

Continuing Impunity of Peacekeepers: The Need for a Convention

Journal of International Humanitarian Legal Studies, Vol. 4.1, page 1

1. Summary

Since the end of the Cold War UN authorised peacekeeping missions have tended to be not only more complex but also much more interventionist and more robust than could ever have been imagined in the early days of peacekeeping.¹ However, because peacekeeping is not explicitly provided for under the UN Charter, and has developed ad hoc in response to changing perceptions as to the nature of the role and responsibilities of peacekeeping missions (particularly in relation to serious human rights violations, political violence, and internal armed conflict), it is often unclear what laws are applicable to peacekeeping missions and when those laws apply. This paper explores the implications of that lack of clarity, focusing in particular on gaps in the international law regulating the conduct of peacekeepers.

The paper argues that the current approach, whereby prosecution for crimes committed by peacekeepers is dealt with primarily through the domestic law of the Troop Contributing State, is unsatisfactory, and is likely to remain unsatisfactory, despite efforts to persuade Contributing States' to establish the legal and administrative frameworks necessary to prosecute and punish their troops for crimes committed outside their territorial borders. A convention based regime specifically tailored to ensuring that peacekeepers are held accountable to internationally agreed standards would be the most effective way of enabling the UN to comply with the rule of law standards it itself espouses² and to retain legitimacy internationally and in the eyes of the communities where missions are deployed. In addition the UN should expand its Office of Internal Oversight Services (which already provides assistance in investigations through its Investigations Division) to encompass a dedicated fully resourced criminal justice unit tasked with monitoring the progress of cases; assisting in criminal investigations and evidence preparation; setting and monitoring due process and

¹ A Roberts, 'The Crisis in UN Peacekeeping' (1994) 36 *Survival* 3, 93, 99; Joint Doctrine Note 5/11 *Peacekeeping: An Evolving Role for Military Forces*, promulgated July 2011 (The Development, Concepts and Doctrine Centre, UK Ministry of Defence, Shrivenham) [210]

² Secretary-General's report *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004/616, 23 August 2004, [6]; Secretary-General's report *In larger freedom: towards development, security and human rights for all* A/59/2005 21 March 2005, [113]

human rights standards; and if necessary participating in the trial process itself through collaboration with Host State or Contributing State authorities.³

Arguably the accountability gap in relation to non-military personnel is even greater than for military personnel since, although troops generally have complete immunity from prosecution in the host State under a Status of Forces Agreement, they are normally covered by their home State's military justice system; whereas non-military personnel have functional immunity in the Host State, under the Convention on the Privileges and Immunities of the United Nations,⁴ but may not be subject to the jurisdiction of their home State at all whilst they are deployed abroad.⁵ However not all Troop Contributing States have independent codes of military justice operating in peacetime, and in those countries that do not, responsibility for punishing any wrong-doing by military personnel falls to the ordinary courts and disciplinary bodies.⁶ In addition some countries have removed serious crimes that violate human rights from the jurisdiction of military courts.⁷ But even where military personnel are subject to their home State's military justice system, and it covers the crime in question, Troop Contributing States are often reluctant to prosecute.⁸ Since the track record on holding UN troops accountable for crimes and other serious misconduct remains poor;⁹ and since the majority of allegations of crimes and misconduct reported in the press continues to be against soldiers;¹⁰ and since soldiers outnumber other personnel in UN operations by a wide margin,¹¹ this paper focuses in particular on military personnel.

2. Introduction

³ The Stimson Group produced a report in 2009 with detailed recommendations for a UN Criminal Justice Support Structure that would, inter alia, collaborate with Host State authorities in prosecuting civilian peacekeepers.: W Durch, K Andres, M England 'Improving Criminal Accountability in United Nations Peace Operations' (Stimson Center report No 65 June 2009)

⁴ Convention on the Privileges and Immunities of the United Nations, 13 February 1946, I. U.N.T.S. 15

⁵ W Durch, K Andres, M England 'Improving Criminal Accountability in United Nations Peace Operations' (n 3), 6

⁶ International Commission of Jurists and Columbian Commission of Jurists, 'Military jurisdiction and international Law: Military courts and gross human rights violations' Vol 1, 24 February 2004, 154; Austria, the Czech Republic, Denmark, Estonia, France, Germany, Guinea, the Netherlands, Norway, Senegal, Slovenia and Sweden have abolished military courts, at least in peacetime (Ibid, 158)

⁷ Ibid, 161-164

⁸ UN Summary Records of the Sixth Committee, UN Doc A/C.6/64/SR.7 (10 November 2009) [39]; Zeid Report A/59/710, para 67 (a)

⁹ W Durch, K Andres, M England 'Improving Criminal Accountability in United Nations Peace Operations' (n 3), xi; UN Summary Records of the Sixth Committee, UN Doc A/C.6/66/SR.9, (7 October 2011), [40]

¹⁰ W Durch, K Andres, M England 'Improving Criminal Accountability in United Nations Peace Operations' (n 3), 3

¹¹ Ibid

Serious crimes committed by peacekeepers against the local population, including murder and torture, first came to light with the missions to Somalia in the early 1990s; but it has since become clear that abusive conduct, including some that is routinely criminalised in many States,¹² is a major problem that has tarnished the reputations of a number of missions.¹³ Its occurrence is not limited to personnel from any particular economic stratum or region and has involved both developed and developing countries and has arisen in operations in Europe, Asia, Africa and the Americas.¹⁴ Much of the public criticism of peacekeepers' conduct has focused on sexual exploitation and abuse (SEA).¹⁵ However exploitation of local labour and resources and corruption are also significant problems. There have also been allegations that some missions have used excessive force and that this has resulted in unnecessary deaths and injuries to civilians.¹⁶

Although the UN is not a party to any international human rights law (IHRL) treaty or international humanitarian law (IHL)¹⁷ treaty, there is wide support in the literature for the view that it is bound by customary IHRL and IHL.¹⁸ In addition Contributing States will be bound by both customary international law and by relevant provisions of the IHRL and IHL treaties that they are party to.¹⁹ IHRL is binding on States at all times²⁰ although the scope of

¹² Not all abusive conduct is criminal. Moreover States may have different rules on what types of abuses are criminal and what is merely misconduct subject to disciplinary procedures but not prosecution.

¹³ However there is currently no way of knowing what proportion of crimes committed by peacekeepers results in some form of official complaint and what proportion of complaints appear in official documents: F Hampson 'The accountability of persons associated with peacekeeping operations' in A de Coning and R Thakur eds. *Unintended Consequences of Peacekeeping* (United Nations 2007), 205

¹⁴ W Durch, K Andres, M England 'Improving Criminal Accountability in United Nations Peace Operations' (n 3), 1

¹⁵ The Investigations Office of the OIOS notes that 34% of its investigations in 2012 related to SEA: Activities of the Office of Internal Oversight Services on peacekeeping operations for the period 1 January to 31 December 2012 A/67/297 (Part II) 13 March 2012, [19]; Address by His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein to the UN Security Council at its 5191st meeting (UN Doc S/PV.5191 (2005); F Ni Aolain, D Haynes, N Cahn *On the Frontlines, Gender, War and the Post Conflict Process* (Oxford University Press 2011), 110;

¹⁶ Notably in relation to the UN Mission in Haiti (MINUSTAH), see: Cite Soleil Massacre Declassification Project, http://www.cod.edu/people/faculty/yearman/cite_soleil.htm, in G Hammond 'Saving Port-au-Prince: United Nations Efforts to Protect Civilians in Haiti in 2006–2007,' (Stimson Center 2012) page 15, note 21

¹⁷ More commonly referred to in the armed forces as the law of Armed Conflict (LOAC)

¹⁸ M Zwanenburg, United Nations and International Humanitarian Law, in *Max Planck Encyclopedia of Public International Law*, (Oxford University Press, online edition, [www.mpepil.com]), [6], visited on 24 July 2013; J Paust 'The UN is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity' (2010) Vol 51 Harvard International Law Journal Online, 1

¹⁹ The ICJ has stated that in armed conflict "both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration" and 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:'" Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment of 19 December 2005, para. 216

²⁰ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (ICRC 2005) 300; UN Human Rights Committee, General Comment No. 29 24 July 2001, [3]; UN General Assembly, Res. 2675 (XXV), 9 December 1970;

extra-territorial jurisdiction of IHRL remains controversial.²¹ However IHRL does not give rise directly to criminal accountability of individuals. In situations of armed conflict IHL may be *lex specialis*.²²

Serious violations of IHL may give rise to criminal prosecutions of individual soldiers and may be subject to universal jurisdiction. Although members of a UN force are agents of the United Nations (UN) and take on the obligations of that organisation, the IHL obligations of Troop Contributing States continue to apply to its forces when serving as members of a UN operation, at least to the extent that those obligations have been incorporated into its domestic law.²³ However, formally IHL is only applicable to peacekeepers when they become parties to an armed conflict. Since *prima facie* peacekeepers are not parties to an armed conflict, IHL cannot, as a general base rule, be the *lex specialis* governing peacekeepers' operations. Determining when IHL is applicable to peacekeepers is especially difficult today because mandates are complex and generally contain some provisions under Chapter VII of the UN Charter that allow for potentially robust use of force on a fluid basis to match the circumstances. This contrasts with earlier peacekeeping missions where transition to 'enforcement' action (which in most cases would trigger the applicability of IHL) was viewed as one-way street from which a return to traditional peacekeeping (to which IHL would no longer apply) was considered unlikely. This transition was sometimes described as "crossing the Rubicon" from peacekeeping to enforcement, after which it was expected that "military force would default to the use of war-fighting techniques' for the remaining duration of the mission."²⁴

Outside of armed conflict situations there are no international laws by which mission personnel deployed abroad maybe held personally accountable, and prosecuted, for individual

²¹ The ICRC notes that "[m]ost human rights treaties specify that they are to be applied by States parties wherever they have jurisdiction. However, it should be noted that treaty bodies, and significant State practice, have interpreted this as meaning wherever State organs have effective control." J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (n 20) 305;

²² The ICJ discussed the relationship between IHL and IHRL and the meaning of *lex specialis* in Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment of 19 December 2005, [216-220]; See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, [106]; Sassoli and Olsen note that sometimes IHRL may be *lex specialis* since "[p]recision requires that the norm explicitly addressing a problem prevails over the one that addresses it implicitly, the one providing the advantage of detail prevails over the other's generality, and the more restrictive norm over the one covering the entire problem but in a less exacting manner." M Sassoli and L Olsen 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts.' Vol 90 (2008) IRRC No. 871, 599, 604

²³ M Zwanenburg, 'United Nations and International Humanitarian Law,' in *Max Planck Encyclopedia of Public International Law*, (n 18), [13] visited on 24 July 2013; A Roberts and R Guelff, *Documents on the Laws of War* (3rd edn Oxford University Press Oxford 2000) 625, 723

²⁴ UK Ministry of Defence Joint Warfare Publication 3.50 The Military Contribution to Peace Support Operations (2ed. The Joint Doctrine and Concepts Centre Shrivenham 2004), [A14]

crimes against the person (as distinct from participation in systematic organised international crimes such as genocide, crimes against humanity, and ethnic cleansing).²⁵ Thus in missions deployed to countries where there is no armed conflict, or where there is but the mission is not party to it, prosecution of mission personnel for individual crimes is usually only possible under the domestic criminal law of the Host State (which would normally require a waiver of immunity)²⁶ or under the domestic criminal law of the Contributing State. However some States have no legal provisions in place that would enable prosecution of domestic crimes committed extra-territorially.²⁷ Other States may only exercise extra-territorial jurisdiction if the conduct constitutes a crime in both the Host State and the Troop Contributing State.²⁸ Military personnel may be held accountable through their States' military justice systems but this only partially resolves the problem since this is not the case for all Troop Contributing States. Moreover even where provision for jurisdiction in the Troop Contributing State exists there may still be dual criminality issues that may not necessarily be resolved through the provisions of the Status of Forces Agreement between the UN and the Host State.²⁹ In addition even when the Contributing State's domestic law is set up to allow for jurisdiction over its peacekeepers abroad, the government may have little incentive to undertake prosecutions, whether of military or civilian personnel: many States have been slow to do so.³⁰

²⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 7 May 2013]

²⁶ Status of Forces Agreements normally provide that military personnel will be afforded absolute immunity from prosecution in the host State. Senior non-military staff enjoy 'diplomatic immunity' and other civilian members of the mission enjoy 'functional immunity.' Convention on the Privileges and Immunities of the United Nations, 13 February 1946, I. U.N.T.S. 15.

²⁷ Report of the Secretary-General, Criminal accountability of United Nations officials and experts on mission, 11 August 2008, A/63/260

²⁸ A 2006 report by a Working Group of the UN's Sixth Committee suggests that the 'difficulties with respect to dual criminality can be mitigated by encouraging States to review, or to adopt a liberal interpretation of, their requirements and to cooperate with each other to the maximum possible.' UN Doc A/60/980 on 'Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations' [23]

²⁹ As illustrated by the case of 'a Kenyan soldier caught smuggling alcohol between Iraq and Kuwait in the 1990s. ... under Kenyan law smuggling alcohol was not an offence. Despite the fact that the officer had several hundred thousand dollars in a frozen bank account in Kuwait – which was patently the proceeds of this smuggling – it proved impossible to prosecute the offence in any jurisdiction, or to reclaim the proceeds of the crime in Kuwait.' (In Kuwait the offence carries the death penalty). Andrew Langley in 'Peacekeeper Abuse, Immunity and impunity,' *Politics and Ethics Review* 1 (10) 2005, 81, 89, footnote 4

³⁰ See for example the Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo A/59/661 5 January 2005, especially paragraphs 46 and 38; and the comments on this topic by the Congolese delegates to the Sixth Committee in 2009 and 2011: UN Summary Records of the Sixth Committee, UN Doc A/C.6/64/SR.7 (10 November 2009) [41] and UN Doc A/C.6/66/SR.9, (7 October 2011), [40]

Over the last decade the UN has made a concerted effort to address the lack of accountability of peacekeepers, particularly in relation to SEA.³¹ A Conduct and Discipline Unit was established in 2007.³² In the same year the Special Committee of Peacekeeping operations approved a new draft Model MOU between the UN and Contributing States.³³ Under the MOU the Government of a Troop Contributing State has ten days from the time at which it receives information from the UN regarding allegations of misconduct by its troops, to start an investigation. If it fails to do so the UN may initiate its own administrative investigation. The Office of Internal Oversight Services has established an Investigations Division with headquarters in New York and two regional centres (in Nairobi and Vienna) and resident investigation offices in seven peacekeeping missions.³⁴ A Digital Forensics Unit provides technical services for forensic recovery and analysis of digital information, and conducts training for all staff of the Division.³⁵ Since the adoption of the Model MOU the UN's track record on pushing Contributing States to hold their troops accountable where there is credible evidence that they have committed serious crimes has improved to some degree; but in general Contributing States do not appear to be taking their obligations in this area as seriously as they should and impunity remains a serious problem.³⁶

An Ad Hoc Committee established by the UN's Sixth Committee, has been debating the development of a Convention on the Criminal Accountability of United Nations Officials and Experts on Mission since 2006;³⁷ but as made very little progress. Moreover, as it stands the proposed convention does not apply to personnel "assigned to the military component of a United Nations peacekeeping operation."³⁸ Several members of the Sixth Committee have recommended that it should be expanded to include military members of missions:³⁹ but

³¹ *Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, 9 October 2003, ST/SGB/2003/13

³² Conduct and Discipline Teams are currently deployed in 18 missions.

<http://cdu.unlb.org/AboutCDU/MissionsCoveredByConductandDisciplineTeams.aspx>

³³ *Draft Model Memorandum of Understanding Annex to Report of the Special Committee on Peacekeeping Operations and its Working Group*, A/61/19 (Part III), New York, 12 June 2007

³⁴ MONUSCO/MONUC, UNMIL, MINUSTAH, UNAMID, UNOCI, UNMISS and UNIFIL

³⁵ Activities of the Office of Internal Oversight Services on peacekeeping operations for the period 1 January to 31 December 2012 (n 15), [7]

³⁶ Z Deen Racsmany, 'The Amended UN Model Memorandum of Understanding: A New Incentive for States to Discipline and Prosecute Military Members of National Peacekeeping Contingents?' *Journal of Conflict and Security Law* (2011), Vol. 16 No. 2, 342, 348 citing statistics from 2005 to 2011 from the DPKO's 'Monthly Summary of Military and Police Contribution to United Nations Operations'

<http://www.un.org/en/peacekeeping/contributors/documents/Yearly06>

³⁷ UN Doc A/60/980 (16 August 2006) Appendix III

³⁸ Ibid

³⁹ Statements at the Sixth Committee by delegates from: Switzerland, UN Docs A/C.6/62/SR.6 (2007) [19] and A/C.6/64/SR.7 (2009) [19] and UN Doc A/C.6/66/SR.9, (7 October 2011) [16]; Indonesia, UN Doc

unless strongly pressed, the UN is likely to be reluctant to push for regulatory mechanisms that might discourage Troop Contributing States from participating in future missions. Currently both the UN Model SOFA and the UN Model MOU explicitly reserve exclusive jurisdiction over military members of peacekeeping missions to the Contributing State.⁴⁰ However as DW Bowett has observed, the provisions in Status of Forces Agreements reserving exclusive jurisdiction over military personnel to the Contributing State, have “no justification, apart from the purely political justification that it is only upon this basis that States will provide contingents.”⁴¹ If the UN is to meet its own rule of law standards it must prioritise accountability. It must establish effective mechanisms of ensuring that perpetrators of crimes are prosecuted and punished and it must be prepared to decline to accept troop contributions from States with a poor record on accountability; even if this leads to difficulties in securing the level of contributions it needs to undertake its missions.

3. The Applicability of International Humanitarian Law to Peacekeeping Missions

3.1 Introduction

Most State armed forces are trained in IHL. IHL principles, in conjunction with the mission’s rules of engagement (ROE), shape the way that commanders and their troops approach their duties in armed conflict situations, whether the force is party to the conflict or not. IHL brings international individual criminal responsibility and a duty to prosecute or extradite under the Geneva Conventions, and arguably also under international criminal law. However because the formal application of IHL to peacekeeping missions is so fraught with difficulties IHL is not a solution to the accountability gap in relation to peacekeepers.

3.2 The Bulletin on Observance by United Nations forces of humanitarian law

In most situations the criteria for determining whether IHL is applicable to peacekeepers will depend on whether the peacekeepers have become engaged as combatants in an armed conflict as detailed in the Secretary-General’s Bulletin on *Observance by United Nations*

A/C.6/63/SR.5 (2008) [52]; Democratic Republic of the Congo, UN Doc A/C.6/64/SR.7 (2009)[41]; Columbia, UN Doc A/C.6/66/SR.9, (7 October 2011) [23]

⁴⁰ Annex to the General Assembly Report of the Secretary- General 9 October 1990, UN Doc A/45/594, [47 b]; Annex to the Report of the Special Committee on Peacekeeping Operations and its Working Group, A/61/19 (Part III), New York, 12 June 2007, [7];

⁴¹ DW Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, (Stevens 1964) 440

forces of humanitarian law (Bulletin). The *Bulletin* was promulgated in 1999 in response to pressure from the ICRC and NGOs to improve standards of accountability for peacekeepers in the wake of Troop Contributing State's reluctance (or inability) to prosecute their troops for serious crimes committed in Somalia and the Balkans. A number of commentators have suggested that where a peacekeeping mission is in effective control of territory the law of occupation may be applicable⁴² (a possibility that is not explicitly addressed in the *Bulletin*), in which case troops would be subject to the grave breaches provisions of Geneva Convention IV.⁴³ Generally however, UN forces act with the consent of the government and most commentators believe that occupation law is not applicable in these circumstances (provided that the consent is genuine and from the legitimate government) regardless of the level of effective control exercised by the mission.⁴⁴ Thus for most peacekeeping operations the *Bulletin* is the key guide to determining when IHL is applicable. It is an internal document that is binding on UN troops but it does not in itself create direct legal obligations for States.⁴⁵

The *Bulletin* provides, in paragraph 1.1, that the fundamental principles and rules of IHL set out in it:⁴⁶

are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement

⁴² S Wills 'Occupation Law and Multi-National Operations: Problems and Perspectives' in *British Year Book of International Law* Vol 77 (Oxford University Press 2007) 256-332; MV Bhatia, *War and Intervention: Issues for Contemporary Peace Operations* (Kumarian Press Inc. Bloomfield 2003), 98; RG MJ Kelly *Restoring and Maintaining Order in Complex Peace Operations* (Kluwer 1999), 63

⁴³ The Australian government considered Geneva Convention IV to be applicable to its peace operations in Somalia and East Timor due to the absence of any other authority capable maintaining law and order. RG MJ Kelly *Restoring and Maintaining Order in Complex Peace Operations* (Kluwer 1999), 63; Patman 'Disarming Somalia: The Contrasting Fortunes of United States and Australian Peacekeepers During United Nations Intervention 1992-1993,' 96 *African Affairs*, 509, 512

⁴⁴ Some commentators believe that occupation is not applicable to UN forces because the UN acts pursuant to the mandate conferred upon it by the Security Council. However Zwanenburg notes that '[a] stronger current in doctrine rejects this view, because it is in contradiction with the fundamental distinction between *ius ad bellum* and *ius in bello*.' M Zwanenburg, 'United Nations and International Humanitarian Law,' in *Max Planck Encyclopaedia of Public International Law*, (n 18), [21] visited on 24 July 2013;

⁴⁵ Direct obligations for peacekeepers under IHL arise as a consequence of their participation as combatants, and hence parties to the conflict: Report of Experts Meeting on Multi-National Operations, 11-12 December 2003 (ICRC Geneva), 2 http://www.icrc.org/eng/assets/files/other/irrc_853_fd_application.pdf

⁴⁶ States contributing troops to a UN mission continue to be bound by their obligations under IHL. Thus the *Bulletin* is also affirmation of the fact that the IHL treaties to which the Troop Contributing State is party become applicable to its forces 'when in situations of armed conflict they are actively engaged therein as combatants.' See Report of Experts Meeting on Multi-National Operations (n 45)

actions, or in peacekeeping operations when the use of force is permitted in self-defence.⁴⁷

This does not greatly help in resolving the problem of peacekeeper impunity (the primary concern behind the adoption of the *Bulletin*) but it does attempt to clarify the legal framework that applies to UN forces that become engaged as combatants in an armed conflict. Unfortunately there are numerous practical problems that make applying the *Bulletin* difficult, many of which were widely discussed in the literature soon after it was promulgated. In particular it was argued that the threshold of “active engagement” as combatants is difficult to determine in practice and that Troop Contributing States are likely to regard it as a relatively high one, if for no other reason than that crossing the threshold exposes their troops to attack.⁴⁸ This problem remains relevant today since nothing has been done to resolve it. In addition new problems have arisen (or become more apparent) as a result of changes in the nature of peacekeeping that have taken place since 1999.

3.2.1 The Relationship between the Bulletin and the Convention on the Safety of United Nations and Associated Personnel

The *Convention on the Safety of United Nations and Associated Personnel (Safety Convention)* was adopted in response to atrocities committed against UN troops, and others, in Somalia in the early 1990s.⁴⁹ It requires State parties to criminalise attacks on UN forces under its national laws, and to prosecute or extradite alleged perpetrators,⁵⁰ except when the UN forces are engaged in:

a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.⁵¹

In line with this, and also, paradoxically, in contrast to it, paragraph 1.2 of the *Bulletin on Observance by United Nations forces of humanitarian law* states that:

⁴⁷ United Nations, Secretary-General's Bulletin on Observance by United Nations forces of humanitarian law ST/SGB/1999/13, 6 August 1999, [1.1]

⁴⁸ C Greenwood ‘International Humanitarian Law and UN Operations’ Year Book of International Humanitarian Law 1998, 3, 23-25; O Engdahl ‘The Status of Peace Operations Personnel under International Humanitarian Law’ (2008) 11 YIHL 109, 131

⁴⁹ Key Elements of the Clinton Administration’s Policy on Reforming Multi-Lateral Peace Operations in *The Clinton Administration’s Policy on Reforming Multi-Lateral Peace Operations* 11 (May 1994), 25

⁵⁰ Convention on the Safety of UN and Associated Personnel 34 ILM (1995), Articles 9, 13

⁵¹ Ibid, Article 2

The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.⁵²

The ‘international law of armed conflict’ referred to in the *Bulletin* is a very different concept to the ‘law of international armed conflict’ referred to in the *Safety Convention*, the latter being a subset of the former.⁵³ This leaves considerable scope for confusion given that the *Safety Convention* is explicitly referenced in paragraph 1.2 of the *Bulletin*.⁵⁴ During the negotiations for the 2005 Optional Protocol supplementing *The Safety Convention*,⁵⁵ the delegate from Costa Rica proposed a new formula such that the Convention would not apply “to any United Nations operation in which any personnel are engaged as combatants against organized armed forces and to which the international law of armed conflict applies;” but it was not adopted.⁵⁶ Hence it remains the case that the *Safety Convention* prohibits attacks on UN forces in all circumstances except where they are engaged as combatants in an international armed conflict. Under the *Bulletin* IHL becomes applicable to UN forces (and protected status is lost) when they are engaged as combatants against organised armed forces in an armed conflict, whether international or non-international.⁵⁷

In the late 1990s there was some support for the view that if UN forces became actively engaged as combatants in an on-going non-international armed conflict their participation in it would nevertheless be subject to the laws of international armed conflict, (notwithstanding that some rules, such as those relating to prisoners of war, may be

⁵² United Nations, Secretary-General's Bulletin on Observance by United Nations forces of humanitarian law (n 47), [1.2]

⁵³ The ‘international law of armed conflict’ refers to the general body of IHL governing both international and non-international armed conflict. The ‘law of international armed conflict’ refers to the specific branch of IHL governing international armed conflict.

⁵⁴ During the negotiations for the Safety Convention a proposal was put forward that the Safety Convention would not apply would apply ‘whenever military personnel of the UN operations were engaged in combat with organised armed forces having an identifiable command structure, carrying arms openly and controlling part of the territory of the host State’ but it was rejected: UN, *Report of the Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel*, 1st Annex, Supp., UN Doc. A/49/22 (1994) para. 12;

⁵⁵ Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel annexed to General Assembly resolution A/C.6/60/L.11 adopted 8 November 2005.

⁵⁶ Sixth Committee, *Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel*, Annex 1 UN Doc/A/C.6/58/1.16 2003 cited in O Engdahl ‘The Status of Peace Operations Personnel under International Humanitarian Law’ (2008) 11 YIHL 109, 129.

⁵⁷ The ICRC notes that although the term combatant is not used in common Article 3 or Protocol II ‘State armed forces may be considered combatants for purposes of the principle of distinction’ in both international and non-international armed conflicts: JM Henckaerts and L Doswald-Beck eds. *Customary International Humanitarian Law*, Volume 1 (n 20), Rule 3, page 12.

inapplicable) on the basis that “the forces of the participating members states are carrying out an international mission on the basis of the United Nations resolution” and it “would be a denial of the clear international dimension of such missions if humanitarian law were to be restricted to common article 3 or to Protocol II to the Geneva Conventions.”⁵⁸ However the ICRC’s current view, and that of the majority of academic commentators, is that formally the law of international armed conflict applies only to conflicts between the armed forces of States.⁵⁹ Consistent with this view peacekeepers engaged as combatants against non-State armed groups would be viewed as engagement in a non-international armed conflict, notwithstanding the international dimension of the UN operation.⁶⁰ This hardening of views may be due in part to the increase, post 9/11, in stability operations in which international forces may be mandated to work alongside Host State armed forces against rebel and insurgent groups.

3.3.2 At what point, if any, do peacekeepers regain protected status?

Once peacekeepers become actively engaged as combatants IHL is applicable ‘to the extent and for the duration’ of their engagement. Does the phrase “to the extent and for the duration” imply that once their active engagement as combatants ceases peacekeepers regain civilian protected status? The US delegates to the *Ad Hoc Committee on the Elaboration of an International Convention Dealing with the Safety and Security of United Nations and Associated Personnel*, thought that the transition to engagement in armed conflict should be one way only. Thus

once the UN crossed that threshold and became a party to an international armed conflict the law of war would apply until either the conflict or the UN’s involvement in it were over.

This was so as to ensure that:

⁵⁸ R Murphy, ‘United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?’ *Criminal Law Forum* 14, 153, 180 citing a statement by the ICRC at the 47th Session of the General Assembly on the 13th November 2002.

⁵⁹ J. Pejić, ‘Status of Armed Conflicts’ in E. Wilmhurst and S. Breau, eds., *Perspectives on the ICRC Study on International Humanitarian Law* (Cambridge University Press 2007) 90

⁶⁰ Zwanenburg suggests that ‘[o]pinions are more or less equally divided between those who consider that an armed conflict between a UN force and an armed group is a non-international armed conflict and those who consider that a UN operation by definition ‘internationalizes’ the conflict.’ M Zwanenburg, ‘United Nations and International Humanitarian Law,’ in *Max Planck Encyclopaedia of Public International Law*, (n 18), [20]

a UN force cannot jump back and forth from the law of war to this Convention depending on whether they happen to be engaged in hostilities on any particular day.⁶¹

This would have been in line with peacekeeping doctrine of the early 1990s which viewed host State consent:

as a line or Rubicon that divided peacekeeping and *Wider Peacekeeping* from peace enforcement. Crossing the Rubicon was to be avoided and re-crossing to regain consent and impartiality was thought to be almost impossible. Once a PSO [Peace Support Operation] had transitioned to peace enforcement stance operations would be conducted ‘in accordance with standard military principles predicated on the identification of an enemy.’ The perception created, therefore, was that once consent was lost, military force would default to the use of war-fighting techniques⁶²

However, as Orla Engdahl has observed in comments on the *Safety Convention*: a ‘UN operation may be conducted over several years and it is possible that the situation on the ground could change considerably in character;’ hence the failure to deal with the question of whether UN forces can return to protected status is problematic.⁶³

Peacekeeping doctrine evolved significantly during the 1990s. Early peacekeeping doctrine “suggested distinct boundaries between phases” of a peace support operation “and tended to create the impression that forces could be deployed under a mandate for a particular period, prepared and equipped to deal solely with the demands of a particular task such as peacekeeping.” However by the early twenty-first century peacekeeping doctrine had moved towards the view that “there are no distinct compartments for Peace Support Operations [PSO] in the spectrum of tension” and that:

Experience has shown that campaigns do not progress in a linear manner. Campaign Authority, which defines a PSF’s capacity to act, as well as the nature of the force required to uphold the mandate, varies fluidly with time and location.⁶⁴

⁶¹ S Lepper, ‘Legal Status of Military Personnel in United Nations Peace Operations’ 18Houston JIL 1996, 410

⁶² UK Ministry of Defence Joint Warfare Publication 3.50 The Military Contribution to Peace Support Operations (n 24), [A14];

⁶³ O Engdahl *Protection of Personnel in Peace Operations: The Role of the ‘Safety Convention’ Against the Background of international Law* ((Martinus Nijhoff 2007), 237

⁶⁴ UK Ministry of Defence Joint Warfare Publication 3.50 The Military Contribution to Peace Support Operations (n 24), [238]

The UK's 2011 Joint Doctrine Note *Peacekeeping: An Evolving Role for Military Forces* observes that peacekeepers' operating "environment is now one of complexity and uncertainty"⁶⁵ and therefore "[t]he need for peacekeepers to be prepared to threaten or use force to implement the mandate has never been more apparent."⁶⁶ The current move away from the reluctance to use force for fear of crossing "the Rubicon" of consent towards a more flexible approach suggests that there may be circumstances when crossing the applicability of IHL threshold is unavoidable but that a return crossing might be both possible and desirable, particularly given that missions are often deployed for several years: certainly there is nothing in *The Bulletin* that clearly indicates that transition across the IHL threshold can only be one way. However such an approach is inconsistent with the way in which the concept of a party to a conflict has generally been understood. In the *Tadic* case the International Criminal Tribunal for the former Yugoslavia held that:

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁶⁷

Thus the *Bulletin* appears to be introducing a temporal element into the concept of combatant status that traditionally has been reserved only for civilians actively participating in hostilities. This creates problems for commanders in the field: if transition to combatant status is not one way only, how is a legal advisor (lacking the ability to foresee the future and thus the ability to know whether or not there may be a resumption of hostilities and if so on what scale) to determine the point at which peacekeepers' return to civilian protected status?

⁶⁵ Joint Doctrine Note 5/11 Peacekeeping: An Evolving Role for Military Forces, (n 1), 108

⁶⁶ *Ibid*, [107]; Moreover on 28 March 2013 the Security Council unanimously adopted resolution 2098 extending the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) to 31 March 2014 and creating on an exceptional basis, a specialized "intervention brigade" within the operation's existing 19,815-strong force, comprising three infantry battalions, one artillery and one special forces and reconnaissance company: <http://www.un.org/News/Press/docs/2013/sc10964.doc.htm>

⁶⁷ ICTY Prosecutor v Dusko Tadic (Jurisdiction) No IT 94-1-AR72, [70]; Zwanenburg notes that it 'is unlikely that the opponent of a UN operation will accept the intermittent application of international humanitarian law.' M Zwanenburg, 'United Nations and International Humanitarian Law, (n 18), paragraph 19; An arguable case could be made that since combatant status does not properly exist in non-international armed conflict (other than for the purposes of distinction in the conduct of hostilities) resort to IHL (at least that part of it dealing with conduct of hostilities) in internal armed conflicts should be limited to the areas in which hostilities are taking place and law enforcement rules applied in those areas of the country that are stable and peaceful; but the approach taken in *Tadic* is widely accepted.

Ordinary civilians that have lost protected status regain it immediately that they have ceased engaging in the “specific hostile act” that rendered them participants in the hostilities. In the view of the ICRC ‘the “revolving door” of civilian protection is an integral part of IHL, not a malfunction. It prevents attacks on civilians who do not at the time present a military threat.’⁶⁸ However whilst a “revolving door” approach to the applicability of IHL to UN forces might provide a means of ensuring compliance with IHL targeting rules in situations where peacekeepers must engage in combat, whilst remaining constrained by ordinary self-defence and law enforcement norms when the situation is less volatile, it would not be an effective means of holding peacekeepers accountable for crimes such as murder, torture, and inhumane treatment. *The Bulletin* was adopted to deal with the latter problem.

Ordinary civilians that directly participate in hostilities temporarily lose protected status; but they do not become combatants unless they take up a continuous combat role within an armed group⁶⁹ (in which case they become part of the armed forces not a civilian temporarily participating directly in hostilities). Hence the criteria for determining at what point combatant peacekeepers re-transition back to protected civilian status may be different from that of ordinary civilians. The ICRC’s *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* sets out detailed, albeit controversial, guidance on interpreting the meaning of “for such time [as a civilian takes] a direct part in hostilities,” using criteria that are purely activity-based.⁷⁰ There is no guidance of an equivalent nature, anywhere, on interpreting the meaning of “the extent and duration” of UN forces’ “engagement as combatants:” it appears to be premised on a blurring of activity-based and status-based criteria that renders the basis of the transition, and hence the point at which it occurs, inherently opaque and thus open to differences of opinion.

3.2.3 Commission of War Crimes by Civilians

⁶⁸ *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Geneva 2009), 71; Some aspects of the guidance have proved very controversial, in particular the comments on military necessity. However much of the remainder of the document, which draws heavily on the Geneva Conventions and their Protocols, does appear to represent a broad consensus of opinion.

⁶⁹ ‘[I]n non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities.’ (Ibid, page 27)

⁷⁰ The ICRC’s *Interpretative Guidance* (n 68) rejects ‘any extension of the concept of direct participation in hostilities beyond specific acts’ since this would ‘blur the distinction made in IHL between temporary, activity-based loss of protection (due to direct participation in hostilities), and continuous, status or function-based loss of protection (due to combatant status or continuous combat function).’ (page 45)

The nexus for determining whether a crime committed in a situation of armed conflict is a war crime is broader in nature than the belligerent nexus that would render a civilian a participant in hostilities. The latter requires a direct causal link between a specific hostile act and the harm caused to a party to the conflict or civilians, and the acts must have been specifically designed to cause that harm.⁷¹ According to the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* "even the perpetration of war crimes" does not constitute direct participation in hostilities (an interpretation that implies that war crimes can be committed by persons that do not belong to the armed forces of a party to the conflict) since "loss of protection against direct attack, within the meaning of IHL,...is not a sanction for criminal behaviour."⁷²

According to the International Tribunals for the former Yugoslavia and Rwanda the nexus to an armed conflict required to render a crime a war crime requires only that it is significantly "shaped" by the armed conflict. The Appeals Chamber of the ICTY in *Kunarac* stated that:

What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.⁷³

The ICTR cited the above paragraph with approval, but added that this does not mean that every act facilitated by an armed conflict situation constitutes a war crime. For example:

if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime⁷⁴

Crimes committed by peacekeepers against the local population, even rape and assault in situations where the motivation is largely opportunistic, would have a greater nexus to the armed conflict (where there is one) than the example of a civilian murdering his long hated neighbour, since peacekeepers exercise military authority in the area in which they are

⁷¹ Ibid, 57-58

⁷² Ibid, 62

⁷³ ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT -96-23, Judgment of 12 June 2002 (Appeals Chamber), [58]

⁷⁴ *Prosecutor v. Rutaganda*, Case No. ICTR -96-3, Judgment of 26 May 2003 [570]

deployed, usually with a robust mandate to use force in specified circumstances. Peacekeepers' relationship with the local population, and their power over individuals within it, is not the result an incidental consequence of the chaos of war but of purposeful deployment by the Security Council in response to the conflict. Thus in most cases, the existence of the armed conflict would "have played a substantial part" in the peacekeeper's ability to commit the crime, his decision to commit it and the manner in which it was committed, in a way that is different in nature to that of a civilian merely exploiting the break-down of order. Such a relationship, even if it were to be grossly abused, would not necessarily render IHL "applicable" in the sense of rendering the force a party to the conflict subject to the full range of obligations and privileges of IHL; but it may well be enough to establish a sufficient nexus to the conflict to render violence and abuse of civilians a war crime. In these circumstances peacekeepers could be held accountable under IHL for conduct amounting to a war crime regardless of whether the peacekeeping force is party to the conflict in the formal sense.

However not all abusive treatment of civilians would necessarily qualify as a war crime. Moreover in practice, it is unlikely that peacekeepers would be prosecuted for war crimes outside their home State, unless their conduct is so heinous as to attract the attention of the International Criminal Court.⁷⁵

3.3 Applying the Principles and Spirit of IHL in Non-Armed Conflict Situations

The *Bulletin* implies that if, *as a matter of fact*, a peacekeeping mission engages in robust use of force where this is necessary to carry a mandated task, IHL may become applicable as a *matter of law* provided a certain threshold level of violence is reached. What that level is may not be crystal clear but it would seem quite reasonable, given the way in which the *Bulletin* is framed, for the commander to assume that he or she does not have to worry too much about that: so long as the force complies with the principles and rules of IHL, and with the mission's ROE, determining the exact point at which the threshold was crossed can be left to lawyers should there ever be a court case. Such an approach accords with the framing of the *Bulletin*; and with public commitments made by the UN prior to the adoption of the *Bulletin* in which it affirmed peacekeepers' obligation to act in accordance with the "principles and

⁷⁵ M O'Brien 'Prosecutorial Discretion as an Obstacle to Prosecution of Peacekeepers by the ICC: The Big Fish/Small Debate and the Gravity Threshold', *Journal of International Criminal Justice* 10 (3) (2012) 525

spirit,” and subsequently “principles and rules” of IHL, regardless of whether IHL was formally applicable to them.⁷⁶

The expectation that non-combatant peacekeepers should comply with the principles, spirit, and rules of IHL, whether or not they are parties to an armed conflict, has not to date been regarded as an especially radical stance, presumably because it has generally been assumed that if peacekeepers were to use robust force it would be in the context of an armed conflict and would be against a party to the conflict, and thus their role would be different from but, in key respects, analogous to a party to a conflict. Today that cannot always be assumed. Missions may be deployed to situations of lawlessness and armed violence that do not, or no longer, meet the criteria for armed conflict, and they may remain for many years.⁷⁷ Use of force by peacekeepers deployed with the consent of the host State to assist it in dealing with domestic problems of lawlessness, but where is no armed conflict, cannot result in the applicability of IHL (even where the mission is authorised under a Chapter VII mandate) since IHL only applies in armed conflicts.⁷⁸

In general, where there is no armed conflict, use of force is regulated through the rules applicable to law enforcement operations. These are largely premised on human rights principles, in particular the right to life. The UN Basic Principles on the Use of Force and

⁷⁶United Nations, General Assembly 50th Session (1995), Fourth Committee, Agenda item 86, 16 November 1996, statement by the ICRC; UN Doc A/46/185 of 23 May 1991 [28]; A Roberts and R Guelff, *Documents on the Laws of War* (3rd edn Oxford University Press 2000) 625, 723; PC Szasz, ‘UN Forces and International Humanitarian Law’ in MN Schmitt (ed), *International Law across the Spectrum of Conflict, Essays in Honour of Professor LC Green on the Occasion of His Eightieth Birthday* (US Naval War College Newport 2000) 507, 516.

⁷⁷ There are a number of factors to be taken into account when determining whether a domestic situation characterised by high levels of violence amounts to an armed conflict; but critically an armed conflict requires identifiable parties to a conflict. Thus there is no dispute that the situation in Haiti, where the UN mission in Haiti (MINUSTAH) has been deployed under a Chapter VII mandate since 2004, is not an armed conflict. By contrast the extent to which the violence in Mexico constitutes a non-international armed conflict governed by IHL ‘is controversial. The level of armed violence is certainly high enough; the question is, do any of the drug gangs fulfil the criteria laid down to be considered a party to an armed conflict..? Rule of Law in Armed Conflicts Project http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=145 citing ICTY *Prosecutor v. Haradinaj et al.*, Judgment, 3 April 2008, paragraph 60

⁷⁸ In practice commanders do tend to assume that if robust use of force is used the appropriate regulatory framework is IHL. This may be because commanders’ approaches to peacekeeping, and the drafting of mission ROE, are built on past experience and it takes time to factor in novel ground rules. See discussion on EJIL Talk! at S Wills, *The Law Applicable to Peacekeepers Deployed in Situations where there is No Armed Conflict*, and Responses April 10 2013, <http://www.ejiltalk.org/the-law-applicable-to-peacekeepers-deployed-in-situations-where-there-is-no-armed-conflict/#more-8019>

Firearms by Law Enforcement Officials⁷⁹ (which does not have the status of a legally binding treaty but draws on customary law), provides that law enforcement officials:⁸⁰

shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁸¹

The ICRC in its 2011 report *Violence and the Use of Force* also reiterates that in non-armed conflict situations use of firearms is warranted only to prevent imminent threat of death or serious injury.⁸²

Neither the UN nor the ICRC has offered any guidelines as to how military personnel serving in a Chapter VII mission in a non-armed conflict situation should interpret their mandate. The ROE for UN Chapter VII missions tend to be broadly similar regardless of whether the mission is operating in an armed conflict or non-armed conflict situation. For example the Chapter VII UN Mission in Haiti (MINUSTAH) is currently dealing with criminal gang violence not armed conflict.⁸³ MINUSTAH's ROE state that, as with all peacekeeping operations, the mission should use minimum force; but use of force "beyond self-defence" is authorised to carry out certain objectives (that are very broadly defined in both the mandating resolution and the ROE), including to "assist the Transitional Government in extending State authority throughout Haiti."⁸⁴ However the ROE do not specify the legal framework within which use force beyond self-defence is to be regulated.

⁷⁹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990)

⁸⁰ The rules apply to military authorities but only when they exercise police powers (Ibid, footnote 1); M Sassoli and L Olsen 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts.' (n 22), 611

⁸¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 79), [9]

⁸² ICRC *Violence and the Use of Force* (ICRC July 2011), 43

⁸³ S/RES 1542 30 April 2004

⁸⁴ Rules of Engagement for the Military Component of the United Nations Stabilisation Mission in Haiti, 28 June 2004 (On file with author). These are still in use at the time of writing, July 2013. S/RES 1529 of 29 February 2004 authorised the deployment of a Multi-National Interim Force for three months in response to the armed insurgency that overthrew President Aristide. MINUSTAH deployed in June, by which time the insurgency was over but there was, and still is, armed violence; Interim report of the Secretary-General on the United Nations Stabilization Mission in Haiti S/2004/698 of 31 August 2004 [56- 59].

In its general introductory paragraph MINUSTAH's ROE states that the "conduct of peacekeeping operations is guided by the Purposes of the Charter of the United Nations and relevant principles of international law;" but most legal principles have to be interpreted in the context of the legal regime to which they relate, and the ROE do not specify what international legal regimes are relevant. There is no reference to either IHL or IHRL.⁸⁵ The ROE state that if armed force is used "MINUSTAH military personnel must comply with the international legal principles of proportionality, the minimum use of force and the requirement to minimise the potential for collateral damage."⁸⁶ This phrasing is also routinely used in the ROE of missions operating in armed conflict situations. The ICRC in its 2011 report on *Violence and the Use of Force* observed that the principles of necessity and proportionality are key concepts in both law enforcement and armed conflict regulation but are used "in completely different senses."⁸⁷ MINUSTAH's ROE defines proportionality as the "amount of force, which is reasonable in intensity, duration and magnitude to achieve an authorised objective." The ROE also state that the "principle of military necessity authorises only that force which is required to accomplish the mission."⁸⁸ The reference to military necessity; and the definition of proportionality as being based on the reasonableness of the intensity, duration and magnitude of the use of force; suggest that the conceptual framework is that of the law of armed conflict: however no armed conflict exists.

Lack of clarity as to the legal regime applicable to the situation in which a peacekeeping force is deployed creates difficulties with regard to any attempt to hold mission personnel accountable. It may also create difficulties with regard to States' responsibilities for conduct of their forces. Haiti is party to the International Covenant on Civil and Political Rights. It would be an awkward discrepancy in the UN's commitment to the rule of law if MINUSTAH, in assisting the Haitian government extend its authority, were free to ignore the human rights obligations that bind the State in carrying out that same task.⁸⁹

3.4 Conclusion to Section 3

⁸⁵ Rules of Engagement for the Military Component of the United Nations Stabilisation Mission in Haiti (n 79).

⁸⁶ Ibid

⁸⁷ ICRC *Violence and the Use of Force* (n 82), 42

⁸⁸ Rules of Engagement for the Military Component of the United Nations Stabilisation Mission in Haiti (n 84).

⁸⁹ For discussion of the applicability of the ICCPR to international forces in Afghanistan see F Hampson, 'The scope of the extra-territorial applicability of international human rights law' in Gilbert, Hampson, Sandoval (Eds.) *The Delivery of Human Rights: Essays in honour of Professor Sir Nigel Rodley*, (Routledge 2011), 157, 174

Under IHL States are obliged to prosecute or extradite alleged offenders where there is credible evidence that war crimes have been committed. However determining when IHL is applicable to peacekeepers is extremely difficult. Some States have accepted that occupation law is applicable to their forces when they exercise effective control over territory; but this is controversial. There is a strong current of opinion that occupation law will not apply to forces deployed with the consent of the Host State government. Outside of occupation, IHL will apply to UN forces when in situations of armed conflict they are actively engaged as combatants; but it is difficult to know what is meant by “actively engaged as combatants.” In non-armed conflict situations IHL does not apply at all and in some cases it is not clear (at least from the ROE, mandate and relevant UN Bulletins) what international legal regimes do apply, especially to operations that have a Chapter VII mandate. Moreover much of the criminal and abusive conduct committed by peacekeepers would not amount to war crimes and hence would not be captured by the accountability mechanisms of IHL. A more day to day level of criminal accountability is needed to ensure rule of law standards apply to the conduct of peacekeepers and to ensure the legitimacy of the mission in the eyes of both the local and international communities.

4. The Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission; the Proposals of the Stimson Group

4.1 The Draft Convention on the Criminal Accountability of United Nations Officials and Experts on Mission

An Ad Hoc Committee on the Criminal Accountability of United Nations Officials and Experts on Mission (established by the UN’s Sixth Committee) is currently trying to develop ways to ensure that UN personnel engaged in missions abroad are held accountable for behaviour that is criminal in most States. One area of dispute has focused on the nature of an international crime. Some delegates have argued that crimes by peacekeepers should not be treated as international crimes since:

an isolated act of rape, or a serious sexual assault, committed by a peacekeeper is an ordinary crime that does not have the degree of seriousness to justify comparisons with such criminal conduct as crimes against humanity.

Others have countered with the argument that:

a violent crime, especially one involving sexual exploitation and abuse, committed by a peacekeeper in the context of peacekeeping operations cannot be regarded as merely an ordinary crime. It is a crime committed against a member of the local population, whose safety and security is entrusted to the protection of the peacekeeping operation of which the offender is a member. The gravity of the crime lies in the breach of what is akin to a relationship of trust between the peacekeeper and the members of the community he or she is sent to protect and assist.⁹⁰

A Group of Legal Experts, in a 2006 report to the committee, suggested that Host State jurisdiction over civilian personnel should be the option of choice if at all possible; it also recommended the adoption of a convention. In response to these recommendations the then Secretary-General Kofi Annan proposed the “assertion of universal jurisdiction on the basis of an extradite or prosecute regime underpinned by a treaty” as a compromise measure less broad than the universal jurisdiction regime applicable to piracy, war crimes and crimes against humanity “in the sense of any State being able to assert jurisdiction irrespective of the location of the offender or the crime or the nationality of the persons involved;” but broad enough to require a State on whose territory an alleged offender is found to “refer the case to its competent authorities for the purposes of prosecution under its domestic laws” or to “extradite him or her to the State of nationality or to another State that has established jurisdiction.”⁹¹ A preliminary draft of the proposed Convention was published implementing this compromise;⁹² but little progress has been made towards moving it beyond draft stage due to an inability amongst the delegates to agree workable grounds for moving forward.

Article 3 of the draft convention sets out the list of crimes to which it would be applicable. These include murder, wilfully causing serious injury to body or health, rape and sexual violence, and sexual offences involving children. Under an alternative version of Article 3 the Convention would cover:

Crimes of intentional violence against the person and sexual offences punishable under the national law of that State party by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty

⁹⁰ UN Doc A/60/980 on ‘Ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations’ [54-55]

⁹¹ Ibid, [57-58]

⁹² Ibid, Appendix III

The alternative version has the advantage of broadening the range of crimes covered; but the disadvantage of creating a variable regime since the criminalisation of conduct and punishments for crimes vary widely between States (a fact that may have implications for extradition).

Under Article 4 each State party is required to take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 3 when:

- (a) The crime is committed in the territory of that State; or
- (b) The crime is committed by a national of that State

Articles 6, 7 and 17 set out obligations that would require the State to extradite or prosecute alleged offenders without delay and to communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who must transmit the information to other States parties and to the host State.

However the Draft Convention does not apply to military personnel of national contingents assigned to the military component of a United Nations peacekeeping operation nor to “any other persons who are, under the provisions of the status-of-forces agreement between the United Nations and the host State for the peacekeeping operation, subject to the exclusive jurisdiction of a State other than the host State.”⁹³ The reason for this limitation is to exclude anyone that under the Model SOFA is subject to the exclusive jurisdiction of the Contributing State. The Convention also does not apply to:

- a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations, in which a United Nations official or expert on mission is engaged as a combatant against organized armed forces and to which the law of international armed conflict applies.⁹⁴

The latter exclusion was intended to parallel Article 2 of *The Safety Convention*. Effectively all military personnel are excluded from the remit of the Convention.

4.1.1 The Views of the Ad Hoc Committee

Most of the delegates to the Sixth Committee’s Ad Hoc Committee on the Criminal Accountability of United Nations Officials and Experts on Mission stress the importance of what they describe as “short term measures” to improve Contributing States’ ability to

⁹³ Ibid, Annex III, [2]

⁹⁴ Ibid

prosecute their own nationals for crimes committed when on peacekeeping missions; primarily through encouraging States that have not yet done so, to adopt legislation providing for extra-territorial jurisdiction in these circumstances.⁹⁵ Some States regard these “short-term measures” as sufficient and are opposed to the adoption of a convention. For example in 2009 the delegates representing the Non-Aligned Movement argued that “it would be premature to discuss a draft convention on criminal accountability of United Nations officials and experts on mission,”⁹⁶ a view shared by the delegates from the Russian Federation,⁹⁷ India⁹⁸ and Morocco⁹⁹ At the same meeting the delegate from the United States said that:

With respect to the outstanding issue of the possible negotiation of a multilateral convention on criminal accountability of United Nations staff and experts on mission, his delegation continued to question whether negotiation of such a convention would present the most efficient or effective means through which to ensure accountability.¹⁰⁰

These views were reiterated at the 2011 meeting.¹⁰¹

In response the delegations in favour of a convention have argued “that cooperation in criminal proceedings normally require[s] the existence of a legal basis such as a treaty,”¹⁰² and:

a binding legal instrument would constitute a solid legal basis for establishing criminal jurisdiction by the State of nationality of the alleged offender, so as to eliminate potential jurisdictional gaps, and for enhancing cooperation among States and between States and the United Nations:¹⁰³

Moreover:

the adoption of a convention would give a strong political signal that criminal conduct by United Nations officials or experts on mission could not and

⁹⁵ Sixth Committee 67th Session Draft Resolution on ‘Criminal accountability of United Nations officials and experts on mission’ 7 November 2012 A/C.6/67/L.17, [3]

⁹⁶ UN Summary Records of the Sixth Committee, UN Doc A/C.6/64/SR.7 (10 November 2009) [12]

⁹⁷ *Ibid.*, [45-46]

⁹⁸ UN Summary Records of the Sixth Committee, UN Doc A/C.6/66/SR.9, (7 October 2011) [26]

⁹⁹ *Ibid.*, [62]

¹⁰⁰ UN Summary Records of the Sixth Committee, UN Doc A/C.6/64/SR.7 (10 November 2009), [54]

¹⁰¹ UN Summary Records of the Sixth Committee, UN Doc A/C.6/66/SR.9, (7 October 2011)

¹⁰² Report of the Ad Hoc Committee on criminal accountability of United Nations officials and experts on mission A/63/54 (7-9 and 11 April 2008) Annex I [A (3)]

¹⁰³ Summary Record of the 14th meeting of the Sixth Committee A /C.6/64/SR.14 (2 December 2009) [4]; The chair noted that ‘the view had been expressed that the draft convention should cover military personnel engaged in peacekeeping operations.’ [4]

would not be tolerated, as well as assist those States that might need an international convention to effect necessary changes at the domestic level.¹⁰⁴

In 2012 the delegate for the EU stated that the EU and its Member States support “the dual track approach, combining short-term measures and long-term measures to deal with existing jurisdictional gaps.” The delegate went on to say that the EU acknowledges:

the value of discussions regarding principles for an international legal instrument. We stand ready to consider a comprehensive legal framework within which alleged crimes could be investigated and prosecuted if necessary, thus enabling competent authorities to punish criminal conduct. We encourage other delegations to do the same.¹⁰⁵

At the same meeting the delegate for Canada, Australia and New Zealand said that these States also support a dual approach and suggested that “a convention could further strengthen the integrity of the UN system and further promote the highest standards of professionalism among UN personnel.”¹⁰⁶

Several of the delegates that are in favour of a convention have explicitly stated that it should be expanded to include military members of peacekeeping missions. At the 2009 meeting Mr Kanyimbue, the delegate from the Democratic Republic of the Congo, where there has been very serious SEA of civilians by peacekeepers over a prolonged period of time, stated that excluding military forces from the scope of a future instrument “could weaken the protection of victims and result in the application of a double standard, one for military personnel and one for civilians.”¹⁰⁷ He also observed that:

despite all the rhetoric on the subject of criminal accountability, in practice impunity was assured all down the line. Host States were often bound by headquarters agreements and had no manoeuvring room; at best, they could refer suspects to the United Nations. Since the United Nations could not punish them, they were sent back to their countries of origin, which often did not want to publicly admit the misconduct of their nationals and were therefore reluctant to prosecute them.¹⁰⁸

He went to give an example, stating that only five months earlier:

¹⁰⁴ Ibid

¹⁰⁵ Statement by the EU, Sixty-seventh session of the Sixth Committee ‘Criminal accountability of United Nations officials and experts on mission’ (8 October to 16 November 2012) Ibid

¹⁰⁶ Ibid, Statement by Australia on behalf of CANZ

¹⁰⁷ UN Summary Records of the Sixth Committee, UN Doc A/C.6/64/SR.7 (10 November 2009) [41]

¹⁰⁸ Ibid, [39]

a Congolese Republican Guard patrol had apprehended five Blue Helmets from the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) raping a girl near N'Djili International Airport in Kinshasa. Although the parties concerned had confessed, nothing seemed to have been done to punish them.¹⁰⁹

At the same meeting Mr Bichet of Switzerland stated that it is “essential” that military personnel are included in the scope of application of the proposed convention since the United Nations deploys numerous peacekeeping troops and a significant proportion of the abuses committed by United Nations personnel are committed by members of the military.¹¹⁰ Switzerland reiterated this view in 2011¹¹¹ and again in 2012 when it said:

Nous sommes en effet convaincus que l'élaboration d'une convention internationale serait le moyen le plus approprié pour faire en sorte que le personnel de l'ONU doive rendre compte de ses actes. Cette convention doit inclure toutes les catégories de personnel des missions de maintien de la paix, les fonctionnaires et les experts en mission comme le personnel militaire.¹¹²

4.1.2 Summary of the Progress of the Sixth Committee in dealing with this issue

The Ad Hoc Committee is deeply divided over the way to approach the issue. Hence over the last seven years it has made very little progress. This is due in large part to the fact that although a number of States are willing to consider a convention, and a few are keen to do so (and would like it to apply to military personnel also), several major powers, including the United States, the Russian Federation, and India, are fundamentally opposed to the adoption of a treaty and prefer to focus on encouraging States to ensure that their domestic laws allow for jurisdiction over UN personnel when abroad. Hence there has been little debate on the merits of the terms of the 2006 draft convention, and little debate on the merits of any other possible options aside from continued improvements in the administrative sphere.

¹⁰⁹ Ibid

¹¹⁰ UN Summary Records of the Sixth Committee, UN Doc A/C.6/64/SR.7 (10 November 2009) [19]

¹¹¹ UN Summary Records of the Sixth Committee, UN Doc A/C.6/66/SR.9, (7 October 2011) [16]

¹¹² Statement by Switzerland, Sixty-seventh session of the Sixth Committee ‘Criminal accountability of United Nations officials and experts on mission’ (8 October to 16 November 2012) ‘We remain convinced that the most appropriate way to ensure accountability of UN personnel is an international convention. Such a convention should specifically include all categories of personnel in peacekeeping operations, officials and experts on a mission as well as military personnel.’ Translation by the Permanent Mission of Switzerland to the United Nations

4. 2 The Stimson Group Proposals

In 2009 the Stimson Group produced a detailed report *Ending Impunity: New Tools for Criminal Accountability in UN Peace Operations* which proposes a radical scheme for addressing impunity comprised of three broad pillars: assessment of the Contributing State's ability and willingness to prosecute where is credible evidence against their nationals; prosecution in the Host State if the Contributing State fails this assessment; and much more direct involvement by the UN in criminal investigations and the judicial process including a preparedness to collaborate with the Host State in undertaking prosecutions where the Host State judicial process does not meet international standards. The scheme is concerned only with civilian personnel. The authors (William Durch, Katherine Andrews and Madeleine England) consulted with twenty one leading experts in the field from across the globe, including two leading US "establishment" lawyers, Sean Murphy and David Scheffer.¹¹³

Under the scheme a State that is contributing civilian personnel to a UN mission must agree that it will exercise jurisdiction with respect to any crimes or offenses committed by them whilst on service with the mission and agree to provide feedback to the UN on its follow up on any case concerning repatriated personnel. In addition all States contributing civilian personnel must be assessed as to the extent to which their criminal justice processes meet international human rights standards. The report recommends that this might be done either through utilisation of procedures similar to the Universal Periodic Review or through joint investigation by the Office of the High Commissioner for Human Rights and the UN Office on Drugs and Crime.¹¹⁴ Any Contributing State that fails this assessment must agree in writing to allow prosecution of its nationals in the Host State.¹¹⁵ These arrangements should be confirmed in Status of Mission Agreements (SOMA).¹¹⁶

Since the criminal justice process of the Host State may also fail UN standards of due process and human rights compliance, particularly since the very need for a UN force suggests that the Host State is likely to be undergoing some form of conflict or social instability, the Stimson Group proposes that if the prosecution is to take place in the Host State the UN should be prepared to collaborate in the process through providing expertise; assisting in criminal investigation and preparing of evidence; arranging for external judges

¹¹³ W Durch, K Andres, M England 'Improving Criminal Accountability in United Nations Peace Operations' (n 3), Acknowledgements

¹¹⁴ Ibid, 49-50

¹¹⁵ Ibid, xiii- xiv

¹¹⁶ Ibid

and attorneys to be brought in if necessary; and ensuring that the trial process and penalties meet human rights standards. The group suggests that its proposed collaborative UN/Host State judicial process could employ the Model Codes for Post-Conflict Criminal Justice jointly developed by the United States Institute of Peace and the Irish Centre for Human Rights.¹¹⁷ These are drawn from the laws of a broad range of the world's legal systems and traditions in an effort to avoid "reformers' tendencies to impose one set of rules or beliefs on others in a patronizing manner or with indifference to cultural variances."¹¹⁸

In order to implement its scheme the Group recommends the creation of a UN criminal justice support capacity headed by a Criminal Justice Advisory Committee (CJAC). Civil provosts would be assigned to field missions answerable only to the CJAC. In an effort to introduce checks and balances vis a vis the administrative apparatus of the Secretariat, the CJAC should be answerable to the General Assembly rather than the Secretary-General.¹¹⁹ The provost would be the principal operational point of contact with the Host State's criminal justice system for the purposes of implementing the collaborative justice system. The provost would be responsible for deciding whether the facts of a case warranted a full forensic investigation, and would also decide whether to repatriate, or to prosecute in partnership with the Host State. The provost would be subject to a rigorous system of accountability and the CJAC would have the power to remove a provost who is not performing to the highest standards of competence, integrity and impartiality.¹²⁰

4.2.1 Feasibility of the Scheme

The Stimson Group's proposal is complex and would be expensive but has the merit of including a form of complementarity, in addition to direct UN involvement in ensuring the accountability of its personnel. The scheme is thought out in considerable detail and has received input from leading experts in the field, some of whom have extensive experience as government lawyers of major powers. Nevertheless significant challenges remain.

Assessment of the Degree to which Contributing and Host States respect human rights

¹¹⁷ V O'Connor and C Rausch eds. *Model Codes for Post-Conflict Criminal Justice Vol 1* (USIP 2007). In drawing up these codes USIP and the Irish Centre for Human Rights worked with the UN Office of the High Commission for Human Rights and UN Office on Drugs and Crime.

¹¹⁸ W Durch, K Andres, M England 'Improving Criminal Accountability in United Nations Peace Operations' (n 3), 25, 59

¹¹⁹ Ibid, xiv

¹²⁰ Ibid, xv, 60-64

The Universal Periodic Review (UPR), or a similar process, is unlikely to be an effective means of assessing the extent to which a Contributing State's judicial processes meet UN human rights standards, because it is such a politicised process. UPR can play a role in encouraging dialogue with UN Member States to improve their human rights record, in part through providing a basis on which NGOs can mobilise; but it is insufficient as a means of determining whether or not the UN can insist on the prosecution of its own personnel where there is a risk that they may be subjected to serious human rights violations. However the Group's alternative proposal is more feasible albeit time consuming and resource intensive: assessment of the sufficiency of the Contributing State's human rights standards for the purposes of prosecution of UN personnel could be undertaken by a dedicated unit within the proposed new CJAC working in collaboration with the Office of the High Commissioner for Human Rights and the UN Office on Drugs and Crime.¹²¹

The UN already has in place a Due Diligence policy that applies to all UN entities¹²² that engage in providing support to non-UN security forces such as national forces and peacekeeping forces of regional organisations.¹²³ Before engaging in support, the UN entity concerned must conduct an assessment of:

- a. the record of the intended recipient(s) in terms of compliance or non-compliance with international humanitarian, human rights and refugee law, including any specific record of grave violations;
- b. the record of the recipient(s) in taking or failing to take effective steps to hold perpetrators of any such violations accountable;
- c. whether any corrective measures have been taken or institutions, protocols or procedures put in place with a view to preventing the recurrence of such violations and, if so, their adequacy, including institutions to hold any future perpetrators accountable;¹²⁴

Since the UN already conducts human rights assessments where its forces provide support to non-UN security forces it should be possible for it to conduct assessments of Host States'

¹²¹ Human Rights Due Diligence Policy on UN support to non-UN security forces A/67/775-S/2013/110 <http://rconline.undg.org/wp-content/uploads/2011/11/2011-HRDDP-Policy.pdf>

¹²² Such as peacekeeping operations, special political missions, United Nations offices agencies, funds and programmes. Ibid, [6]

¹²³ Such as national military, paramilitary, police, intelligence services, border-control and similar security forces; national civilian, paramilitary, or military authorities directly responsible for the management, administration, or command or control of such forces; and peacekeeping forces of regional international organizations. Ibid [7]

¹²⁴ Ibid, [14]

record on compliance with relevant international human rights norms, whatever the nature of the intended peacekeeping operation; and also that of Contributing States.

The difference in treatment of civilian and military personnel

The difference in treatment of civilian and military personnel presents a more intractable problem. The *justification* given for the limitation of the applicability of the scheme to civilian personnel is that military personnel are subject to the military justice of their home State. The *reason* that the Stimson Group limited the applicability of its proposals to civilians is because, as noted in the Zeid report, there “is no possibility of host state jurisdiction over military members of national contingents.”¹²⁵ However the responsibility of the UN for ensuring the human rights of its personnel, and of the victims of their crimes, cannot be limited to civilian perpetrators. If the UN cannot repatriate a civilian to face trial because he or she might be tortured, or evidence obtained by torture might be used against them, or because prison conditions are inhumane, or because the penalty for that particular crime is death or removal of a limb; or any other due process or human rights based reason; it would not be able to repatriate a soldier that had committed a similar crime. In such circumstances the UN would have to insist that the soldier was prosecuted in the Host State (with the assistance of the UN); or involve itself in the Contributing State’s military justice process; or do nothing and let the crime go unpunished. The last option is unacceptable; the first option would entail extending the scheme to military personnel, at least in certain situations.

The scheme would also have to be extended to military personnel in circumstances where the Contributing State’s willingness or ability to prosecute and punish a particular crime is in doubt. One area where this is likely to arise is SEA. If the Contributing State has a record of appalling indifference to violence against women it would be irresponsible of the UN to rely on repatriation (in a case of rape for example) without a reliable guarantee that the case will be dealt with promptly, justice done in accordance with UN standards of due process and human rights, and a report made to the UN so that it can inform the victim: a tall order.

Agreements with Contributing and Host States

¹²⁵ Report of the Secretary-General’s Special Advisor, Prince Zeid Ra’ad Zeid al-Hussein on “A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations” A/59/710 24 march 2005, [A.27]; W Durch, K Andres, M England ‘Improving Criminal Accountability in United Nations Peace Operations’ (n 3), 6

The Stimson Group suggest that the written consent of the Contributing State to the application of the scheme should be obtained prior to participation in the mission, and that the arrangements should be confirmed in the SOMA. However SOMAs and SOFAs are made between the UN and the Host State; the Contributing States are not party to them. The agreements between the UN and the Contributing States are usually made through Memoranda of Understanding. The draft Model MoU could be revised to encompass the Stimson group's proposed scheme and parallel arrangements could be set out in revised SOMAs or SOFAs; but since these model agreements are only "model" they can be varied for each mission and may be different with each Contributing State and each Host State. If the Host State has no effective government it may not be possible to negotiate a SOMA at all. For the Stimson Group scheme to work effectively the agreements made between the UN and Contributing States and between the UN and Host States should be in sync: it could be difficult to administer a scheme that involves both Host and Contributing States if the terms are agreed through separate SOMAs and MoUs made via the UN.

If the UN is take a much more active role in criminal investigations and prosecutions with a provost appointed to field missions it will need to be able to exercise this role consistently. The appointment of a provost to a major field mission cannot depend on whether or not an MoU has been agreed with each Contributing State, and the provost's role within the mission cannot be different for different personnel depending on the terms of their State's MoU. Thus some aspects of the scheme would probably have to be established by the Security Council through a binding resolution; and certain aspects of SOFAs and MoUs applicable to UN peacekeeping missions would have to be framed as non-negotiable. The feasibility of the scheme would be increased if States were to agree at least a baseline scheme in the form of a multi-lateral treaty so that some core principles are agreed ahead of time.

4.3 Conclusion to Section 4

The Sixth Committee has been engaged for at least seven years on improving accountability of UN personnel; with limited success. An outline Convention limited to civilian personnel has been proposed but negotiations have stalled due to intractable disagreements between States as to the best approach to take. The Stimson Group has proposed a scheme, also limited to civilians, that in addition to measures intended to counter impunity also takes into account the human rights obligations of the UN towards its own personnel. The scheme has merit but problems with regard to the difference in treatment between military and civilian

personnel, and the ad hoc nature of UN agreement with Contributing and Host States, would need to be resolved.

5. Overall Conclusion

The current ad hoc approach to dealing with crimes committed by peacekeepers is no longer sustainable. The Secretary-General's 2004 report on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* report states that:

The rule of law is a concept at the very heart of the Organization's mission. It refers to 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.¹²⁶

As Kofi Annan observed in his 2005 report *In Larger Freedom* "[s]ince the rule of law is an essential element of lasting peace...the United Nations system should reaffirm its commitment to respect, adhere to and implement international law, fundamental human rights and the basic standards of due process."¹²⁷

The Secretary-General's 1999 *Bulletin on Observance by United Nations forces of humanitarian law* was adopted in response to Troop Contributing States' inability, or reluctance, to prosecute their peacekeepers for inter alia murder, torture and rape, due to the fact that at the time it was strongly argued within State courts and by academics that "notwithstanding moral and ethical considerations,' since IHL is not applicable to peacekeepers, violent attacks of this nature do not constitute "punishable act[s]."¹²⁸ However the *Bulletin* has done little to mitigate peacekeeper impunity principally because IHL is not

¹²⁶ Secretary-General's report *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004/616, 23 August 2004, [6]

¹²⁷ Secretary-General's report *In larger freedom: towards development, security and human rights for all* A/59/2005 21 March 2005, [113] The delegate representing Canada, Australia, and New Zealand on the UN's Sixth Committee spoke in similar vein at a meeting in 2011, noting that 'criminal accountability was a fundamental pillar of the rule of law and should apply to everyone' UN Summary Records of the Sixth Committee, UN Doc A/C.6/66/SR.9, (7 October 2011) [1]

¹²⁸ RCR Siekmann, 'The Fall of Srebrenica and the Attitude of Dutchbat from an International Legal Perspective,' 1 Yearbook of International Humanitarian Law, 301, 312; The conduct of Dutchbat has since been the subject of a successful claim against the Dutch State. The Court of Appeal in The Hague held that the expulsion of three men from the Dutch camp immediately prior to the genocide violated customary international human rights law. *Nuhanović v Netherlands*, Appeal judgment, LJN: R5388; ILDC 1742 (NL 2011), 5 July 2011; *Gerechthof 's Gravenhage (Court of Appeal) Mustafić v Netherlands*, Appeal judgment, LJN: BR5386, 5 July 2011.

an appropriate means of holding peacekeepers accountable since it is only transiently applicable, if at all. UN efforts to ensure that Contributing States use their domestic criminal law to prosecute their peacekeepers, whenever they commit crimes abroad, have resulted in some improvements but these are limited.

In order to tackle the current levels of impunity the UN must increase its criminal justice support capacity and must take a much more active role in criminal investigations and prosecutions of its personnel, in collaboration with the Host State and possibly also the Contributing State. If a Contributing State has a reputation for treating certain types of crimes with impunity, the UN would be failing in its responsibilities if it were to repatriate an alleged perpetrator of such a crime (whether civilian or military) without reliable guarantees that an investigation and prosecution will be undertaken (if the evidence supports it) and that both the investigation and prosecution will meet UN standards. Some of these changes can be achieved through agreements between the UN and Contributing States and between the UN and Host States; but core parts of such a scheme would need to be consistent over time and therefore cannot rely solely on ad hoc arrangements. The best way to ensure that all UN peacekeepers are “accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards,” is by means of a convention, in conjunction with a much more proactive role on the part of the UN in supporting criminal justice processes. Mechanisms for such an enhanced role for the UN would probably have to be established through Security Council resolutions.

The Sixth Committee has been debating this issue since 2006. At the 2011 meeting of the Ad Hoc Committee, Ms Tupa, the Congolese delegate, expressed her frustration with the lack of progress stating that “the Secretary-General’s report (A/66/174) had not shown evidence of great progress in combating impunity since the previous year’s report, owing in large part to the inefficacy of the Committee’s approach.”¹²⁹ Unless there is a change of approach the DRC and other Host States are likely to be expressing the same kind of frustration next year and for many years to come. The major powers will not be persuaded to adopt greater international oversight over their personnel (especially military personnel) without pressure from either, or all of, the UN, the ICRC, influential NGOs such as Human Rights Watch, and perhaps through NGO engagement with the UN Universal Periodic Review process. A sustained campaign is required.

¹²⁹ UN Summary Records of the Sixth Committee, UN Doc A/C.6/66/SR.9, (7 October 2011), [40]

