

The effect of immunity on the accountability of UN peacekeeping military personnel: a case study of MONUSCO and MINUSCA.

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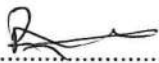
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Declaration

I, ROSE NGANIZA MUMANYA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 
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This Research Proposal has been submitted for examination with my approval as University Supervisor.

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Date: 30 / 5 / 18

Jerusha Asin Owino

Abstract

This paper attempts to dissect the effect of the immunity granted to MINUSCA and MONUSCO peacekeeping military personnel on their accountability (or lack thereof) for the abuse of civilians contrary to their duty to protect the said civilians. It is argued that accountability, because of its deterrent effect, is necessary to prevent the abuse of civilians by peacekeeping military personnel and thus is a necessary condition for the achievement of the mandate of the peacekeeping missions in light of the human security concept. As such, this paper analyses the extent to which the lack of accountability for the abuse of civilians by peacekeeping soldiers is as a result of the immunity granted to them and in light of this, interrogates this immunity. It does so by analysing the cases of abuse of civilians by the peacekeeping soldiers and the relationship between the accountability (and lack thereof) for such acts and the immunity granted to the peacekeeping military personnel. In light of this, it is concluded that the immunity granted to peacekeeping soldiers negatively affects their accountability for the abuse of civilians to the extent that (i) it subjects the investigation to the legal systems of the troop contributing countries, which are often inadequate, (ii) it compromises the collection of evidence, and (iii) it compromises the impartiality of the process. It is also established that this immunity is indispensable to the UN peacekeeping model and thus it cannot be waived. Therefore, it is recommended that any measures taken to foster accountability of the soldiers for abuse of civilians cannot include the waiver of the immunity. Instead, any such measure must examine and address the 3 factors that make immunity problematic in holding peacekeeping soldiers accountable for abuse of civilians.

List of abbreviations

CAR: Central African Republic.

DRC: Democratic Republic of Congo

ECCAS: Economic Community of Central African States.

ICC: International Criminal Court.

M23: The March 23 Movement based in Eastern DRC.

MINUSCA: United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic.

MISCA: International Mission under African Leadership to Support the Central African Republic.

MONUC: United Nations Mission in the Democratic Republic of Congo

MONUSCO: United Nations Organization Stabilization Mission in the Democratic Republic of Congo.

MOU: Memorandum of Understanding.

OIOS: Office of Internal Oversight Services.

RCD: Rally for Congolese Democracy.

SOFA: Status of forces agreement between the United Nations and a host state for purposes of peacekeeping.

TCC: Troop contributing country.

UN: The United Nations.

UNIB: The United Nations Intervention Brigade.

List of cases

Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986

The Case of the S.S. Lotus (France v Turkey), Judgement, PCIJ Reports 1927.

List of legal instruments

Charter of the United Nations, 24 October 1945.

1 Chapter One: Introduction

1.1 Background of the problem

The maintenance of international peace and security is one of the main purposes of the United Nations (UN).¹ Many of the activities of the UN are geared towards this end, especially those of the Security Council. The Security Council is mandated with taking measures- including the use of force- for the restoration and maintenance of international peace and security.² One such measure is the deployment of military forces in conflict areas in order to ensure the cessation of hostilities, often referred to as UN peacekeeping.³ Though peacekeeping is not directly envisaged by the UN charter, it has been used numerous times to restore peace and often the mission is mandated with the protection of civilians.⁴ The concept of peacekeeping can be traced back to the 5th century BC but its surest precedent is the deployment of troops by the League of Nations in Germany to preserve law and order during the Saar status referendum.⁵

UN peacekeeping operations are authorised by the Security Council with the consent of the host state.⁶ The military forces deployed are composed of troops contributed by member states known as Troop contributing countries (TCC) and the financial burden of the operations is borne by the international community.⁷ For purposes of obtaining these troops, the UN acts as an intermediary between the TCC and the host state by contracting with each party separately. The agreement between the UN and the TCC governs the terms under which the TCC agrees to contribute its soldiers, such as compensation and takes the form of a memorandum of understanding.⁸ The agreement between the UN and the host state is called a status of forces agreement (SOFA) and is an undertaking by the host state to cooperate with the peacekeeping forces. All SOFA's must follow a model adopted by the UN General Assembly that sets out

¹ Article 1, *Charter of the United Nations*, 24 October 1945.

² Article 42, *Charter of the United Nations*.

³ Bellamy A and Williams P, *Understanding Peacekeeping*, 2nded, Polity, London, 2010.

⁴ Lewis P, 'A short history of United Nations Peacekeeping' HistoryNet, 18 August 2017 <<http://www.historynet.com/short-history-united-nations-peacekeeping.htm>> on 23 November 2017.

⁵ Lewis P, 'A short History of United Nations Peacekeeping' HistoryNet, 18 August 2017 <<http://www.historynet.com/short-history-united-nations-peacekeeping.htm>> on 23 November 2017.

⁶ <<http://peacekeeping.un.org/en/what-is-peacekeeping>> on 23 November 2017.

⁷ <<http://peacekeeping.un.org/en/what-is-peacekeeping>> on 23 November 2017.

⁸ Code Blue Campaign, *Privileges and immunities of the United Nations*, 13 May 2015, 1-3.

mandatory provisions such as the immunity of the peacekeeping military personnel from the criminal justification of the host state and exclusive jurisdiction of the TCC over their soldiers.⁹

Since the first UN peacekeeping forces were deployed in 1956, the number of UN peacekeeping operations has exponentially increased.¹⁰ There are currently over 10 on-going UN peacekeeping operations.¹¹ Despite the role of UN peacekeeping in the restoration of peace in areas like Namibia and Cambodia, UN peacekeeping has been heavily criticised for its alleged futility.¹² UN peacekeeping has been especially criticised for its weakness and failure to protect fundamental human rights even where the mandate of the mission is to protect civilians.¹³ For instance, many peacekeeping soldiers have been accused of sexually abusing the civilians they were mandated to protect.¹⁴

1.2 Statement of the problem

According to the Office of Internal Oversight Services (OIOS), 480 cases of sexual abuse of civilians by peacekeeping staff were reported between 2008 and 2013.¹⁵ Majority of these abuses occurred in the Democratic Republic of Congo (DRC) and the Central African Republic (CAR)¹⁶ where there are ongoing UN peacekeeping missions: The United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) and the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) respectively. These missions have the primary mandate of protecting civilians from the use of force¹⁷ but the soldiers responsible for the abuse of civilians largely go unpunished.¹⁸ The lack of accountability with which these allegations have been treated has caused a

⁹ UNGA, *Comprehensive Review of the whole question of peacekeeping operations in all their aspects: Model status-of-forces agreement*, UN A/45/594 (9 October 1990).

¹⁰ < <http://www.un.org/en/peacekeeping/> > on 8 November.

¹¹ < <http://www.un.org/en/peacekeeping/> > on 8 November.

¹² Roberts A, 'The crisis in UN peacekeeping' Cycle of Conferences by foreign individuals delivered within the scope of the National Defense Course organised by the Instituto da Defeca Nacional, Lisbon, 20 April 1994, 131.

¹³ Akonor K, *UN Peacekeeping in Africa: A Critical Examination and Recommendations for Improvement*, 1st ed, Springer, London, 2016, 10.

¹⁴ Akonor, *UN Peacekeeping in Africa*, 25

¹⁵ *Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations*, OIOS Evaluation Report, 12 June 2015, 8-9.

¹⁶ *Peacekeeping initiatives in action: addressing Sexual Exploitation and Abuse*, UN Department of Peacekeeping Operations Report, March 2017, 1.

¹⁷ UNSC S/RES/1925 (2010) The establishment of MONUSCO and UNSC S/RES/ 2149 (2014) The establishment of MINUSCA.

¹⁸ Morenne B, 'No Charges in Sexual Abuse Case Involving French Peacekeepers' *The New York Times* (2017).

lot of back-lash and many have attributed it to the immunity granted to the peacekeeping soldiers.¹⁹ The immunity granted to the MONUSCO and MINUSCA soldiers has allegedly enabled them to escape liability for using force against civilians which is in breach of their duty to protect civilians under the mandate of their respective missions.

The immunity is granted to peacekeeping soldiers supposedly to ensure that the said soldiers are able to perform their functions without fear of interference by the host state. This same immunity is now enabling the soldiers to escape liability for gross violations of their mandate.

1.3 Purpose of the study

The main purpose of this dissertation is to analyse and discuss the effect of the immunity granted to MINUSCA and MONUSCO peacekeeping military personnel on their accountability (or lack thereof) for the abuse of civilians contrary to their duty under their respective mission to protect the said civilians.

1.4 Hypothesis

The immunity granted to UN peacekeeping military personnel is very important for the overall effectiveness of the peacekeeping missions. However this immunity also means that the blue helmets are not subject to the jurisdiction of the host state and the head of their missions. As outlined in the model status of forces agreement for peacekeeping operations, military personnel are exclusively under the jurisdiction of their respective TCC in respect of any criminal activity in the host countries.²⁰ Thus whether they are adequately held accountable for sexually abusing civilians is utterly under the discretion of their TCC. This means that their accountability for abusing civilians cannot be ascertained as it will be subject to the willingness and ability of the TCC to prosecute and investigate the abuses. As such the immunity granted to UN peacekeeping military personnel negatively affects their accountability for their abuse of civilians.

1.5 Research questions

In order to analyse how the immunity granted to MINUSCA and MONUSCO soldiers affects their accountability (or lack thereof) for their use of force against civilians contrary to their duty under their respective mission to protect the said civilians, the following are my research questions:

¹⁹ Hunter L, 'Should we prosecute the protectors? Holding peacekeepers accountable in cases of sexual exploitation and abuse' 1(1) *Carleton Review of International Affairs*, 2009, 19.

²⁰ UNGA, *Model status-of-forces agreement*.

1. To what extent is the lack of accountability for the abuse of civilians by peacekeeping soldiers a result of the immunity granted to them?
2. To what extent is the immunity granted to the peacekeeping soldiers justified in light of its effect on their accountability for their abuse of civilians?

1.6 Justification of the study

MINUSCA and MONUSCO, are primarily mandated with the protection of civilians from the imminent threat of force. The immunity granted to peacekeeping military personnel is meant to facilitate the achievement of this goal. Ironically, many peacekeeping soldiers working under the two missions have been accused of sexually abusing civilians²¹ and almost none have been adequately held accountable for the abuse.²² Many human rights activists have attributed this lack of accountability to the immunity granted to the peacekeeping military personnel, without discussing how and why the immunity fosters lack of accountability and what this means.²³

The claim that the immunity granted to peacekeeping soldiers fosters lack of accountability for their abuse of civilians needs to be serious and thus needs to be discussed and analysed. This is because if true, it implies that the immunity granted to peacekeeping personnel is counterproductive. If indeed the immunity has enabled peacekeeping troops to escape accountability for their abuse of civilians, then it has allowed them to escape liability for gross violations of their mandate instead of facilitating the missions. Additionally and more importantly, the claim that the immunity fosters lack of accountability for the abuse of civilians is a serious one because of the importance of accountability for the overall effectiveness of the missions.²⁴ Thus if true, the claim implies that the immunity granted to peacekeeping soldiers undermines the effectiveness of the missions. There is a legitimate interest in ensuring the effectiveness of these missions because of the resources invested in them in order to ensure the safety of vulnerable civilians.²⁵ Therefore the claim that the immunity granted to peacekeeping soldiers fosters lack of accountability for their abuse of civilians must be discussed and analysed so as to come up with ways to secure accountability and thus the effectiveness of the missions.

²¹ Hall J, 'Children condemned by the UN to sexual abuse: regional analysis - Central Africa' 23(2) *Africa Conflict Monitor*, 2016, 51-58.

²² Moscoe A, 'Sexual exploitation and abuse in United Nations peace operations: towards evidence-based prevention and response' Major Research Paper, University of Ottawa Graduate School of Public and International Affairs.

²³ Hunter L, 'Should we prosecute the protectors?', 19-23.

²⁴ This will be discussed in the next chapter.

²⁵ For instance the approved Budget for MONUSCO for the year 2017-2018 is 1.2 billion dollars see <https://monusco.unmissions.org/en/facts-and-figures> on 17 January 2018

1.7 Scope and limitations of the study

The effect of the immunity granted to peacekeeping military personnel on the accountability for abuse of civilians will be analysed, only with regards to MONUSCO and MINUSCA and not peacekeeping missions in general. Because of time constraints, this study will not investigate the veracity of allegations of abuse of civilians by peacekeeping soldiers will not be one, only the manner in which these allegations were treated will be analysed.

1.8 Methodology and outline

To analyse the possible effect of immunity granted to the blue helmets on their accountability for the abuse, the methodology will involve first explaining the importance of accountability for the effectiveness of the mission. Then an analysis of the cases of use abuse of civilians by the peacekeeping soldiers and of the accountability (or lack thereof) for such acts will be done. In light of this the relationship between the immunity granted to the peacekeeping soldiers and the accountability will be analysed. The cases of abuse by blue helmets in the CAR and the DRC- including responses to the allegations- have been documented thoroughly by various human rights organisations (including UN agencies) as well as well-known independent searchers. These two categories of sources will provide a balanced perspective on the cases of abuse and will be my main source of information.

1.9 Definition of terms

Deterrence: Theory that asserts that punishment discourages people from committing crimes.²⁶

Host state: the country in which the peacekeeping occurs.²⁷

Immunity: the exclusion of certain persons, by law, from the criminal or civil jurisdiction of state that would otherwise have jurisdiction over the said state.²⁸

Peacekeeping military personnel/soldiers: Troops contributed by a TCC for purposes of peacekeeping.²⁹

Peacekeeping: The deployment of military forces by the United Nations in conflict areas in order to ensure the cessation of hostilities³⁰

²⁶ Kevin K, 'A Critical Appraisal of Criminal Deterrence Theory' 8 *Dickson Law Review* (1983), 2.

²⁷ Code Blue Campaign, *Privileges and immunities of the United Nations*, 13 May 2015, 1.

²⁸ Code Blue Campaign, *Privileges and immunities of the United Nations*, 13 May 2015, 1.

²⁹ <<http://peacekeeping.un.org/en/what-is-peacekeeping>> on 23 November 2017.

³⁰ Bellamy A and Williams P, *Understanding Peacekeeping*, 34.

Troop contributing country or sending state: a United Nations member state that contributes its troops for purposes of peacekeeping.³¹

1.10 Chapter summary

Chapter two: A discussion of the importance of accountability for the effectiveness of the mission.

Chapter 3: An analysis of the cases of use abuse of civilians by the peacekeeping soldiers and of the accountability (and lack thereof) for such acts.

Chapter 4: A discussion of the relationship between the immunity granted to the peacekeeping soldiers and the accountability for the abuse of civilians.

Chapter 5: Conclusion and recommendations

Chapter 6: Bibliography.

³¹ <<http://peacekeeping.un.org/en/what-is-peacekeeping>> on 23 November 2017.

2 Chapter Two: Conceptual framework

The Human security concept and the theory of deterrence

The restoration of international security is the primary reason for the deployment of UN peacekeeping troops.³² This security, when the first UN peacekeeping missions were deployed was state-centric and focused on the freedom of states from military aggression.³³ For instance the United Nations Military Observer Group in India and Pakistan in 1948 had the primary mandate of supervising the ceasefire between India and Pakistan thus ensuring both state's safety from external military aggression.³⁴ Even the missions that were started in response to internal conflicts focused on aiding national military forces to exterminate insurgents and excluded the direct protection of civilians from the effects of internal conflict.³⁵ This approach was unable to restore international security in several situations and often peacekeepers watched as civilians were killed.³⁶ Thus there was a need to re-conceptualise security with regard to UN peacekeeping missions and a more human centric approach was adopted in the mid 90's.³⁷ This individual-centered approach to security (often called human security) has been incorporated in several peacekeeping missions where the missions are expressly mandated to focus on the safety of individuals. For instance the peacekeeping missions which serve as the case studies for this research, MINUSCA and MONUSCO, both have a primary mandate of directly protecting civilians from the imminent threat of force.³⁸ Thus both missions are primarily concerned with human security and their effectiveness will depend on whether or not this security is ensured and a clear understanding of human security is needed.

Human security is defined as the protection of the vital core of all human lives in ways that enhance human freedoms and human fulfilment.³⁹ This entails the protection of the fundamental freedoms of individuals from a variety of threats instead of focusing on the protection of

³² Article 42, *Charter of the United Nations* (1945).

³³ *Human security in theory and practice: an Overview of the Human Security Concept and the United Nations Trust Fund for Human Security*, United Nations Human Security Unit Publication, 2009, 5.

³⁴ UNSC S/RES/47 (1948) Restoration of peace and order and the plebiscite in the State of Jammu and Kashmir.

³⁵ As in the case of the United Nations Operation in Mozambique see UNSC S/RES/782 The situation in Mozambique (1992).

³⁶ As in the case of United Nations Mission in Srebrenica see Henderson B, 'What have been the successes and failures of UN peacekeeping missions?' The telegraph, 28 September 2015 -< <http://www.telegraph.co.uk/news/worldnews/europe/bosnia/11729436/Srebrenica-20-years-on-What-have-been-the-successes-and-failures-of-UN-peacekeeping-missions.html>> on 5 September 2017.

³⁷ United Nations Human Security Unit, *Human security in theory and practice*, 5.

³⁸ UNSC 1925 (2010) and UNSC 2149 (2014).

³⁹ United Nations Human Security Unit, *Human security in theory and practice*, 5.

national defence forces from military aggression. Human security is people-centred⁴⁰ which means that the individual is placed at the centre of analysis by protecting him from threats to his/her dignity. For several years now, one of the threats to the dignity of individuals in the CAR and the DRC is the sexual exploitation and other abuse by peacekeeping troops working for the respective mission's.⁴¹ Protecting these individuals from this threat has thus become part of the mandate of these missions.

The best way to protect from threats to insecurity is early prevention- this is another core element of the human security concept.⁴² Human security seeks to minimise the impact of threats on individuals by avoiding the actualisation of the threat. This means that the two missions' mandate to protect civilians from the threat posed by peacekeeping troops is best achieved by preventing these peacekeeping troops from using violence against the civilians. Shielding the peacekeeping soldiers from accountability for their abuse of civilians does not prevent the harm and achieves the opposite.

Many sociologists argue that punishment/accountability because of its deterrent effect is one of the best ways to prevent crime.⁴³ This theory of deterrence- proposed by Thomas Hobbes, Cesare Beccaria amongst others- asserts that punishment discourages people from committing crimes.⁴⁴ The rationale is that the human being is '*rational and free and has the capability to choose among a variety of behavioural options*'⁴⁵ and so will choose the option which he/she believe has the least negative effect. There are two types of deterrent effects: specific and general. Specific deterrence discourages the criminal from repeating his/her criminal behaviour because the severity of his punishment was such that it outweighs whatever benefits he/she was hoping to get from the crime.⁴⁶ General deterrence discourages the public from committing crime because they have seen the severity of the punishment of the criminal and it outweighs the possible benefits of the crime.⁴⁷ For the punishment to have these deterrent effects, the probability of being caught for the crime must be high and the punishment must be severe enough to outweigh the potential benefits of the crime.⁴⁸

⁴⁰ United Nations Human Security Unit, *Human security in theory and practice*, 6.

⁴¹ Hall J, 'Children condemned by the UN to sexual abuse', 51-58.

⁴² United Nations Human Security Unit, *Human security in theory and practice*, 14.

⁴³ Donner M, 'Deterrence theory' in David L (ed.) *Encyclopaedia of Crime and Punishment*, SAGE Publications, 2002, 512-514.

⁴⁴ Kevin K, 'A Critical Appraisal of Criminal Deterrence Theory' 8 *Dickson Law Review* (1983), 2.

⁴⁵ Donner M, 'Deterrence theory', 513.

⁴⁶ Donner M, 'Deterrence theory', 512-514.

⁴⁷ Donner M, 'Deterrence theory', 512-514.

⁴⁸ Kevin K, 'A Critical Appraisal of Criminal Deterrence Theory', 4.

Applying this theory of deterrence, in order to prevent the use of force against the civilians by the peacekeeping troops - and thus protect them according to the human security concept and the mandate of the respective missions - adequate accountability/punishment because of its deterrent effect is necessary. The accountability must be severe enough to discourage the perpetrators from repeating their act (specific deterrence) and more importantly to discourage the other peacekeeping soldiers from abusing the civilians (general deterrence). Accountability for the use of force against civilians because of its deterrent effect is important in order to prevent the abuses and thus is a necessary condition in assessing whether these missions have fulfilled their mandate to protect the civilians against the threat posed by the peacekeeping soldiers according to the human security concept.

The importance of accountability because of its deterrent effect in preventing the abuse of civilians by peacekeeping military personnel and thus for the achievement of the mandate of the missions in light of the human security concept, means that this accountability is necessary for the fulfilment of the mandates. Therefore the extent to which peacekeeping military personnel are held accountable for their abuse of civilians can assess the effectiveness of the missions. The claim that the immunity granted to the peacekeeping military personnel shields them from accountability needs to be analysed and discussed in order to find ways to ensure accountability.

3 Chapter Three: The abuse of civilians by peacekeeping soldiers

This chapter will analyse the cases of abuse of civilians by the peacekeeping soldiers and the accountability (or lack thereof) for such acts. A clear understanding of the two missions and the circumstances under which they were created is required thus a background of MONUSCO and MINUSCA will be done before delving into the analysis of the allegations of abuse. The response of the TCC as well as additional responses of the UN to the allegations will be analysed.

3.1 Background of the missions

3.1.1 MONUSCO

The second Congo war began in August 1998 when the rebel group named Rally for Congolese Democracy (RCD) and other rebel factions with the backing of Rwanda and Uganda attempted to overthrow the Government of the then president of the DRC Laurent-Desire Kabila.⁴⁹ In response to this attack, Kabila sought military support from friends and Angola, Zimbabwe, Sudan and Libya intervened.⁵⁰ With the help of these countries Kabila managed to push the rebels away from the capital but could not exterminate them and they continued to operate in the east of the country.⁵¹ The UN called for a cease fire and in July 1999 the foreign parties agreed to withdraw from the DRC in a document called the Lusaka Agreement.⁵² The UN mission in the Democratic Republic of Congo (MONUC) that predeceases MONUSCO was created in November 1999 to oversee the implementation of the Lusaka Agreement and facilitate the withdrawal of foreign military troops.⁵³ The RCD forces that continued to operate in the east of the county continued to pose threats to civilians⁵⁴ and in response to this the mandate of MONUC was extended to include the protection of civilians using means that included military personnel.⁵⁵ Until its replacement with MONUSCO in 2010 MONUC had a total of 18,653 military troops from more than 60 TCC's including Bangladesh, South Africa, Sri Lanka, Kenya and Morocco.⁵⁶ The mission has been greatly criticised for its failure to protect

⁴⁹ Prunier G, *Africa's World War: Congo, the Rwandan genocide, and the making of a continental catastrophe*, Oxford University Press, Oxford, 2009, 303-350.

⁵⁰ Prunier, *Africa's World War*, 303-350.

⁵¹ Prunier, *Africa's World War*, 303-350.

⁵² Prunier, *Africa's World War*, 347.

⁵³ UNSC S/RES/1279 (1999) The situation concerning the Democratic Republic of the Congo.

⁵⁴ Unknown, 'Africa's great war' *The Economist*, 4 July 2002 - <<http://www.economist.com/node/1213296>> on 12 September 2017.

⁵⁵ UNSC S/RES/1565 (2004) The situation concerning the Democratic Republic of the Congo.

⁵⁶ <<http://www.un.org/en/peacekeeping/missions/monusco/facts.shtml>> on 12 September 2017.

civilians, and has been referred to as *'the embodiment of all the failures and contradictions that have characterised the United Nations in the last decade'*.⁵⁷

Nevertheless, in acknowledgement of the progress the DRC had made in overcoming its security challenges since the second Congo war the Security Council extended the mandate of MONUC, renaming it MONUSCO in 2010.⁵⁸ The new mandate of the mission was to help stabilise the country in terms of peace and security. Because the rebel factions were still active in the eastern part of the country and continued to kill civilians MONUSCO was also mandated to protect civilians from imminent threat of physical violence and the deployment of blue helmets in the region was authorised. Despite the presence of MONUSCO troops, rebel factions continued to kill and rape in eastern DRC and in 2015 the UN Secretary General called for the strengthening of the military component of the mission, to enable it to successfully protect civilians against the rebel groups.⁵⁹ The UN Intervention Brigade (UNIB) was thus created, under MONUSCO by the Security Council.⁶⁰ This brigade was tasked with neutralising the M23 rebel group and other armed groups that continued to threaten the security of civilians in eastern DRC, with or without the aid of the Congolese national army.⁶¹ This was the first time that a peacekeeping mission was specifically tasked with directly neutralising a rebel group.⁶² This proactive approach to the protection of civilians reflects the shift of the security paradigm from a state-centric approach to the human security concept that puts individuals at the centre of security that happened in the mid 90's.⁶³

3.1.2 MINUSCA

The ongoing civil war in the Central African Republic began in 2012 when a rebel group called Seleka began a series of attacks against the then government.⁶⁴ The government negotiated with the group and this led to an unsuccessful agreement between the two parties. With the

⁵⁷ Dizolele M, 'The UN in Congo: The failure of a peacekeeping mission' The New York Times, 10 May 2004 - <<http://www.nytimes.com/2004/05/10/opinion/the-un-in-congo-the-failure-of-a-peacekeeping-mission.html?mcubz=3>> on 20 February 2017.

⁵⁸ UNSC 1925 (2010), 1.

⁵⁹ *Special Report of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region*, The Secretary General, 2013, S/2013/119.

⁶⁰ UNSC S/RES/2098 (2013) The extension of the mandate of MONUSCO.

⁶¹ UNSC 2098 (2013), 6

⁶² Benson J, 'The UN Intervention Brigade: Extinguishing Conflict or Adding Fuel to the Flames?' One Earth Future, Discussion Paper, 2016, 1 <<http://oefresearch.org/sites/default/files/documents/publications/unintervention-brigade.pdf>> on 17 September 2017.

⁶³ See chapter 2

⁶⁴ Pejic G, 'Central African Republic' South Front, 25 August 2016 - <<https://southfront.org/central-african-republic-an-ongoing-civil-war/>> on 16 September 2017.

alleged support of Sudan and Chad, the group managed to take control of the capital city Bangui in March 2013 and the President François Bozizé fled.⁶⁵ The group's leader Michel Djotodia declared himself president and after pressure from the Economic Community of Central African States (ECCAS) an electoral commission was created.⁶⁶ Elections were conducted and Djotodia was elected president but failed to control Seleka Militia who had spread throughout the country, killing raping and looting.⁶⁷ In response to these atrocities village protection groups together with members of the overthrown army formed the Anti-Balaka movement⁶⁸ that started attacks against Seleka Militia.⁶⁹ In a failed attempt to stop the violence, President Djotodia disbanded the Seleka group but this did little to stop the violence as the group had divided into separate rebel factions that continued to fight against each other.⁷⁰ In response to this violence in December 2013, the African Union and France with the authorisation of the UN Security Council set up the International Mission under African Leadership to Support the Central African Republic (MISCA) and the Operation Sangaris respectively, two peacekeeping missions mandated with the protection of civilians in the CAR.⁷¹ In January 2014 President Djotodia resigned and was replaced by Catherine Samba-Panza an interim head of state. The Ex Seleka and Anti Balaka militias continued to fight killing thousands of civilians and the Security Council feared the possibility of Genocide.⁷² In an effort to strengthen the existing peacekeeping operations and curb the violence, MINUSCA was created in April 2014 by the UN Security Council as a replacement of MISCA.⁷³ The primary mandate of the mission was/is to protect civilians from threat of physical violence and to provide specific protection to women and children.⁷⁴ The mission was also tasked with facilitating the transitional process by providing technical assistance to the electoral process, as well as disarmament and reintegration of the

⁶⁵ Pejic G, 'Central African Republic' South Front, 25 August 2016 - <<https://southfront.org/central-african-republic-an-ongoing-civil-war/>> on 16 September 2017.

⁶⁶ Pejic G, 'Central African Republic' South Front', 25 August 2016 - <<https://southfront.org/central-african-republic-an-ongoing-civil-war/>> on 16 September 2017.

⁶⁷ Pejic G, 'Central African Republic' South Front, 25 August 2016 - <<https://southfront.org/central-african-republic-an-ongoing-civil-war/>> on 16 September 2017.

⁶⁸ Mellgard E, 'What is the Antibalaka?' Religions and geopolitics, 29 January 2015 -<<http://www.religionandgeopolitics.org/anti-balaka/what-antibalaka>> on 15 September 2017.

⁶⁹ Mellgard E, 'What is the Antibalaka?' Religions and geopolitics, 29 January 2015 -<<http://www.religionandgeopolitics.org/anti-balaka/what-antibalaka>> on 15 September 2017.

⁷⁰ Encyclopædia Britannica, online - <<https://www.britannica.com/place/Central-African-Republic/The-21st-century#ref1174710>> on 15 September 2017.

⁷¹ UNSC S/RES/ 2127 The situation in the Central African Republic (2013), 3-5.

⁷² Mellgard E, 'What is the Antibalaka?' Religions and geopolitics, 29 January 2015 -<<http://www.religionandgeopolitics.org/anti-balaka/what-antibalaka>> on 15 September 2017.

⁷³ UNSC 2149 (2014), 2.

⁷⁴ UNSC 2149 (2014), 9.

armed elements.⁷⁵ Presidential Elections were held January 2016 and with the help of MINUSCA, the new government was able to stabilise and reduce violence in the country. Nevertheless, this calm was short lived as in May 2017 clashes between Ex Seleka and Anti-Balaka militia resumed and 100 people were killed.⁷⁶ The mandate of MINUSCA ended in November 2017 but was extended until November 2018.⁷⁷

3.2 Cases of abuse

Instances of peacekeeping soldiers using violence against the civilians that they are mandated to protect are not uncommon: according to the Office of Internal Oversight Services (OIOS) from 2008 to 2013, 480 cases of sexual abuse of civilians by peacekeeping staff, military personnel were reported.⁷⁸ Moreover, a report by the Department of Peacekeeping operations shows that the cases of sexual exploitation committed by peacekeeping staff have increased since then.⁷⁹ This information is illustrated below:

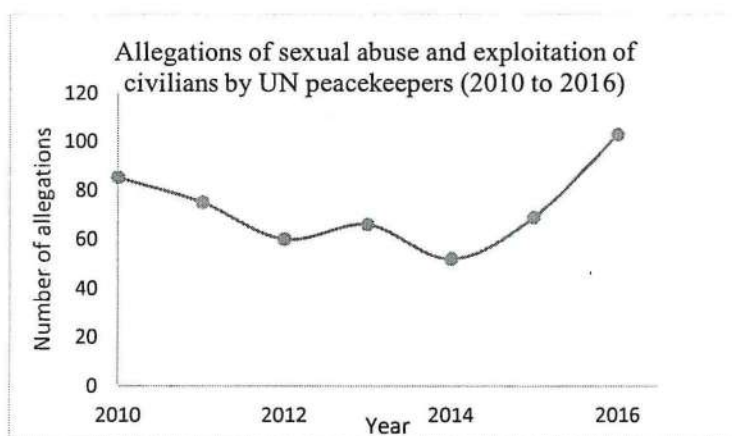


Figure 1: Allegations of sexual abuse and exploitation of civilians by UN peacekeepers (2010 to 2016). Source: *Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations*, UN Office of Internal Oversight, May 2015, 8-9.

⁷⁵ UNSC 2149 (2014), 10.

⁷⁶ <<http://www.aljazeera.com/news/2017/05/100-killed-car-fighting-170517025938882.html>> on 18 September 2017.

⁷⁷ UNSC S/RES/2387 (2017) The extension of MINUSCA.

⁷⁸ *Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations*, UN Office of Internal Oversight, May 2015, 8-9.

⁷⁹ UN Department of Peacekeeping Operations, *Peacekeeping initiatives in action*, March 2017, 1.

Out of all the UN peacekeeping operations, MONUSCO and MINUSCA have the highest number of cases of abuse of civilians by peacekeeping soldiers⁸⁰:

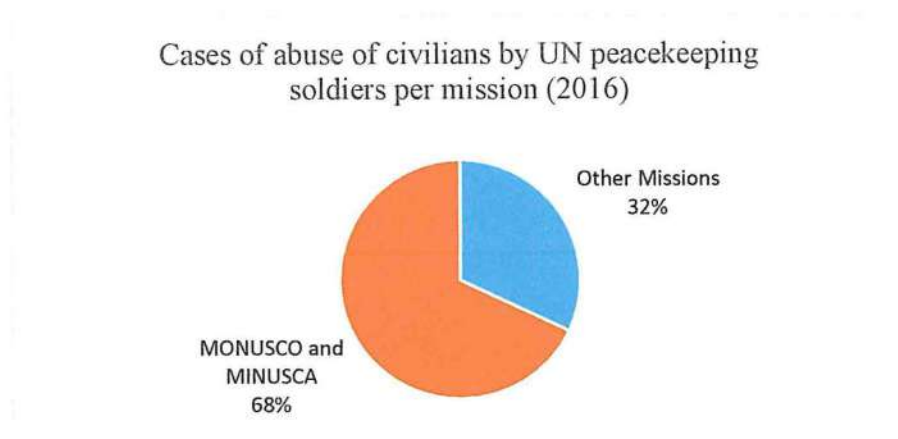


Figure 2: Cases of abuse of civilians by UN peacekeeping soldiers per mission (2016). Source: *UN Department of Peacekeeping Operations, Peacekeeping initiatives in action, March 2017, 1.*

Neither the UN nor the host's countries can punish the offending soldiers since all peacekeeping military personnel are immune from the jurisdiction of the host countries. According to the model status of forces agreement for peacekeeping operations, military personnel are exclusively under the jurisdiction of their respective TCC in respect of any criminal activity in the host countries.⁸¹ Thus in all the allegations, the TCC's have a duty to investigate and punish offenders. When the Conduct and Discipline Teams in the field receive a sexual exploitation allegation (or other criminal allegation) that involves military personnel, it is referred to the concerned TCC for investigation.⁸² The table below illustrates the actions taken by TCC's in response to allegations of sexual assault made against MINUSCA and MONUSCO military personnel in 2015:⁸³

⁸⁰ UN Department of Peacekeeping Operations, *Peacekeeping initiatives in action*, March 2017, 1.

⁸¹ UNGA, *Comprehensive Review of the whole question of peacekeeping operations in all their aspects: Model status-of-forces agreement*, UN A/45/594 (9 October 1990).

⁸² UNGA, *Model status-of-forces agreement*.

⁸³ UNGA, *Special measures for protection from sexual exploitation and sexual abuse*, UN A/70/729 (16 February 2016).

Mission	Allegations investigated by TCC (%)	Pending action by TCC after investigation (%)
MINUSCA	58	100
MONUSCO	82	100

Figure 3: Table showing the outcomes of investigations. Source: UNGA, *Special measures for protection from sexual exploitation and sexual abuse*, UN A/70/729 (16 February 2016).

As this table shows, though most allegations were investigated by the respective TCC, in both missions the TCC has not reported on the outcome of the investigations and any actions taken against the suspected soldier.

Below are details of some allegations against military personnel working for the two missions and the responses to them:

1. Some allegations against MONUSCO soldiers

In 2008, 100 peacekeeping soldiers from India - one of the largest contributors of military personnel to UN peacekeeping operations⁸⁴ - working under MONUSCO (then MONUC) were accused by human rights observers of forming a prostitution ring and paying children in North Kivu for sex.⁸⁵ In response to this, India investigated the matter and all hundred men were held to be innocent.⁸⁶ The government of India proceeded to condemn the UN for unnecessarily embarrassing the country.⁸⁷ The official report of the Indian authorities is confidential and so it is impossible to assess the accuracy of the findings. Nevertheless, as Bhanvi Satija writes, even for sexual assault committed on Indian soil, Indian military personnel are rarely held accountable as a result of The Armed Forces Special Powers Act which grants them immunity from criminal liability for acts committed in the line of duty and under which they can be prosecuted only if the government deems it fit.⁸⁸ Though Satija laments that the government took the cases

⁸⁴ Wyss M and Tardy T, *Peacekeeping in Africa: The evolving security architecture*, Routledge, London, 2014, 6.

⁸⁵ Caplan G, 'Peacekeepers gone wild: How much more abuse will the UN ignore in Congo?' *The Globe and Mail*, 3 August 2012 -< <https://beta.theglobeandmail.com/news/politics/second-reading/peacekeepers-gone-wild-how-much-more-abuse-will-the-un-ignore-in-congo/article4462151/?ref=http://www.theglobeandmail.com&> on 29 September 2017.

⁸⁶ Akonor, *UN Peacekeeping in Africa*, 39

⁸⁷ Akonor, *UN Peacekeeping in Africa*, 39.

⁸⁸ Satija B, 'UN reports sexual abuse by Indian peacekeepers, and we Ignore similar situation back home' *Youth Ki Awaaz*, 2015, 2 -< <https://www.youthkiawaaz.com/2015/06/sexual-violence-by-the-indian-army/>> on 28 September 2017.

of against peacekeepers more seriously than those against their soldiers at home⁸⁹, it is not unreasonable to imagine that these cases were most treated with the same disregard sexual assault cases are held with in India. Vulnerable people, including children were sexually exploited yet no one was held liable.

In 2016, Tanzanian peacekeeping soldiers working under MONUSCO- specifically the UNIB- were accused of sexually abusing minors in eastern DRC.⁹⁰ MONUSCO promptly reacted, sending a response team to the area so as to ascertain the facts. The accused men were ordered to remain in their camp (and later deported) and Tanzanian authorities were informed and asked to investigate the matter.⁹¹ Tanzania's ambassador to the UN Tuvako Monongi was outraged by the allegations and expressed Tanzania's commitment to effectively investigate the matter.⁹² He explained that a commission had been set up to inquire into the matters and that the investigation would possibly lead to prosecution and/or dismissal from the military service.⁹³ Nevertheless, a year and a half later and a report of the investigation is yet to be released and no arrests have been made.⁹⁴

2. Allegations against MINUSCA

The cases of sexual exploitation by peacekeepers were first brought to the public's attention in 2015 when Anders Kompass Chief of Field Operations at the UN leaked a confidential report to French authorities.⁹⁵ This report details sexual exploitation of more than 100 women and children in the CAR by French soldiers working under the *Operation Sangaris*⁹⁶ committed between 2013 to 2014 and Kompass – who has resigned after being investigated by the IOS for breach of professional confidentiality - claimed that UN officials had failed to take the

⁸⁹ Satija B, 'UN reports sexual abuse by Indian peacekeepers', 2.

⁹⁰ Akonor, *UN Peacekeeping in Africa*, 42.

⁹¹ Akonor, *UN Peacekeeping in Africa*, 42.

⁹² Bryce-Pease S, 'Ambassador laments allegations of rape against troops in Tanzania' SABC, 6 April 2016 - <<http://www.sabc.co.za/news/a/038d81004c4cbb29a42caf66ac5e10bb/Ambassador-laments-allegations-of-rape-against-troops-in-Tanzania-20160604>> on 30 September 2017.

⁹³ Bryce-Pease S, 'Ambassador laments allegations of rape against troops in Tanzania' SABC, 6 April 2016 - <<http://www.sabc.co.za/news/a/038d81004c4cbb29a42caf66ac5e10bb/Ambassador-laments-allegations-of-rape-against-troops-in-Tanzania-20160604>> on 30 September 2017.

⁹⁴ Kelley K, 'TZ troops now accused of sex abuse in DRC' *The Citizen*, 4 April 2016 - <<http://www.thecitizen.co.tz/News/TZ-troops-now-accused-of-sex-abuse-in-DRC/1840340-3145178-j32jcu/index.html>> on 1 October 2017.

⁹⁵ Essa A, 'Why do some peacekeepers rape? The full report' Al Jazeera, 10 August 2017 - <<http://www.aljazeera.com/indepth/features/2017/08/peacekeepers-rape-full-report-170804134221292.html>> on 2 October 2017.

⁹⁶ See page 12.

matter seriously.⁹⁷ The report which contains some disturbing allegations - including sodomy of 9 year old boys and teenagers who were force to engage in sexual activity with dogs⁹⁸ - caused public outrage and prompted a series of Investigations by the UN and human rights organisations.⁹⁹ These series of reports revealed several cases of sexual abuse by MINUSCA soldiers and in August 2015, the chief of MINUCA resigned.¹⁰⁰ Since then, more and more cases of sexual exploitation by MINUSCA soldiers keep emerging. Below is a summary of some of them.

Troops from the Republic of Congo working for MINUSCA have been notorious for allegations of sexual exploitation against civilians. For instance, a woman was allegedly gang raped by an unknown number of men from the battalion 100 meters from the peacekeeping base in Boda.¹⁰¹ A week after the allegation was made, a representative from The Republic of Congo commenced investigations. This investigation concluded that the allegations were unsubstantiated because despite the fact that medical examination showed that the woman had been physically and sexually aggressed, the peacekeepers were not allowed to go out at night. This is just one of the several allegations against Congolese soldiers working under MINUSCA and in 2015, 120 of them were repatriated after allegations of sexual exploitation of children.¹⁰² In June 2017, President Sassou Nguesso decided to withdraw all his troops working under MINUSCA, and a UN statement on the matter claimed that the cases of sexual exploitation pointed to systematic problems in the battalion. No arrest has been made by Congolese authorities against any of the men.

Two Burundian Soldiers working under MINUSCA allegedly assaulted and attempted to rape two women after they refused to engage in sexual activity with the men in public.¹⁰³ This led

⁹⁷ Laville S, 'Child sex abuse whistle-blower resigns from UN' The Guardian, 7 June 2016 - <<https://www.theguardian.com/world/2016/jun/07/child-sex-abuse-whistleblower-resigns-from-un>> on 1 October 2017.

⁹⁸ Dearden L, 'French troops accused of 'forcing girls into bestiality' in CAR as rape claims mount against UN peacekeepers' The Independent, 30 March 2016 - <<http://www.independent.co.uk/news/world/africa/french-troops-accused-of-forcing-girls-to-have-sex-with-dog-in-car-as-rape-claims-against-un-a6961711.html>> on 2 September 2017.

⁹⁹ *More allegations of sexual abuse of children by foreign soldiers in the Central African Republic*, The office of the United Nations high commissioner for human rights, 1 February 2016.

¹⁰⁰ Halliday J, 'UN peacekeeping chief in CAR sacked over sex abuse claims' The Guardian, 7 August 2015 - <<https://www.theguardian.com/world/2015/aug/12/un-peacekeeping-chief-central-african-republic-resigns-babacar-gaye>> on 2 September 2017.

¹⁰¹ Code Blue Campaign, *Confidential: Sexual Exploitation and Abuse Case Files MINUSCA*, 13 September 2017, 5.

¹⁰² Al Jazeera, 'Congo peacekeepers accused of sex abuse to leave CAR', 22 June 2017.

¹⁰³ Code Blue Campaign, *Confidential: Sexual Exploitation and Abuse Case Files MINUSCA*, 13 September 2017, 7-8.

to a commotion and local authorities managed to arrest one of the men. He was later released to the UN because he is immune from the jurisdiction of Central-African authorities. The soldier's commander admitted that he failed to investigate the matter after the man was released to him and he was disciplined for this failure. It is not clear what further actions were taken.

3.2.1 Measures taken by the UN in response to the allegations

In 2015 after Anders Kompass leaked the report¹⁰⁴ detailing the blatant disregard with which UN officials treated the cases of sexual exploitation against peacekeeping staff in the CAR, the already existing public outrage regarding the lack of accountability for abuses to civilians by peacekeeping staff. For instance, the United States has been threatening to cut funding to UN peacekeeping operations¹⁰⁵, claiming that the allegations of abuse put in question the suitability of such operations for the maintenance of international security.¹⁰⁶ In response to these pressures, the UN took a series a measures to prevent sexual exploitation of civilians by peacekeeping staff and to foster accountability as detailed in the UN report. Most of these measures concern allegation against non-military peacekeeping personnel who are generally not immune from the criminal jurisdiction of host states. Nevertheless, there have been attempts to address cases against military personnel by encouraging TCC's to take the allegations seriously. Below are some of these measures:

3.2.1.1 The Kigali principles on the protection of civilians

These principles were formulated in Rwanda in early 2015, at a high level conference on the protection of civilians that brought together various stakeholders to peacekeeping operations including TCC's and financial contributors. The main objective of the conference and the resulting principles is to provide a guidelines that will facilitate the implementation of the peacekeeper's mandate to protect civilians. The present TCC's undertook to hold their respective troops to the highest standard of conduct, to adequately investigate allegations of abuse of civilians and hold culprits accountable.¹⁰⁷ Though they are endorsed by more than 30 top TCC's, these principles are not mandatory or legally binding¹⁰⁸ and thus will not compel the TCC's to adequately hold their soldiers accountable for the abuse of civilians

¹⁰⁴ See page 16.

¹⁰⁵ Al Jazeera, 'Congo peacekeepers accused of sex abuse to leave CAR', 22 June 2017.

¹⁰⁶ Sengupta S, 'UN peacekeeping faces overhaul as US threatens to cut funding' *The New York Times*, 24 March 2017 < <https://www.nytimes.com/2017/03/24/world/united-nations-peacekeeping-trump-administration.html>> on 30 July 2017.

¹⁰⁷ Principle 13-15, *The Kigali principles on the protection of civilians*, 29 May 2015.

¹⁰⁸ Global centre for the responsibility to protect, *Peacekeeping and the Kigali Principles*, 1 June 2017.

3.2.1.2 UN Security council resolution 2272 (2016) on sexual abuse by peacekeepers

This resolution was adopted in March 2016. It expresses deep concern for the sexual abuse of civilians by peacekeeping forces and provides for measures to ensure accountability.¹⁰⁹ For instance, countries that have previously failed to adequately investigate allegations of sexual exploitation against their troops and/or to hold culprits accountable will be subjected to the following¹¹⁰:

- i. Their troops will be repatriated or replaced
- ii. Their participation in peacekeeping may be suspended
- iii. They will be barred from future/present participation in peacekeeping.

This resolution is inadequate for purposes of ensuring accountability. The repatriation and suspension of troops of a TCC that fails to adequately hold offending soldiers accountable for the abuse of civilians will not compel the TCC's to prosecute their soldiers. Instead, it will reduce the number of soldiers involved in peacekeeping as states- the only source of military personnel for UN peacekeeping¹¹¹- will be discouraged to contribute their soldiers. This repatriation/suspension would be damaging to state's reputation and since peacekeeping does not benefit the TCC significantly, most states will likely choose not to contribute their troops. Though the ban on TCC's that fail to adequately hold their soldiers accountable will ensure only states that are willing and able to adequately investigate the matter

3.3 Summary of findings

The abuses of civilians by MONUSCO AND MINSCA peacekeeping military personnel are extensive and yet the culprits have mostly escaped liability. The TCC'S have failed to adequately investigate allegations of abuse and prosecute their troops. The additional measures taken by the UN to foster accountability are mostly inadequate. The next chapter will analyse the relationship between this lack of accountability and the immunity granted to peacekeeping military personnel.

¹⁰⁹ UNSC S/RES/2272 (2016) Sexual abuse by UN peacekeepers.

¹¹⁰ UNSC 2272 (2016), 2-3.

¹¹¹ Hunter L, 'Should we prosecute the protectors?', 22-23.

4 Chapter four: The relation between the immunity of peacekeeping military personnel and the lack accountability

As established in the previous chapter, the sending states are entirely responsible for the investigation/prosecution of their soldiers for any criminal misconduct and they have mostly failed to adequately hold their soldiers accountable for the abuse of civilians. In light of this, this chapter will attempt to justify the immunity granted to peacekeeping soldiers and analyse the reasons for the failure to hold them accountable as well as evaluate any possible solutions.

4.1 Justifying Immunity

As a general principle of customary international law, states are sovereign.¹¹² They have complete autonomy over their own affairs. The arms of government and affairs of a state should be free from any interference by another state.¹¹³ The military because it is indispensable for the defence of a state's sovereignty and interests needs special protection from foreign interference.¹¹⁴ During peacekeeping operations, soldiers from a TCC operate on the territory of another sovereign state. In such a situation, the host state has complete jurisdiction over the territory on which the peacekeeping occurs according to customary international law.¹¹⁵ This means that TCC soldiers would be subject to the jurisdiction of the host state. However, this would also mean that the military of the TCC is potentially subject to any interference by the host state through judicial or military action. This is problematic as it leaves the sovereignty of the TCC vulnerable to violation by the host state.

TCC's would most likely not participate in peacekeeping if they did not have exclusive jurisdiction over their soldiers, as doing so would potentially compromise the independence of their military and thus their sovereignty.¹¹⁶ For instance, the United States withdrew its troops from a peacekeeping mission in Eritrea and Ethiopia shortly after the establishment of the International Criminal Court (ICC) because of the slim possibility that its soldiers could be prosecuted by the ICC.¹¹⁷ Even though the USA was not party to the Rome Statute, there were fears that

¹¹² Article 2, Charter of the United Nations (24 October 1945).

¹¹³ *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 300.

¹¹⁴ Deng F and Kimaro S, *Sovereignty as Responsibility: Conflict Management in Africa*, Brookings Institution Press, Washington, 1996, 23-35.

¹¹⁵ *The Case of the S.S. Lotus (France v Turkey)*, Judgement, PCIJ Reports 1927, 22.

¹¹⁶ Hunter L, 'Should we prosecute the protectors? Holding peacekeepers accountable in cases of sexual exploitation and abuse' 1(1) *Carleton Review of International Affairs*, 2009, 19.

¹¹⁷ Lumpkin J, 'US to pull forces from 2 UN missions' Associated Press, 1 July 2004- <<https://www.global-policy.org/component/content/article/199/41073.html>> on 8 December 2017.

Eritrea and Ethiopia would accede to the treaty and thus American soldiers could be prosecuted if they committed crimes enshrined in the Rome statute in Eritrea and Ethiopia.¹¹⁸ Peacekeeping depends entirely on military contributions by states¹¹⁹ and would not exist if states refused to participate. Therefore, to ensure state participation in peacekeeping, peacekeeping soldiers are granted immunity from the criminal jurisdiction of the host states and their sending states retain exclusive jurisdiction over them.¹²⁰ If this immunity was waived, states would withdraw their troops and peacekeeping would become impossible. This explains why despite public pressure to foster accountability, the UN has not contemplated waiving this the immunity of peacekeeping forces, and instead has inadequate taken measures to encourage the TCC's to adequately hold their soldiers accountability.¹²¹

On the other hand, the immunity granted to peacekeeping soldiers, because it leaves the accountability of the soldiers for criminal misconduct at the sole discretion of their TCC, is problematic.¹²² As established in the second chapter, accountability for the use of force against civilians because of its deterrent effect is important in order to prevent the abuses and thus a necessary condition in assessing whether these missions have fulfilled their mandate to protect civilians against the threat posed by the blue helmets according to the human security concept.¹²³ Thus, the fact that the immunity granted to peacekeeping soldiers fosters lack of accountability for their abuse of civilians cannot be disregarded and must be addressed. However, this immunity is indispensable and without it, peacekeeping would not be feasible because states would not contribute their soldiers, as discussed above. On one hand the immunity makes the peacekeeping missions feasible and on other hand it renders the missions ineffective by fostering lack of accountability. This is indeed a dilemma because waiving the immunity so as to enhance the effectiveness of the missions would render the missions impossible. The immunity is a necessary evil because without MONUSCO and MINUSCA, the civilians in the DRC and the CAR would be vulnerable to insecurity posed by civil war¹²⁴ and thus be in a worse position than they are now, even despite the abuse by peacekeeping soldiers. For in-

¹¹⁸ Lumpkin J, 'US to pull forces from 2 UN missions' Associated Press, 1 July 2004 - <https://www.global-policy.org/component/content/article/199/41073.html>.

¹¹⁹ Hunter L, 'Should we prosecute the protectors?', 22-23.

¹²⁰ UNGA, *Comprehensive Review of the whole question of peacekeeping operations in all their aspects: Model status-of-forces agreement*, UN A/45/594 (9 October 1990).

¹²¹ See page 18-19.

¹²² See chapter 3

¹²³ See chapter 2

¹²⁴ See page 10-12.

stance, the UN Intervention Brigade created under MONUSCO in collaboration with the Congolese army drove the M23 rebel group that had been killing and raping thousands of civilians out of the DRC.¹²⁵ Likewise, with the help of MINUSCA, the new government of the CAR was able to stabilise and reduce the extensive violence in the country.¹²⁶ The two missions are necessary in order to ensure the safety of vulnerable civilians in the face of weak governments¹²⁷ and they cannot be done away with. This means that any measures taken to foster accountability of soldiers for abuse of civilians cannot include the waiver of the immunity. Instead, any such measure must examine and address the factors/reasons that make immunity problematic in holding peacekeeping soldiers accountable for abuse of civilians.

4.2 Immunity and lack of accountability

Having established that the immunity granted to peacekeeping soldiers is indispensable to the UN peacekeeping model and therefore cannot be waived even though it is problematic in ensuring that soldiers who abuse civilians are held accountable, it is essential to understand why this immunity fosters lack of accountability.

The immunity granted to the soldiers negatively affects the collection of evidence regarding the allegations. As Jessica Hatcher explains, when a peacekeeping soldier is accused of sexually abusing civilians, the head of the mission repatriates him/her to his/her home country and invites the TCC to investigate the matter.¹²⁸ This means that the accused might not be available at the crime scene and that essential evidence cannot be gathered: the collection of DNA samples, identification by witnesses, questioning etc. cannot be done without the suspect.¹²⁹ All these processes are important to ensure a credible investigation. In exercising its criminal jurisdiction over the suspect, the TCC might thus be unable to conduct a thorough

¹²⁵ Barrera A, 'The Congo trap: MONUSCO Islands of stability in the sea of instability' 4(1) *International Journal of Security & Development*, 2015, 1-16.

¹²⁶ Benn M, 'Newly Elected Central African Republic Leader Faces Hard Realities' *The New York Times*, 21 February 2016 - <<https://www.nytimes.com/2016/02/22/world/africa/newly-elected-central-african-republic-leader-faces-hard-realities.html?mcubz=3>> on 16 September 2017.

¹²⁷ Baaz M and Verweijen J, 'The volatility of a half-cooked bouillabaisse: Rebel–military integration and conflict dynamics in the eastern DRC' 112(449) *African Affairs*, 2013.

¹²⁸ Hatcher J, 'Defining Peacekeeping Downward: The U.N. Debacle in Eastern Congo' *World Time*, 26 November 2012- <<http://world.time.com/2012/11/26/defining-peacekeeping-downward-the-u-n-debacle-ineastern-congo/>> on 25 December 2016.

¹²⁹ Metejik L, 'DNA sampling privacy and police investigation in a suspect society' 61(3) *Arkansas Law Review*, 2008, 53.

investigation that would ensure accountability. Furthermore, in order to conduct a proper investigation, the TCC needs to use certain tools of evidence collection such as search warrants whose use would potentially violate the sovereignty of the host state. As principle of international customary law, a state cannot exercise its jurisdiction over the territory of another unless it has express permission to do so.¹³⁰ Thus, the use of such tools by a TCC would need the formal authorisation of the host state.¹³¹ The process of getting such formal authorisation is time-consuming and this might further compromise the investigation, especially considering the time-sensitive nature of sexual abuse¹³² and the fact that the host states in question are war zones and civilians who are potential witnesses are likely to vanish at any time. All these mean that the immunity compromises the investigations of the allegations of abuses.

The peacekeeping soldiers are under the exclusive criminal jurisdiction of their TCC thus whether they are held accountable for sexual abuse of civilians depends on the adequacy of the TCC's legal system. This is explained by Lauren Hunter who writes that the legal systems of various UN member states do not correspond to international standards and may not have legislation requiring the prosecution of peacekeeping soldiers for abuse of civilians in host states.¹³³ For instance, the Italian Military Criminal Code does not criminalise the rape and torture of civilians by Italian soldiers and thus when Italian peacekeepers raped Somali women, they were simply disciplined but could not be prosecuted.¹³⁴ Likewise, because of the inadequacy of the Indian legal system, a hundred Indian peacekeeping soldiers working under MONUSCO who were accused of sexual exploitation in the DRC were not held accountable for their actions.¹³⁵ As Bhanvi Satija writes, this lack of accountability is not surprising since even for sexual assault committed on Indian soil, Indian military personnel are rarely held accountable as a result of The Armed Forces Special Powers Act which grants them immunity from criminal liability for acts committed in the line of duty and under which they can be

¹³⁰ *The Case of the S.S. Lotus*, PCIJ, 22.

¹³¹ Kerr O, 'Search warrants in an era of digital evidence' 75(2) *Mississippi Law Journal*, 2005, 86-91.

¹³² Ferris L and Sandercock J, 'The sensitivity of forensic tests for rape' 17(3) *Medicine and Law*, 1998, 335-348.

¹³³ Hunter L, 'Should we prosecute the protectors?' ,20-21.

¹³⁴ Bedont B, 'The renewed popularity of the rule of law: implications for women, impunity and peacekeeping' in Mazurana D and Parpat J (eds) *Gender conflict and peacekeeping*, Rowman & Littlefield Publishers, 17 February 2005, 90.

¹³⁵ See page 15.

prosecuted only if the government deems it fit.¹³⁶ The inadequate legal systems often allow the culprits to escape liability for the abuse of civilians.

The TCC's ability to conduct an impartial investigation or prosecution can be comprised by its various interests in not declaring its soldiers guilty of sexually abusing civilians. For instance, a TCC will want to preserve a good reputation and absolve itself of any blame for the misconduct of its soldiers.¹³⁷ This desire to preserve a good reputation was demonstrated by India's quick rebuke of the UN for embarrassing the country with such accusations.¹³⁸ Even when TCC's troops are repatriated for abuse of civilians, the TCCs' avoid revealing the real reason for the repatriation. For example in 2015 when the Congolese troops were repatriated for widespread sexual violence against civilians in the CAR, the matter was presented as simply a decision of President Sassou Nguesso to withdraw the troops.¹³⁹ This desire to protect the reputation of their states can mean that the suspects will never be found guilty. Even TCCs' that claim to be committed to ensure the accountability of their soldiers do not report back on the outcome of their investigations and whether there was a prosecution. For example in 2012 when Tanzanian peacekeeping soldiers working under MONUSCO were accused of rape in the DRC, Tanzania claimed to take the matter seriously and a commission of enquiry was set up. Nevertheless, a year and a half later and a report of the investigation is yet to be released and no arrests have been made.¹⁴⁰ This unlikelihood of states to find and declare their soldiers guilty in order to preserve their reputation explains the lack of accountability observed for cases of abuse against civilians.

In view of the foregoing, the immunity granted to peacekeeping soldiers negatively affects their accountability for the abuse of civilians to the extent that (i) it subjects the investigation to the legal systems of the TCC, which are often inadequate, (ii) it compromises the collection of evidence, and (iii) it compromises the impartiality of the process. Because the immunity cannot be waived, these factors needs to be addressed in order to foster accountability for the abuse of civilians be peacekeeping soldiers.

¹³⁶ Satija B, 'UN reports sexual abuse by Indian peacekeepers, and we Ignore similar situation back home' *Youth Ki Awaaz*, 2015, 2-<<https://www.youthkiawaaz.com/2015/06/sexual-violence-by-the-indian-army/>> on 28 September 2017.

¹³⁷As shown by India's reaction to sexual abuse allegations against its troops, see page 15.

¹³⁸ See page 15.

¹³⁹ Al Jazeera, 'Congo peacekeepers accused of sex abuse to leave CAR', 22 June 2017.

¹⁴⁰ See page 16.

4.3 Possible ways to foster accountability

A number of solutions have been proposed to ensure peacekeeping soldiers are held adequately accountable for their abuse of civilians. The feasible solutions i.e. those that do not require the waiver of the immunity need to be evaluated based on the factors discussed above that make the immunity problematic: effect on the collection of evidence, inadequacy of legal systems and lack of impartiality.

4.3.1 The establishment of an international military tribunal

Some have proposed the establishment of an international tribunal that would have the jurisdiction to prosecute peacekeeping soldiers who have abused civilians.¹⁴¹ Under this model, the peacekeeping soldiers would still be immune from the jurisdiction of the host state but the TCC would not have exclusive jurisdiction over them. The stakeholder states would agree on a legal instrument that would adequately provide for the prosecution of peacekeeping soldiers who abuse civilians. Thus the accountability would not be left under the discretion of the TCC who may have inadequate laws.

The proponents of this solution have argued that an intentional tribunal would not be subject to the same biases as the courts of a TCC and thus would ensure an impartial process.¹⁴² The tribunal would be independent and free from interference by TCC's who have any interests in the innocence of their soldiers. However this assertion assumes that the judges/prosecutors of the tribunal would be completely outside the sphere of influence of states. This is not true since the tribunal would be created through an agreement of all concerned states and thus each state would influence the manner in which it operates and possibly participate in the appointment of judges. Moreover the tribunal would need funding from states in order to function and the funding states will most probably influence the manner in which it operates. Therefore, an international tribunal will not necessarily be impartial¹⁴³ in holding peacekeeping soldiers accountable for the abuse of civilians.

An international tribunal would face the same challenges as a TCC in conducting a credible investigation into allegations of abuse of civilians by peacekeeping soldiers. It would not be

¹⁴¹ Leck C, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' 10(1) *Melbourne Journal of International Law*, 2009, 346-364.

¹⁴² Leck C, 'International Responsibility in United Nations Peacekeeping Operations', 356.

¹⁴³ Mackenzie R and Sands P, 'International courts and tribunals and the independence of the international judge' 44(1) *Harvard International Law Journal*, 2003, 271-286.

possible for the tribunal to have representatives in all the host states because of economic constraints. Thus, the investigators from the tribunal would not be able to start the investigation as soon as the allegations are brought forward and this would compromise the process, considering the time sensitive nature of sexual abuse. Furthermore, just like the TCC an international tribunal would need formal authorisation in order to use certain tools of collection of evidence, such as search warrants in the territory of a host state. The process of acquiring such formal authorisation is time consuming and will further compromise the collection of evidence. Moreover, considering the challenges that the ICC is currently facing in securing the cooperation of states with its investigations¹⁴⁴, it is not guaranteed that the host states and the other stakeholder states will always facilitate the investigations conducted by this proposed international tribunal. States have different political interests and motives that would affect the extent to which they cooperate with an international tribunal/court.¹⁴⁵ The tribunal would be unable to collect important evidence situated in the territory of a state that refuses to cooperate. This would affect the ability of the tribunal to conduct credible investigations and thus to ensure that peacekeeping soldiers who abuse civilians are adequately held accountable.

Additionally and perhaps more importantly, an international tribunal will threaten the sovereignty of TCCs' in the same manner that waiving the immunity of the peacekeeping soldiers would. Though the peacekeeping military personnel would still be immune from the jurisdiction of the host state, they would be under the jurisdiction of this international tribunal. The troops would no longer be under the exclusive jurisdiction of their TCC. As explained earlier, the military's role in protecting the sovereignty and interest of a state is indispensable and this is why states want to retain exclusive jurisdiction over their military personnel. The United States threatens to veto a Security Council resolution to extend the mandates of the UN peacekeeping missions in Bosnia and Herzegovina until its troops were exempted from the jurisdiction of the ICC¹⁴⁶ clearly exemplifies the reluctance of states to give up the exclusive jurisdiction over their soldiers. States will not risk any interference with their military by subjecting them to external judicial proceedings especially since contribution of peacekeeping troops does not

¹⁴⁴ Demirdjian A, 'Armless giants: cooperation, state responsibility and suggestions for the ICC review conference' 10(2) *International Criminal Law Review*, 2010.

¹⁴⁵ Hillebrecht C and Straus S, 'Who pursues the perpetrators? State cooperation with the ICC' 39(1) *Human Rights Quarterly*, 2017, 162-188.

¹⁴⁶ Weller M, 'Undoing the global constitution: UN Security Council action on the ICC' 78(4) *International Affairs*, 2002, 705-707.

significantly benefit the TCCs.¹⁴⁷ The establishment of such a tribunal would most probably result in the withdrawal of troops by many TCCs. This would be disastrous since peacekeeping relies solely on military contributions by states¹⁴⁸ and would weaken the existing missions and eventually cause the abolition of peacekeeping. This would leave civilians who depend on peacekeeping missions such as MONUSCO and MINUSCA vulnerable to insecurity.

All in all, the establishment of an international tribunal to prosecute peacekeeping soldiers for their abuse of civilians would not foster accountability significantly better than the current model. This is because an international tribunal would face the same issues that the current model - under which the soldiers can only be prosecuted by their TCC- faces in ensuring the culprits are held accountable.

4.3.2 The establishment of Court Martials in the host state

The UN Secretary- General, in 2016, recommended the establishment of court-martials in the host state by each TCC to deal the allegations of sexual abuse of civilians against its military personnel.¹⁴⁹ The court Martials would be composed of members of the TCCs armed forces and would operate according to the laws of the TCCs'. As such, the immunity of the peace-keeping soldiers would be preserved and they would be under the exclusive jurisdiction of their respective TCC. The court Martials would operate on the territory of the host state and this would need formal authorisation of the host state. Consequently, model status of forces agreement would need to be amended to impose a duty on the host state to authorise and cooperate with the court Martials.

The UN Secretary General argues that an onsite court martial would be better placed to conduct a credible investigation into allegations of sexual abuse of civilians by peacekeeping soldiers.¹⁵⁰ This is because unlike in the current model, the court would be present at the crime scene and thus would have quicker and better access to victims and physical evidence. This would avoid any unnecessary delay that would compromise the investigation. Moreover, the undertaking by the host state to cooperate with the court means that tools of evidence collection such as search warrants would not be delayed by formalities.

¹⁴⁷ K Coleman and B Nyblade, 'Peacekeeping for profit: the scope and limits of mercenary UN peacekeeping' 10th annual conference on the Political Economy of International Organizations, Bern, 12-14 September 2017, 38-39.

¹⁴⁸ Hunter L, 'Should we prosecute the protectors?', 23.

¹⁴⁹ UNGA, *Special measures for protection from sexual exploitation and sexual abuse*, para 68.

¹⁵⁰ UNGA, *Special measures for protection from sexual exploitation and sexual abuse*, para 68.

Nevertheless, because the court Martials would operate under the laws of the TCCs', whether the soldiers are held accountable for sexual abuse of civilians would still depend on the adequacy of the TCC's legal system. As explained above the inadequacy of TCCs' laws has enabled soldiers who have sexually abused civilians to escape liability.¹⁵¹ However with regards to a court martial this problem can be solved because they typically operate under specialised laws and do not apply the general laws of a country.¹⁵² Whereas it would be unrealistic/impractical to require all TCCs' to change their entire legal systems, they can be reasonably required to change only their court martial rules. Therefore, requiring all TCCs' martial courts rules to adequately provide for the prosecution and punishment of peacekeeping soldiers who sexually abuse civilians would ensure that inadequate legal systems are no longer obstacles to accountability.

Although not perfect, this solution solves some of the issues that the current model is facing in ensuring that peacekeeping soldiers are held accountable for their abuse of civilians.

¹⁵¹ See page 23.

¹⁵² Fairman C, *The law of martial rule*, Callaghan, Chicago, 1930, 5.

5 Chapter Five: Conclusion and recommendations

The main purpose of this dissertation is to analyse and discuss the effect of the immunity granted to MINUSCA and MONUSCO peacekeeping military personnel on their accountability (or lack thereof) for the abuse of civilians contrary to their duty under their respective mission to protect the said civilians. In light of this, it was established that the abuses of civilians by MONUSCO and MINUSCA peacekeeping soldiers were very extensive and that the perpetrators were not adequately held accountable. This lack of accountability for the abuses is a result of the immunity granted to the peacekeeping soldiers, to the extent that the immunity (i) subjects the investigation to the legal systems of the TCC which are often inadequate, (ii) compromises the collection of evidence due to territorial barriers, and (iii) compromises the impartiality of the process. These 3 factors make immunity problematic in holding peacekeeping soldiers accountable for their abuse of civilians. As hypothesized¹⁵³, the immunity granted to UN peacekeeping military personnel negatively affects their accountability for their abuse of civilians since whether they are held accountable depends entirely on the willingness and ability of the TCC to prosecute and investigate the abuses.

It was established that MONUSCO and MINUSCA both have a primary mandate of protecting civilians from the use of force and thus are concerned with the human security concept. Human security seeks the protection of the vital core of all human lives in ways that enhance human freedoms and human fulfilment by protecting him/her from threats to his/her dignity.¹⁵⁴ This entails the protection of the fundamental freedoms of individuals from a variety of threats. For several years now, one of the threats to the dignity of individuals in the CAR and the DRC is the sexual exploitation and other abuse by peacekeeping troops working for the respective mission's.¹⁵⁵ Protecting these individuals from this threat has thus become part of the mandate of these missions. Human security seeks to minimise the impact of threats on individuals by avoiding the actualisation of the threat.¹⁵⁶ As such, the two missions' mandate to protect civilians from the threat posed by peacekeeping troops is best achieved by preventing these peacekeeping troops from using violence against the civilians. Many sociologists argue that punishment/accountability because of its deterrent effect is one of the best ways to prevent crime.¹⁵⁷

¹⁵³ See page 3

¹⁵⁴ United Nations Human Security Unit, *Human security in theory and practice*, 5.

¹⁵⁵ Hall J, 'Children condemned by the UN to sexual abuse', 51-58.

¹⁵⁶ United Nations Human Security Unit, *Human security in theory and practice*, 5.

¹⁵⁷ Donner M, 'Deterrence theory' in David L (ed.) *Encyclopaedia of Crime and Punishment*, SAGE Publications, 2002, 512-514.

Consequently, accountability for the use of force against civilians because of -its deterrent effect- is important in order to prevent the abuses and thus a necessary condition in assessing whether these missions have fulfilled their mandate to protect the civilians against the threat posed by the peacekeeping soldiers. Therefore, the failure to hold peacekeeping military personnel accountable for their abuse of civilians demonstrates that the two missions have failed to fulfil their respective mandates. This lack of accountability must be adequately addressed in order to justify the continuation of these missions. Consequently, the fact that the immunity granted to peacekeeping soldiers fosters lack of accountability for their abuse of civilians cannot be disregarded and must be addressed.

On the other hand, the immunity granted to the peacekeeping military personnel is indispensable and without it peacekeeping would not be feasible because states – the only source of military personnel for UN peacekeeping- would not contribute their soldiers.¹⁵⁸ As discussed, TCC's would most likely not participate in peacekeeping if they did not have exclusive jurisdiction over their soldiers, as doing so would potentially compromise the independence of their military and thus their sovereignty.¹⁵⁹ If this immunity was waived, states would withdraw their troops and peacekeeping would become impossible. On one hand the immunity makes the peacekeeping missions feasible and on other hand it renders the missions ineffective by fostering lack of accountability. This is indeed a dilemma because waiving the immunity so as to enhance the effectiveness of the missions would render the missions impossible. MONUSCO and MINUSCA are necessary in order to ensure the safety of vulnerable civilians in the face of weak governments¹⁶⁰ and they cannot be done away with. The immunity is a necessary evil because without MONUSCO and MINUSCA, the civilians in the DRC and the CAR would be vulnerable to insecurity posed by civil war and thus be in a worse position than they are now, even despite the abuse by peacekeeping soldiers. This means that any measures taken to foster accountability of the soldiers for abuse of civilians cannot include the waiver of the immunity. Instead, any such measure must examine and address the 3 factors that make immunity problematic in holding peacekeeping soldiers accountable for abuse of civilians.

Some have suggested that the establishment of an international tribunal that would have the jurisdiction to try peacekeeping military personnel accused of abusing civilians would ensure

¹⁵⁸ See page 10-22.

¹⁵⁹ Hunter L, 'Should we prosecute the protectors? Holding peacekeepers accountable in cases of sexual exploitation and abuse' 1(1) *Carleton Review of International Affairs*, 2009, 19.

¹⁶⁰ Baaz M and Verweijen J, 'The volatility of a half-cooked bouillabaisse: Rebel–military integration and conflict dynamics in the eastern DRC' 112(449) *African Affairs*, 2013.

accountability.¹⁶¹ However, this study found that such a tribunal most likely not be feasible as it would threaten the sovereignty of sending states in the same manner that waiving the immunity of the peacekeeping soldiers would. As such it could result in the withdrawal of troops by many TCC's. Even if it were feasible, it would face challenges similar to those being faced by the current system in ensuring accountability. Such a tribunal would not necessarily be impartial and its collection of evidence would be compromised by territorial barriers and political interests.

Nevertheless, the proposal by the UN Secretary General to establishment of onsite court martials in the host state by each TCC to deal the allegations of sexual abuse of civilians against its military personnel¹⁶², though not a perfect solution, would address the 3 factors that make the current system inefficient and thus is the most adequate way of ensuring that peacekeeping soldiers are adequately held accountable for their abuse of civilians. This would lift the territorial barriers that compromise the collection of evidence and because court martials typically operate under specialised laws, all sending sates would be required to adequately legislate for the prosecution of peacekeeping soldiers who abuse civilians.¹⁶³ Thus the problem of inadequacy of laws would be solved. Moreover, a court martial would ensure that TCC's retain the exclusive jurisdiction over their military personnel and thus this is a feasible and sustainable solution.

Because of the extensiveness and grotesque nature of the abuses of civilian's peacekeeping military personnel, especially in the DRC and the CAR, some human rights activists have called on the International Criminal court to prosecute the perpetrators of the abuse.¹⁶⁴ A study on the feasibility and legality of this proposal would be recommended, to determine whether the abuses and the peacekeeping military personnel fall under the jurisdiction of the ICC.

¹⁶¹ Leck C, 'International Responsibility in United Nations Peacekeeping Operations', 356.

¹⁶² UNGA, *Special measures for protection from sexual exploitation and sexual abuse*, para 68.

¹⁶³ See page 27.

¹⁶⁴ Vezina R, 'Combating Impunity in Haiti: Why the ICC Should Prosecute Sexual Abuse by UN Peacekeepers' *Ave Maria International Law Journal*, 2012, 445-460—<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239478>on 28 December 2017.

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