

³⁴⁵ *Op cit* 342 at ii.

³⁴⁶ UN Doc A/59/710 24 March 2005 9.

fled and set up shelters in MONUC's headquarters and next to the UN peacekeeping troops' camps, trusting that the UN troops would protect them from the violence.

According to a report in the United Kingdom newspaper, *The Independent*,

Many of the girls and women had been raped by the warring factions and left with children to support. With no husbands to assist them and facing stigmatisation from their families, they turned to the Uruguayan and Moroccan peacekeepers stationed directly across from the camp. One way for them to barter for food was to offer to have sex with the peacekeepers. 'It is easy for us to get to the UN soldiers, explained one woman, 'we climb through the fence when it is dark, sometimes once a night, sometimes more.'³⁴⁷

One camp worker, who refused to give his name and worked for Atlas, the NGO in charge of managing the camp, said:

Yes, we know that the girls go and visit the UN soldiers every night. There is nothing to stop them, and the girls need food. 'Going to the camp is OK because the soldiers are kind to me and don't point their guns like the other soldiers did,' one girl says.

In traditionally male dominated environments, such as police departments, militaries, and fraternities, there is a tradition of the "wall of silence", or a pledge that protects the members inside from accusations, whether true or not, from outside. An internal UN report stated:

The general attitude of the military contingents in Bunia has been one of trying to protect their national honor from any accusation of sexual misconduct.

MONUC personnel expressed the view that the military was being discriminated against and unfairly targeted because they claimed that civilian staff were doing the same things and not getting the same level of scrutiny. International civilian personnel were reluctant to report sexual misconduct by colleagues because they fear being victimised and punished as 'whistle-blowers', especially because

³⁴⁷ *Op cit* 342 at 4.

prostitution including child prostitution and exploitation of Congolese women employees is so widespread.³⁴⁸

Again, *The New York Times* reported that two UN peacekeepers were being investigated for sexual misconduct in Burundi after an investigation into sexual abuse in neighbouring Congo. The soldiers, whose nationalities and reported abuses were not disclosed, were suspended from their duties during the investigations. In Congo, again, the UN investigated accusations of paedophilia, rape and prostitution against peacekeepers, including some from Pakistan, Uruguay, Morocco, Tunisia, South Africa, Nepal and France. Three civilians on the UN staff were also set aside.³⁴⁹

The UN stated that it had uncovered 150 allegations of sexual abuse committed by UN peacekeepers stationed in Congo, many of them here in Bunia where the population has already suffered unbearable atrocities committed by local fighters. The raping of women and girls has become normal in the war raging in Congo's eastern jungles involving numerous militia groups. In Bunia, a program run by UNICEF has treated 2000 victims of sexual violence in recent months. But it is not just the militia members who have been plundering on the women. So too, local women say, have some of the soldiers brought in to keep the peace.³⁵⁰

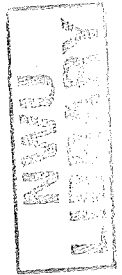
The allegations levelled against UN personnel in Congo include sex with minors, sex with prostitutes and rape, an internal UN investigation has found. Investigators said they found evidence that UN peacekeepers and civilian workers paid \$1 to \$3 for sex or exchanged sexual relations for food or promises of employment. A confidential

³⁴⁸ UN Internal Document *Evaluation of Emergency Rapid Response* July 2004.

³⁴⁹ Lacey *The New York Times* 2004

<http://www.nytimes.com/2004/12/18/international/africa/18congo.html>.

³⁵⁰ *Ibid.*



report prepared by Prince Zeid, Jordan's ambassador to the UN, and dated 8 November, says the exploitation appears to be significant, widespread and ongoing. Violators described in the investigation, which continues, appear to come from around the world. Fifty countries are represented among the 1000 civilian employees and 10800 soldiers who make up the MONUC. Already, a French civilian was accused of having sex with a girl, even though the progress of the case was unknown, and two Tunisian peacekeepers have been sent home, where the local authorities will decide whether to punish them or not.³⁵¹

Judith and Saidati, both 15 and sexually experienced with Congolese boys, accepted that they were looking for foreign boyfriends as they sold their fruit. The girls, who have the same father, said in an interview that they both found French boyfriends first, when the French Army controlled Bunia last year. Then they each found militias from Nepal, one of the countries supplying peacekeepers to the UN mission. After that, the girls spent time with soldiers from Morocco, who contributed a substantial number of peacekeepers now patrolling Bunia. The girls said they each stuck to one soldier respectively and switched to new ones only when their boyfriends were transferred out. Each time they had sex, the soldiers gave them \$5, they said. On other occasions, they were given gifts as well.³⁵²

They also accepted that fewer Moroccan soldiers were propositioning them, reducing their temptation. The soldier's new commander is keeping a closer eye on them, the girls said. "They want to come to us but their chief is watching them", Judith said. Judith and Saidati said they wanted the soldiers to remain in Bunia for many years. The girls were fond of UN troops because they managed to stabilise their war-torn

³⁵¹ *Op cit* 349.

³⁵² *Op cit* 349.

town. The foreigners also have much more money to spend than local boys, the girls said.³⁵³

4.3 Case Study 2: Sierra Leone

In 2003 and 2004, the Refugees International (RI) interviewed women in internally displaced persons (IDP) camps in Liberia, refugee camps in Liberia, Guinea and Sierra Leone, and remote areas of Liberia and Sierra Leone who described the sexual embarrassment and forced or coerced prostitution they suffered at from the warring parties.³⁵⁴ In addition to mass gender-based violence during the conflict, Sierra Leone also became the stage of the infamous sexual exploitation scandal of 2002 when it was reported that members of the humanitarian community were coercing sex from female refugees in exchange for humanitarian assistance.³⁵⁵

Throughout the nine-year Sierra Leonean conflict, there had been prevalent and systematic sexual violence against women and girls including individual and gang rape, sexual assault with objects such as firewood, umbrellas and sticks, and sexual slavery. In thousands of cases, sexual violence had been followed by the kidnapping of women and girls and forced bondage to male combatants in slavery-like conditions often accompanied by forced labour. These sexual crimes were most often characterised by extraordinary cruelty and were frequently preceded or followed by violent acts against other family members.³⁵⁶ UNAMSIL members were not immune from committing those heinous crimes.

³⁵³ *Op cit* 349.

³⁵⁴ RI conducted interviews with local populations, government officials and UN staff in Liberia and Guinea from 3-24 November 2003, in Liberia, Ivory Coast and Sierra Leone from 5-30 March 2004, in Liberia from 5-18 December 2004.

³⁵⁵ *Op cit* 342 at ii.

³⁵⁶ Human Rights Watch 2001 <http://www.hrw.org>.

Human Rights Watch had documented several cases of sexual violence by UNAMSIL peacekeepers, including the rape of a twelve-year old girl in Bo by a soldier of the Guinean peacekeeping contingent in March 2001 and the gang rape of a woman by two Ukrainian peacekeepers in April 2002 near Kenema.³⁵⁷

Human Rights Watch was informed of a rape committed by a Guinean peacekeeper, Sergeant Ballah, by two reliable sources, including the Sierra Leone Police who had interviewed the twelve-year old victim. The victim was raped on 26 March 2001 when she asked Sergeant Ballah for a lift to Freetown at the checkpoint that he was manning. The rape was perpetrated in Bo, the area of deployment of the Guinean peacekeeping contingent. Sergeant Ballah was charged in court on the same day. Unfortunately the police dropped the charges and the offender was sent back to Guinea. Human Rights Watch was not able to locate the victim.³⁵⁸

In February 2001, a Nigerian peacekeeper reportedly raped a sixteen year old girl in Freetown. When Human Rights Watch investigated the case, the police claimed they had not been able to apprehend the culprit for questioning. UNAMSIL claimed that the Nigerian contingent and UNAMSIL Civilian Police Section had investigated the matter and that the plaintiff had subsequently withdrawn the charge. Human Rights Watch interviewed a witness to an alleged rape by two Ukrainian peacekeepers that took place on 3 April 2002 in the village of Joru in Kenema district. KS, a fifty-five year old farmer testified that she as well as others in her village had witnessed the gang rape.³⁵⁹

³⁵⁷ Human Rights Watch *We'll kill if you cry* 28.

³⁵⁸ *Ibid* at 48.

³⁵⁹ *Op cit* 357 at 48.

Late at night I came out of my house to ease myself (urinate). Maybe I had been woken up by a big white truck that had stopped about fifty meters away from my house. I hid and watched what was happening; there were people inside. I noticed two white men and one black lady inside the truck. Clearly there was a struggle going on. I could hear her yelling at them to 'leave me alone' in what sounded like a Liberian accent, but I cannot be sure. The door was open and one of them was on top of her. The lady was really struggling. I saw that one of them was holding her down while the other was raping her. I was able to see because in the process the men had opened the door to the car and the light had come on. I am sure they were raping her and she was fighting with them to stop it. I stayed and watched this go on for several minutes. I later learned a few more people were also watching what was going on. In fact we talked about it the next morning.³⁶⁰

Then perhaps afraid of being watched, the two whites moved their truck further down the road...past my house, further down the road going out of town. Maybe they thought that because there were no houses around, we would not see what they were up to. They stayed another thirty or so minutes in this second location. I saw both of them have their turn on her, but I did not see any guns. After they were finished, I saw one of them drag her out of the cabin and put her in the back of the big truck. I cannot remember if one of them got in the back with her but I think so. Then they drove off.³⁶¹

The next morning when I went out to go to the mosque, we found one of her black shoes that she must have kicked off while struggling with those men. The shoe was near the first place they had stopped. We took it to the police but they never came to ask us any questions. We are all a bit frightened of those UNAMSIL people now. We tell our girls never to get in a truck with them or the same thing might happen to them.³⁶²

On 22 June 2002, a fourteen year old boy was allegedly raped by a Bangladeshi peacekeeper near the Jui transit camp for Sierra Leone returnees located outside of Freetown in the Western Area. The rape occurred when the victim and his friends were fishing with several Bangladeshi peacekeepers near the camp. The offender was reported to have taken the boy away from others in the group before raping him. The victim's friends reported that the boy looked dishevelled after re-joining the group and immediately told them what happened. The offender gave the victim the equivalent of US\$25 to silence him. The boy reported the rape to the police on 24

³⁶⁰ *Op cit* 357 at 49.

³⁶¹ *Op cit* 357 at 49.

³⁶² *Op cit* 357 at 49.

June 2002 and a medical examination carried out on the same day confirmed penetration had taken place.³⁶³

The police were involved in the case for ten days, until the UNAMSIL provost marshal took it over. The provost marshal concluded that there was no conclusive evidence to link the crime to the perpetrator. After reviewing the case, the UNAMSIL force commander concluded that while the evidence was inconclusive, the circumstantial evidence was strong enough to conclude that the peacekeeper had violated military discipline, and was sent back to his country of origin. It is not clear to Human Rights Watch whether this violation will be recorded on the offender's file. According to a reliable source, the investigation by the police and UNAMSIL was conducted in an insensitive manner and members of the Bangladeshi contingent spoke with the victim while the UNAMSIL investigation was ongoing, even though they should not have had access to him. Nor did UNAMSIL follow up with the victim or his family to apologise, provide compensation, and explain the outcome of the investigation.³⁶⁴

The UNHCR and SC-UK Report detailed that certain peacekeepers would misrepresent their intentions to the girl's parents before having sex with their daughter in exchange for money. A group of peacekeepers in a community in Sierra Leone allegedly rented a room for the purpose of having sex with teenage girls. Reportedly, teenage girls travelled great distances to arrive in Sierra Leone for the purpose of having sex with peacekeepers for money, supplies or favours. Eventually,

³⁶³ *Op cit* 357 at 50.

³⁶⁴ *Op cit* 357 at 50.

the girls which were affected by such exploitation and abuse reported far-reaching, negative consequences on their lives.³⁶⁵

Teenage girls complained to the NGOs of the difficulty of making a living through hard work. Girls who tried to earn an honest living through selling items at the market were made fun of by other girls.

Why are you suffering wasting your time? Look at me and all the nice things I can now buy. If you want to live good go to UNAMSIL.³⁶⁶

The position of power, wealth and status enjoyed by peacekeeping personnel gives them the ability to do as they wish. In Freetown, helpless and sad nationals spoke about the behaviour of the 'boys in blue helmets'.

All you need to do is go to Paddys (a bar in Freetown) around four o'clock and in the evening you will see for yourself, or just drive along the beach. All the restaurants there, you just see these big men with little girls. You go to Lumley beach and Laka beach and no one needs to tell you anything.³⁶⁷

4.4 Case Study 3: Liberia

Peacekeepers involvement in the sex industry has long been part of the history of UN missions. Long before sex trafficking became an unconcealed concern of the UN and the international community; peacekeepers were intimately involved in fuelling a demand for sex workers on the ground.³⁶⁸ Liberia was no exception to this exhausting trend. Trafficking activities coexisted with UN peacekeeping initiatives in Liberia. Along with reporting that Liberia regards human trafficking as a human rights abuse, the US Department of State pronounced that

Poverty, unemployment, and illiteracy were widespread, and the country's infrastructure was severely damaged as a result of the war. The education

³⁶⁵ Naik *Protecting Children from the Protectors* 16-19.

³⁶⁶ *Op cit* 339 at 7.

³⁶⁷ *Op cit* 342 at ii.

³⁶⁸ Kirby 2008 *University of St Thomas Law Journal* 230.

system barely functioned and the country had no public electricity, potable water, sewer system or postal service.³⁶⁹

The 2005 Country Reports on Human Rights Practices mentions that trafficking occurred into, from and within Liberia. Likewise, the 2004 Trafficking in Persons Report (TIP) states

Liberia is a source country for men, women and children trafficked for sexual exploitation, soldiering and domestic and commercial labor.

In 2004, one year after peacekeepers were deployed to the country, the TIP report listed child soldiers and trafficking, including sex slavery and forced marriage, as problems in the country.³⁷⁰ Peacekeepers, reportedly engaged in sexual exploitations and the patronage of prostitutes while on missions in the country. The RI noted that the wild-west environment of post-conflict countries is particularly conducive to trafficking, especially when international peacekeepers are present, as in Liberia. The UN was definitely aware of the trafficking problem and the involvement of peacekeepers in the sex industry since the organisation of a counter trafficking initiative was seen in Liberia as it had been in Bosnia.³⁷¹

Peacekeepers are alleged to have sexually exploited children in exchange for money and food. It is claimed that even some very young children have been asked to pose naked in exchange for biscuits, cake powder and other food items.

When ma asked me to go to the stream to wash plates, a peacekeeper asked me to take my clothes off so that he can take a picture. When I asked him to give me money he told me, no money for children only biscuit.³⁷²

Children and adults spoke of teenage girls being asked to strip naked, wash and pose in certain positions while the peacekeepers took pictures, watched and

³⁶⁹ US Department of State 2005 <http://www.state.gov/g/drl/rls/hrrpt/2005/61577.html>.

³⁷⁰ *Op cit* 342 at iii.

³⁷¹ *Op cit* 369 at 233.

³⁷² *Op cit* 342 at 6.

laughed. Some are alleged to have had sex without protection. Peacekeepers are reportedly among the highest paying customers for sex with children. They pay from US\$5 to \$300. Some peacekeepers are alleged to pool money to obtain a girl and then indulge in gang rape. Certain battalions used a locally well-known phrase 'jig jig 5 block' to procure sex from young girls.³⁷³

Some peacekeepers reportedly go as far as meeting the parents of a girl and claiming they have good intentions. However, when the time comes to leave, some of them leave unceremoniously, and some will leave the parents some money to take care of the girl. Others will give the girl some of their personal belongings. The girls laugh and say

if he really liked you he would leave you his cooking things, bedding and a picture. If he loved you, he might leave you his underwear to remember him.³⁷⁴

A woman in Liberia said

I am a mother of seven children and when the food finishes my youngest child keeps on crying and pulling my skirt, what do you think you can do if your daughter brings some?³⁷⁵

The pressure to conform to traditional harmful practices such as female genital mutilation also led girls into exchanging sex for 'sponsorship'. In such cases, men would provide the required payment associated with these procedures and receive sexual favours in return.³⁷⁶ Girls are also forced to marry in order to relieve their families of the financial burden of supporting them. A girl in Liberia said

I was 14 years old and my grandfather forced me to marry an old man. I was so sad, I became pregnant and had a child. Again I became pregnant and I

³⁷³ *Op cit* 342 at 6.

³⁷⁴ *Op cit* 21 at 85.

³⁷⁵ *Op cit* 357 at 8.

³⁷⁶ *Op cit* 323 at 141.

had another child. I waited for him and prayed until he died; now I am free and I have never looked at another man again.³⁷⁷

4.5 Case Study 4: Ivory Coast

In Ivory Coast, peacekeepers made use of young boys in their relations with the girls. They sent them to find girls for them in exchange of small gifts for the boys. At the end, not only girls were affected by these atrocious acts, young boys were also at risk, because they too could be raped or sodomised like it had happened in other countries. The boys were very much aware of the wrongfulness of the acts, but because they too needed to survive, they ended up carrying out these tasks.³⁷⁸

Three young boys aged fourteen from Ivory Coast gave their version

We all work at the peacekeeping camp. We have worked there every day since they arrived in 2003. We sell them sculpture and jewellery. I go there so that I can earn money to contribute to the family income in order to cover all that I need. If there are other things that they want and they can't talk about in front of other people, they invite us to their rooms to tell us what they want us to do for them. They ask us for various types of favours. Sometimes they ask us to find them girls. They especially ask us for girls of our age. Often it will be between eight and ten men who will share two or three girls. When I suggest an older girl, they say that they want a young girl, the same age as us.

I find them girls in town. I know which girls have done it before and I go ask them. When I ask the girls to come they are often keen because of the gifts that are promised, such as mobile phones and food rations. The peacekeepers hide it from their supervisors and their friends who are not in their immediate group. Because when this kind of thing happens you have to keep it confidential. Otherwise, if others hear about the activities, then the men will be punished. For us, we said to ourselves that even if it is bad, we are gaining something from it too. So we continue because we then get the benefits, such as money, new t-shirts, souvenirs, watches and tennis shoes. They also used their mobile phones to film the girls.³⁷⁹

³⁷⁷ *Op cit* 335.

³⁷⁸ Csaky *No one to turn to* 6.

³⁷⁹ *Ibid.*

4.6 Case Study 5: Sudan

The Telegraph's publication³⁸⁰ of a report on sexual abuse of children in South Sudan caused a roar in the UN and international NGO circles, as it explicitly implicated UNMIS 'blue helmets' but also international UN and NGO personnel, in sexual manipulation of children, in South Sudan both girls and boys. Four UN peacekeepers were subsequently silently sent out of South Sudan.³⁸¹ More evidence of sexual exploitation and abuse of children in South Sudan (boys and girls) came out in subsequent reports. The SC-UK report which focuses on the SEA of children perpetrated by peacekeepers and foreign aid workers, quoted a young boy in South Sudan

Although the peacekeepers are not based here, they have abused girls here. They come here a few days at a time where they stay in a local compound. This compound is near to the water pump where everyone collects water. In the evening hours, the peacekeepers come out and stand near to the water pumps. Some of the girls from the village will come and collect water. The men call to the girls and they go with them into the compound. One of them became pregnant and then went missing. We still do not know where she is. This happened in 2007.³⁸²

The same report also quotes a young girl in South Sudan:

NGO workers bring a lot of young girls to the boarding school where they run training. The trainers abuse the girls and some of them leave pregnant. The perpetrators are staff from several UN agencies and local and international NGOs as well as religious groups.³⁸³

In 2007, there was an exposé of widespread sexual abuse by UN personnel of refugees in Southern Sudan, many of them children and it had clouded the reputation of the UN. Incidents of sexual exploitation in UN peacekeeping missions around the world have become depressingly routine. On 03 January 2007, *The Daily Telegraph* revealed that members of the UN peacekeeping forces in Southern Sudan

³⁸⁰ Holt and Hughes *The Telegraph* 2007 <http://www.telegraph.co.uk/news/main.jhtml>.

³⁸¹ Groenendijk and Veldwijk *Behind the papyrus and the Mabaati* 28.

³⁸² *Op cit* 342 at 6.

³⁸³ *Op cit* 342 at 6.

are facing allegations of raping and abusing children as young as 12. The newspaper interviewed more than 20 victims in the city of Juba alone and reported that hundreds more may have been abused by UN peacekeepers since the 10000 strong UNMIS arrived in the region two years ago after decades of civil war.³⁸⁴ It was only after *The Telegraph* report was released that the UN admitted to repatriating four Bangladeshi peacekeeping personnel in connection with the allegations.³⁸⁵

Many of the children who claim to have had sex with UN personnel in Juba belong to the Southern Sudan's 'lost generation', separated from their families by the recent civil war, who have become streets kids in Juba, the regional capital. *The Telegraph* gathered more than 20 victims accounts claiming that peacekeeping and civilian staff based in the town are regularly picking up young children in their UN vehicles and forcibly having sex with them. It is thought that hundreds of children may have been abused this way.³⁸⁶

"I was sitting by the river the first time it happened", said Jonas, 14, one of more than 20 children who told *The Telegraph* they had been abused this way.

A man in a white car drove past and asked me if I wanted to get into the car with him. I saw that the car was a UN car because it was white with the black letters on it. The man had a badge on his clothes. When he stopped the car, we got out; he put a blindfold on me and started to abuse me. It was painful and went on for a long time. When it was over, we went back to the place we had been, and he pushed me out of the car and left.³⁸⁷

Jonas now returns to the same place regularly in the hope of being picked up and paid something for his services.

³⁸⁴ *Op cit* 335 at 1.

³⁸⁵ *Op cit* 21 at 2.

³⁸⁶ *Op cit* 380.

³⁸⁷ *Op cit* 380.

I know it is a terrible thing to do but I see the UN cars around late at night by the drinking places and I sit there in the hope of being picked up. If I get 1000 SD (\$3) a day, then that is a good day.³⁸⁸

One boy, 13 years old, reported being lured into a car using cash and then abused before being dumped without any payment. An unfinished UNICEF report said that evidence suggested that UNMIS staff may already be involved in sexual exploitation.

UN cars have been staying into the early hours of the morning, as late as 6am, at a restaurant/disco called Kololo in Juba, adult informants reported seeing a UNMIS car stop along a main road in Juba to pick up three young girls.³⁸⁹

The report stated

According to Kennedy Tombe, 23, a shoe shiner in Konyo Konyo Market, the issue of young girls being picked up by UNMIS cars during late hours in Juba is common. One time he stated, he was chatting with his friends of his own in Kosti area near Konyo Konyo Market, they saw a UNMIS vehicle drop three girls off. One girl, Jackline Keji was 18, the other two were 13 and 16, who was obviously frightened, said that they had spent the night with an UNMIS official. She said that they had sex with that UNMIS official.³⁹⁰

Juba's Country Court Judge Ali Said, said that the region had seen an increase in child prostitution since the UN arrived.³⁹¹

4.7 Case Study 6: Eritrea

There were about 4000 UN peacekeepers who worked on the Eritrean-Ethiopian border, including troops from the Netherlands, Jordan, India and Kenya, when the UNMEE started. In the presence of the UNMEE in Eritrea at the beginning of 2001, three Danish soldiers were prosecuted for having sex with a 13 year old girl. Later on, reports of UN Peacekeepers caught red-handed making porno movies in Eritrea surfaced. It became common knowledge that UNMEE staff members were in the

³⁸⁸ *Op cit* 380.

³⁸⁹ *Op cit* 380.

³⁹⁰ *Op cit* 380.

³⁹¹ *Op cit* 380.

business of making a lot of money by illegally trafficking people across the border into Sudan and Ethiopia. It was clear several UNMEE officials and peacekeepers are in Eritrea not because they believe in peacekeeping but for the money.³⁹²

The Guardian newspaper reported that an Italian military prosecutor was investigating the alleged sexual abuse of under-age or minor prostitutes by UN peacekeeping troops in Eritrea.³⁹³ Girls as young as 10 years of age, are said to have been sexually exploited by members of the Italian, Danish, and Slovakian contingents of the mission. "Some of the most serious cases involve very young girls" Maurizio Block, the Padua military prosecutor, confirmed.³⁹⁴

The abuses are alleged to have occurred in a seven-month period beginning in November. The investigation was prompted by a report to the Italian military justice authorities filed by a *carabinieri* officer after a tour of duty in Eritrea. Mr Block stated:

It's not just a squalid case of prostitution. The fact is that these soldiers had sex with girls who were barely 10 years old. Paedophilia is a serious crime.³⁹⁵

The abuses allegedly took place at weekends, when peacekeepers stationed in the capital Asmara travelled to Massawa on the coast, looking for sex. Mr Block has identified a number of pubs and discos where the soldiers are alleged to have picked up under-age prostitutes.³⁹⁶

Furthermore, in 2002, an Irish soldier was prosecuted for making pornographic movies with Eritrean women. He was sentenced to only 16 days detention by the UN

³⁹² Asmeron *UNMEE abusing the welcome of a generous population* 10 May 2004.

³⁹³ Willan *The Guardian* 2001
<http://www.guardian.co.uk/world/2001/aug/25/philipwillan/print>.

³⁹⁴ *Ibid.*

³⁹⁵ *Op cit* 393.

³⁹⁶ *Op cit* 393.

court and was later dismissed from the mission, yet the punishment for the women involved was far tougher. One of the women, a 22 year old, was sent to prison for two years. Since then several women have been arrested, allegedly for prostitution. A couple of months after the incidents involving the Irish soldier, an Italian soldier was accused of similar behaviour and the entire peacekeeping operation threatened to downfall. This peacekeeper was accused of performing indecent sexual acts with minors while working in Eritrea. It was alleged that he had sex with under-age Eritrean girls in the country's port city of Massawa. The population of Eritrea was fuming and accused the UNMEE of bringing their sick mentality to their country.³⁹⁷

4.8 Case Study 7: Somalia

In Operation Restore Hope in Somalia during the early 1990s, there were numerous cases of misconduct such as torture, rape, and summary killing. The misconduct of the Canadian Special Force got particular attention, but was according to Alex de Waal, only the tip of the iceberg. He further states:

The level of resentment among ordinary Somalis at these abuses should not be underestimated, nor should the implications for the failure of the mission.³⁹⁸

A previous study on the Canadian troops pointed out

They were vehemently opposed to homosexuality and saw efforts to discipline soldiers who harassed women and minorities as limiting the military's capacity to produce effective soldiers.³⁹⁹

As one soldier explained,

men who spend a great deal of time together feel a need to prove they are not homosexuals by going out and getting themselves a woman, when we go

³⁹⁷ The Nordic Africa Institute Policy Notes *Sexual Exploitation and Abuse* March 2009 2.

³⁹⁸ *Ibid.*

³⁹⁹ *Op cit* 397 at 2.

out a woman becomes a machine, an object that we'd use as much as possible because afterwards there won't be any woman around.⁴⁰⁰

The Somali case is particularly useful in showing how failure to respect the norms of the host country endangers a whole mission and furthermore makes redeployment in a country difficult. It also highlights the sad outcome of militarised masculinity where a military culture, insensitive to gender equality and rights or deprecatory to women in general, allows men to violate women in ways that would never be accepted in mainstream society.⁴⁰¹

UN peacekeepers atrocities in Somalia included, but were not limited to, roasting a living Somali child over an open fire, placing wires from a radio transmitter on the genitals of a Somali man, violating a Somali woman with a flare, and making a child eat vomit and worms. All these happened while other peacekeepers were watching and taking photographs.⁴⁰²

4.9 Responses from the international community

As far as the UN itself is concerned, a number of measures have been instituted to address sexual exploitation and abuse by personnel, which are described in the report⁴⁰³ as follows:

The Inter-Agency Standing Committee created the Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises, co-chaired by the Office for the Co-ordination of Humanitarian Affairs and UNICEF, which led to the publication of a Secretary General's Bulletin on special measures for protection from sexual

⁴⁰⁰ *Op cit* 397 at 2.

⁴⁰¹ *Op cit* 397 at 2.

⁴⁰² *Op cit* 392 at 1.

⁴⁰³ Security Council Document S/2004/814 13 October 2004. This was a follow-up report on the full implementation of Resolution 1325 (2000) on Women and Peace and Security and was presented to the Security Council in October 2004.

exploitation and sexual abuse. The Task Force developed a number of tools to facilitate the implementation of the Bulletin such as implementation guidelines, model information sheets on sexual exploitation and abuse for local communities and model complaints forms. In addition, focal points on sexual exploitation and sexual abuse are to be appointed in each UN entity and NGO at country level, creating a network to ensure the full implementation of the Bulletin in both emergency and development contexts.⁴⁰⁴ Only if these tools are taken to the most vulnerable groups, interpreted in local languages, will they be effective. Communities which are illiterate will not benefit from these tools if they are not brought to their level.

The motivation for the first UN legislative measures to deal with sexual exploitation and sexual abuse by peacekeepers came as a result of an investigation and exposure of alleged misconduct by aid workers in West Africa in 2003. The aid workers in charge of distributing relief food were alleged to have exchanged food for sex. After the 2003 investigation into sexual exploitation of refugees by these aid workers, and the media outcry that accompanied it, the Secretary-General promulgated a set of rules, the Secretary-General's Bulletin, to govern disciplinary matters relating to sexual abuse and sexual exploitation in peacekeeping missions and to provide sanctions for any violations.⁴⁰⁵

The Bulletin is applicable to all UN staff, including staff of separately administered organs and programs of the UN. Section 2 of the Bulletin prohibits UN forces from committing acts of sexual exploitation and abuse and requires troops to have a

⁴⁰⁴ *Ibid* at para 100-101.

⁴⁰⁵ *Op cit* 13.

particular duty of care towards women and children and to observe IHL.⁴⁰⁶ It categorically states that sexual exploitation and sexual abuse violate universally recognised international legal norms and standards and have always been unacceptable behaviour and prohibited conduct for UN staff by the UN Staff Regulations and Staff Rules.⁴⁰⁷

The second motivation by the UN to develop further measures to deal with sexual abuse and sexual exploitation by peacekeepers by the UN happened in 2004. In that year, there was strong international media coverage of the involvement of peacekeepers in widespread sexual abuse and sexual exploitation of girls and women in the eastern Congo. Following these allegations, the UN began a review process to determine the nature and extent of the problem and to come with ways of addressing the problem.⁴⁰⁸

The Secretary-General asked Prince Zeid Hussein, Jordan's ambassador to the UN to travel to the Eastern Congo to investigate the allegations reported in the media and requested him to undertake a comprehensive review of UN measures on the issue of sexual abuse and exploitation by peacekeepers and make recommendations on how to deal with the problem.⁴⁰⁹ These recommendations included and are not limited to the following:

- 1) That there be application of all rules set out in the Bulletin to all categories of UN peacekeeping personnel;

⁴⁰⁶ Op cit 13 at section 2.

⁴⁰⁷ Op cit 13 at section 3.1.

⁴⁰⁸ UN Doc A/59/710 24 March 2005.

⁴⁰⁹ *Ibid.*

- 2) That there be wide publication among UN personnel of the Bulletin and the "Ten Rules: Code of Personal Conduct for Blue Helmets;
- 3) That there be publication of the Bulletin rules and the other codes of conduct in the languages of the contingents; and
- 4) That there be establishment of a permanent professional investigative capacity to investigate complex cases of serious misconduct, including sexual exploitation and abuse.⁴¹⁰

A study conducted by Corinna Csaky and published by SC-UK suggested that existing efforts to keep children safe from sexual exploitation and abuse are insufficient. Firstly, children and adults are not being sufficiently supported to speak out about the abuse against them. Children in particular, need effective services to help them report abuse. These services must be safe, confidential and easy to use, and must reach out to marginalised and excluded people, such as orphans, street children and minority ethnic groups. Secondly, the international community is not exercising sufficiently strong leadership or managerial courage on this issue. Senior managers within international institutions should make this an organisational priority, allocate more resources to it, and encourage staff to speak out when cases are identified. Finally, many of the underlying causes of these abuses point to an acute lack of investment in child protection by governments and donors. In addition to emergency relief efforts, there needs to be more sustained investment in tackling the root causes or drivers of child sexual exploitation and abuse.⁴¹¹

⁴¹⁰ *Op cit* 329 at 17.

⁴¹¹ *Op cit* 378 at 20.

RI found that the sexual exploitation scandals in DRC have created more lack of trust among the local population towards male peacekeepers. Despite this stated need and very vocal public policies of the UN on systematically incorporating gender perspectives into its missions, the recruitment system for CIVPOL officers continues to neglect the specific targeting of women for recruitment.⁴¹² RI made a list of recommendations which included and not limited to the following two:

- 1) The UN Security Council encourage more female representation in troop-contributing countries; and
- 2) The UN deploy key personnel such as code of conduct officers, senior gender advisors and investigators of sexual exploitation and abuse in the early stages of peacekeeping missions.⁴¹³

The issue of sexual exploitation and abuse surfaced in November 2004 with the revelation that a shockingly large number of UN peacekeepers had engaged in such practices in the DRC. At the time the UN OIOS cited payments ranging from two eggs to \$5 per counter. Extreme cases involved victims who were abandoned and illiterate orphans. Secretary-General Kofi instituted a policy of zero tolerance. The Secretary-General for Peacekeeping Jean-Marie Guehenno said

Indeed, today, the single measure that would do the most to reduce the level of allegations and strengthen the policy of zero tolerance against sexual exploitation and abuse is if all troop contingents had an active and effective policy against all prostitution in mission areas.⁴¹⁴

He stated that there are tens of thousands of extremely competent, honest and courageous personnel in the field. They cannot allow acts of serious misconduct by some of their own to betray their good work and tarnish the reputation of the UN

⁴¹² *Op cit* 342 at 7.

⁴¹³ *Op cit* 337 at 13.

⁴¹⁴ Guehenno 2006 <http://www.un.org/apps/news/printnewsAr.asp?nid=17593>.

peacekeeping. Peacekeeping is an essential instrument, it is effective, and it helps to maintain peace for tens of millions of people around the world.⁴¹⁵

Prince Zeid Raad Zeid al-Husseini also said that the UN must continue to view sexual exploitation and abuse in UN peacekeeping operations, not as some short-lived issue, but as the serious issue it is.⁴¹⁶

One cannot and must not, forget that there are peacekeeping representing all parts of the world who are dying every year in pursuit of the objectives being established by this Council. Because of this, it is all the more urgent to remove the blight of sexual exploitation and abuse on what is otherwise a distinguished and appreciated performance.⁴¹⁷

Late in November 2001, the OIOS was asked by the Office of the UN High Commissioner for Refugees (UNHCR) to review allegations of sexual exploitation of female refugees by international and national aid workers, specifically regarding UN and non-governmental organisation staff and peacekeepers in three West African countries: Guinea, Liberia and Sierra Leone.⁴¹⁸

The Inter-Agency Standing Committee (IASC), co-chaired by the Office for the Coordination of Humanitarian Affairs and UNICEF, must continue to play a prominent and essential role in working with all of the humanitarian organisations and agencies. That is to ensure that appropriate and standard norms are included in their respective codes of conduct, specifically prohibiting sexual exploitation, and imposing sanctions for violations of the code. Aid agencies, international organisations and NGOs must do more to address the issue of intimate relationships between their staff and the refugees they care for. UNHCR and its implementing

⁴¹⁵

Ibid .

⁴¹⁶

Op cit 414.

⁴¹⁷

Op cit 414.

⁴¹⁸

Op cit 324 at para 418.

partners should put in place clear procedures and guidelines for the investigation of sexual exploitation of refugees and other related conduct which include reporting all such instances to the UNHCR Inspector General for prompt and appropriate monitoring.⁴¹⁹

OIOS also recommended that UNHCR and its implementing partners should sensitize the refugee population on sexual exploitation. UNHCR and the NGOs should have a more visible presence in the camps, increasing the number of field staff working inside the refugee camps so as to better monitor camp activities and to ensure that the refugees are indeed receiving the services which they are entitled to.⁴²⁰

UNHCR recommended that personnel who violate the standards established in the 2003 Secretary General's bulletin ought to be subjected to disciplinary action unless, in the case of staff or experts on mission, the Secretary-General, *in lieu* of such action, accepts an immediate resignation and a designation statement that the individual is never to be re-employed by the UN is placed in his or her file.⁴²¹

It is recommended that the General Assembly amend the Staff Regulations to specifically provide that acts of sexual exploitation and abuse constitute serious misconduct. It is also recommended that the Assembly request the Secretary-General to introduce accelerated procedures, including suspension without pay in appropriate cases, to deal with cases of sexual exploitation and abuse. That would

⁴¹⁹ *Op cit* 324 at para 55.

⁴²⁰ *Op cit* 324 at para 55.

⁴²¹ *Op cit* 324 at para 55.

ensure that those found guilty of such acts are severely punished, including being summarily dismissed.⁴²²

In 1999, Human Rights Watch criticised forms of sexual exploitation in refugee camps, including several cases of child prostitution involving humanitarian organisations in Sierra Leone. After a series of investigations in Sierra Leone, Human Rights Watch urged UNAMSIL to ensure that its monitoring of human rights abuses included reporting on current incidents of rape and sexual assault against women and abduction of women for forced labour by rebel or pro-government forces, or by soldiers serving with the UNAMSIL peacekeeping forces. UNAMSIL should have worked with Sierra Leonean government to put in place disciplinary and other procedures to prevent violations of international humanitarian law and other abuses, including sexual violence, by pro-government forces including the Sierra Leonean Army and the Civil Defence Forces.⁴²³

In another response to the UNHCR and SC-UK Report, Kamel Morjane, the third highest ranking official of UNHCR, confirmed that sexual exploitation by aid workers in refugee camps is a fact. The UN Security Council soon followed with the adoption of an *aide-memoire* "recalling 54 recommendations by UN Secretary General Kofi Annan to protect civilians in armed conflict".⁴²⁴

In May 2002, the Security Council adopted a Presidential Statement, read out loud by its President for the month, Kishore Mahbubani from Singapore. The statement

⁴²² Human Rights Watch Sexual Violence within the Sierra Leone Conflict 26 February 2001 5-6.

⁴²³ *Ibid* at 5.

⁴²⁴ Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict S/1999/957 7 September 1999.

reiterated the Security Council's strong condemnation of *inter alia*, the sexual exploitation and abuse of children in armed conflicts, and called for all parties involved in such armed conflicts to immediately desist from such practices.⁴²⁵ Present at the meeting of the Security Council was Carol Bellamy, Executive Director of the UNICEF, who stated that the allegations of widespread sexual abuse and exploitation against refugee and internally displaced children by humanitarian workers in West Africa were of great concern.⁴²⁶

4.10 Summary

UN peacekeeping operations have for decades brought peace and stability to countries emerging from war. The women and men who serve the blue flag do so under arduous and often dangerous conditions. The history of peacekeeping has been one of distinguished collective accomplishment and personal sacrifice. However, this exemplary record has been clouded by the unconscionable conduct of a few individuals. In particular, the revelations in 2004 of sexual exploitation and abuse by a significant number of UN peacekeeping personnel in the DRC have done great harm to the name of peacekeeping. Such abhorrent acts are a violation of the fundamental duty of care that all UN peacekeeping personnel owe to the local population that they are sent to serve.⁴²⁷

As one peacekeeping expert told the RI, the UN's mission is not to undermine the rule of law, but rather to strengthen it. But, when they blatantly disregard the local

⁴²⁵ *Op cit* 324.

⁴²⁶ Bellamy *Remarks to the Security Council on Children in Armed Conflict* May 2002.

⁴²⁷ *Op cit* 408.

laws about prostitution and encourage the cover-up of violations within the mission, they are poisoning the mission and corrupting the mandate.⁴²⁸

In 2003, Human Rights Watch issued a report documenting sexual violence committed by international peacekeeping forces, and confirmed that;

UNAMSIL investigations into allegations of sexual violence by international peacekeepers indicate a lack of appreciation for the seriousness of the problem of sexual violence.⁴²⁹

In that report, Human Rights Watch agrees with Ms Naik, one of the team members and authors of UNHCR and SC-UK Report, that 'the zero tolerance' policy for sexual exploitation by UNAMSIL staff and affiliates has had no teeth to date.⁴³⁰

The sexual abuses across the world make a scorn of the UN's professed commitment to uphold basic human rights. It is a sham that in the shadow of the genocide in Darfur carried out by barbaric Sudanese-backed Janjaweed militias, personnel from the UN have been preying on the refugees and all other vulnerable persons. UN peacekeepers and the civilian officials who work with them should be symbols of the international community's commitment to protecting the weak and innocent in times of war. The exploitation of the most vulnerable people in the world, refugees in war-ravaged countries, is a shameful episode and a betrayal of trust that will haunt the UN for years to come.⁴³¹

The UN has adopted new measures to address misconduct by peacekeepers that amount to criminal acts. It is very important to identify and prosecute individuals who

⁴²⁸ *Op cit* 342 at 4.

⁴²⁹ *Op cit* 424 at 840.

⁴³⁰ *Op cit* 424 at 840.

⁴³¹ *Op cit* 335.

are responsible for violations that infringe fundamental rights, not only to ensure the consistent action of UN missions, but also to avoid tensions with local communities that may inhibit the success of peacekeeping operations. The purpose of peacekeeping operations, in the context of situations of either the UN or other international organisations, is to protect individuals in situations of extraordinary suffering.⁴³² As pointed out by Radhika Coomaraswamy, Special Rapporteur on Violence against Women, the UN would lose “its moral force if it fails to respond when those within the UN system violate human rights”.⁴³³

The next chapter will determine the accountability of UN peacekeepers. It starts of by discussing the principle of rule of law and determining whether UN peacekeepers can be held individually accountable for their own unlawful acts or the UN can be held accountable under the principle of organisational responsibility. Lastly it will also discuss whether troop-contributing countries can also be held accountable using the principle of state responsibility.

⁴³² UN Doc A/63/677 12 January 2009.

⁴³³ UN Doc E/CN.4.2000/68 29 February 2000.

CHAPTER FIVE: DETERMINING THE ACCOUNTABILITY OF UN PEACEKEEPERS

5.1 Introduction

Given the reactions by NGOs, the UN Secretaries-General, the ICRC, and other interested and affected persons, to different reports on allegations of human rights abuses by members of UN peacekeeping forces, over the course of time, it is very evident that very strict or stringent measures and systems must be put in place to combat these allegations. From these reactions and reports evident in the previous Chapter, there is consensus that these members of the Department of Peacekeeping Operations must be held accountable. What matters most is that innocent civilian lives are being destroyed at the expense of self-interest and lust, dysfunctional local legal systems, lack of uniform rules of conduct and misconduct, lack of effective investigative systems in host countries, and lack of effective reporting systems by victims. This chapter discusses how UN peacekeepers can be held accountable for atrocities which they cause and violations of IHL and IHRL.

In the absence of functioning 'rule of law' structures, such as police, independent judicial and penal systems, gender and sexual-based violence is largely unpunished. As violence levels increase during conflicts, violence against women and girls becomes pervasive. Traditionally relegated to subordinate positions, second-class citizens, with no rights of their own, women and girl-children are subjected to gender-based discrimination at home as well as in public. With little control over their own sexuality, many resort to trading sex for food, money or shelter. Therefore, it should come as no surprise that women and girls often aggressively seek out peacekeeping and aid personnel in mission areas to trade their bodies for any form of

remuneration. When women can be seduced with the promise of money, food or shelter, the UN is challenged by the reality that it is hard to keep soldiers and other police and civilian personnel chaste.⁴³⁴ However, only once accountable and transparent response strategies are in place to prevent and protect local populations from sexual exploitation and abuse, will the UN send a message that it does not tolerate or condone such behaviour.⁴³⁵

The rule of law is the bedrock upon which the UN is built. On the international stage, it is fundamental to peace and stability. All states in the General Assembly have a duty to abide by the Charter of the UN and the wider body of international law. All member states are expected to be subjected to these laws, to apply them in their international relations, and to be equal before them. The rule of law also strengthens mechanisms that enforce and protect universal human rights. As such, strengthening the rule of law creates both opportunity and equity, and ultimately helps create better conditions for the broader responsibilities of states and the UN.⁴³⁶

Highlighting the fundamental importance of the rule of law, on 24 September 2012, the General Assembly concluded its first High-level meeting on the Rule of Law by adopting a very important Declaration.⁴³⁷ For the first time, Member States agreed that

all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination, to equal protection of the law.

The Declaration covered the breadth of the rule of law, including the importance of judicial systems to informal justice systems, transitional justice, transnational

⁴³⁴ *Op cit* 21 at 87.

⁴³⁵ *Op cit* 21 at 91.

⁴³⁶ Eliasson *UN Chronicle* 1.

⁴³⁷ Declaration of the High-level Meeting on the Rule of Law A/RES/67/1 24 September 2012.

organised crime and terrorism, corruption and international trade. The Declaration reaffirmed that the rule of law is indispensable for upholding peace and security, as well as sustainable development and respect for human rights.⁴³⁸

The rule of law generally refers to two elements; firstly, the recognition that the use of governmental powers should be kept in check to prevent breach upon civil liberties; and secondly, the recognition that law and order should be maintained at all times to ensure unwavering platform upon which the governments work may be done. Albert Venn Dicey summarised the rule of law under three main principles. His primary principle concerned the rule of law and discretionary powers. No man could be punished or lawfully interfered by the authorities except for breaches of law. In other words, all government actions must be authorised by the law, or government must act within its legal powers. The classic example of these ideas was in the judgement of *Entick v Carrington*⁴³⁹ where it shows the limitation to state power. It was held that there was no law supporting the issuance of warrant and invasion of Entick's house. The warrant was, therefore declared illegal and void. Dicey placed emphasis on this aspect of rule of law. He argued that nobody should be punished, except for a specific breach of law; and that every person irrespective of rank be subject to the law.⁴⁴⁰ In *R v Horseferry Road Magistrates Court, Ex Parte Bennett*,⁴⁴¹ it was held that the authorities abused their power and this resulted in the entire prosecution being illegal. Lord Griffiths said,

⁴³⁸ Para 7 of the Draft Resolution adopting the Declaration provides that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.

⁴³⁹ *Entick v Carrington* (1765) EWHC KB J98.

⁴⁴⁰ Dicey *The Law of the Constitution* 110.

⁴⁴¹ *R v Horseferry Road Magistrates Court, Ex Parte Bennett* (1994) 1 AC 42 (HL).

...the judiciary accept responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.⁴⁴²

Based on the challenges that face the world today, it is important to refer to the concept/principle of the rule of law. Even though the rule of law was a purely national constitutional issue at its inception/conception, today this principle finds relevance at an international level as well. This can be seen from the Background Note of the High Level Meeting, where it was stated that:

Rule of law is central to many challenges facing the global community. At the national level, strong, inclusive and accountable institutions of which demonstrates equitable application of the rule of law are crucial for conflict prevention and the consolidation of post-conflict peacebuilding gains. Interconnected threats in terms of organized crime, trafficking, conflict and terrorism undermine international security and development and require effective rule of law instruments to address them at national, regional and global level.⁴⁴³

At the international level, rule of law accords predictability and legitimacy to the actions of states, strengthens their sovereign equality and underpins the responsibility of a state to all individuals within its territory and subject to its jurisdiction. Full implementation of the obligations set forth in the Charter of the UN and in other international instruments, including the international human rights framework, is central to collective efforts to maintain international peace and security, effectively address emerging threats and close off accountability gaps for international crimes.⁴⁴⁴

In the South African case of *Billy Lesedi Masetlha v The President and Manala Elias Manzini*,⁴⁴⁵ Ngcobo J held that under the Constitution, the President has a duty to act fairly and that duty precludes the President from unilaterally altering the term of office of the head of the National Intelligence Agency. He held that this is a requirement of the rule of law which is one of the foundational values of our constitutional democracy. Accordingly, the President had to consult with Mr Masetlha before taking

⁴⁴² *Ibid* at para 62.

⁴⁴³ Para 1 of the Background Note of the High Level Meeting of the General Assembly on the Rule of Law 24 September 2012.

⁴⁴⁴ *Ibid* at para 2.

⁴⁴⁵ *Billy Lesedi Masetlha v The President and Manala Elias Manzini* 2008 (1) SA 566 (CC).

a decision to alter his term of office prior to its scheduled expiry date. In doing so, the President acted in breach of the Constitution.⁴⁴⁶

The abovementioned cases clearly stated that the executive cannot lawfully assume powers which are not within the realm of the common or statutory laws.⁴⁴⁷ Dicey's second principle has the resounding title of "equality before the law", which means, no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land. This reflected the famous quote by Thomas Fuller "Be you ever so high, the law is above you", this held that the government and its officials should not have any special exemptions or protections from the law. Dicey claimed that every official is under the same responsibility for every act done without legal justification as any citizen.⁴⁴⁸ In *M v Home Office*,⁴⁴⁹ it was held that the executive was not above the law and that the Secretary of State was not entitled to claim Crown Immunity. Dicey also did not like the French system where government activities were dealt with by separate administrative courts. He considered this to be too partial to the government and inferior to ordinary courts of law.⁴⁵⁰

The final principle concerns individual rights. There is no need for a Bill of Rights because the general principle of the Constitution is the result of judicial decisions determining the rights of the private person. The courts protect them in their decisions by developing the common law in a way that respects individual liberty. Parliament legislates on particular problems. In contrast, Bills of Rights are

⁴⁴⁶ *Ibid* at para 172-174.

⁴⁴⁷ Unknown <http://www.lawteacher.net/miscellaneous/essays/the-rule-of-law.php>.

⁴⁴⁸ *Op cit* 440 at 114.

⁴⁴⁹ *M v Home Office* (1994) 1 AC 377 HL

⁴⁵⁰ The French Jurist Montesquieu in his book *L. Esprit Des Lois (Spirit of Laws)* published in 1748, for the first time enunciated the principle of separation of powers. In essence, it signifies the fact that one person or body of persons should not exercise all the three powers of the Government, viz legislative, executive and judiciary. In other words each organ should restrict itself to its own sphere and restrain from transgressing the province of the other.

documents which promise a variety of rights. These promises are so general and capable of so many meanings that they are meaningless. Again, the Bill of Rights might not be respected by the government and might be unenforceable. This reveals Dicey's belief that the common law affords greater protection to the citizens than a written Constitution.⁴⁵¹

The rationale for referring to Dicey's principles in this Chapter in particular, is that, the rule of law be the bedrock upon which accountability is determined. The challenge of determining accountability is an international challenge and given the nature of the British Constitution and its founding principles, this challenge will have a solid, legal solution.

Nowadays, there is a mechanism for applying the rules. The rules apply to all persons, as no one should be above the law and all people should be treated equally. As said by Lord Denning, "Be you ever so high, the law is above you" memorably in *Gouriet v Union of Post Office Workers and Others*.⁴⁵² The law should be applied without fear or favour, malice of ill will, or prejudice, bias or fear from others, particularly the powerful. This means there must be an independent and impartial judiciary.⁴⁵³

⁴⁵¹ *Op cit* 440 at 115.

⁴⁵² *Gouriet v Union of Post Office Workers and Others* (1977) 3 ALL ER 70.

⁴⁵³ Lon Fuller in his work "Morality of Law" has identified 8 requirements of the rule of law. (1) Laws must be general, specifying rules prohibiting or permitting behaviour of certain kinds. (2) Laws must also be widely promulgated, or publicly accessible. Publicity of laws ensures citizens know what the law requires. (3) Laws should be prospective, specifying how individuals ought to behave in the future rather than prohibiting behaviour that occurred in the past. (4) Laws must be clear. Citizens should be able to identify what the laws prohibit, permit or require. (5) Laws must not be contradictory. One law cannot prohibit what another law permits. (6) Laws must not ask the impossible. Nor should laws change frequently; (7) the demands laws make on citizens should remain constant. (8) Finally, there should be congruence between what written statute declares and how officials enforce those statutes. Judges should not interpret statutes based on their personal preferences and police should only arrest individuals they believe to have acted illegally. Like Fuller, Dworkin insists there is a necessary connection between law and morality. The law consists of the explicitly adopted rules plus the best moral principles that can be interpreted as lying behind those rules.

One of the most important legal obligations arising from violations of international human rights and humanitarian law is the obligation to ensure accountability for those violations.⁴⁵⁴ The then UN Secretary-General, Kofi Annan, in his 2004 Report on the rule of law stressed that, for the UN, the rule of law is:

A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁴⁵⁵

Referring to this definition in his 2009 Guidance Note on Democracy, Secretary-General Ban Ki-moon added that the UN provides knowledge and sustenance to the development of legislation and the strengthening of, in particular, legislative, executive and judicial institutions under such principles to ensure that they have the capacity, resources and necessary independence to play their respective roles.⁴⁵⁶

The concept of rule of law is deeply linked to the principle of justice, involving an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Long before the UN, states were working towards a rule of justice in international life with a view to establishing an international community based on law.⁴⁵⁷

The concept of the rule of law is also embedded in the Charter of the UN. In its Preamble, one of the aims of the UN is:

Dworkin also says rules are applicable in an all-or-nothing fashion, whereas principles have the extra dimension of weight.

⁴⁵⁴ *Op cit* 55 at 71.

⁴⁵⁵ Tommasoli *UN Chronicle* 2.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ United Nations www.unrol.org/article.aspx?article_id=3 accessed on 17 September 2014.

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.⁴⁵⁸

A primary purpose of the Organisation is:

to maintain international peace and security, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁴⁵⁹

It is clear from the above two provisions that the UN has an obligation towards the international community that, of ensuring that global justice and security are maintained and that there is settlement of international disputes by peaceful means. All that will be achieved if the UN is at the forefront of respecting and promoting the principle of the rule of law. Justice means accountability and fairness, and once that is done, there shall be peace and security.

The UDHR, the historic international recognition that all human beings have fundamental rights and freedoms, recognises that it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against dictatorship and oppression, that human rights should be protected by the rule of law.⁴⁶⁰

The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN of 1948, recognises the inherent link between the UN and the international rule of law. Its Preamble stresses the paramount importance of the Charter of the UN in the promotion of the rule of law among nations:

Drawn from existing commitments in international law, the core values and principles of the UN include respect for the Charter and international law; respect for the sovereign equality of states and the principle of non-use or threat of use of force; the fulfilment in good faith of international obligations;

⁴⁵⁸ *Op cit* 1.

⁴⁵⁹ *Op cit* 1 at article 1.

⁴⁶⁰ Preamble of the UDHR.

the need to resolve disputes by peaceful means; respect for and protection of human rights and fundamental freedoms; recognition that protection from genocide; crimes against humanity; ethnic cleansing and war crimes is not only a responsibility owed by a state to its population, but a responsibility of the international community, the equal rights and self-determination of peoples; and the recognition that peace and security, development, human rights, the rule of law and democracy are interlinked and mutually reinforcing. Appropriate rules of international law apply to the organisation as they do to states.⁴⁶¹

Although peacekeeping is often associated with serious crimes against helpless civilians, it is usually assumed that the peacekeepers are those attempting to prevent further massacres, as opposed to being involved in the commission of such crimes. Sadly, this is not always the case, as those who are meant to keep the peace themselves become perpetrators of crimes against those under their protection.⁴⁶² This has been illustrated in a report to the Security Council of the UN by the then Secretary-General of that organisation on the topic of Women and Peace and Security.⁴⁶³ In that report, the Secretary-General stated:

Sexual exploitation and abuse are forms of gender-based violence that can be perpetrated by anyone in a position of power or trust. The involvement of UN personnel, whether civilian or uniformed, in sexual exploitation and sexual abuse of local populations is particularly abhorrent and unacceptable and a serious impediment to the achievement of the goals of Resolution 1325 (2000) on the protection of women and girls. In May 2004, the MONUC uncovered allegations of sexual exploitation and abuse, including of minors, by civilian and military personnel in Bunia. Such abuses must be prevented and the perpetrators must be held accountable.⁴⁶⁴

Clearly, it is of utmost importance that peacekeepers should be held accountable for serious crimes committed by them during peacekeeping operations.⁴⁶⁵ So far, it can be concluded that the international community can no longer accept incidents of deliberate violations of IHL and IHRL, but only that accountability must take the lead. Members of the Department of Peacekeeping Operations must be held individually

⁴⁶¹ Preamble of the 2013 Declaration of the Principles.
⁴⁶² *Op cit* 8 at 5.
⁴⁶³ Security Council Document S/2004/814 13 October 2004.
⁴⁶⁴ *Ibid* at para 99.
⁴⁶⁵ *Op cit* 8 at 5.

financially and criminally accountable. In the Srebrenica case, the Supreme Court examined whether the immunity of the UN should prevail in light of the gravity of the alleged charges by reasoning through analogy with state immunity. It concluded that the difference between state immunity and UN immunity is not such as to justify the relationship between the right of access to a court differently in the two cases. Following the decision of the ICJ in *Germany v Italy* of 3 February 2012, it concluded that the UN is entitled to immunity irrespective of the extreme seriousness of the accusations on which the Association basis its claims in the present instance. The UN is claiming that it is immune, citing article 2, section 2 of the Convention on the Privileges and Immunities of the UN, which says that

the UNs property and assets shall enjoy immunity from every form of legal process except it has expressly waived its immunity.

The court ruling added that the lawsuit against the Dutch state and those who committed the genocide could still go ahead.⁴⁶⁶

The UN, as the organisation which mandates these members, as well as the troop-contributing countries, must all be held accountable as well. Disciplinary measures must concurrently be instilled at UN level and at sending country level.

By failing to hold those responsible to account, the UN may in fact be stimulating even greater discrimination and violence against women and children, in the process, encouraging a culture of impunity. In order to ensure that those who are mandated to protect do not become perpetrators of abuse, the UN must take a stronger stand against those who commit acts of sexual misconduct, and must

⁴⁶⁶ *Mothers of Srebrenica et al v State of the Netherlands and the UN* 10/04437 13 April 2012 para 4.3.14.

ensure that victims see that their abusers are brought to justice and that compensation is offered.⁴⁶⁷

It is a well-settled principle of international law that international organisations are subjects of international law and capable of possessing international rights and duties and of enforcing such rights by bringing international claims for breach of an international obligation against the organisation.⁴⁶⁸ At least theoretically, the opposite situation enjoys equal recognition, namely that international organisations may be held responsible for their wrongful acts as a logical consequence of the powers and duties bestowed upon them in terms of their constitutive instruments.⁴⁶⁹ Thus, the earlier submission that the UN must also be held accountable.

Where states are unwilling or unable to address international crimes committed in their jurisdictions, the ICC is well placed to play a complementary role.⁴⁷⁰ The core of the ICC's role lies in enforcing and prompting compliance with specific norms of international law aimed at outlawing and preventing mass violence. The ICC contributes to the fight against immunity and establishment of the rule of law by ensuring that the most severe crimes are punished and by promoting respect for international law. The core mandate of the ICC is to act as a court of last resort with the capacity to prosecute individuals for genocide, crimes against humanity and war crimes.⁴⁷¹ As the then UN Secretary-General Kofi Annan stated in 2004, the ICC

⁴⁶⁷ *Op cit* 21 at 85.

⁴⁶⁸ *Op cit* 192 at 174.

⁴⁶⁹ Strydom *South African Yearbook of International Law* 101.

⁴⁷⁰ Such was evident in the ICC case of *The Prosecutor v Francis Kirihi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-3 26 November 2009, where the delays and machinations in Kenya included proposals for a special tribunal, the suggestion that the TJRC could have judicial functions and the promise of judicial reform in order that domestic trials might proceed. The Kenyan government repeatedly delayed action, which in turn postponed the ICC's prosecutor request for a formal investigation.

⁴⁷¹ In the Pre-Trial Chamber in *The Prosecutor v Jean Pierra Bemba Gombo* ICC-01/05-01/08 15 June 2009, Bemba was charged with murder, rape, torture, outrages against personal dignity and pillage as constituting war crimes and crimes against humanity, thus falling within the

makes an impact by putting prospective violators on notice that immunity is not guaranteed.⁴⁷²

The Rome Statute created not only a court, but also a new international legal system consisting of the ICC as well as the domestic jurisdictions of each state party. Within this system, states have the primary responsibility to investigate and prosecute crimes found in the Rome Statute. In his 2004 report, Mr Annan noted that the court is already having an important impact by putting would-be violators on notice that impunity is not assured and serving as a catalyst for enacting national laws against the gravest international crimes.⁴⁷³ Indeed, the Assembly of states party to the Rome Statute has repeatedly stressed the importance of national implementation of the concept of complementarity, and have been multiplied in many forums among a wide range of stakeholders, notably the UN, interested states and civil society.⁴⁷⁴

Without the rule of law, immunity reigns. By punishing violations of international legal norms and by promoting adherence to these norms, the ICC and the wider Rome Statute system play an important part in advancing the rule of law, thereby reducing immunity. This role is critical given the nature of the specific norms that the Rome Statute provides for, and which are aimed at preventing crimes which ‘threaten the peace, security and well-being of the world. The acts and omissions which fall under its jurisdiction are so heinous, so destructive, that every effort towards their prevention is meaningful. Accountability is important not only for the sake of the past,

jurisdiction of the ICC. The Pre-Trial chamber confirmed that he was criminally responsible for murder, rape and pillage as crimes against humanity and war crimes within the meaning of article 28(a) of the Statute.

⁴⁷² Report of the Secretary-General 23 August 2004 S/2004/616 para 49.

⁴⁷³ As of 25 March 2014, the Rome Statute had 122 ratifications and 139 signatories.

⁴⁷⁴ Song *UN Chronicle* 3.

but for the future as well. Where immunity is left unaddressed, it provides fertile ground for the recurrence of conflicts and repetition of violence.⁴⁷⁵

The long-term value of the ICC and the Rome Statute system lies in both the punishment of perpetrators and the prevention of future crimes. There is already evidence that it has made a significant contribution in this regard. As it enters its second decade, the ICC remains firmly committed to bringing an end to immunity and upholding the rule of law, inspired by the common values of humanity that the Court shares with the UN.⁴⁷⁶

In the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL, the General Assembly recognised that the obligation to respect, ensure respect for and implement international human rights and humanitarian law implies the duty to

investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.⁴⁷⁷

The General Assembly further recognised the customary law character of this obligation and indicated that the Basic Principles and Guidelines

do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.⁴⁷⁸

The main purpose of this chapter is to determine accountability for acts of violations of IHL and IHRL by members of Department of Peacekeeping Operations or the UN or the troop-contributing country. In the past, the UN Secretary-General presented

⁴⁷⁵ *Ibid* at 4.

⁴⁷⁶ *Op cit* 474 at 5.

⁴⁷⁷ General Assembly Res 60/147 16 December 2005 para 3.

⁴⁷⁸ Preamble of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL.

the Prince Zeid Report to the General Assembly on 24 March 2005, after a series of investigations into these aforementioned allegations. The Zeid Report made recommendations in four general areas:

- 1) creation of common set of rules;
- 2) formation of a professional investigation capability;
- 3) introduction of measures to ensure organisational, managerial and command responsibility; and
- 4) establishment of procedures to ensure individual disciplinary, financial and criminal accountability.

This chapter does not repeat what is in the Zeid Report, but focuses on the question of collective and individual accountability of members. It draws some guidance from the Zeid Report and other reports that have tackled these issues before, thereby drafting a comprehensive and detailed exposition of addressing the issue of collective and individual accountability.

5.2 Individual Responsibility

Many violations of international human rights and humanitarian law may be considered criminal under national law. When certain conditions are met, some of these violations can also be qualified as crimes under international law, with additional legal consequences for states and individuals. Unlike 'simple' violations of international human rights and humanitarian law, international crimes may in particular be prosecuted not only in national courts or tribunals but also

internationally. For example, genocide, crimes against humanity and war crimes may be tried by an international criminal tribunal.⁴⁷⁹

From the onset, it must be made clear that what is being discussed here is the individual criminal responsibility of persons/troops accused of violations. This responsibility can be determined at both domestic and international level.

The creation of the International Military Tribunal (IMT) at Nuremberg and the related war crimes trials revealed a decision by the Allies that individual officials bore personal responsibility for outrageous conduct towards their own citizens and foreigners during wartime and ought to be held accountable. As a result, the IMT Charter provided for individual criminal responsibility for violations of the laws and customs of war, as well as other inhuman acts in connection with the war encompassed under the rubric of crimes against humanity. It also criminalised the war itself, and indeed made the initiation of aggressive war the chief crime of the Nazis.⁴⁸⁰ The IMT Charter discarded the defences of superior orders, command of law, and act-of-state immunity, thereby subjecting even heads of state to criminal liability. These principles were included in the Charter of the Tokyo Tribunal and in Control Council Law No 10, the latter of which governed many noteworthy prosecutions of Nazis below the level of those tried before the IMT, and were endorsed by the UN General Assembly in 1946.⁴⁸¹

Secondly, although the IMT Charter, strictly speaking, addressed atrocities only in connection with the war, Nuremberg proved a springboard for the development of IHRL, as much of the international community came to conclude that a government's

⁴⁷⁹ *Op cit* 55 at 74.

⁴⁸⁰ Article 6(a) of the International Military Tribunal Charter.

⁴⁸¹ Ratner and Abrams *Accountability for Human Rights Atrocities* 6-7.

treatment of its citizens in peacetime was appropriate for general international regulation. Thirdly, Nuremberg also laid the basis for further elaboration of international law on individual criminal responsibility for violations of IHL and IHRL. For violations of the law of armed conflict, the Geneva Conventions and Protocol I, have made provisions for individual culpability for certain violations and compel states to prosecute offenders.⁴⁸²

Individual criminal responsibility is fundamental to ensuring accountability for violations of international human rights and humanitarian law. In 1946, the Nuremberg IMT famously pronounced that:

crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁴⁸³

This thinking is captured in article 25 of the Rome Statute. The Rome Statute provides the most recent codification of individual responsibility for international crimes. Article 25(3) indicates that in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court. It then continues to list a series of criminal behaviour, such as committing the crime, ordering or instigating it. Here are some of the most important principles in individual criminal responsibility:

⁴⁸² In Schabas' *An Introduction to the International Criminal Court* 7, it is clear that at Nuremberg, Nazi war criminals were charged with what the prosecutor called "genocide", but the terms did not appear in the substantive provisions of the Statute, and the Tribunal convicted them of "crimes against humanity" for the atrocities committed against the Jewish people of Europe..

⁴⁸³ Schabas *International Criminal Court* 101. The establishment of special courts or tribunals have also emphasized this philosophy. The ICTY has jurisdiction over war crimes, crimes against humanity and genocide committed in the territory of the former Yugoslavia after 1 January 1991. The ICTR has jurisdiction over war crimes, crimes against humanity and genocide. It is also limited to crimes committed in Rwanda or by Rwandans in neighbouring states between 1 January and 31 December 1994. The SCSL's mandate is to try persons who bear the greatest responsibility for serious violations of IHL and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The ECCC has jurisdiction to try senior leaders of the Khmer Rouge and those most responsible for the crimes and serious violations of Cambodian penal law, IHL and custom and international conventions recognised by Cambodia.

- 1) Individuals are criminally responsible for the international crimes they commit;
and
- 2) Individuals shall be criminally responsible and liable for punishment for an international crime if the material elements of the crime are committed with intent and knowledge.

Intent is often described using the Latin expression *mens rea* (guilty mind), taken from the phrase *actus not facit reum nisi mens sit rea*. But, even if it is understood that a criminal act must be intentional and knowing, there are degrees of intention ranging from mere negligence to recklessness and full-blown intent with premeditation. In keeping with the seriousness of the offences over which the Court has jurisdiction, the Rome Statute sets a high standard for the mental element, requiring in paragraph (1) of article 30 that unless otherwise provided', the material elements of the offence must be committed with 'intent and knowledge'. A person has intent with respect to conduct when that person means to engage in the conduct. A person has intent with respect to a consequence when that person means to cause that consequence or is aware that it will occur in the ordinary course of events. Knowledge is defined as awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Article 30 defines knowledge, adding that 'know and knowingly' shall be construed accordingly. But 'know and knowingly' are not used in either article 30 or elsewhere in the Rome Statute. The word 'known' appears in the command responsibility provision (article 28).⁴⁸⁴

Genocide is defined as a punishable act committed with the intent to destroy a protected group in article 6 of Rome Statute. Crimes against humanity involve a

⁴⁸⁴ The word 'knowledge is in the chapeau of article 7, crimes against humanity.

widespread or systematic attack directed against a civilian population with 'knowledge of the attack'. Many of the war crimes listed in article 8 include the adjectives 'willfully, wantonly or treacherously'. Indeed, it is at least partly for this reason that article 30 begins with the words 'unless otherwise provided'.⁴⁸⁵

In the Jelisic Case (Appeal), the ICTY explained that it is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against IHL.⁴⁸⁶ In *Prosecutor v Akayesu* ICTR, the ICTR Trial Chamber found that the accused had the required *mens rea* to commit genocide, and had shown that aggravated criminal intention through, *inter alia*, the systematic rape of Tutsi women. According to the ICTR, the systematic rape of Tutsi women was part of the campaign to mobilise the Hutus against the Tutsi, and the sexual violence was aimed at destroying the spirit, will to live, or will to procreate, of the Tutsi group.⁴⁸⁷

These principles apply to the different types of crimes, ranging from grave breaches of the Geneva Conventions and violations of the laws or customs of war and of Common Article 3, to crimes against humanity and genocide, for which individual responsibility arises for any person who planned, instigated, ordered, committed or otherwise aided and abetted in their planning, preparation or execution.⁴⁸⁸

The UN Charter provides that the Secretariat, one of the principal organs of the UN organisation created pursuant to article 7, para 1 of the Charter, shall comprise a Secretary-General and such staff as the organisation may require. According to article 101, para 1 of the Charter, the Secretary-General, under regulations promulgated by the General Assembly, shall appoint the staff members of the

⁴⁸⁵ *Op cit* 483 at 108.

⁴⁸⁶ *Jelisic Case (Appeal)* ICTY 5 July 2001 IT-95-10-A 40 ILM 1295 para 66.

⁴⁸⁷ *Op cit* 260 at para 732.

⁴⁸⁸ *Op cit* 55 at 78.

organisation. Para 3 of the same article requires that the staff of the organisation be persons with the highest standards of integrity.⁴⁸⁹

It must be made clear that peacekeepers can face prosecution both at the host state and their home state. However, prosecuting peacekeepers for sexual abuses committed in the state hosting the peacekeeping operation has several advantages. First, the prosecution would occur in the territory in which the act occurred. Not only would this permit the victim to appreciate that justice was done, it would also serve as a deterrent and would enable gathering of evidence and the provision and securing of witnesses to testify.⁴⁹⁰

If prosecution fails because the offender has already been sent home or the mission has ended, prosecution must continue in the troop-contributing countries or home country. The troop-contributing countries must undertake or make an assurance to prosecute offenders after they have been sent back to their home countries. In the past, there has never been such an assurance, which led to no prosecution in the host country or in troop-contributing countries.⁴⁹¹

Troop-contributing countries are responsible for the conduct and discipline of their troops. Under a typical SOFA signed with the UN, troop-contributing countries retain exclusive criminal jurisdiction over their troops and the troops remain an integral part of their national military force. The UN is, therefore, limited in what it can do once a soldier engages in sexual abuse or sexual exploitation. It may order suspension, or at worst, repatriation to the home state for those found guilty of sexual abuse or sexual exploitation. Because the UN's ability to discipline its peacekeeping military

⁴⁸⁹ *Op cit* 1 at article 97.

⁴⁹⁰ *Op cit* 323 at 153.

⁴⁹¹ *Op cit* 323 at 155.

personnel is limited, and given the general inability of host states to prosecute UN peacekeeping personnel, troop-contributing countries are in the best position to prosecute their own nationals who serve as peacekeepers and commit sexual abuse or sexual exploitation abroad. Furthermore, according to IHRL jurisprudence, states have a duty to prosecute nationals who commit abuses, especially where the abuses amount to a violation of international human rights norms.⁴⁹²

While domestic courts have jurisdiction over violations that occurred within the territory of their own state, territory alone does not define the limits of jurisdiction. The legal obligations created by IHRL and IHL have been widely recognised as extending beyond the territory of a state and to any place where the state exercises jurisdiction or control over persons. Yet, in *Bankovic and Others v Belgium and Others*,⁴⁹³ the European Court of Human Rights, held that the European Convention on Human Rights was not designed to be applied throughout the world, but essentially only applied in what the Court referred to as ‘the legal space of the contracting states’, which notably did not include Bosnia-Herzegovina until 2002.

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting states. The Federal Republic of Yugoslavia clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.⁴⁹⁴

⁴⁹² *Velasquez v Honduras* Inter-American Court of Human Rights No 4 1998. In this case, the Inter-American Court of Human Rights held that the obligations imposed on state parties to a human rights convention is to respect the rights and freedoms recognized by the convention, and the second obligation is to ensure the free and full exercise of the rights recognized by the convention to every person subject to its jurisdiction.

⁴⁹³ ECHR *Bankovic and Others v Belgium and Others* (52207/99) 12 December 2001.

⁴⁹⁴ *Ibid* at para 80.

Article 56 of the European Convention enables a contracting state to declare that the Convention shall extend to all or any of the territories for whose international relations that state is responsible.

On the other hand, in the case of *Al-Skein and Others v The UK*, Brooke LJ, who gave the leading judgment, held that a state could exercise extra-territorial jurisdiction when it applied control and authority over a complainant, which he termed state agent authority (SAA) and when it held effective control of an area outside its borders, effective control of an area (ECA), observing that:⁴⁹⁵

I would therefore be more cautious than the Divisional Court in my approach to the *Bankovic* judgment. It seems to me that it left open both the ECA and SAA approaches to extraterritorial jurisdiction, while at the same time, emphasizing that because a SAA approach might constitute a violation of another state's sovereignty (for example, when someone is kidnapped by the agents of a state on the territory of another state without that state's invitation or consent), this route to any recognition that extra-territorial jurisdiction has been exercised within the meaning of an international treaty should be approached with caution.⁴⁹⁶

Furthermore, under the principle of universal jurisdiction, a state may, and for grave breaches of the Geneva Conventions must, prosecute alleged perpetrators of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim. For example, the Geneva Convention IV on the Protection of Civilians establishes universal jurisdiction over grave breaches, providing that parties to the Convention:

shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches of the present Convention, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.⁴⁹⁷

⁴⁹⁵ *Al-Skein and Others v The UK* 55721/07 7 July 2011 para 79.

⁴⁹⁶ *Ibid* at para 80.

⁴⁹⁷ Article 146 of the Geneva Convention IV.

This principle of universal jurisdiction derogates from the ordinary rules of criminal jurisdiction that require a territorial or personal link with the crime, the perpetrator or the victim. The rationale behind this principle is that certain crimes are so harmful to international interests that states are entitled and even obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim.⁴⁹⁸ One can conclude that violations of IHL and IHRL by UN peacekeepers have international interest, and therefore can be subjected to universal jurisdiction.

Sometimes the extent of a state's accountability obligations will have to be determined in the framework of the jurisdictional competence of an international tribunal or court. The jurisdiction of the ICC, for example, is meant for crimes set out in its Rome Statute committed by nationals or on the territory of a state party to the Statute, or when the UN Security Council so decides.⁴⁹⁹ However, in view of the complementarity principle enshrined in the Rome Statute, the Court can exercise its jurisdiction only when the competent state is unwilling or unable to prosecute. States therefore hold the main responsibility for prosecuting alleged perpetrators and only in certain cases may prosecution be transferred to the ICC.⁵⁰⁰

On the same note, with regard to UN peacekeeping forces, IHRL and IHL principles of accountability and the UN Charter the UN must conduct internal investigations of reported violations and reports on the results. Moreover, these individual home states have jurisdiction and, when acting through the UN, including through the Security Council, these states must take steps to prevent violations and to ensure

⁴⁹⁸ Philippe *International Review of the Red Cross* 377.

⁴⁹⁹ *Op cit* 42 at article 12.

⁵⁰⁰ Article 17(3) of the ICC Statute states that in order to determine inability in a particular case, the Court shall consider whether, due to total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

accountability of their own nationals in accordance with IHRL and IHL requirements.⁵⁰¹

The UN is bound by a SOFA or Memorandum of Understanding between the UN and countries contributing personnel to the peacekeeping operation. This agreement assumes that the troop-contributing countries will meet its duty to exercise criminal jurisdiction over national personnel in return for immunity from local prosecution. However, experience has demonstrated that, because this is an implicit understanding, few countries often meet this requirement. Moreover, peacekeepers seem aware of the UN's limited jurisdiction over them.⁵⁰² The UN OIOS Report from the DRC notes

despite knowledge that the investigation was on-going, sexual activities between the military and the local population apparently continued, it was clear that the investigation did not act as a deterrent, perhaps because they had not been made aware of the severe penalties for engaging in such conduct, nor had any seen any evidence of negative impact on individual peacekeepers for such behaviour. Without strong reinforcement of the legal requirement and prompt sanctions for violations, they may well continue this behaviour.⁵⁰³

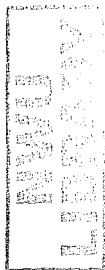
Currently peacekeeping troops report to their home country commanders. If a soldier is found guilty, that person is sent back to his country for discipline. It is very problematic, if not impossible, for victims and their families to know which, if any, actions have been taken. In order for local communities and victims to trust the UN enough to begin reporting violations, victims must know they will be protected and treated with respect when they report and that there will be action taken against the perpetrator.⁵⁰⁴

⁵⁰¹ *Op cit* 55 at 87.

⁵⁰² *Op cit* 21 at 88.

⁵⁰³ Office of Internal Oversight Report A/59/661 5 January 2005.

⁵⁰⁴ *Op cit* 342 at iii.



The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity refers to state's obligation to undertake prompt, thorough, independent and impartial investigations of violations of human rights and IHL and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by making sure that those responsible for serious crimes under international law are prosecuted, tried and duly punished.⁵⁰⁵

The respect shown to peacekeepers will be a direct consequence of their professional conduct and how they treat the parties and the local population. Through special agreements, peacekeepers enjoy certain immunities related to their duties. These notwithstanding, peacekeepers must still respect the laws and customs of the host nation and must be seen to be doing so. Thus, whether they are soldiers, police or civilians (including humanitarian workers), all peacekeepers are expected to conduct themselves with professionalism and integrity. It is mandatory for them to support international human rights standards, respect local populations and cultures, as well as enhance the credibility of the mission.⁵⁰⁶

Article 105 of the Charter is the source of authority granting immunity to UN personnel acting on behalf of the organisation. The Charter subjects UN officials to local law with regard to their personal conduct because the Charter only grants immunity to UN personnel for acts performed in the course of their official duties. In other words, there is no impunity for private misconduct.⁵⁰⁷ Article 105 clearly is

⁵⁰⁵ E/CN.4/2005/102/Add 1 8 February 2005 principle 19. The principles define the term 'serious crimes under international law, as encompassing grave breaches of the Geneva Conventions and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution and slavery.

⁵⁰⁶ *Op cit* 21 at 86.

⁵⁰⁷ *Op cit* 330 at 90.

intended for the immunity to attach only to official acts, regardless of the final nature and extent of the immunity. The Charter made it clear that immunity for official functions is not similar immunity for private actions. It follows that the Secretary-General has a duty to waive immunity if the existence of such immunity would obstruct the course of justice and such waiver would not prejudice to the interests of the UN.⁵⁰⁸

Obviously, acts of sexual exploitation and abuse will never be acts performed in the course of official functions. Nevertheless, in practice, many courts seek and insist on a formal waiver of immunity whenever an official or an expert on mission is charged with a criminal offence. Normally, the Secretary-General will review the request from the appropriate authorities of the host state in order to waive immunity. The Secretary-General will grant this request if there is credible evidence to satisfy the test in sections 20 and 23 of the General Convention. But the Secretary-General cannot grant a request and permit a staff member to be criminally indicted if the local legal process of the host state does not meet the minimum human rights standards with which the UN is bound to uphold and respect.⁵⁰⁹

The Head of Mission may anticipate such an issue and raise it as an objection when considering the request of an immunity waiver from the local authorities. Naturally, if the state of nationality of the accused staff member is able to prosecute a criminal action, then the Secretary-General will cooperate at all times with the appropriate authorities of members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in

⁵⁰⁸ Section 23 of the Convention on the Privileges and Immunities of the UN.

⁵⁰⁹ *Op cit* 329 at para 84-90.

connection with the privileges, immunities and facilities mentioned in the Convention.⁵¹⁰

While the UN Department of Peacekeeping Operations has a zero tolerance clause of sexual abuse within its Code of Conduct, it is only enforceable if the military command of the member state taking part in the operation chooses to enforce it. Peacekeepers are protected from prosecution of sexual abuse as troops are traditionally granted jurisdictional immunity through SOFAs in the countries where they operate. These agreements give peacekeepers absolute immunity within host countries and give exclusive jurisdiction to the peacekeepers' nation of origin. If abuses occur, peacekeepers are held accountable to the rules and regulations of their country's armed forces, not according to the laws of the land where they serve. Trials are not held in civilian courts, but in military courts, most often in the peacekeeper's home country, not where the abuse occurred. This is a clear path to immunity from punishment, as perpetrators are tried by their peers in a context in which impartiality is questionable.⁵¹¹

5.3 Organisational Responsibility

This section relates to the UN as an international organisation, not any other organisation. The section also focuses on civil responsibility and not criminal responsibility, because only natural persons can bear criminal responsibility and not juristic persons. The discussion here focuses on holding the UN responsible for misconducts committed by its members in terms of international law.

⁵¹⁰ *Op cit* 508 at section 21.

⁵¹¹ Novick 2012 <http://www.womenundersiege/blog>.

In the *Behrami and Behrami v France decision*⁵¹², the European Court of Human Rights held that as regards UN peacekeeping forces, the acts of such subsidiary organs were in principle attributable to the organisation and, if committed in violation of an international obligation, involved the international responsibility of the organisation and its liability in compensation. This, according to the ILC Report, summed up the UN practice in respect of several UN peacekeeping missions referenced in that Report.⁵¹³

As in the case of a state, an international organisation is rendered responsible in international law when, firstly, conduct consisting of an action or omission constitutes a breach of an international obligation; and secondly, the conduct is attributable to the organisation. A breach of an international obligation is established when an act of the organisation is not in conformity with what is required of it by that obligation, whatever the source of the obligation. Such a breach may also arise under the rules of the organisation, which, in particular, include the constituent instruments, decision, resolutions and other acts of the organisation, as well as its established practice.⁵¹⁴

The conduct of an organ or agent of an international organisation is also, in the performance of the official functions of that organ or agent, attributable to the organisation whatever the position the organ or agent holds in the organisation.⁵¹⁵

Applied to the UN, for instance, this would mean that the UN is not only responsible for the acts or omissions of its principal and subsidiary organs, but also for those of its agents, a term which includes not only its officials, but also persons acting on behalf of the UN on the basis of powers and functions conferred upon them by the

⁵¹² *Behrami and Behrami v France* Application No 71412/01 ECHR 2 May 2007.

⁵¹³ *Ibid* at para 25.

⁵¹⁴ Draft article 2(b) of the Draft Articles on the Responsibility of International Organisations 2011.

⁵¹⁵ *Ibid* at draft article 6(1).

UN. In the *Reparations* case⁵¹⁶, for instance, the Court understood the word 'agent' in the most liberal sense, that is to say, any person, who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organisation with carrying out, or helping to carry out, one of its functions, in short, any person through whom it acts.⁵¹⁷

As early as 2004, the UN Secretariat responded to the ILC report at the time in the following terms:

The principle of attribution of the conduct of a peacekeeping force to the UN is premised on the assumption that the operation in question is conducted under UN command and control, and thus has the legal status of a UN subsidiary organ. In authorised Chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted under national or regional command and control, international responsibility lies where effective command and control is vested and practically exercised.⁵¹⁸

In response to the Draft Articles on Organisational Responsibility, the UN has sent out its Commentary.⁵¹⁹ The UN made a clear distinction between 'UN command and control' and 'effective command and control'. Such distinction will assist in determining the attributability of an act of members of the military operations of the UN. In the practice of the UN a clear distinction is made between two kinds of military operations: (a) UN operations conducted under UN command and control, and (b) UN authorised operations conducted under national or regional command and control. UN operations conducted under UN command and control are subsidiary organs of the UN. They are accountable to the Security Council. UN authorised operations are conducted under national or regional command and control, and while authorised by the Security Council, they are independent of the

⁵¹⁶ *Op cit* 192 at 177.

⁵¹⁷ *Op cit* 192 at 177.

⁵¹⁸ UN Doc A/CN.4/545 of 25 June 2004.

⁵¹⁹ UN Doc A/CN.4/637/Add.1 of 17 February 2011.

UN or the Security Council in the conduct and funding of the operation. Having authorised the operation, the Security Council does not control any aspect of the operation, nor does it monitor it for its duration. Its role following the authorization of the operation is limited to receiving periodic reports through the lead nation or organisation conducting the operation.⁵²⁰

Questions about attribution of responsibility to a UN or a UN-authorized operation have arisen in the practice of the UN in only two cases: the operation in the Republic of Korea and the Somalia operation.

The Korean operation in the 1950s was the first UN authorized operation. Conducted under United States unified command, it reported periodically, through the United States Government, to the Security Council. Claims against the operation were settled by the Unified Command, or as the case may have been, by the participating States pursuant to bilateral agreements concluded between the US and the participating states. While the UN cannot say with confidence that all such claims were settled and compensated for by the Unified Command, it can say with certainty that none were settled by the UN.⁵²¹

In Somalia, between 1992 and 1994, a number of UN and United States-led operations were deployed for the most part simultaneously and within the same area of operation. They maintained a separate command and control structure, including in the conduct of joint or coordinated operations. Claims commissions established by either operation settled third-party claims according to whether the UN or the UN authorized operation had effective command and control over any given operation.⁵²²

⁵²⁰ *Ibid* at 10.

⁵²¹ *Op cit* 519 at 11.

⁵²² *Op cit* 519 at 11.

The recent jurisprudence of the European Court of Human Rights, in the *Behrami and Saramati* case⁵²³, disregarded this fundamental distinction between the two kinds of operation for purposes of attribution. In attributing to the UN acts of a United Nations-authorized operation International Security Force in Kosovo (KFOR) conducted under regional command and control, solely on the grounds that the Security Council had 'delegated' its powers to the said operation and had 'ultimate authority and control' over it, the Court disregarded the test of 'effective command and control' which for over six decades has guided the UN and member states in matters of attribution.⁵²⁴

In the *Behrami* case, the Court referred to both articles 3 and 4 (now 4 and 5) of the ILC's Draft Articles on the Responsibility of International Organisations, it ultimately formulated its finding on UN responsibility with reference to article 3 only. It reads as follows:

In such circumstances, the Court observes that the High Representative was exercising lawfully delegated Chapter VII powers of the UN Security Council so that the impugned action was, in principle, 'attributable' to the UN within the meaning of draft article 3 of the Draft Articles on the Responsibility of International Organisations.

In this instance, the responsibility of the UN is based on the situation where the impugned conduct is that of an agent or official on whom the UN has conferred certain powers and functions, and who then acts on behalf of the organisation.⁵²⁵

Towards the end of the UN report on the *Srebrenica* case⁵²⁶ the following telling assessment was made by the Secretary-General:

The international community as a whole must accept its share of responsibility for allowing this tragic course of events by its prolonged refusal

⁵²³ *Op cit* 512.

⁵²⁴ *Op cit* 512 at 12.

⁵²⁵ *Op cit* 469 at 124.

⁵²⁶ *Op cit* 466.

to use force in the early stages of the war. This responsibility is shared by the Security Council, the Contact Group, and other Governments, which contributed to the delay in the use of force, as well as by the UN Secretariat and the mission in the field.⁵²⁷

5.4 State Responsibility

It is often stressed that the rule of law implies that not only the law-breakers be held accountable, but also that decision-makers must as well give account of their actions. In international law, the focus is naturally put on states, but other actors should also be looked at, such as international organisations or eventually non-state decision-makers.⁵²⁸ The following discussion shall outline the legal mandate for state responsibilities as well as responsibilities for the UN as an international organisation.

State responsibility for violations of international human rights and humanitarian law has long been a foundation of international law. State responsibility stems from the principle of *pacta sunt servanda*, which means that every treaty in force is binding upon the parties to it and must be performed by them in good faith.⁵²⁹ Even beyond treaty obligations, the ILC's Draft Articles on State Responsibility recall the general principle of international law that the breach of a state's international obligation constitutes an international wrongful act, which entails the international responsibility of that state.⁵³⁰ In this context, it is useful to recall that a state is responsible for violations of international human rights and humanitarian law in the context of armed conflict if the violations are attributable to it, such as:

- 1) Violations committed by its organs, including its armed forces;⁵³¹

⁵²⁷ UN Doc A/54/549 par 501 15 November 1999.

⁵²⁸ *Ibid.*

⁵²⁹ Article 26 of the Vienna Convention on the Law of Treaties, 1969.

⁵³⁰ Article 1-2 of ILC's Draft Articles on State Responsibility.

⁵³¹ *Ibid* at article 4.

- 2) Violations committed by persons or entities empowered to exercise elements of governmental authority;⁵³²
- 3) Violations committed by persons or groups in fact on its instructions, or under its direction or control;⁵³³ and
- 4) Violations committed by private persons or groups which it acknowledges and adopts as its own conduct.⁵³⁴

A state may also be responsible for lack of due diligence if it has failed to prevent or punish violations of international human rights and humanitarian law committed by private actors.⁵³⁵

Although individual accountability for violating human rights standards has been honoured more in theory than in actual practice, its place in international law is secure. An excellent example of the centrality of the principle is the Torture Convention under which all state parties compel themselves to either prosecute or to extradite any torturers who are within its territorial borders; and what does not matter is if the torture had been carried out in that state or whether the victim or the perpetrator were nationals of that state.⁵³⁶

In the *Srebrenica Case*, the ICJ used the framework of article 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that

The conduct of a person or group of persons is in fact acting on the instruction of, or under the direction or control of, that state in carrying out the conduct.

In addressing this matter, the Court invoked the 'effective control' test from its previous decision in *Nicaragua v US*, holding that in order to have any legal

⁵³² *Op cit* 530 at article 5.

⁵³³ *Op cit* 530 at article 8.

⁵³⁴ *Op cit* 530 at article 11.

⁵³⁵ *Op cit* 55 at 72.

⁵³⁶ Gibney and Roxstrom *Human Rights Law Journal* 452.

responsibility, it must be shown that a state had exercised 'effective' control', with respect to each operation in which the alleged violations occurred, not generally in respect of the overall operations taken by the persons or groups of persons having committed the violations.⁵³⁷

The ruling in *Bosnia v Serbia* means that in order for a state to be 'responsible' for human rights violations that occur in another land, it must exercise some degree of control over events that take place there. It will virtually be impossible to hold a state responsible in any manner for human rights violations that occur in some other land.⁵³⁸

In *Bosnia and Herzegovina v Serbia and Montenegro*,⁵³⁹ the ICJ found that Serbia had violated its obligations to prevent and prosecute acts of genocide. The Court held that Serbia had to take effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide and to transfer individuals accused of genocide or any of those other acts for trial by the ICTY, and to cooperate fully with that Tribunal.⁵⁴⁰

The Inter-American Court of Human Rights and the European Court of Human Rights refer to international customary rules of state responsibility to order the payment of compensation to victims of human rights abuses.⁵⁴¹

⁵³⁷ *Ibid* at 453.

⁵³⁸ *Op cit* 536 at 455.

⁵³⁹ *Bosnia and Herzegovina v Serbia and Montenegro* ICJ 26 February 2007.

⁵⁴⁰ In the case of *Prosecutor v Dusko Tadic* IT-94-I-A, Tadic was found guilty of crimes against humanity, grave breaches of the Geneva Convention and violations of the customs of war by the ICTY. In the case of the *Prosecutor v Anto Furundzija* IT-95-17/1-T, he was also found guilty of violations of laws or customs of war. Also, in the case of the *Prosecutor v Dragomir Milosevic* IT-98-29/1, the ICTY found Milosevic guilty of war crimes.

⁵⁴¹ For example, according to the Inter-American Court of Human Rights, it is a principle of International Law that any violation of an international obligation which causes damage gives rise to a duty to make adequate reparations. The obligation to provide reparations is

Under international law, the fact that an individual is found guilty of gross abuses of international human rights and humanitarian law does not absolve the state from international responsibility.⁵⁴²

It is fundamental that states develop or refine their own capacity to investigate and prosecute perpetrators of gross violations of human rights. In many cases, this means setting up new and specialised institutions that can handle international crimes and gross human rights violations. This is not a luxury, but an obligation. Any state which finds that violations or crimes may have been committed on its territory or otherwise in its jurisdiction must assemble the resources necessary to carry out effective prosecutions, while guaranteeing the full judicial, prosecutorial and investigative independence of these processes. In addition to that, states need to remove any hurdles to prosecuting international crimes and gross human rights violations, in particular, legal hurdles such as amnesties or statutes of limitations.⁵⁴³

The obligation to seek accountability includes a responsibility for states, in accordance with international law, to cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. The obligation to seek accountability is explicitly referred to in some instruments of international human rights and humanitarian law and has been reinforced by interpretations of the law. The ICCPR,⁵⁴⁴ the Convention against

regulated in every aspect by International Law. *Rochela Massacre v Colombia* 11 May 2007 Series C No 163 para 226.

⁵⁴² Article 25.4 of the Rome Statute of International Criminal Court, which establishes that no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

⁵⁴³ Pillay *UN Chronicle* 3.

⁵⁴⁴ Article 2 of the International Covenant on Civil and Political Rights 16 December 1966 provides that each state party to the present Convention undertakes to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

Torture,⁵⁴⁵ the International Convention for the Protection of All Persons from Enforced Disappearance,⁵⁴⁶ and the Optional Protocols to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography,⁵⁴⁷ all impose a general obligation on all state parties to provide an effective remedy for violations of the rights and freedoms contained in these treaties, including a duty to investigate and punish those responsible.⁵⁴⁸

In the DRC, the UN set up prosecution support cells that work in collaboration with Congolese prosecutors in cases involving war crimes or crimes against humanity. States need to set up national commissions of inquiry to respond to serious violations of human rights. Some are sincere efforts to break with the legacy of the past, while others serve mainly to bounce international scrutiny.⁵⁴⁹

True accountability can be achieved only if national inquiry mechanisms are credible, independent, impartial and transparent. They should have unconstrained access to all relevant authorities, persons, places and information, as well as adequate financial and human resources. They must also be able to publicise their findings.

⁵⁴⁵ Article 14(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 26 June 1987 provides that each state party shall ensure its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

⁵⁴⁶ Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance 20 December 2006 states that each state party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

⁵⁴⁷ Article 8(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography 25 May 2000 states that states parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process.

⁵⁴⁸ *Op cit* 55 at 82.

⁵⁴⁹ *Op cit* 543 at 5.

Central to any effective investigation and prosecution process is a successful witness protection programme that, if necessary, may also include international assistance to get witnesses out of harm's way.⁵⁵⁰

No state can or should be able to evade responsibility for the most egregious crimes committed by its agents. Accordingly, the doctrine of private conduct does not provide any assistance in instances where the aim is to hold the state itself accountable. It may become an appropriate legal device where an attempt is made to overcome the personal immunity of high-ranking governmental officers in criminal cases, the proceedings against General Pinochet, stands out as the most prominent example.⁵⁵¹

5.5 Prosecution: The Legal Mandate

Justice is the indispensable companion of truth. Accountability for crimes and gross violations, including individual accountability under the criminal law, is key to reinstate public trust in justice and security institutions to rebuild the rule of law and sustainable peace. At the same time, we need to pay more attention to the victims. Everyone is aware of the incredible physical, psychological and material price victims of armed conflict pay. However, efforts to end immunity have, unfortunately, not been accompanied by equally strong efforts to address the plight of victims.⁵⁵²

⁵⁵⁰ Charles Ghankay Taylor was transferred by the Special Court of Sierra Leone to The Hague in the Netherlands, to stand trial there; due to concerns about regional security should the trial be held in Sierra Leone.

⁵⁵¹ Tomuschat *Vanderbilt Journal of Transnational Law* 1222.

⁵⁵² According to Eric Brahm in *Beyond Intractability*, the Chilean Truth and Reconciliation Commission allowed victims' families to be relieved from administrative and legal limbo due to their status as "disappeared". Because their loved ones had not been confirmed dead, benefits could not be extended. Just under 5000 people received a monthly 'pension' as families of those killed or disappeared, which amounts to about \$500 per year. Survivors of torture or illegal imprisonment which are much bigger numbers, unfortunately, are not eligible because of the restricted mandate.

Accountability for international crimes and gross human rights violations constitutes a central board of the contemporary human rights agenda. Today, the question is no longer whether to ensure accountability, but when and how this can be best achieved.⁵⁵³

The then Secretary-General in his 2004 Report,⁵⁵⁴ stated that the rule of law implies that all persons must be accountable to the law, that is, face the social and legal consequences of their violating the law. It indeed seems that for the law, and therefore for the rule of law, to have any real social function, the social actors must have the obligation to abide by it and society must be able to hold them to account.⁵⁵⁵

In 1995, the UN declared that forcing women to render sexual services is sexual slavery, a violation of their human rights, and that sexual slavery imposed by members of armed forces is a war crime.⁵⁵⁶ Incidents that took place in DRC, amounted to sexual slavery, for those women had nowhere else to go, except to the peacekeepers camps, to render sexual services.⁵⁵⁷

At the level of prosecuting perpetrators of sexual violence offences in the context of war, great strides were made with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in developing the law regarding violence against women in conflict.⁵⁵⁸ The ICTY and the ICTR produced a series of decisions that explicitly recognised the international criminal nature of acts of sexual violence. Together, the decisions resulted in the

⁵⁵³ *Op cit* 527 at 5.

⁵⁵⁴ UN Secretary-General The Rule of Law UN Doc S/2004/616 23 August 2004 4.

⁵⁵⁵ Nollkaemper *et al* *Accountability and the Rule of Law* 5.

⁵⁵⁶ *Op cit* 368 at 244.

⁵⁵⁷ See discussion in Chapter 4.2 above.

⁵⁵⁸ *Op cit* 323 at 133.

classification of acts of sexual violence as forms of genocide, crimes against humanity, war crimes, and grave breaches of the Geneva Conventions. Several critical cases set important precedent. In *Tadic*, the Tribunal formerly recognised sexual violence as an international crime.⁵⁵⁹ The *Delalic* Tribunal recognised sexual humiliation as a war crime and a grave breach of the Geneva Conventions and established command responsibility for acts of sexual violence.⁵⁶⁰

The Tribunal found rape and forced watching of rape to constitute torture as well as a war crime in *Furundzija*.⁵⁶¹ In *Kunarac*, rape, enslavement of women, and related outrages upon personal dignity were found to constitute crimes against humanity as well as war crimes.⁵⁶² In the ICTR jurisprudence, *Akayesu* was the major case solidifying sexually violent acts as international crimes.⁵⁶³ In this case, the Tribunal found that as long as there was a specific intent to destroy a particular group in whole or in part, rape could constitute genocide.⁵⁶⁴

The final text of the Rome Statute of the ICC also made major strides in correcting many of the injustices and deficiencies of the prosecution of gender-based crimes in international law. This was done primarily by enlarging the scope of the crimes. While the Nuremberg Charter did not explicitly recognise rape as a crime against humanity⁵⁶⁵ (which was later corrected by judicial interpretation),⁵⁶⁶ the ICC explicitly codified sexual assault such as rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilisation, and any other form of sexual violence of

⁵⁵⁹ *Op cit* 540 at para 476.

⁵⁶⁰ *Prosecutor v Delalic* IT-96-21 Judgment 16 November 1998 para 476-478.

⁵⁶¹ *Op cit* 259 at para 175.

⁵⁶² *Prosecutor v Kunarac* IT-96-23-T & 96-23/I Judgment 21 July 2000 para 438, 498, and 539-540.

⁵⁶³ *Op cit* 260 at para 687.

⁵⁶⁴ *Ibid* at 731.

⁵⁶⁵ Paragraph 6.C of the Nuremberg Charter.

⁵⁶⁶ *Trial of General Tomoyuki Yamashita* 8 October- 7 December 1945 IV Law Reports of Trials of War Criminals 1 London HMSO 1948 67.

comparable gravity as crimes against humanity.⁵⁶⁷ In building up on the advances achieved by the former Yugoslav and Rwandan Tribunals, the ICC statute has provided more comprehensive and precise definitions for gender-based crimes, thereby making it easier to prosecute such crimes. Given the above codifications and case law, it means that the 72 cases of sexual exploitation and abuse against MONUC, between May and September 2004, all amount to serious violations of article 7(1)(g) of the Rome Statute. The documented cases of sexual violence by UNAMSIL peacekeepers in Sierra Leone, between 2001 and 2002, also amount to violations of the Rome Statute. Also, when UNMIS, and UNMEE sexually exploited children in Sudan and in Eritrea, their actions amounted to grave breaches of article 7(1)(g).⁵⁶⁸ Since it is clear from these incidents that those heinous acts were perpetrated by UN peacekeepers, who were under the UN command and control, such peacekeepers must be held criminally responsible for their actions.

Another area of the law that provides a framework for the prosecution of gender-based crimes is IHL. War crimes as we know them today were first elaborated and statutorily defined in the Nuremberg Charter.⁵⁶⁹ Four years later, they were incorporated into the 'grave breaches' provisions of the 1949 Geneva Conventions. Outside the Statute of the ICC, the Geneva Conventions remain the main texts of humanitarian law and provide the main framework for the protection of individuals affected by armed conflict, especially for countries that are not party to the ICC Statute.⁵⁷⁰

⁵⁶⁷ *Op cit* 42 at article 7(1)(g).

⁵⁶⁸ All these incidents and many others are discussed in Chapter 4 above.

⁵⁶⁹ *Op cit* 480.

⁵⁷⁰ *Op cit* 323 at 135.

Common Article 3, contained in all Four Conventions, provides that all parties to a non-international armed conflict taking place within the territory of a state party are required to treat all persons not taking active part in hostilities humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.⁵⁷¹ To this end, Common Article 3 explicitly prohibits

- 1) violence to life and person, in particular murder of all kinds, mutilation cruel treatment and torture;
- 2) taking of hostages;
- 3) outrages upon personal dignity; in particular humiliating and degrading treatment; and
- 4) the passing of sentences and executions without a regularly constituted court's previous judgment, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.⁵⁷²

These prohibitions, which are closely linked to the foundational norms of the then-emerging law of international human rights, are thus the absolute minimum requirements for protecting non-combatants during all armed conflicts.

Common Article 3 is supplemented by the Protocol II Additional to the Geneva Conventions (Protocol II).⁵⁷³ Protocol II expands on the basic prohibitions of Common Article 3 to criminalise acts of terrorism, rape and forced prostitution, slavery and the slave trade, and pillage. It also provides special protection for children, requiring that they may be granted educational opportunities and that families not be separated unnecessarily, and prohibiting the use of child soldiers

⁵⁷¹ *Op cit* 186.

⁵⁷² *Op cit* 186.

⁵⁷³ Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts.

under the age of fifteen. As in international armed conflicts, special steps must be taken to protect civilian populations, including a prohibition on acts or threats of violence designed to “spread terror among the civilian population”.⁵⁷⁴

Article 75(2) of Protocol I of the Geneva Conventions prohibits, in relation to both women and men, outrages upon personal dignity, in particular humiliating and degrading treatment, forced prostitution, and any form of indecent assault, whether committed by military or civilian personnel.⁵⁷⁵ Article 76 of the Protocol applies specifically to women, and provides that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other forms of indecent assault. Protocol I additionally provides that all children shall be the object of special respect and are to be protected against sexual assault and shall be provided with care and aid.⁵⁷⁶ The earlier report by Human Rights Watch, on incidents that took place in Sierra Leone, clearly shows the type of acts that peacekeepers commit, the horrendous experiences suffered by communities, and lifetime trauma that victims have to go through, all at the hands of peacekeepers.⁵⁷⁷

In the past, arguments were raised that the Geneva Conventions did not apply to the UN peacekeeping forces that perform classical peacekeeping duties. Gantz has argued that the UN is not a state. Only states may be parties to the Geneva Conventions. Furthermore, in peacekeeping operations, UN peacekeepers are considered non-combat forces and are typically charged with monitoring peace agreements and cease-fires. They are not allowed to use force except in self-defence and cannot militarily engage with fighting groups. The UN Office of Legal

⁵⁷⁴ Article 13 of Protocol II.

⁵⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts.

⁵⁷⁶ *Ibid* at article 77.

⁵⁷⁷ See discussion in Chapter 4.3 above.

Affairs expressed the view that UN forces are bound only by their Security Council mandate and are not legally obliged to uphold the provisions of the Geneva Conventions.⁵⁷⁸

In the 1993 Agreement on the Status of the UN Assistance Mission for Rwanda, the UN undertook to ensure that the UN forces would conduct operations with full respect for the principles and spirit of the humanitarian conventions applicable to the conduct of military personnel, including the Four Geneva Conventions of 1949, their two Additional Protocols of 1977 and the Hague Conventions of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.⁵⁷⁹

Again in 1999, the UN Secretary-General at the time, approved a set of rules and guidelines for UN peacekeepers in combat during the marking of the fifty years of the signing of the Geneva Conventions. The approval of the UN rules on the fiftieth anniversary of the Geneva Conventions was an important symbolic act of support for the Conventions and all of what they stand for. The UN rules contain all the norms articulated in the Geneva Conventions. Therefore, the UN can now be regarded as having effectively joined the Conventions by incorporating their contents into its set of rules and guidelines.⁵⁸⁰ This means that to the extent that the UN guidelines incorporate Geneva Conventions norms, UN peacekeepers can be said to be governed by them.⁵⁸¹

IHL protections provided to women and girls in times of armed conflict are complemented by IHRL protections.⁵⁸² Legal protection is available under the

⁵⁷⁸ Gantz *The Postconflict Security Gap* 247.

⁵⁷⁹ Agreement on the Status of the UN Assistance Mission for Rwanda 5 November 1993.

⁵⁸⁰ UN joins Geneva Conventions after 50 years Kyodo News International 16 August 1999.

⁵⁸¹ *Op cit* 578.

⁵⁸² *Op cit* 578.

UDHR,⁵⁸³ the ICCPR,⁵⁸⁴ the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁸⁵ the ICESCR,⁵⁸⁶ and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT).⁵⁸⁷ Under the Convention against Torture, there is an affirmative duty on states to prevent and enforce laws against torture and to extradite perpetrators, if necessary.⁵⁸⁸ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), expressly addressed issues such as trafficking in women and girls and the exploitation of women through prostitution.⁵⁸⁹ Article 19 of the Convention on the Rights of the Child, (CRC) requires states to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, and maltreatment or exploitation including sexual abuse.⁵⁹⁰ The TIP Report in Liberia has outlined how peacekeepers take advantage of the most vulnerable poor children, by giving them a mere biscuit, in exchange for sex.⁵⁹¹ Such acts amount to pure, gross violations of IHL and IHRL protecting women and children against any form of violence, during and after conflict.

Additionally, specific protection is provided for children in the CRC.⁵⁹² For instance, article 38 requires states to respect IHL applicable to children in armed conflicts and to take all feasible measures to ensure protection and care of children who are

⁵⁸³ Universal Declaration of Human Rights 10 December 1948.

⁵⁸⁴ International Covenant on Civil and Political Rights 16 December 1966.

⁵⁸⁵ International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965.

⁵⁸⁶ International Covenant on Economic, Social and Cultural Rights 16 December 1966.

⁵⁸⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 26 June 1987.

⁵⁸⁸ *Ibid* at article 7.1.

⁵⁸⁹ Article 6 of CEDAW.

⁵⁹⁰ Convention on the Rights of the Child 20 November 1989.

⁵⁹¹ See discussion in Chapter 4.4 above.

⁵⁹² *Op cit* 590.

affected by armed conflict.⁵⁹³ Further protections are provided by the Optional Protocol to the CRC, which prohibits the sale of children, child prostitution, and child pornography.⁵⁹⁴

Trafficking in women and girls is specifically addressed by international law. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was adopted by the General Assembly in 1949.⁵⁹⁵ The UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, prohibits trafficking of persons.⁵⁹⁶ The TIP Report in Liberia clearly details how children have been victims of human trafficking at the hands of peacekeepers. Such trafficking resulted in further sexual and physical abuse and exploitation.⁵⁹⁷

Regional human rights systems have also made major contributions to the promotion of international law norms that protect women and girls against sexual violence. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa has extensive provisions which guarantee women's rights including a condemnation of any harmful practices and behaviour which negatively affect the fundamental rights of women and girls.⁵⁹⁸

Because peacekeeping troops are increasingly deployed into situations of ongoing armed conflict, a concomitant increase in attention should be paid to the human

⁵⁹³ *Op cit* 590 at article 38.

⁵⁹⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts 25 May 2000.

⁵⁹⁵ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 2 December 1949.

⁵⁹⁶ UN Convention Against Transnational Organised Crime 15 November 2000 and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children UN Doc A/45/49.

⁵⁹⁷ See discussion in Chapter 4.4 above.

⁵⁹⁸ Protocol to the African Charter on Human and People's Rights of Women in Africa 11 July 2003.

rights dimensions of IHL, especially in the case of sexual slavery and human trafficking. If IHL and IHRL are combined, a comprehensive framework can be employed to create more realistic modern standards for peacekeeping troops. Ideally, they will internalise the values inherent in these systems of law. Only then can the international community take confidence that the civilian human rights, both during conflict and immediately following, are better assured.⁵⁹⁹

Because states are charged with supplying volunteer forces and the training provided to these forces, it must be the states that are directly responsible for initiating and ensuring change within peacekeeping missions. By addressing the underlying roots of the behaviours associated with illegal activity, states can effectively ensure that their responsibilities to the international system are upheld and that the protection of civilian population is achieved. An analysis of the roots of military involvement in prostitution and the use of 'other' might help us to better understand why state efforts should focus on addressing peacekeeping and prostitution, perhaps looking at military culture and its potential for change.⁶⁰⁰

5.6 Summary

The purpose of peacekeeping forces, in the context of either the UN or other international organisations, is to protect individuals in situations of extraordinary suffering. As pointed out by Rhadika Coomaraswamy, Special Rapporteur on Violence against Women,⁶⁰¹ the UN would lose "its moral force" if it fails to respond when those within the UN system violate human rights.⁶⁰²

⁵⁹⁹ Kirby *University of St Thomas Law Journal* 235.

⁶⁰⁰ *Ibid* at 236.

⁶⁰¹ Special Rapporteur on Violence Against Women Integration of the Human Rights of Women and the Gender Perspective: Violence against Women UN Doc E/CN.4/2000/68 29 February 2000.

⁶⁰² Odello *Journal of Conflict and Security Law* 42.

Ultimately, articles 101(3) and 105 (2) of the UN Charter says that officials must have the highest standards of integrity and privileges and immunities are for the discharge of official functions. There is a growing political realisation that this must be the standard for all those associated with the work of the organisation. Those individuals who do not meet this standard should be dismissed from the organisation.⁶⁰³ The UN must take drastic steps to regain the trust of those whom peacekeepers are sent to protect and serve.⁶⁰⁴

As the UN continues to deliberate on new reforms to strengthen its agencies, it must enact guidelines to eliminate sexual exploitation and abuse and the tolerance of these activities throughout the UN.⁶⁰⁵

In addition to that, troop-contributing countries, the UN and the individual members must take joint responsibility for their conduct. The concept of plurality of responsible actors is now also an essential part of article 47 of the ILC Draft Articles on the Responsibility of International Organisations. There it is stated that where

an international organisation and one or more states or other organisations are responsible for the same internationally wrongful act, the responsibility of each State or international organisation may be invoked in relation to that act.

In its commentary on this article, the ILC refers to the “joint responsibility of an international organisation with one or more states” in connection with the responsibility of an international organisation for the wrongful act of a state, or the international responsibility of a state in connection with the wrongful act of an international organisation.⁶⁰⁶

⁶⁰³ *Op cit* 330 at 96.

⁶⁰⁴ *Op cit* 21 at 86.

⁶⁰⁵ *Op cit* 342 at iv.

⁶⁰⁶ ILC Report 140.

If the UN uses its immunity in violation of fundamental rights guarantees (such as the right to a remedy), it would mean that it is entitled to ignore the human rights regime set up by the organisation itself.⁶⁰⁷ Singer has clarified the position as follows:

Internationally protected human rights should be set firmly at the forefront of the debate regarding jurisdictional immunities of international organisations. In any case brought against an international organisation in a municipal court, the court should first enquire whether the complainant alleges violation of any human rights that international law obliges the forum to protect and uphold. The fact that the violator is an international organisation does not excuse the state from its international responsibilities to protect and uphold human rights within its territory. A state cannot avoid these responsibilities by hiding behind the supposed autonomy of an international organisation, regardless of whether the state itself shares responsibility for creating the organisation. If a plaintiff alleges human rights violations, the court should fulfil the forum's obligations and take jurisdiction of the case.⁶⁰⁸

Lastly, one can follow the approach adopted by the IMT Charter, that members of peacekeeping forces should be held individually responsible for their wrongful acts, thereby eliminating the defences of superior orders or immunity. The purpose of the UN is very clear, that is to

save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish condition under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security⁶⁰⁹

And further than that, some of the aims of the UN Charter related to peacekeeping are:

- 1) To unify the Member States for the purpose of maintaining international peace and security;
- 2) To prevent threats to international peace and security; and

⁶⁰⁷ *Op cit* 469 at 130-131.

⁶⁰⁸ Singer *Virginia Journal of International Law* 162-163.

⁶⁰⁹ *Op cit* 1.

3) To deter acts of aggression.⁶¹⁰

The mandates are very clear, so one would never have a defence of why he committed those egregious crimes against humanity. IHRL and IHL are also very clear on their mandate on how to conduct hostilities thereby protecting the most vulnerable.

The next chapter shall present the conclusions and give recommendations at a short, medium and long term level.

⁶¹⁰ UNDPKO *UN Peacekeeping Handbook* 10.

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

From the beginning, this thesis laid the foundation of the concept of UN peacekeeping. It commenced by briefly outlining the history of the UN as an international organisation. This history enabled us to understand the principles which underpin peacekeeping as a mission or operation. From the brief history of the League of Nations to the rise of the UN, it is very apparent that through the ages, nations have always had one common agenda, and that is the maintenance of peace and stability. That is why the birth of the UN saw it paramount that a force with a mandate of peacekeeping be established through international consensus, a force which will uphold the core business of the UN Charter and the founding principles of the UN peacekeeping force itself.

The Department of Peacekeeping Operations developed its own set of values and operational norms which enabled UN forces to be perceived as both non-coercive and neutral with the operation in the Congo (1960-1964) being the only notable exception. These values and norms were maintained throughout the Cold War, generally as a result of the sensitivity of the superpowers to the UN taking on any more responsibility than was absolutely necessary.⁶¹¹

As earlier stated, the deployment of peacekeeping forces has decreased substantially in the past few years as compared to the high number of deployments around the 1950s and 1960s. This decrease is as a result of states being able to resolve their tensions or differences amicably, through non-use of force and use of regional arrangements like the African Union, ECOWAS or European Union instead

⁶¹¹ *Op cit* 84 at 211.

of UN peacekeeping mechanisms. Again, this decrease is as a result of states being aware of very strict international norms and standards on preservation of life, humanity, respect and protection of human rights, alleviation of human suffering, liability and accountability for heads of state and international mandatory sanctions. States have realised that where armed conflict arises, the beneficiaries are civilians, those that are unable to protect themselves. It is for these reasons that deployment of peacekeeping forces is paramount in volatile situations, in situations where the vulnerable are bound to suffer.⁶¹²

The purpose of peacekeeping operations, in the context of either the UN or other international organisations, is to protect individuals in situations of extraordinary suffering.⁶¹³ As pointed out by Rhadika Coomaraswamy, Special Rapporteur on Violence against Women, the UN would lose its moral force if it fails to respond when those within the UN system violate human rights.⁶¹⁴

An essential step in the strategy to enforce the standards of conduct for peacekeeping operations is to have an effective investigation into all allegations. If investigations are unprofessional, then there will be no accountability, no matter how well the rules against sexual exploitation and abuse are drafted.⁶¹⁵ Over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council has considered that, in armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict.

⁶¹² Own emphasis.

⁶¹³ ICISS Report UN Implementing the Responsibility to protect 12 January 2009 UN Doc A/63/677.

⁶¹⁴ Special Rapporteur on Violence Against Women Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women 29 February 2000 UN Doc E/CN.4/2000/68 para 59.

⁶¹⁵ *Op cit* 330 at 83.

This thesis has also shown that IHL and IHRL are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Despite this, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice. The most frequent examples are situations of occupation or non-international armed conflicts where human rights law complements the protection provided by humanitarian law.⁶¹⁶

IHRL and IHL share the goal of preserving the dignity and humanity of all. Although different in scope, IHRL and IHL offer a series of protections to persons in armed conflict, whether civilians, persons who are no longer participating directly in hostilities or active participants in the conflict. Indeed, as has been recognized, *inter alia*, by international and regional courts,⁶¹⁷ as well as by UN organs, treaty bodies and human rights special procedures, both bodies of law apply to situations of armed conflict and provide complementary and mutually reinforcing protection.⁶¹⁸

In general, human rights law enshrines the more general rules, but is broader in its scope of application. It can often benefit from the more narrowly applicable, but often more precise rules of humanitarian law. On the other hand, human rights law has become increasingly specific and refined through a vast body of jurisprudence and

⁶¹⁶ *Op cit* 265 at 310.

⁶¹⁷ This was reaffirmed in the ICJ Reparation for Injuries Suffered in the Service of the UN Advisory Opinion 11 April 1949 179. The ICTR also found Jean Paul Akayesu guilty of charges of crimes of genocide, crimes against humanity and violations of the Geneva Conventions in *Prosecutor v Jean Paul Akayesu* ICTR-96-4 2 September 1998.

⁶¹⁸ *Op cit* 55 at 1.

the details of interpretation can influence the interpretation of humanitarian law, which has less interpretative jurisprudence at its disposal.⁶¹⁹

One can say that human rights law and humanitarian law have in common that they seek to protect people from abusive behaviour by those in whose power they are, state authorities in the case of human rights law, a party to the conflict in the case of humanitarian law. Thus, the protection of persons in the power of the authorities constitutes an area of considerable overlap between human rights and humanitarian law, judicial guarantees, treatment of persons, economic and social rights. In these situations, there is a considerable overlap.⁶²⁰

The Charter has given the UN a mandate to maintain peace and international security,⁶²¹ while placing it under an obligation to promote and encourage respect for human rights and fundamental freedoms for all.⁶²² Yet the specific *corpus* of norms that establishes a common measure between these two objectives is the law of armed conflict, which contains rules for the protection of the human person that are specially adapted to wartime. There would thus be a disturbance of the equilibrium intended by the Charter if international peace and security were maintained without also recognizing that the forces carrying out this mission are subject to the law of armed conflicts.⁶²³

Based on the above extrapolation, it is very apparent that UN peacekeeping missions or operations must uphold the basic principles of IHL and IHRL in their daily activities. There is no other organisation which is better positioned to uphold, promote and protect IHL and IHRL than the UN through its structures. It therefore

⁶¹⁹ *Op cit* 584 at 341.

⁶²⁰ *Op cit* 587.

⁶²¹ *Op cit* 1 at article 1(1).

⁶²² *Op cit* 1 at article 1(3).

⁶²³ *Op cit* 191 at 20.

means that UN peacekeeping operations must be a key player in implementation of the rules of IHL and IHRL.⁶²⁴

UN peacekeeping operations have for decades brought peace and stability to countries emerging from war. The women and men who serve the blue flag do so under arduous and often dangerous conditions. The history of peacekeeping has been one of distinguished collective accomplishment and personal sacrifice. However, this exemplary record has been clouded by the unconscionable conduct of a few individuals. In particular, the revelations in 2004 of sexual exploitation and abuse by a significant number of UN peacekeeping personnel in the DRC have done great harm to the name of peacekeeping. Such abhorrent acts are a violation of the fundamental duty of care that all UN peacekeeping personnel owe to the local population that they are sent to serve.⁶²⁵

As one peacekeeping expert told Refugee International,

the UN's mission is not to undermine the rule of law but rather to strengthen it. When they blatantly disregard local laws about prostitution and encourage the cover-up of violations within the mission, they are poisoning the mission and corrupting the mandate.⁶²⁶

In 2003, Human Rights Watch issued a report documenting sexual violence committed by international peacekeeping forces, and confirmed that

UNAMSIL investigations into allegations of sexual violence by international peacekeepers indicate a lack of appreciation for the seriousness of the problem of sexual violence.⁶²⁷

In that report, Human Rights Watch agrees with Ms Naik, one of the team members and authors of UNHCR and SC-UK Report, that 'the zero tolerance' policy for sexual exploitation by UNAMSIL staff and affiliates has had no teeth to date.⁶²⁸

⁶²⁴ Own emphasis.

⁶²⁵ *Op cit* 408.

⁶²⁶ *Op cit* 342 at 4.

⁶²⁷ Scott *NYL School Journal of Human Rights* 840.

The moment a peacekeeping force starts killing civilians, it becomes part of the conflict it is supposed to be controlling, and therefore part of the problem. It loses the quality which distinguishes it from and sets it above the people it is dealing with.⁶²⁹

The UN has adopted new measures to address misconduct by peacekeepers that amount to criminal acts. It is very important to identify and prosecute individuals who are responsible for violations that infringe fundamental rights, not only to ensure the consistent action of UN missions, but also to avoid tensions with local communities that may compromise the success of peacekeeping operations. The purpose of peacekeeping operations, in the context of situations of either the UN or other international organisations, is to protect individuals in situations of extraordinary suffering.⁶³⁰ As pointed out earlier by Radhika Coomaraswamy, the UN would lose 'its moral force' if it fails to respond when those within the UN system violate human rights.⁶³¹

Personnel who violate the standards established in the 2003 Secretary-General's Bulletin ought to be subjected to disciplinary action unless, in the case of staff or experts on mission, the Secretary-General, *in lieu* of such action, accepts an immediate resignation and a designation that the individual is never to be re-employed by the UN is placed in his or her file. It is recommended that the General Assembly amend the Staff Regulations to specifically provide that acts of sexual exploitation and abuse constitute serious misconduct. It is also recommended that the Assembly request the Secretary-General to introduce expedited procedures, including suspension without pay in appropriate cases, to deal with cases of sexual

⁶²⁸

Ibid.

⁶²⁹

James *Review of International Studies* 373.

⁶³⁰

UN Doc A/63/677 12 January 2009.

⁶³¹

UN Doc E/CN.4.2000/68 29 February 2000.

exploitation and abuse. That would ensure that those found to have committed such acts would be severely punished, including being summarily dismissed.⁶³²

The issue of sexual exploitation and abuse by UN peacekeeping personnel has attracted the attention of governments, inter-governmental organisations, non-governmental agencies, and other public interest groups. More than a decade after reports of sexual abuse surfaced and several years after the Secretary-General announced the UN's zero-tolerance policy;⁶³³ the then Under-Secretary for Peacekeeping Operations, Mr. Alain Le Roy, acknowledged that not all troop contingents were fully supportive of the zero-tolerance policy, particularly when it came to prostitution.⁶³⁴ Prince Zeid stressed that member states must not view the issue as one of ephemeral or passing importance, but rather, it should be viewed as the serious topic that it is.⁶³⁵ However, he recognised that it was difficult to change the dismissive culture, which is within us, in our own countries and in the mission areas.⁶³⁶

In February 2006, John Bolton, US Representative to the UN stated:

Sexual exploitation and abuse of women and children at the hands of UN peacekeepers is not an isolated incident, it is a widespread scourge which creates lasting victims, scarred for their lifetimes. The 'boys will be boys' attitude, which too long pervaded peacekeeping operations, must correctly be met with a zero tolerance policy.⁶³⁷

⁶³² *Op cit* 329 at 24-25.

⁶³³ Zeid Report. While acknowledging that condoms are routinely distributed, it urges that such distribution of condoms to peacekeepers is misinterpreted. When condoms are distributed to troops, it should be emphasized that it is a strategy to combat transmission of HIV/AIDS and not to encourage prostitution.

⁶³⁴ Press Release UN Doc SC/8649.

⁶³⁵ *Ibid* at 4.

⁶³⁶ *Op cit* 634 at 4.

⁶³⁷ Press Release US Mission to the UN Statement by Ambassador John Bolton US Representative to the UN on Sexual Exploitation and Abuse at the hands of UN Peacekeepers: Translating Outrage into Action in Security Council US UN Doc 035(06) 23 February 2006.

On 14 December 2006, the European Parliament adopted a Resolution that expressed serious concern over reports of a culture of silence in some UN missions, stemming from the fear of punishment and retaliation, and “calls on the UN to take all necessary steps to create a working environment that allows staff to report instances of abuse without fear of retaliation”.⁶³⁸ The Resolution also emphasized that, despite current measures and the UN’s long-standing ‘zero-tolerance’ approach, allegations of sexual misconduct persist, and that, unless the UN can put a stop to this behaviour, it will have a detrimental impact on the credibility and moral authority of the institution as a whole.⁶³⁹ The Resolution recognised that ultimately, some member states may reduce the number of their troops at a time when there is strong need for peace keeping missions.⁶⁴⁰

There is a need to ensure that all personnel in UN peacekeeping operations function in a manner that preserves the image, credibility, impartiality and integrity of the UN.⁶⁴¹ Ultimately, articles 101(3) and 105 (2) of the UN Charter say that officials must have the highest standards of integrity and privileges and immunities for the discharge of official functions. There is a growing political realisation that this must be the standard for all those associated with the work of the organisation. Those individuals who do not meet this standard should be dismissed from the organisation.⁶⁴²

The UN must take drastic steps to regain the trust of those whom they are sent to protect and serve.⁶⁴³ Thus, it is essential that all future agreements include a legal

⁶³⁸ European Parliament Resolution on the Involvement of UN Forces in Sexual Abuse in Liberia and Haiti TA-PROV (2006)0606 (2006).

⁶³⁹ *Ibid* at 143.

⁶⁴⁰ *Op cit* 638 at 143 para 9.

⁶⁴¹ UN Report of the Special Committee on Peacekeeping Operations 11.

⁶⁴² *Op cit* 330 at 96.

⁶⁴³ *Op cit* 21 at 86.

obligation for member states to take appropriate action, including punitive sanctions, against those that commit acts of sexual exploitation and abuse. Memoranda of Understanding should contain clauses indicating that if an investigation concludes that allegations are well-founded, and if there is a *prima facie* case of misconduct, the national contingent commander must forward the case to its national authorities. The mission should also forward the reports on such investigations to the troop-contributing countries through the Permanent Mission in New York. While the decision on whether or not to prosecute is a national responsibility, the agreement to follow this procedure should be an essential condition for acceptance of an offer from a troop-contributing countries to provide troops for UN peacekeeping operations. The Secretary-General, must, therefore receive formal assurances that troop-contributing countries will implement their legal obligation to exercise criminal jurisdiction over their troops in return for local immunity. It is incumbent on those who work under a system of privileges and immunities not to abuse a system never intended to protect them from crimes committed in the host state.⁶⁴⁴

As the UN continues to discuss new reforms to strengthen its agencies, it must enact guidelines to eliminate sexual exploitation and abuse and the tolerance of these activities throughout the UN.⁶⁴⁵

In addition to that, troop-contributing countries, the UN and the individual members must take joint responsibility for their conduct. The concept of plurality of responsible actors is now also an essential part of article 47 of the ILC Draft Articles on the Responsibility of International Organisations. There it is stated that where

⁶⁴⁴ *Op cit* 21 at 88.

⁶⁴⁵ *Op cit* 342 at iv.

an international organisation and one or more states or other organisations are responsible for the same internationally wrongful act, the responsibility of each state or international organisation may be invoked in relation to that act.

In its commentary on this article, the ILC refers to the joint responsibility of an international organisation with one or more states in connection with the responsibility of an international organisation for the wrongful act of a state, or the international responsibility of a state in connection with the wrongful act of an international organisation.⁶⁴⁶

If the UN uses its immunity in violation of fundamental rights guarantees (such as the rights to a remedy), it would mean that it is entitled to ignore the human rights regime set up by the organisation itself.⁶⁴⁷ Singer has clarified the position as follows:

Internationally protected human rights should be set firmly at the forefront of the debate regarding jurisdictional immunities of international organisations. In any case brought against an international organisation in a municipal court, the court should first enquire whether the complainant alleges violation of any human rights that international law obliges the forum to protect and uphold. The fact that the violator is an international organisation does not excuse the state from its international responsibilities to protect and uphold human rights within its territory. A state cannot avoid these responsibilities by hiding behind the supposed autonomy of an international organisation, regardless of whether the state itself shares responsibility for creating the organisation. If a plaintiff alleges human rights violations, the court should fulfil the forum's obligations and take jurisdiction of the case.⁶⁴⁸

Lastly, one can follow the approach adopted by the IMT Charter, that members of peacekeeping forces should be held individually responsible for their wrongful acts, thereby eliminating the defences of superior orders or immunity. The purpose of the UN is very clear, that is to

save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish condition under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to

⁶⁴⁶ *Op cit* 606 at 140.

⁶⁴⁷ *Op cit* 469 at 130-131.

⁶⁴⁸ *Op cit* 608 at 162-163.



promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security⁶⁴⁹

And further than that, some of the aims of the UN Charter relating to peacekeeping are:

- 1) To unify the member states for the purpose of maintaining international peace and security;
- 2) To prevent threats to international peace and security; and
- 3) To deter acts of aggression.⁶⁵⁰

The mandates are very clear, so one would never have a defence of why he committed those egregious crimes against humanity. IHRL and IHL are also very clear on their mandate on how to conduct hostilities, thereby protecting the most vulnerable.

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

⁶⁴⁹ *Op cit* 1.

⁶⁵⁰ *Op cit* 610 at 10.

state's jurisdiction, the definitions of crimes, the criminal consequences and the fundamental guarantees that alleged perpetrators must enjoy.⁶⁵¹

Several measures should be adopted to clarify the legal uncertainties that still surround the practical prosecution of UN personnel in cases of misbehaviour. Due to the lack of UN police and judiciary, there is a need to clarify and implement the obligations of member states in dealing with the investigation and prosecution, rather than codify new rules. The crimes and misbehaviour of UN peacekeepers should be identified, probably through a relevant UN body, such as a Department of Peacekeeping Operations. The acts under consideration identified as misbehaviour are essentially of a criminal nature. They may not reach the qualification of international crimes, but there would be no need to use this option if states applied standard criminal law effectively. However, the role of international courts should be considered only as a subsidiary option, and only for those crimes that have been internationally defined, such as torture. Even in that case, the possible prosecution by international courts, including the ICC, seems too remote and illusory.⁶⁵²

While it is extremely unlikely that troop-contributing countries will cede jurisdiction over alleged criminal offenders within their military contingents, the UN's position that troop-contributing countries alone are responsible for discipline of military peacekeepers, and that it is powerless to intervene, is no longer acceptable. The UN could impose sanctions, withdraw contingents, and blacklist states that fail to take action in a legally effective way. While this might result in the loss of troops from some troop-contributing countries, this factor must be considered in undertaking peacekeeping operations. Further, it has been suggested that the UN itself and the

⁶⁵¹ *Op cit* 602 at 42-43.

⁶⁵² *Op cit* 584.

troop-contributing countries could be held responsible for violations of IHL by both civilian and military peacekeepers.⁶⁵³

Allegations of sexual abuse have already tarnished both the reputation of the UN and the fine and difficult work of UN peacekeepers. Reform is called for. The tools and recommendations are available. If the UN is truly to live up to its promise, the will of member states as well as the UN itself is crucial. While the issue of sexual abuse has been addressed in numerous Security Council Resolutions, UN reports, and press accounts, allegations of sexual abuse and official inaction continue to escalate. It is crucial that abuse be eliminated, that perpetrators be punished, and that victims be compensated.⁶⁵⁴

Regardless of locations and mandate, appropriate conduct and discipline are essential for peacekeeping operations to maintain legitimacy on the world stage and for individual peacekeeping missions to effectively carry out their mandates. With an increase in the number of operations managed by the Department of Peacekeeping Operations, it is important than ever for peacekeepers to act with dignity and responsibility.⁶⁵⁵

The road to justice is long, and the many battles that have been won in relation to 'no impunity' and 'yes to accountability for perpetrators', must not preclude or overshadow the many hardships involved in obtaining justice for the survivors and their families. This progress towards justice does not necessarily seem beneficial or

⁶⁵³ In his *Hastings Law Journal* article, Jaume Saura concludes that despite the possible narrow applications of the Bulletin, applicable when peacekeepers are engaged in hostilities, humanitarian law is still binding on UN operations beyond those listed in the Bulletin on the Observance by UN Forces of International Humanitarian Law. Additionally, despite the degree of protection afforded to UN troops by the Safety Convention, troops still must comply with the rules of IHL. Indeed, both the UN and the TCC have a duty to respect IHL.

⁶⁵⁴ Defeis *Washington University Global Studies Law Review* 214.

⁶⁵⁵ UN Special Committee on Peacekeeping Operations *Issues at AMUN* 43

meaningful for healing, but the solution does not lie in less justice but in 'better justice'.⁶⁵⁶

6.2 Recommendations

6.2.1 Short-Term Strategies

The first short term recommendation is that victims must get rehabilitation as soon as possible. Article 14 of CAT requires the state to ensure that a person who has been tortured obtains redress including the means for as full rehabilitation as is possible. As promising as this seem, the fact is that most persons exposed to torture will be in immediate need of care and rehabilitation and will not be in a position to address and submit formal claims of reparation or lodge criminal cases.⁶⁵⁷

The first and perhaps still the strongest formulation of the right to rehabilitation as part of redress is found in the above-mentioned article 14 of the CAT which provides that

each state party shall ensure in its legal system that the victims of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.⁶⁵⁸

The adoption by the General Assembly in December 2005 of the Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL, as a UN Resolution was an important step in the process of strengthening international focus on the right to remedy and on forms of reparation. These principles, often known as "Van Boven principles" established that rehabilitation shall be provided to include legal, medical,

⁶⁵⁶ Sveaass *European Journal of Psychotraumatology* 9.

⁶⁵⁷ *Ibid* at 5.

⁶⁵⁸ *Op cit* 656 at 6.

psychological, and other care and services as well as measures to 'restore the dignity and the reputation of the victims'. This Resolution further states that

In accordance with domestic law and international law, and taking into account of individual circumstances, victims of gross violations of IHL should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19-23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁵⁹

Article 75 of the 1998 Statute of the ICC provides that: The Court shall establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation.⁶⁶⁰

Rehabilitation is a substantive right. Effective rehabilitation must be given at a very early stage. It is disadvantageous if rehabilitation must be based on judicial or other lengthy and thorny processes and this emphasises the need for establishing other, non-legal channels. A state that is answerable for the violations must provide redress and means to rehabilitation, and that this should be done in the state where the violations have taken place.⁶⁶¹

Rehabilitation to survivors of torture regarded as a free-standing right to all persons who have been subjected to torture and crimes against humanity and as a basic form of compensation or redress have been outlined.⁶⁶²

The second short term recommendation is that the UN Department of Peacekeeping Operations must draft and adopt individual codes of conduct to be signed by individual peacekeepers at the beginning of an operation. If peacekeepers bind themselves to such codes, it therefore means they will abide by the code. Failure to abide by committing human rights atrocities, during peacekeeping operations, will

⁶⁵⁹ *Op cit* 656 at 6.

⁶⁶⁰ *Op cit* 656 at 6.

⁶⁶¹ *Op cit* 656 at 8-9.

⁶⁶² *Op cit* 656 at 9.

amount to being subjected to investigations and prosecutions. The code must be in simple, certain and clear language that is understood by all peacekeepers. The code must outline acceptable and non-acceptable acts during operations. The code must also outline the repercussions or consequences of disobedience.

Another recommendation is *ad hoc* or regional tribunals. The creation of *ad hoc* or regional criminal tribunals can also serve as a solution to the problem at hand. Such tribunals will be established for purposes of prosecuting crimes committed by peacekeepers during peacekeeping operations. There shall not be a need to repatriate alleged perpetrators to their troop-contributing country, to stand prosecution there, instead, investigations and prosecutions will be carried out within the host state, whilst the perpetrator is held in custody in that state. The *ad hoc* tribunal might comprise various commanders of troops that are represented in that particular mission at that point in time and officials from ordinary courts within that country. Such a strategy will ensure that victims are offered prompt justice which is not delayed by other factors. A possibility is that, if perpetrators are repatriated back to their countries of origin, and prosecutions are carried out there, immediate and prompt justice might not be served. These tribunals will make a significant contribution in terms of achieving accountability under the law.

6.2.2 Medium-Term Strategies

The ICC is also better placed to handle cases of human rights atrocities. The proposed treaty (to be discussed below) must also provide for referrals to the ICC by the host state, where a host state is able to prosecute due to lack of resources. The principal role of the ICC is to impose and induce compliance with specific norms of international law. It also guarantees that more severe or serious crimes against humanity do not go unpunished. As the then UN Secretary-General Kofi Annan

stated in 2004, the ICC makes an impact by putting prospective violators on notice that immunity is not assured.⁶⁶³

Although a lack or less number of women peacekeepers has not been identified as a cause of these atrocities discussed in preceding chapters, the inclusion of women in peacekeeping missions might be a solution to the problem at hand. The UN Department of Peacekeeping Operations must increase the number of women in future peacekeeping operations. A substantive increase in the representation of women in peacekeeping operations might lead to a decrease in the number of HIV and AIDS cases directly or indirectly linked to peacekeeping operations, a decrease in the number of brothels around peacekeeping bases, and a drop in the number of babies fathered and abandoned by peacekeepers after their mission comes to an end.⁶⁶⁴ The call for the deployment of women peacekeepers has primarily come as an answer to the UNs broken image and name following a number of reports of peacekeepers' involvement in acts of sexual manipulation. Women peacekeepers are essentially expected to take on the obligation for preventing sexual manipulation and abuse and protecting local women from such acts.⁶⁶⁵

During wartime, women suffer terrible atrocities, from physical abuse to the collapse of their societies. During peacekeeping, women are not only key beneficiaries of the UN presence; they are also often its best asset. Experience has proven that women can perform the same roles, to the same standards and under the same difficult conditions as their male counterparts and in many cases, women are better-placed to carry out peacekeeping tasks. Whether interviewing victims of sexual and gender-based violence, working in women's prisons, assisting female ex-combatants during

⁶⁶³ *Op cit* 472 para 49.

⁶⁶⁴ Simic *Moving beyond the numbers* 1.

⁶⁶⁵ *Op cit* 474 at 2.

disbandment and reintegration into civilian life, or mentoring female cadets at police academies, women personnel are at an advantage. They also play a major role in helping empower women to reconstruct their war-torn countries.⁶⁶⁶

As countries embark on sending troops to various missions in future, they must ensure that a substantive, considerable number of members of these troops are women. Women would be better placed to protect rights of civilians, promote the rule of law and eventually ensure compliance with IHL, IHRL and their key mandate.

6.2.3 Long-Term Strategies

A gap exists in the regulation of UN peacekeeping forces. The UN must proactively confront this lack of regulation in order to maintain compliance with IHL, the spirit of the UN Charter, and the mission of promoting the rule of law. International state responsibility, national jurisdiction, human rights mechanisms, and the ICC will not effectively enforce compliance of IHL and IHRL by UN peacekeeping forces.⁶⁶⁷

It is very apparent that the international community does not have a legally binding instrument on peacekeeping forces. Instruments that exist today do not specifically apply or even regulate the conduct of peacekeeping forces; they do not have teeth to bite peacekeeping forces, particularly during their operations. Therefore a long-term recommendation is that the UN must draft and adopt a treaty which specifically talks to the conduct of peacekeeping forces. Some treaties are bilateral, creating relations between two states only; others are multilateral, creating relations between many states. They are binding upon states in accordance with the principle of *pacta sunt servanda*,⁶⁶⁸ which constitutes one of the foundations of international law.⁶⁶⁹ On the

⁶⁶⁶ UN Year in Review 15-16.

⁶⁶⁷ Chapman *Ensuring Respect* 7.

⁶⁶⁸ This principle is reaffirmed by article 26 of the Vienna Convention on the Law of Treaties.

other hand, the principle of *clausula rebus sic stantibus* allows treaties to become inappropriate because of a fundamental change of circumstances.⁶⁷⁰ This principle becomes an exception to the general rule of *pacta sunt servanda*.

Such a proposed treaty must provide for the conduct of peacekeeping operations, it must provide for incidents that are prohibited during peacekeeping operations, measures or mechanisms need to be put in place when human rights abuses are being reported. That proposed treaty must provide for principles of universal jurisdiction, in that if a host state is unwilling or unable to investigate and prosecute allegations of human rights abuses, other states must be able to carry out such prosecutions. Universal jurisdiction implies that there must be no safe haven for those responsible for crimes against humanity. There should be no safe hiding place. If arrested, extradition and court procedures should commence where the crimes have been committed or, if this is not possible, in the state where the person has been detained, that person must be extradited. The principle involved here is the obligation known as *aut dedere aut judicare*, extradite or prosecute.⁶⁷¹

The UN proposed treaty must also provide for other multilateral or bilateral agreements between host states and troop-contributing countries. States must agree that where incidents of human rights abuses against peacekeepers are being reported, a host state must prosecute the alleged offenders, if the host state is

⁶⁶⁹ A customary norm that is by its very nature non-derogable. The Vienna Convention in article 26 provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."

⁶⁷⁰ The *clausula rebus sic stantibus* principle is recognized in public international law by the Vienna Convention on the Law of Treaties. In terms of this principle, a fundamental change to the circumstances existing at the time of the conclusion of an agreement and which was not foreseen by the parties, may be invoked as a ground for terminating or withdrawing from an agreement if the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the agreement and the effect of the change is radically to transform the extent of the obligations to be performed under the agreement.

⁶⁷¹ *Op cit* 656 at 2.

unable or unwilling, any other state including the troop-contributing country must prosecute according to international criminal law. Alleged offenders must not be repatriated to their countries of origin before investigations and prosecution commence. They must be held in custody within the host country. If an alleged offender is repatriated back to the country of origin, the troop-contributing country concerned must give an assurance that such a peacekeeper will be prosecuted within the local courts for human rights atrocities committed. An alleged offender must not be repatriated when there is no assurance or when there is a 'perceived' prosecution in local courts, when in actual fact, no real prosecution will ever take place. At the end of prosecutions within any court, the prosecuting authorities must report the outcome or the decision of the court to the UN Security Council.

The UN proposed treaty must also provide for principles of individual accountability. Individual peacekeepers must be held accountable for their acts. The notion of 'boys will always be boys' must be completely erased within the peacekeeping system. The principal aim of peacekeeping is to bring peace and stability within war-torn states, and not erode peace and stability within communities. Peacekeepers must learn not to take advantage of vulnerable communities, by inflicting more pain in those communities. Individual peacekeepers must be investigated and prosecuted for the crimes against humanity. At the end of such prosecutions, very serious judgements and sentences must be passed, to deter would be offenders from committing the same atrocities.

The then Secretary-General of the UN, Kofi Annan reiterated that sexual abuses and sexual exploitation by peacekeepers must be prevented and perpetrators must be

held accountable.⁶⁷² Accountability is important not only for the sake of the past, but for the future as well. Where impunity is left unaddressed, it provides fertile ground from the recurrence of conflicts and repetition of violence.⁶⁷³ State immunity does not serve human rights well.

Article 25(3) of the Rome Statute provides that individuals shall be criminally responsible and liable for punishment for an international crime if the material elements of the crime are committed with intent and knowledge. These principles apply to grave breaches of the Geneva Conventions and violations of the laws and customs of war and of Common Article 3, to crimes against humanity and genocide.⁶⁷⁴

In principle, independent states are free to frame their conduct as they see fit, even submitting to the jurisdiction of another state even if they choose to do so. Immunity does not belong to the class of *jus cogens* rules, which require full and unrestricted respect. The UN Convention provides for express consent as a ground for excluding immunity in article 7. In the case of *Princz v Federal Republic of Germany*, Judge Wald of the US Court of Appeals wrote that a state committing grave violations of human rights implicitly renounces its immunity.⁶⁷⁵ Likewise a group of US scholars⁶⁷⁶ took the same view

The existence of a system of rules that states may not violate implies that when a state acts in violation of such a rule, the act is not recognized as a sovereign act. When a state is no longer recognized as sovereign, the state is no longer entitled to invoke the defense of sovereign immunity. Thus in

⁶⁷² *Op cit* 463.

⁶⁷³ *Op cit* 342 at 4.

⁶⁷⁴ *Op cit* 55 at 78.

⁶⁷⁵ *Princz v Federal Republic of Germany* 26 F.3d 1186, 1187 (D.C. Cir. 1994).

⁶⁷⁶ Adam Belsky, Mark Merva and Naomi Roht-Arriaza Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law California Law Review 1989 365, 394.

recognizing a group of peremptory norms, states are implicitly consenting to waive their immunity when they violate one of these norms.⁶⁷⁷

In addition to that, victims of these gross abuses must also be compensated by the perpetrators. Where sexual manipulation or sexual exploitation results in 'peacekeeping babies', such babies must be duly financially maintained by their fathers. The UN must take appropriate measures to ensure that these babies receive appropriate financial support from their fathers through the UN system. Where there are no babies left behind, the UN must financially compensate victims for emotional and physical suffering they endured. In this way, the organisation will be playing its role of being responsible.

In addition to the above proposed treaty, the international community must come together and draft and adopt an Additional Protocol to the 1949 Geneva Conventions, which will specifically regulate peacekeeping operations. Such a Protocol will have similar provisions to the above proposed treaty. It will also assist or give teeth to the already existing Geneva Conventions and the Two Additional Protocols. This proposed Protocol will also extend its application to other peacekeeping operations like the African Union peacekeeping forces or European Union or the Arab League missions. It will not only apply to UN peacekeeping missions but to other peacekeeping missions who often have to observe principles of IHL and IHRL during wartime.

Another recommendation is that each peacekeeping mission must have an office of an ombudsman or watchdog, a person vested with powers and authority to protect the rights of civilians in each mission. That person would investigate any accusation of misconduct on the part of UN peacekeeping officers, make relevant referrals,

⁶⁷⁷ *Op cit* 551 at 1122-1123.

reports directly to the Department of Peacekeeping Operations and the Secretary-General. Those reports will also be sent to troop-contributing countries concerned, so that they are taken into account during prosecutions in those respective countries. The ombudsman would also make recommendations on compensation of victims to the Department of Peacekeeping Operations and the Secretary-General.⁶⁷⁸

An ombudsman must also be free from political influence and able to coerce state and UN compliance with enforceable and binding decisions. This ombudsman should be given the authority to promote and protect the rights, freedoms, and protections provided by IHL of all individuals and legal entities operating in areas of UN peace support and peace enforcement operations without intrusion from member states.⁶⁷⁹ The UN plays an invaluable role around the world promoting peace; however, the organisation must do more to ensure compliance of its forces with IHL. Such compliance with the laws of war will reduce civilian casualties, help facilitate the change to peace, and encourage representative government based on the rule of law. An ombudsman could do much to promote this accountability.⁶⁸⁰

Lastly, national courts simply do not have the capacity to address human rights claims from victims the world over. One thing that should get much more serious consideration is the creation of an international institution that would relieve national adjudicatory bodies of this role, whether it be something like the ICC, which would serve as a compliment to the ICC, or else a world human rights tribunal within the UN itself. What an international institution would also do is to take out the sovereign immunity problem that arises when the courts of one country are asked to rule on the human rights practices of another state. Above all, what needs to be circumvented is

⁶⁷⁸ Own emphasis.

⁶⁷⁹ Zwanenburg *Accountability* 290.

⁶⁸⁰ *Op cit* 667 at 8.

the kind of 'double victimisation', that is now common. The first victimization occurs with the practical violation, while the second violation takes place when victims are deprived of the 'effective remedy' that is promised to them under international human rights law.⁶⁸¹

⁶⁸¹ *Op cit* 536 at 456.

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