Criminal accountability of UN officials serving in peacekeeping operations
With focus on sexual exploitation and abuse

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### List of abbreviations and acronyms

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<th>Full Form</th>
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<tr>
<td>AM J. INT’L L art.</td>
<td>American Journal of International Law Article</td>
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<td>CDU</td>
<td>Conduct and Discipline Unit</td>
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<td>Conn’ J. Int’l L.</td>
<td>Connecticut Journal of International Law</td>
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<td>Cornell J.Int’l L.</td>
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<td>DPKO</td>
<td>Department of Peacekeeping Operations</td>
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<td>FOPO</td>
<td>Future of Peace Operations</td>
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<td>GA</td>
<td>General Assembly, United Nations</td>
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<td>ICJ</td>
<td>The International Court of Justice</td>
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<td>Int’l Org. L</td>
<td>International Organization Law Review</td>
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<td>The Office of Internal Oversight</td>
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<td>RES</td>
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<td>UN</td>
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<td>UNAT</td>
<td>United Nations Appeals Tribunal</td>
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<td>VA J Int’l L</td>
<td>Virginia Journal of International Law</td>
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1 Introduction

1.1 General issues

"... if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law."¹

The United Nations (UN) has since long been committed to implementing the rule of law on both a national and an international level.² According to the Secretary-General the rule of law requires, among other things, equality before the law, accountability to the law and fairness in the application of the law.³ The rule of law is found in the preamble of the Charter of the United Nations (the Charter),⁴ along with the principle that all men and women are equal. If a crime is committed, accountability to the law shall be ensured and impunity cannot be accepted.

The Department of Peacekeeping Operations (DPKO) documented in December 2013 over 100 000 personnel serving in peacekeeping operations around the world.⁵ It mostly consists of troops sent by member states of the UN, but also international servants consisting of among others UN officials. These officials shall “create a secure and stable environment while strengthening the State’s ability to provide security, with full respect for the rule of law and human rights”.⁶ They are under an obligation through being hired directly by the UN to uphold the highest international standards of

³ S/2004/616, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, the Secretary-General’s description: "the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure ... equality before the law, accountability to the law, fairness in the application of the law, ... legal certainty, avoidance of arbitrariness and procedural and legal transparency”. Since there is no agreed definition for the rule of law, the UN definition will be applied in this thesis.
⁴ From June 1945.
behaviour, and the fact that they are, makes the problem well worth acknowledging. With the UN’s commitment to the rule of law, UN officials should therefore be seen as the most crucial category of persons to impose criminal accountability on.

As acknowledged by the Secretary-General, the Security Council, The General Assembly and other UN organs, a lack of prosecution of criminal acts poses a threat to the reputation of the UN and the acceptance of the UN deploying peacekeeping operations. The main purpose of the UN is to maintain international peace and security around the world, as set out in the Charter article 1. When UN staff members commit crimes during attempts to fulfil this purpose it seriously undermines the credibility of the organization.

One of the first important efforts to eliminate impunity was made in 2002, when a scandal was revealed in West Africa – sexual exploitation of refugees by aid workers. The General Assembly brought this to the Secretary-General’s attention, which resulted in a bulletin called “Special measures for protection from sexual exploitation and abuse” (the 2003 bulletin). Sexual exploitation and abuse is considered to be one of the most serious of crimes, and even though the work by the UN to eliminate any kind of impunity has come a long way since the scandal in 2002, there is still work to be done.

In 2009, the organization Future of Peacekeeping Operations (FOPO) presented a report on the subject sexual exploitation and abuse, in which they explained that a procedural vacuum exists when UN staff breach the law of the country they are serving in, and often the only sanctions are disciplinary ones. The UN Office of Internal Oversight

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10 A/57/46, Investigation into sexual exploitation of refugees by aid workers in West Africa.
14 Durch, W, p. ix para. 1.
(OIOS) reported in February 2014 that sexual exploitation and abuse is still a problem, highly present in peacekeeping operations.\textsuperscript{15}

In the light of the events in the Democratic Republic of Congo, the Secretary-General asked Prince Zeid Ra’ad Zeid Al-Hussein (Zeid) to act as an adviser concerning sexual exploitation and abuse by UN peacekeeping personnel. In March 2005 the report (the Zeid report) was presented,\textsuperscript{16} containing specific recommendations regarding several types of UN personnel, officials included.

Overall, four main areas were presented as in need of change to reduce any situations of sexual exploitation and abuse (SEA); develop more uniform rules, the investigation capacity, organizational, managerial and command accountability and finally individual disciplinary, financial and criminal accountability. Several potential solutions were further recommended.

One suggestion involved the UN setting up a system of justice in the host state, only for UN staff. This however, as pointed out in the report, would lead to two different systems of justice, i.e., if the host state’s justice system did not reach minimum international human rights standards and the UN one did. As pointed out by Zeid, if the alternative were impunity, a system as the one proposed would at least ensure accountability.\textsuperscript{17} However, this would seriously breach the principle that all men and women are equal, and also be non-compliant with the rule of law and everyone’s equality before it. It would further undermine the credibility of the organization if the UN were to enforce this method. Further, the Zeid report suggested creating an international convention to ensure accountability of UN officials, which was left to the UN and a group of experts to discuss.\textsuperscript{18} As of today, no convention has yet been put in place, but it has been discussed and will be presented below.

\textsuperscript{15} A/68/337 (Part II), Activities of the Office of Internal Oversight Services on peace operations for the period 1 January to 31 December 2013, para. 13.
\textsuperscript{16} A/59/710, A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations.
\textsuperscript{17} A/59/710, p. 29 para. 89.
\textsuperscript{18} A/59/710, p. 31 para. 93.
Another solution proposed in the report was to establish that SEA-crimes are always to be considered as serious misconduct, and therefore impose serious disciplinary actions for those who breach the 2003-bulletin. Since the report was published, the UN system for internal disciplinary matters has evolved remarkably. A breach of the 2003-bulletin is classified as serious misconduct, which could lead to a terminated appointment. In the report it was also recommended to create a UN mandated group of legal experts, which was put in place shortly after. The UN Conduct and Discipline Unit (CDU) and the OIOS have also improved since. The rules of conduct have been clarified, as suggested by Zeid, along with victim support and assistance for victims. Despite these efforts made, there are still problems regarding impunity of UN officials. This is also visible when studying statistics, as will be shown below.

1.2 Purpose and limitations

Since it should be consider as highly important to avoid impunity for those who shall serve to rebuild peace in the name of the UN, the purpose of this thesis is to investigate the criminal accountability of UN officials. To do this, the question if UN officials are in fact held accountable and if so, who holds them accountable, will be investigated. Who has the legal authority to impose criminal accountability on UN employees committing crimes? Further, if they are not, what could be done to ensure criminal accountability?

This thesis will focus on UN officials and experts on mission, the latter including UN police. The terms UN officials and experts on mission are found in many documents, the two most essential ones being the Charter and the Convention on the Privileges and

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19 A/59/710, p. 25 para. 69.
20 UN Staff Rules 10.2, see chapter 3.2 for further reading.
21 A/59/710, p. 6.
23 The Charter includes experts on mission in the term officials, see Szasz, Paul C., Ingadottir, Thordir, The UN and the ICC: The Immunity of the UN and Its Officials, p. 871 (henceforth Szasz, Paul C.). The Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly in A/RES/22(I)A of 13 February 1946, makes a difference between officials and experts on mission (henceforth cited as “The General Convention”). See also Durch, W., p. 6, experts on mission (UN police). For further explanation of the terms, see below in chapter 1.3 “Definitions”.

Immunities of the United Nations. However, locally recruited personnel on hourly basis are excluded,\(^{24}\) as well as peacekeeping officers and specialized agents.\(^{25}\)

When referring to peacekeeping operations and accountability, many may think of military personnel. So why exclude them from this thesis? This thesis shall examine among other things the jurisdictional gap that exists when UN officials commit crimes, but when member of a military contingent does this, the jurisdiction is regulated and awarded the sending state.\(^{26}\) This area is still far away from fully investigated, but the majority of articles published regarding accountability of UN staff concerns military peacekeepers. This might have its explanation in the fact that military personnel stand for the higher amount of allegations put forth towards them.\(^{27}\) However, this makes examining UN officials even more interesting. First, military forces are easier to discipline, and second, crimes committed by UN officials might not be as visible, partly since they are often dressed in civilian clothes.\(^{28}\)

Emphasis will be on countries where peacekeeping operations are deployed (for example Haiti, Congo, Sudan\(^{29}\)). Officials working in Switzerland or Austria will therefore not be included. Nor will the possibility to prosecute UN officials in international tribunals be discussed more than necessary.

SEA-crimes, referred to by the UN as Category I offences,\(^{30}\) is considered as one of the most serious acts of abuse.\(^{31}\) On this basis, focus shall be on these crimes. Category II

\(^{24}\) A/59/710, p. 32 para A.1, locally recruited personnel not hired on an hourly basis are included in the term "officials". See also the comments to the Convention on the Privileges and Immunities of the United Nations (henceforth the General Convention).


\(^{26}\) A/45/594, Model status-of-forces agreement for peace-keeping operations, 9 October 1990, para 47(b). See also A/59/710, para. A.27.

\(^{27}\) See statistics below under chapter 2.1.


\(^{30}\) Category I includes: all offences related to sexual exploitation and abuse including rape, transactional sex, exploitative relationships and sexual abuse, cases involving risk of loss of life to staff or to others, conflict of interest, gross mismanagement, bribery/corruption, illegal mineral trade, trafficking with prohibited goods, life threat/murder, abuse or torture of detainees, arms trade, physical assault, forgery, embezzlement, major theft/fraud, use, possession or distribution of illegal narcotics, waste of substantial resources, entitlement fraud and procurement violations, see UN Conduct and Discipline Unit website, http://cdu.unlb.org/Statistics/Investigations.aspx , 10 June 2014.
offences\textsuperscript{32} will be left out, being less serious than category I offences, as well as crimes against human rights. The latter is out of the scope for this thesis since different rules become relevant if there is a breach of human rights.

Criminal accountability is a broad subject, awakening questions concerning immunity, jurisdiction, the rule of law and existing treaties. The demarcations have been done with this in mind, since all the above-mentioned questions needs to be dealt with to fulfil the purpose of this thesis.

1.3 Definitions, material and disposition

The most common words used in this thesis will be further explained, since there is sometimes a different meaning to words used in an international law context.

\textit{UN officials} are staff hired directly by the UN. According to the General Assembly, officials consist of the members of the UN Secretariat and of a few others,\textsuperscript{33} which includes all members of staff with the exception of locally recruited staff who are assigned to hourly rates.\textsuperscript{34} Officials are also referred to as “civilian personnel” in statistics, and since statistics and resolutions from the UN often put officials together with experts on mission, the term officials will also include experts on mission if nothing else is mentioned.

\textit{Experts on mission} are others than UN officials,\textsuperscript{35} also hired directly by the UN. This group includes UN police and military observers.\textsuperscript{36}

\textit{Military personnel} are uniformed personnel in peacekeeping operations, which is another word for peacekeeping officers.

\textsuperscript{32} Category II includes: discrimination, harassment, sexual harassment, abuse of authority, abusive behaviour, basic misuse of equipment or staff, simple theft/ fraud, infractions of regulations, rules or administrative issuances, traffic-related violations, conduct that could bring the UN into disrepute and breaking curfew, see UN Conduct and Discipline Unit website, http://cdu.unlb.org/Statistics/Investigations.aspx, 10 June 2014.
\textsuperscript{33} A/RES/76(I), 7 December 1946.
\textsuperscript{34} A/59/710, p. 32 para. A.1.
\textsuperscript{35} The General Convention, article VI section 22.
\textsuperscript{36} Szasz, Paul C., p. 871.
Peacekeeping operations are missions led by the Department of Peacekeeping Operations (the DPKO). “It consists of military, police and civilian personnel who work to deliver security, political and early peace building support”,37 and is authorized under the chapters VI and VII in the Charter of the United Nations.

Host state will be used to describe the country in whose territory a UN peacekeeping operation is conducted.38

State of nationality will refer to the state where a UN staff origins.

Member state refers to a state that is a member to the Charter and to the UN, with an obligation to fulfil the purpose of the Charter.

Sending state refers to the country sending military personnel.

Criminal accountability is referred to as holding the perpetrator responsible for the crimes committed by him/her. Accountability can also refer to other types, such as financial accountability. However, the additional types of accountability are out of the scope for this thesis.

Sexual exploitation and abuse has been described in the 2003 bulletin as “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Similarly, the term “sexual abuse” means the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”39 This is the definition of sexual exploitation and abuse that will be used.

Regarding the material, many of the sources used to write this thesis are produced by the UN and found in UN databases. To balance this, the research of various writers not directly linked to the UN has been used. The legal base consists of both public international law and domestic criminal law.

38 The Convention on Safety of the United Nations and Associated Personnel, 9 December 1994, art. 1(d),
Judgments from the United Nations Dispute Tribunal (UNDT) and United Nations Appeals Tribunal (UNAT) will be used to examine potential crimes committed by UN staff. Since the UN does not have any jurisdiction over criminal offences but only disciplinary, these judgments will serve to show how the internal system of justice within the UN works. Further, judgments from the International Court of Justice (ICJ), a principal judicial organ of the UN established through the Charter,\textsuperscript{40} is used to explain parts of the immunity.

In the following chapter (2), a summary of reasons to improve the current system along with statistics supporting this view is laid out, followed by the problems and potential solutions, to give the reader an overview of what will follow. Thereafter, chapter three contains a presentation of existing regulations, including the internal justice system of the UN, for the purpose of showing how criminal accountability is dealt with on the international level. Chapter four brings up one of the first potential obstacles when dealing with criminal accountability for UN officials, namely the immunity regarding UN officials both according to the Charter and to the Convention on the Privileges and Immunities of United Nations staff. In chapter five, a second obstacle is presented, which is the question of who is responsible to ensure accountability. This includes jurisdiction for both the host state and the state of nationality, as well as universal jurisdiction. Thereon after, a de lege ferenda approach is taken in chapter six, where the options presented by UN and others will be discussed. Further, some new or at least improved suggestions are presented and argued for. Finally, a summary as well as a conclusion finalizes the thesis in chapter seven.

\textsuperscript{40} The Charter, chapter XIV article 92.
2 Outline of the issue of accountability

2.1 Reasons to improve the current system

There are many questions connected to accountability of international servants, and also many reasons why it is highly essential with criminal accountability of UN officials. First, it is important to uphold the reputation of the UN and to ensure the effectiveness of the organization. Second, it does send a message to the host state where the peacekeeping operation is deployed that committing crimes is and will not be accepted, not by UN staff neither by locals. Third, it can help to make the local population feel safe, and finally, it gives retribution to the victims. Overall, it should be deemed as highly important to ensure criminal accountability.

This view is supported by statistics regarding SEA-crimes committed by UN staff, which will be presented below. When doing this, it is crucial to note that there may be a high risk of underreporting, which is a conclusion supported by both the UN as well as other organizations. The statistics does not make any difference between international staff and locally recruited staff on an hourly basis, and since UN police is considered as experts on mission they have also been included in the category “civilians” in the calculations below. With this in mind, below will follow some statistics.

In 2013, 28% of all peacekeeping personnel were civilian personnel, and 70% were military. However, out of all investigations towards UN personnel, 47% were connected to civilian personnel, compared to 52% towards military. Only 7% of these investigations towards civilian personnel were substantiated, again compared to 19% of

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41 A/RES/68/105, Criminal accountability of United Nations officials and experts on mission, p. 2 para. 3
42 Durch, W, p. 2.
43 A/RES/68/105 p. 2 para. 5
44 A/59/710, p. 7 para. 10.
45 A/RES/68/105 p. 2 para. 6
47 UN Peacekeeping Operation Fact Sheet, DPI/1634/Rev.152, January 2014. The term civilian personnel include international civilians, local civilians, and UN volunteers. Experts on mission include UN police and military observers. The remaining 2% consists of other personnel.
investigations towards military personnel.\textsuperscript{48} The numbers have decreased since 2005, when civilian personnel stood for 54\% of the substantiated allegations,\textsuperscript{49} but the problem still exists.

![SEA-related allegations\textsuperscript{50}](image)

Looking at these numbers, civilian staff stands for a high percentage of allegations towards them, despite the fact that they are only a small part of a peacekeeping operation compared to military personnel. They are also the group of staff that are hired directly by the UN and therefore have higher demands on their behaviour.

During 2013, 80\% of all SEA-allegations were received from four out of 16 peacekeeping missions; The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), the United Nations Stabilization Mission in Haiti (MINUSTAH), the United Nations Mission in Liberia (UNMIL) and the United Nations Mission in South Sudan (UNMISS). The same four peacekeeping missions stood for the majority of allegations in 2012 as well.\textsuperscript{51}

\begin{footnotes}
\item Durch, W., p. 4.
\item PKO stands for peacekeeping operations in this diagram.
\item A/68/756, Special measures for protection from sexual exploitation and sexual abuse, para. 8.
\end{footnotes}
Congo will serve as an example. This is the country where the most SEA-crimes in peacekeeping operations are reported. A researcher stated that approximately 1.69-1.8 million people reported having been raped in Congo during their lifetime, and that sexual violence is almost accepted and generalized.52

Further, in many countries, for example Mozambique, it is not a crime to rape a woman if the perpetrator marries her afterwards. In Egypt, reports have been produced revealing that the women often get blamed for being raped, which also exists in other countries.53 This attitude towards serious crimes such as SEA-related ones surely contributes to a fear of reporting a crime, and the research presented supports the statement that there is a high percentage of under-reporting when it comes to SEA-crimes.

2.2 Potential obstacles
When working to ensure criminal accountability, there are many issues that can arise. One of them is a lack of minimum international human rights standards in the system of justice of the host state (or the state of nationality).54 Second, the victims might fear pressing charges for various reasons. Third, prosecution of UN officials requires resources that the prosecuting state may not have or does not want to spend, which may also depend on a lack of will – e.g. if a UN official commits a crime, will the host state spend time and resources on this matter rather than focusing on ending the war? Fourth, the prosecuting state may not have the right kind of jurisdiction, or have no jurisdiction at all. Fifth, the immunity that UN officials are provided with may cause an obstacle, and finally, perhaps the absence of an internationally accepted convention for prosecution.

54 A/59/710, p. 29.
The conclusion is that these problems presented derive from the environment of where these crimes are committed (i.e., a state where a peacekeeping mission has been deemed necessary), the states involved and the UN itself.\textsuperscript{55}

\textbf{2.3 Potential solutions}

The UN has attempted many different strategies to solve these problems. Apart from various resolutions, where the UN is requesting that member states ensure that they have the right kind of jurisdiction and acknowledging the problem, other mechanisms exists. The OIOS keeps developing, whose main task is to independently monitor the UN organization and to be the primary responsible part to investigate allegations of SEA.\textsuperscript{56} The former Administrative Tribunal has evolved into two internal courts for administrative matters. The CDU, established in 2005,\textsuperscript{57} manage all oversight over discipline in peacekeeping operations, and they now serve in all UN operations.\textsuperscript{58}

People with a record of serious misconduct can be blacklisted from the organization,\textsuperscript{59} and the General Assembly has established an ad hoc committee on criminal accountability of UN officials and experts on mission.\textsuperscript{60}

The UN has come a long way since the Congo situation in 2002. However, according to recent statistics from the UN,\textsuperscript{61} there is still progress to be made. What could be the potential solutions for the future? Preventive measures, such as clear rules and education for UN officials\textsuperscript{62} are a suitable first step. It is also essential to ensure that there are no jurisdictional gaps in member states legislation, as well as ensuring that the question regarding jurisdiction is clear in each peacekeeping operation. When the UN deploys a peacekeeping mission, the UN will assist the host state in reaching minimum international human rights standards, which is a part of establishing the rule of law in post-conflict countries. This could however take a very long time. Further, the UN and

\textsuperscript{55} Durch, W., p. 27.
\textsuperscript{57} A/62/890, para. 20.
\textsuperscript{58} https://cdu.unlb.org.
\textsuperscript{59} Durch, W., p. xi. See also; Statement of Commitment on eliminating sexual exploitation and abuse by UN and non-UN personnel, p. 2 para. 3.
\textsuperscript{60} A/RES/61/29 4 December 2006.
\textsuperscript{61} See chapter 2.1.
their member states should be responsible to assist with resources, both economic and administrative, if needed. Finally, the UN putting more focus on staying updated concerning prosecution, and “name drop” states that do not prosecute, is an alternative.

3 Existing regulations on accountability

Problems with criminal accountability have been present a long time, but it was only in the beginning of 2002, in connection with the scandal in West Africa, that the work really begun. Resolutions and solutions were presented and reports written, which led to some improvement. Below, some of the most essential resolutions will be presented, to shed light on how the existing regulations are working.

3.1 Regulations from the UN

It was after the scandal in West Africa that the 2003 bulletin came into force, still in force today. However, it was not legally binding for UN staff until May 2006 when it was adopted as a uniform standard of conduct. Since then, the UN has committed itself to a zero tolerance policy concerning UN staff involved in SEA-related crimes. It includes a prohibition against any sort of SEA, for example sexual activity with children under 18 and engaging in prostitution. It also prescribes an obligation to report any suspicion UN staff may have regarding their colleagues. If there is enough evidence, the case shall be referred to the national authorities for prosecution after consultation with the UN Office of Legal Affairs (OLA).

The UN mandated group of legal experts have been working with criminal accountability of UN officials since the group was created after the Zeid report. Several documents and resolutions have also been produced concerning SEA-crimes,

63 A/59/710, pp. 2, 5 and 20.
64 Durch, W., p. 7.
65 S/2005/79, Letter dated 9 February 2005 from the Secretary-General addressed to the President of the Security Council, p. 1 para. 2. See also the 2003-bulletin, Section 3.2 (a)-(f).
66 The 2003-bulletin, Section 5.
jurisdiction and different potential solutions.\textsuperscript{67} A report-chain is now in place in every peacekeeping operation and protocols for handling victims of SEA-related crimes have been introduced.\textsuperscript{68} A jurisdictional convention has been suggested, but not yet adopted, since many states considered this premature or even unnecessary.\textsuperscript{69}

### 3.2 The internal justice system of the UN

One part of the UN that has developed since 2002 is the UN internal justice system, which handles internal disputes and disciplinary matters relating to UN staff members and came into force on 1 July 2009.\textsuperscript{70} Just as in any work environment, disputes can arise for various reasons, such as contract renewals, wrongful terminations, harassment and even theft. Since the UN cannot be sued in a national court\textsuperscript{71} this system has been put in place to deal with the examples given. If a staff member is found to have done something wrong, i.e. not in line with the principles of the UN, there are disciplinary sanctions to enforce. For example, this could be written censure, loss of steps and summary dismissal, which are found in the UN staff rules.\textsuperscript{72} If the dispute cannot be solved by informal resolutions, the UN has also set up two courts for formal litigation - UNDT and UNAT.

When a staff member has committed an SEA-crime, it shall always be considered as serious misconduct.\textsuperscript{73} For example, in the case of Massah, an officer in charge of the security in a UN mission in Morocco was dismissed after he photographed nude local women and compensated women for sex.\textsuperscript{74} However, the proceedings in UNDT and UNAT do not in any way concern criminal accountability.\textsuperscript{75} Nonetheless, the internal system is an alternative way to punish the perpetrators and can be seen as providing a

\textsuperscript{67} See for example A/60/980, Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, 16 August 2006.


\textsuperscript{70} Miller, A, Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations, 39 Cornell J Int'l L. 71 2006, pp. 71-96, p. 76

\textsuperscript{71} The General Convention, article II (2).

\textsuperscript{72} UN Staff Rules, section 10.2, found at http://www.un.org/hr_handbook/English/.

\textsuperscript{73} 2003-bulletin, 3.2 (a), SEA-crimes is considered to be serious misconduct.

\textsuperscript{74} Massah v. Secretary-General of the United Nations, Judgment No. 2012/UNAT/274.

\textsuperscript{75} See for example the Molari Judgment, 2011/UNAT/164, 21 October 2011, p. 2 para 2 and Toukolon, UNDT/2013/012, see especially paragraphs 42-50.
preventive effect, but is inadequate since it does not provide for any retribution for the victims, or criminal accountability for the perpetrators.

4 Immunity

Whilst criminal proceedings are preferable to only disciplinary actions, there are difficulties with enforcing criminal prosecution. Even though every state recognized by the international society enjoys the right to sovereignty, states have agreed through different agreements and treaties to give up some of their sovereignty to enable immunity.76

There are many questions to be dealt with concerning immunity, and also several different treaties regulating the matter. Immunity plays an important role in examining the question concerning accountability of UN officials by being one of the potential obstacles. Immunity should not be considered as an obstacle when an SEA-crime has been committed, however, practise has shown that this might not be the case.77 Below, the most common treaties where immunity is regulated shall be examined.

4.1 The UN Charter

“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this

77 This will be further explained below, see especially chapter 4.2 and 7.
Treaties only bind parties to it, and formally, this article along with the rest of the Charter binds only members of the UN and the ICJ. Non-member states are thus formally not bound, but they do have an obligation according to customary law to grant immunity for UN staff with diplomatic status, dating centuries back. However, there are no international principles that extend to cover UN officials without this diplomatic status. Instead, their immunity is settled in international treaties. Article 105 sets the standard for immunity for UN officials, and in accordance with the third paragraph, the General Assembly has specified these terms by adopting the Convention on the Privileges and Immunities of the United Nations.

4.2 Convention on the Privileges and Immunities of the United Nations

4.2.1 Background

The convention, or “the General Convention”, was drafted in 1946, only a few months after the start of the organization. Still in force, the General Convention gives UN officials and experts on mission a so-called functional immunity, which will protect this category of UN staff during their mission. However, at the creation of the convention, UN staff was not expected to work in countries that lacked minimum international human rights standards for the justice system. Therefore, today it would not be in the interest of the UN for the Secretary-General to waive the immunity if these standards for a system of justice are not met. The purpose of the convention was to shield UN staff from subjective state power, but now the situation may sometimes be quite the opposite, especially with regard to SEA-crimes.
4.2.2 Interpretation and application

According to the General Convention, officials are immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity, which is the functional immunity. Experts on mission enjoy a functional immunity as well. Contrary to diplomatic immunity, officials enjoying functional immunity are not exempt from legal jurisdiction for their private acts. The sole purpose of this functional immunity is to protect the interests of the UN, and not to protect the staffs’ personal benefits. The only categories of staff that enjoys diplomatic immunity are the Secretary-General and the Assistant Secretary-Generals with their families.

The immunity for a UN official is dependent on the interpretation of the wording “necessary for the independent exercise of their functions” in the second paragraph of the Charter article 105, together with section 18 and 22 of the General Convention. It has previously been expressed that there is reason to believe that the ICJ would provide a broad interpretation of the functional immunity. For example, in the case of Mazilu, “necessary for the independent exercise of their functions” was considered to protect all “tasks entrusted to the person”. Further, there seem to be no distinction between on and off duty regarding experts on mission, according to the wording “during the period of their mission” in the General Convention.

Once immunity is found to apply, the immunity can be waived by the Secretary-General if the “immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations”. There are several examples of when the immunity has been waived, especially regarding the more serious crimes such as rape and sexual abuse of children. According to the ICJ, the Secretary-General has the

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84 The General Convention, article VI section 20 and 23.
85 The General Convention, article V section 19.
87 Rawski, F., p. 112.
88 ICJ, Mazilu, Advisory opinion 31 August 1989, concerning an expert on mission.
89 The General Convention, article VI section 22.
90 The General Convention, article V section 20 and article VI section 23.
91 Rawski, F., p. 119-120. For further reading on the subject, see also Murray, J, Who will police the peace-builders? The failure to establish accountability for the participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina, Colum. Hum. Rts. L. Rev., 2003, Vol. 34, pp. 475-527, p. 507. Another, not related to SEA, concerned a Finnish civilian staff member involved in a hit and run, which resulted in a Timorese women’s death. First after a discussion
primary responsibility to waive the immunity. The court itself, as acknowledged by the OLA, can set aside the Secretary-General’s decision.\textsuperscript{92} In the case of Cumaraswamy, the ICJ proclaimed that a finding by the Secretary-General concerning immunity “creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts”.\textsuperscript{93} Accordingly, national courts seem to be able to set aside the immunity in very particular cases.

It is not within the functions of UN officials to commit SEA-crimes.\textsuperscript{94} However, even if immunity should not be seen as a formal obstacle in cases of SEA, if the system of justice does not fulfil the international human rights standards, the Secretary-General cannot waive the immunity.\textsuperscript{95} This is an issue in many states where peacekeeping missions are deployed. The immunity could be lifted for the purpose of the state of nationality prosecuting the potential perpetrator, but then an investigation into whether their system of justice fulfils the demands of international human rights standards needs to be done.\textsuperscript{96} However, there are other methods to regulate the questions concerning immunity, which is an agreement with the host state where a peacekeeping operation is deployed.

### 4.3 Status of forces agreements

When the UN decides to deploy a peacekeeping mission, a status of forces agreement (SOFA) is signed by both the UN and the host state. Therein, the two parties agree on different clauses relating to everything from recruitments to immunity. A draft model SOFA was produced by the General Assembly in 1990\textsuperscript{97} and in section VI regulations concerning immunity for staff members of the peacekeeping operation is found. It refers

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\textsuperscript{93} See ICJ, Difference relating to the Immunity from Legal Process of a Special Rapporeur of the Commission of Human Rights, Advisory Opinion, Cumaraswamy, 1999 ICJ Rep. 62 at 87 para. 61, where the ICJ refers to "UN agents".

\textsuperscript{94} A/59/710, p. 30 para 90.

\textsuperscript{95} A/59/710, p. 6.

\textsuperscript{96} Durch, W., p. 28.

\textsuperscript{97} A/45/594, Model status-of-forces agreement for peace-keeping operations, 9 October 1990.
to the General Convention and its clauses, establishing the same immunity as found therein. In some cases, as for example military personnel, the model SOFA refers to specific agreements being made with the host state. If, which is not very probable, a SOFA would not be in force, the model SOFA is presumed to be in place.

The SOFA is one of the most important documents when regulating the process of a peacekeeping operation. In chapter six it will be argued that this kind of document can be used to regulate the jurisdiction further than what is the case today.

5 Who is responsible?

5.1 Jurisdiction

If immunity is no longer a problem, i.e. it is either waived or not applicable in the first place, which state shall prosecute? For the military contingents there are relatively clear rules – it is the sending state that will prosecute. But for the objective of this thesis – officials and experts on mission – it is not as clear. What happens if for example the national state cannot prosecute, because they don’t have a functioning system of justice, or they do not live up to the standard of international justice? Further, the purpose of a UN peacekeeping operation is to maintain international peace and security and help the country of war, the host state, to recover. If UN personnel themselves contribute to a state of war instead of peace, could the UN themselves have some sort of responsibility?

At the sixty-eight session of the UN’s Legal Sixth Committee, the jurisdiction over crimes committed by UN officials was discussed, and all representatives agreed that more needed to be done to ensure criminal accountability – foremost by ensuring the rule of law and covering potential jurisdictional gaps in national legislation. This chapter will lay out different possible states with jurisdiction and discuss which alternative is the preferable one.

98 This according to the model SOFA. Surely issues can arise here as well, but the general rule is fairly straightforward.
5.1.1 Prosecution in the host state

When a crime is committed on a state’s territory, the government has the right to prosecute the potential perpetrator in accordance with the territorial principle, unless they for some reason cannot prosecute.\textsuperscript{100} The state could for example have made a deal with another state to use an alternative jurisdictional principle, or choose not to prosecute because of lack of evidence or resources. Prosecution could also be an unavailable option, if the perpetrator is covered by immunity.

There are several compelling arguments to allow the host state jurisdiction. The UN’s group of legal experts\textsuperscript{101} (hereon after the Group) presented a few, similar to those presented by Zeid. First, the territorial principle is straightforward, which allows easy determination of which country that has jurisdiction. Second, holding a trial in the host state allow witnesses and victims easy access to the court, and the process can be held without any extravagant costs and without much delay. Third, the Group referred to the UN personnel’s obligation to respect local laws.\textsuperscript{102} It makes sense to therefor also try the case in the host state. And last, one of the purposes when deploying a peacekeeping mission is to establish the rule of law. Holding a trial in the host State allows the population of the country to witness justice being done.\textsuperscript{103} It is essential to not assume that the host state is incapable to handle a prosecution merely because a peacekeeping operation has been deployed there.\textsuperscript{104}

The reasons for allowing the host state jurisdiction could be considered as persuasive, but what are the down sides? The perhaps most convincing reason not to allow territorial jurisdiction for the host state is the previously mentioned case where the legal system is not functioning, or not in accordance with international human rights standards. In 2009, four major peacekeeping missions were deployed in countries where

\begin{footnotes}
\item[100] Abass, A, Complete International law: text, cases and materials, p. 526 – e.g., the potential perpetrator has immunity.
\item[101] A/60/980, Report of the Group of Legal Experts on ensuring the accountability of United Nations staff and experts on mission with respect to criminal acts committed in peacekeeping operations, 16 August 2006.
\item[103] A/60/980, para 27 (a)-(d), see also A/59/710, para. 35.
\item[104] A/60/980, p. 2.
\end{footnotes}
the rule of law was non-existent, i.e. with no legal system at all.\footnote{Scott N. Carlson, Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons-Learned Study, Report for the DPKO Peacekeeping Best Practices Section, March 2006, Section 2, footnote 4.} Consequently, prosecution for the host state may in practise not be relevant at all.

It has been suggested both in the Zeid-report and by the Group that the UN itself could assist, if the host state does not have the capacity or if they do not fulfil international human rights standards.\footnote{A/59/710, p. 29 para. 89 and A/60/980, p. 16, para. G.44.} This solution is better than impunity, but there is still a problem with equality before the law. It would result in a special system for UN staff, fulfilling the demands of human rights, but not for the host state’s nationals. However, as the Group express, this solution should not be ruled out only because of the arguments presented.\footnote{A/60/980 p. 11, para. A.30.}

Finally, even if the host state is deemed to have the capacity to prosecute, they might not have the will or the possibility to carry out the verdict.\footnote{Durch, W., p. 63.} There are also further problems connected to the sentence, such as who should hold the perpetrator in custody while waiting for a trial, and who should transport the perpetrator if the sentence is to be carried out in the state of nationality. If the host state were to keep not only their own nationals in custody, but also UN officials, this could be costly. It would also prolong the time awaiting trial.

5.1.2 Prosecution by the state of nationality

Since a while back, the UN has tried to ensure that states shall have the right to prosecute its nationals who have committed crimes, this according to the nationality principle.\footnote{A/RES/68/105, para. 3.} In 2005, Zeid proclaimed that this kind of extraterritorial jurisdiction was rather an exception than the rule,\footnote{A/RES/68/105, para. 3.} but this seems to have changed.\footnote{A/59/710, p. 6.} As late as December 2013, the General Assembly encouraged, once again, member states to report

\begin{itemize}
\item[106] A/59/710, p. 29 para. 89 and A/60/980, p. 16, para. G.44.
\item[107] A/60/980 p. 11, para. A.30.
\item[108] Durch, W., p. 63.
\item[109] A/RES/68/105, para. 3.
\item[110] A/59/710, p. 6.
\item[111] See e.g. A/68/173, 22 July 2013 and A/66/174, 25 July 2011, where summaries of member states jurisdiction are found.
\end{itemize}
to the UN if they in fact have national jurisdiction over crimes committed by UN officials.112

The work of the sixth committee has been going on since 2006, and almost identical recommendations have been repeated since.113 They have encouraged member states to fill the potential jurisdictional gaps, to report back to the Secretary-General when prosecuting and to ensure the rule of law.114 All these recommendations are in line with the approach to have the state of nationality ensure criminal accountability, but still there is no obvious evidence of these urges being met. Regarding the reports from member states concerning their national jurisdiction, concerns has been expressed over the few answers submitted.115

In the sixty-eight session, as well as previous sessions, the representatives in the sixth committee have assumed that the way to deal with the problem of UN officials committing SEA-crimes is to have the state of nationality prosecute them, i.e., in accordance with the nationality principle.116 Some delegations have expressed that priority should be given to the state of nationality to prosecute.117 This urge for the state of nationality to be given a priority in prosecution might have a political explanation, consisting of member states not wanting to hand over the jurisdictional question to a state where a peacekeeping mission is deployed - perhaps even more so when it is concerning their own nationals. Even so, the zero tolerance policy is clearly not progressing as fast as it could. UN officials, regardless of who is prosecuting them, will surely continue to commit crimes, but it is when no one gets prosecuted for it that the situation could escalate.

What are the advantages with having jurisdiction for the state of nationality? One big advantage is that the issue of a non-functioning legal system would perhaps not exist. It

113 See for example the sixty-six - the sixty-eight ones (footnotes 99 and 116).
114 GA sixty-eight session.
115 GA sixty-eight session.
116 GA sixty-seventh session, Criminal Accountability of United Nations officials and experts on mission (agenda item 76) (http://www.un.org/en/ga/sixth/crimacc.shtlm), referred to as the active personality principle, which is the same as the nationality principle, see Ryngaert, C, Jurisdiction in International Law, p. 88.
117 GA sixty-eight session.
could be seen as the state of nationality lifting a burden from the host state, rather than them stepping in and breaching the sovereignty of the host state. Also, if the member states of the UN and the representatives in the sixth committee would succeed in their recommendations, prosecution would hopefully be ensured. However, as it is right now, member states does not seem to keen to prosecute or report to the Secretary-General, or update their national jurisdiction if there were gaps to be found.\textsuperscript{118}

There are some down sides with allowing the state of nationality to prosecute rather than the host state. Some countries restrict prosecution to the situation where the crime committed is a crime in both the state of nationality and the host state (\textit{lex loci}),\textsuperscript{119} which is also according to the Model Criminal Codes.\textsuperscript{120} In other countries, it is sufficient that the prosecuting state – in this case the state of nationality – have criminalized the offence. Some states, Canada and the US for example, may only prosecute under special circumstances of the crime.\textsuperscript{121}

An example may illustrate the problem with these different types of criminal codes. In some states, solicitation of prostitutes is legal (as long as they are not minors). The prosecuting state of nationality may have criminalized this act, which would lead to them prosecuting their nationals for it. Nonetheless, even though solicitation of prostitutes is not in accordance with the UN regulations,\textsuperscript{122} some UN officials will not be prosecuted if the state of nationality does not consider solicitation of prostitutes a crime.\textsuperscript{123} This leads to a situation where some nationalities serving as UN officials are prosecuted and some nationalities get impunity.

Finally, the state of nationality could have a system of justice that does not fulfil the demands of minimal international humanitarian standards. In that case, immunity cannot be waived.\textsuperscript{124}

\textsuperscript{118} Sixty-seventh session.
\textsuperscript{119} Abass, A, International law, p. 538.
\textsuperscript{120} According to the Model Criminal Codes, \textit{lex loci} is a condition of extradition, see O’Connor, V. and Rausch, H-J, Model Codes for Post-conflict Criminal Justice, pp. 43-46.
\textsuperscript{121} Durch, W, p. 77, table A-2.
\textsuperscript{122} See for example the 2003-bulletin who prohibits solicitation of prostitutes.
\textsuperscript{123} A/59/710, para. 88.
\textsuperscript{124} GA sixty-seventh session: a measure taken by a state against it’s national must be consistent with the General Convention.
5.1.3 Prosecution by other states

One of the principles for jurisdiction in international law is the principle of universal jurisdiction. This often stretches to cover particular serious crimes, such as genocide, war crimes and piracy.\(^{125}\) It does not have to be a crime committed within a state’s territory or by a state’s national. The argument against including SEA-crimes in universal jurisdiction is that the crimes committed are only one single act, and not comparable in seriousness with the crimes already covered by universal jurisdiction.\(^{126}\) However, when a crime is committed during a peacekeeping mission, it is severe and something that UN member states should want to prosecute.\(^{127}\) In line with this view, universal jurisdiction could be extended to also include SEA-crimes, and perhaps SEA-crimes related only to international civilian personnel.

The outcome of this would be that UN officials committing SEA-crimes would be seen as a particular serious crime. This could be a fairly good solution, since these international servants are sent out to promote peace and the establishment of the rule of law. The potential problem with enforcing this as a first-hand solution would be to decide who should prosecute. It could become a situation where no member states have the will to prosecute, either because the lack of interest in other state’s nationals or purely political reasons. The latter reason is highly essential, since prosecution then could be used as a political weapon against other states. Further, it is not very likely that states without connection to the perpetrator would want to spend resources on prosecuting.\(^{128}\) Instead, universal jurisdiction should be promoted and encouraged among member states, but only to be used as a last resort. If both the host state and the state of nationality decide not to prosecute the UN official, other countries would be invited to ensure accountability.

With regard to universal jurisdiction, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\(^{129}\) obligates the

\(^{125}\) Abass, A, International Law, p. 539-540.
\(^{126}\) A/60/980 p. 16 para. 54.
\(^{127}\) Ferstman, C, United States institute of Peace, Criminalizing Sexual Exploitation and Abuse by Peacekeepers, 2013, p. 8 and A/60/980 p. 16 para. 55.
\(^{128}\) Ferstman, C, p. 8.
\(^{129}\) Adopted and opened for signature, ratification and accession by the General Assembly in A/RES/39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with article 27 (1) of the convention.
parties to the convention to ensure that they have universal jurisdiction for the crime of torture.\(^{130}\) Today 155 countries has signed the convention,\(^{131}\) most of these are member states of the UN. This convention could serve as a role model to a potential convention for jurisdiction over SEA-crimes committed by UN officials, if universal jurisdiction is considered as a suitable solution.

5.1.4 Prosecution in the International Criminal Court

For the International Criminal Court (ICC) to prosecute a crime, it needs to be a special type of crime, such as genocide, crimes against humanity, war crimes and the crime of aggression.\(^{132}\) The ICC can prosecute if a state is unwilling or unable to prosecute, or if it is of special gravity for the court.\(^{133}\) Further, when the UN responds to threats or breaches of peace, and acts of aggression,\(^{134}\) the Security Council can refer a case to the ICC.\(^{135}\) It has been discussed if the ICC should be able to prosecute a UN official as well, if the crime in question is of a particular serious character.\(^{136}\)

Naturally, this option includes both advantages and disadvantages. First of all, it would most probable increase the workload of the ICC, and second, not be as efficient as having the perpetrators prosecuted by local authorities. Third, it would be inconsistent with the severity of the other crimes. Even though UN officials committing SEA-crimes is to be regarded as appalling, it can perhaps not be considered being on the same level as genocide. One advantage is that the monitoring of whether the perpetrators are prosecuted or not could be done more easily, and it would send a clear statement that these crimes are not in any way accepted by the international community. However, it would not only increase the workload, but indeed the costs for the ICC as well. One could consider the possibility of a shared jurisdiction between the ICC and the local authorities, but it would still demand that the crime of a UN official is considered being

\(^{130}\) Article 2.1, “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.


\(^{132}\) The Rome Statute, article 5.1.

\(^{133}\) The Rome Statute, article 17.1.

\(^{134}\) The Charter chapter XII, used when deploying a peacekeeping mission.

\(^{135}\) The Rome Statute, article 13(b).

\(^{136}\) For further reading on the subject, see O’Brien, Melanie, National and International Criminal Jurisdiction over United Nations Peacekeeping Personnel for Gender-based Crimes against Women, University of Nottingham, PhD thesis, July 2010, who gives an interesting analysis of the advantages and disadvantages of prosecution by the ICC.
on the same level as the crimes the ICC has jurisdiction over today. In conclusion, this is a viable option, but perhaps not one to put the primary focus on. Instead, there are other options that have further advantages, and probably without being less efficient.

5.2 The perpetrator leaves the host state

A potential perpetrator could leave the host state before prosecution, either because the official has been sent home to the state of nationality or has gone to another country. In the first case, the state of nationality should prosecute according to the nationality principle. If the host state is deemed capable to prosecute, an extradition deal could also be made if considered as necessary. A principle in international law is that if the state chooses not to prosecute, they must extradite the perpetrator (aut dedere aut judicare). This obligation strives from treaties, and if a valid treaty is in place between two parties, this principle could be enforced.137

The same solutions could be said to apply on the second situation, where the official has gone to another country.138 This situation is however further complicated by the fact that it might not be entirely clear who the responsible for prosecution is. Should the state of nationality prosecute, it would demand that they have a right to prosecute a national irrespective of where the crime was committed, as long it was committed by a national to that state. The UN should in these situations allocate the state with responsibility to prosecute, with the sole purpose of avoiding confusion and foremost impunity. Whether or not the UN could be considered having such responsibility will be further discussed in the following chapter.

5.3 Accountability of the UN

The UN does not have any criminal jurisdiction, but since the UN is such an enormous international organisation with special mandates, they do have some responsibilities. They will probably never be given criminal responsibility, nor should they, since international tribunals (such as the ICC) already exist regarding certain crimes such as

137 Ryngaert, C, p. 104 and Abass, A, p. 543.
crimes against humanity. However, they should be responsible for ensuring accountability in cooperation with the member states.

The UN has immunity from prosecution in national courts,\textsuperscript{139} but this is not to confuse with the UN not having any responsibility for their acts or omissions. Instead, they have an institutional responsibility for acts within their missions,\textsuperscript{140} which mean that they should help member states to ensure accountability. It could be by encouraging member states to create an instrument by which member states can deal with the problem of impunity for UN officials,\textsuperscript{141} as previously has been suggested in the shape of a jurisdictional convention, and to keep working with potential jurisdictional gaps. According to the 2003 bulletin, the UN has to refer SEA-cases to national authorities if the evidence supports the allegations,\textsuperscript{142} which is an assignment for the OLA. Today, this is practically what the UN is doing. However, it must not be forgotten in the work to eliminate impunity, that the UN itself does have some responsibility.

6 Who should be responsible?

6.1 Suggestions de lege ferenda by the UN

The Zeid-report presented in 2005 was one of the first to suggest a convention to regulate the problem with jurisdiction. However, Zeid ruled this alternative out because of difficulties with the convention only binding the parties to it.\textsuperscript{143} The Group later followed with a recommendation to create such an instrument, and attached a draft convention to their report.\textsuperscript{144} Naturally, the up sides with a convention would be that jurisdictional uncertainty could be reduced further. Nevertheless, just as Zeid expressed, the problem of a potential convention only binding the parties to it is considered a

\begin{itemize}
\item The General Convention, article II.
\item Ferstman, C, p. 12.
\item 2003 bulletin, section 5.
\item A/59/710, p. 29 para. 88.
\item A/60/980, p. 17 para B.62.
\end{itemize}
downside.\textsuperscript{145} Despite this, the group recommended a convention as a solution, since the up sides was considered to weigh up the down sides.\textsuperscript{146}

More recent declarations from member states during meetings of the General Assembly reveal that creating such an instrument as suggested by the Group has mixed support among all member states. Some delegations considered a legal framework to be a solution, while others thought it to be premature and unnecessary. Instead, according to the opponents of a convention, adopting appropriate national legislation could solve the problem, if there are in fact any jurisdictional gaps.\textsuperscript{147} The same views have been expressed at several meetings with the General Assembly,\textsuperscript{148} which should be considered as evidence that these appeals to adopt national legislation and so on is not improving fast enough. Even if there are no gaps in the member states national legislation, the responses from member states concerning how they have regulated their jurisdiction are as mentioned few.\textsuperscript{149} According to a report from the United States Institute of Peace, among the member states who have submitted reports concerning their national jurisdiction, jurisdictional gaps seem non-existent. Despite this, the alleged perpetrators are often not prosecuted.\textsuperscript{150} This is rather confusing, since member states seem pleased with only adopting national legislation. Apparently, this system is not working as well as it could.

The Group also suggested a hybrid international tribunal,\textsuperscript{151} which would deal with crimes committed in the host state’s territory without regard to who has committed the crime. That is, it could both be nationals of the host state and UN peacekeeping personnel (including officials). The host state would need to give their consent to enforce this kind of tribunal, but it would ensure that the same human rights standard is used regardless of the perpetrator being a UN employee or a national of the host state.\textsuperscript{152} This solution may sound very attractive, but as the Group expressed, since a tribunal as suggested is dependent on consent from the host state, the range of consent as to what is

\begin{footnotesize}
\begin{enumerate}
\item A/59/710, para. 89.
\item A/60/980, p. 18 para. B.64.
\item GA sixty-eight session.
\item See GA sixty-seventh and sixty-eight session for almost identical views.
\item GA sixty-eight session.
\item Ferstman, C p. 11
\item This was also suggested in A/59/710, para. 89.
\item A/60/980, p. 12 para. C.
\end{enumerate}
\end{footnotesize}
allowed will differ between peacekeeping locations. Further, previous hybrid international tribunals have proven to be very expensive. During the three initial years of a type of hybrid international court in Cambodia, the cost was estimated to approximately $57 million.\textsuperscript{153} There are currently 16 UN peacekeeping operations deployed around the world, and to install 16 hybrid courts would most likely not be possible.

6.2 Suggestions by independent organisations

In addition to what has been suggested by the General Assembly and the delegations, proposals have been laid out further specifying a potential solution. One of these was presented in 2009 by the Future of Peace Operations program. According to their solution, the first step would be to “accord primary jurisdiction to the sending state/state of nationality, if it meets relevant conditions” on their system of justice. If the first step fails, the second step would be to “assign responsibility for criminal investigation and prosecution to a collaborative criminal justice mechanism of the United Nations and the host state” which would be reinforced in the SOFA.\textsuperscript{154} This solution is fairly different from the one suggested by the Group in the regard of who should have the primary right to prosecute. However, the suggestion seems to be in line with what the majority of the delegations from the General Assembly strive towards. That is, having the state of nationality prosecuting.

6.3 Discussion of other solutions

The work with accountability of UN officials has been going on for a long time, with similar recommendations published and the work is still being criticized. This chapter will serve to evaluate the solutions presented and furthermore provide alternative solutions, since there is room for improvement.

\textsuperscript{153} A/59/432, para. 45.
\textsuperscript{154} Durch, W, p. xiii.
6.3.1 Step 1: Before deploying a peacekeeping mission

The work with accountability of UN officials begins long before the actual peacekeeping operation is deployed. It consists of preventive measures, such as training and education for UN officials regarding SEA-crimes. Another preventive measure, which should be considered as highly essential, is to regulate the jurisdiction before deploying a peacekeeping operation.

Even though many countries have updated their jurisdiction to also include a possibility to prosecute their nationals serving as UN officials in the host state, the first approach would be to ensure that all member states have the jurisdiction needed to prosecute their nationals. The UN could compile a list of whether the member states have implemented the principle of nationality or not, and the question regarding potential jurisdictional gaps could then be answered. It would further allow the UN to focus on other things, rather than reiterating the same recommendations concerning jurisdiction. Universal jurisdiction for UN officials is also something to consider, but since this applies only to the most serious of crimes today, it should only be used as a last resort. However, solely focusing on member states to legislate nationally might not solve the problem, but instead the focus should be on getting them to use their jurisdiction.

A proposal, overlapping the suggestion by the Group, would be to create a binding agreement where all member states accept to implement extraterritorial jurisdiction, so that they are able to prosecute their nationals. However, it must be considered highly important to include the host state in the process of prosecution. This regardless to which country that shall be considered to have jurisdiction. When rebuilding the rule of law in the host state, a part of that consists of rebuilding and strengthening their system of justice. To let the host state be a part of the investigation will give them experience how to handle SEA-crimes and also give them a sense of involvement.

Further, there could be an addition to the SOFA agreements stating that UN officials and experts on mission shall be prosecuted in the host state if immunity is waived and the host state fulfil the demands on a justice system. If they do not, and the immunity is not waived, the state of nationality would then have an obligation to prosecute. Understandably, prosecution is obviously dependent on whether there are sufficient evidence or not, and if prosecution is in accordance with domestic law. A system like
the one suggested would give the host state an incentive to improve their justice system, and not diminish the principle of sovereignty and the jurisdiction connected to it. It would also provide a focus on peace building rather than prosecuting non-nationals of their country. When the Rule of Law Unit based in a specific peacekeeping operation deems that the system of justice in the host state is fulfilling international human rights standards, the host state shall be the one to have primary jurisdiction. This could be described as the state of nationality filling in when the host state is not capable to prosecute. Once the host state is capable, the state of nationality has done its duty.

What is suggested is therefore the 2-step approach presented by the FOPO-institute in 2009, but reverse. Step one would be to focus on allowing the host state jurisdiction, and if that is not possible, the state of nationality will, according to an agreement made between the UN and the state of nationality, step in and prosecute. If step two has been chosen, but after work with the rule of law and the host states’ system of justice the host state is deemed to fulfil international human rights standards, step one should be enforced. There is a high risk that states where peacekeeping operations are deployed do not have the accepted system of justice that will enable step one. However, it does send an essential message to the host state: the UN will work to eventually rebuild the system of justice and enable the host state to prosecute UN officials.

Can the UN create a valid agreement between the UN itself and the host state? Since a SOFA is already put in place when deploying a peacekeeping operation, the answer to this question should be yes. An agreement like the one suggested does not need to be enforceable in international courts, it should only serve as guidance when determining the jurisdiction. If clear guidelines are given regarding jurisdiction, it is bound to be easier to determine who shall prosecute UN officials.

In line with current practise regarding the SOFA’s, i.e. the SOFA is agreed upon before deploying a peacekeeping operation, the agreement concerning jurisdiction shall also be established before placing UN officials in the host state. It will not only serve as guidelines for whose responsibility it is to prosecute, but it would also serve as a preventive measure. If UN officials do not anticipate facing any criminal accountability, but only to lose their jobs in a worst-case scenario, it is not likely that this will stop these officials committing crimes in peacekeeping operations. Instead, if UN officials
are aware of a clear chain of responsibility to prosecute, they might refrain from taking criminal actions.

6.3.2 Step 2: The victims of SEA-crimes

Even if guidelines for jurisdiction in various agreements have been made before a peacekeeping operation, it is crucial to ensure that as many victims of SEA as possible report these crimes to the relevant authorities. If the victims do not report the crimes committed, an agreement concerning jurisdiction will be of no use.

Studies published show that many women fear reporting these crimes. In several countries where peacekeeping operations are deployed, the attitude towards women being sexually abused is that it is shameful and often the victim’s own fault. A UN-connected survey regarding Asia and the Pacific showed that approximately 72-92% of all men who participated in the study and committed rape did not suffer any legal consequences. Logically, these numbers have to be considered with care, but it does show that women in developing countries may not feel comfortable with reporting crimes if they might get blamed or it feels like it is no use to report them. Another aspect is connected to the social vulnerability of the victims. It is hard to believe that UN and their staff, who have come to help rebuild and maintain peace, would sexually abuse inhabitants of the country in need. A fear of not being believed might also lower the reporting rate.

To improve the reporting rate, today considered as not reflecting the real amount of SEA-crimes, the UN could in cooperation with the host state assign a number of local “officials”, not connected to the UN, to make the reporting process easier. For example, this could be regulated in the SOFA. All inhabitants in the host state should be informed about who these local officials are and where to find them, together with an opportunity

155 In Egypt, women reported being blamed and therefor afraid to speak of sexual exploitation and abuse, http://www.staradvertiser.com/news/19040101_Blamed_for_rapes_women_in_Egypt_are_speaking_out.html?id=199985131, March 26 2013, visited 14 August 2014. In Mozambique, the perpetrator can escape punishment by marry the victim, Mozambique Penal Code article 223.
157 See footnote 46.
6.3.3 Step 3: When a crime is reported

If a jurisdictional agreement has been made, when a crime is reported it should be forwarded to the relevant authorities in a timely manner. However, before this, immunity needs to be dealt with. It is imperative to stress the fact that the immunity is only a functional one, and this could be clarified in the General Convention or documents relating to it. This should be done, not only for the reputation of the UN, but also for the purpose of clarifying to potential victims that “immunity is not impunity.”  

The fear of reporting combined with a false belief that all UN officials have something comparable to diplomatic immunity could be a contributing factor with regard to the low reporting rates.

6.3.4 Step 4: Assisting in the criminal proceedings

If considered as an advantage, there should be nothing preventing the jurisdiction being divided between two states. If, for example, the perpetrator left the country, the state of nationality will prosecute and the host state may help with the investigation. This is especially a good approach when dealing with securing evidence. Since evidence in

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158 See also RES/62/214, United Nations Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by the United Nations Staff and related personnel.
159 ST/SGB/2005/21, Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations.
160 Madeleine Rees, in the movie "The Whistle-blower" 2010, based on true events in Bosnia in the late 1990s.
SEA-crimes is very time sensitive, the host state or the UN would need to secure it immediately. If the state prosecuting is the state of nationality, it would be of great importance to secure witness statements from victims and potential witnesses in the host state. The UN (or/and the state of nationality) working together with the host state in the preparation and during the criminal proceedings has the advantage of not entirely excluding the host state from the process. By including more than one party in the process it could also serve as a trust-mechanism, since after all it is an official from the UN who has committed a crime.

When the case is referred to national authorities by the OLA, the OLA will also assist in any investigations when asked for.\textsuperscript{161} This system is already in place, and it seems to be a good one – if it is actually used by the member states. As with any other aspects of ensuring accountability, this opportunity to receive help from the UN in investigations should be encouraged.

6.3.5 Step 5: UN responsibility to follow up

If the suggested system were to be put in place, there is an enormous need of transparency. Even if a state of nationality has committed itself to prosecuting UN officials, mechanisms to ensure that they actually will prosecute is necessary. The latest reports from the UN shows that there has been a great improvement in the statistics concerning responses from member states. In 2007, only 23 out of 67 member states responded to the UN-conducted follow-up. In 2013 the numbers had improved tremendously, 64 out of 70 responded.\textsuperscript{162} To stay at this level, and for the purpose of progressing further, the UN could list the countries that have not shared their updates regarding prosecution of UN officials with the UN. This may result in a “positive pressure” on the member states, i.e. to avoid being portrayed as not fulfilling your obligations the member states would see the value of updating the UN more frequently. This should also be addressed in meetings with member representatives, and their explanations for why they have not chosen to prosecute should be published. The model below will serve as a further explanation.

\textsuperscript{161} A/68/173, p. 5 para. 19.
\textsuperscript{162} https://cdu.unlb.org/Statistics/UNFollowupwithMemberStatesSexualExploitationandAbuse.aspx
6.3.6 Difficulties

Even if the solutions presented seem direct, many complications will surely arise along the way to ensure accountability of UN officials. For one, it might be difficult to get the victim to attend the trial, especially if the perpetrator has left the country and/or is to be prosecuted in his/her state of nationality. Should the UN then make arrangements for transporting the victim to the state of nationality, or set up a witness hearing over video in the middle of a peacekeeping operation? If a trial were held without the victim, no retribution would be served. It could also be considered to be inconsistent with the European Charter of Human Rights and the right to a fair trial.\footnote{ECHR article 6, right to a fair trial.}

Furthermore, even if the fear of reporting these crimes decrease in some way, SEA-crimes also involves exchange of money/food/other for sex.\footnote{Durch, W, p. 2-3 – two eggs or a glass of milk are examples of payments in previous cases.} The actions of a UN
official could then be regarded as prostitution by the victim, which also partly eliminates an incentive to report the crime.\textsuperscript{165}

It will be difficult for the UN to do other than trust potential explanations from member states as to why they have not prosecuted a UN official. It is unrealistic to demand that UN staff would give an extensive second opinion as to whether one member state chose not to prosecute. To ease the burden, one suggestion could be to create a model-reporting sheet, where member states would fill in the evidence gathered, what the victim said (and if the victim is actually contacted), if there were any witnesses, the alleged perpetrators statement and finally, why they chose not to prosecute.

Even if the state of nationality or the host state is deemed to fulfil international human rights standards, several countries enforce the death penalty, as for example Congo, Syria and Sudan.\textsuperscript{166} This is a current issue for the OLA, when referring a case for prosecution to countries that enforce the death penalty.\textsuperscript{167}

Surely more problems than this could be presented. However, despite these problems, a change in the attitude towards the way to handle UN officials committing SEA-crimes is needed.

7 Final remarks

7.1 Summary

Several potential solutions by different actors have been presented in this thesis. These solutions have subsequently been developed further into a two-step approach. First, before a peacekeeping operation is deployed, it is important to ensure that there are


\textsuperscript{167} This according to a staff member at OLA UN Headquarters, spoken to in February 2014.
clear rules. Making an addition to the SOFA regarding primary and secondary jurisdiction, whilst restoring the host state’s system of justice, would not only give the member states a relatively undisputable answer to whose responsibility it is to prosecute. Having clear rules and also enforcing them would increase the knowledge about what happens if a SEA-crime is committed, and therefore serve as an incentive not to commit these crimes. The potential problem that there might be jurisdictional gaps existing in the domestic laws of UN member states is to be set aside. The issue is rather to get the member states (or the host state) to use their jurisdiction. If they do not prosecute, without presenting reasonable justification for why, the UN would question and finally name-drop the state.

Another issue is victim assistance for the duration of a peacekeeping operation, which needs to evolve. The aspect of the victim is sometimes forgotten. Very rarely in the research done during the work with this thesis has there been a chapter (or a paragraph) dedicated to the aspect of the victims as described here. This refers to both the victim’s fear of reporting a crime, but also to certain countries where the attitude towards SEA-crimes is highly questionable. It is important to remember that there is a big difference between being right and getting your right acknowledged.

Despite the fact that SEA-crimes should not be considered as “within the functions” of a UN official, the functional immunity has gotten a bad reputation – mainly that it is believed to cover much more than it was actually intended to cover. UN officials shall not enjoy such immunity comparable to diplomatic immunity, and this needs to be clarified both for the victims’ and for the UN officials’ sake.

7.2 Conclusion

Surely there are many solutions that could be evaluated beyond those presented in this thesis. What matters is to continue striving for an attitude that condemns SEA-crimes, and to be clear on whose fault sexual abuse really is. The UN does not look upon this problem easily, which they have made clear. It is important to keep working on implementing these thoughts in the attitudes of the member states, and to strongly enforce the zero-tolerance of SEA-crimes.
International law discussed in this thesis has a tendency to be very vague in some parts, and the huge amount of resolutions from the UN makes this particular area of the law very difficult to manage. Obviously, there is no easy way to achieve the zero tolerance policy and end impunity for UN officials at once. The sixth committee discussing very similar solutions to the problem of criminal accountability of UN officials for years also shows this. Criminal accountability will, as it has been for the last couple of years, be on the agenda for the General Assembly’s sixty-ninth session starting in September.\(^{168}\) However, when reviewing the efforts made, it seems like the work with criminal accountability of UN officials has rather ground to halt in the last couple of years.\(^ {169}\)

How much can the UN actually do? It is important to notice that the State sovereignty will most likely continue to be an obstacle regarding criminal jurisdiction. It is solely the member states themselves who can amend their jurisdiction and finally prosecute. States do not want to agree to such an extent that their sovereignty becomes hollowed. This is also the reason for why the phrasing in UN documents often is vague. However, even though international organisations are based on consent from member states, the UN could possibly implement many of the suggestions summarized above without much reluctance from the member states.

“No one, including peacekeepers, is above the law”.\(^ {170}\) This statement is morally correct, but at the same time probably not reflecting reality. If this is true, it makes it perhaps even more important for the UN to work to ensure that their own staff is not above the law.

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\(^ {168}\) A/C.6/68/L.15, (Draft resolution) Criminal accountability of United Nations officials and experts on mission, p. 5 para. 18


\(^ {170}\) See quote from the Secretary-General, footnote 1.
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