



**THE INTERNATIONAL LEGAL RESPONSIBILITY OF UN  
PEACEKEEPERS TO PROTECT CIVILIANS AGAINST CRIMES  
IN HOST STATES: CHALLENGES AND PROSPECTS OF  
PROSECUTING THEIR FAILURES AND OTHER CRIMINAL  
ACTS**

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## **Dedicated to the innocent souls of**

civilians who have lost their lives or whose dignity has been violated owing to the failure of United Nations peacekeeping forces to discharge their duty to protect civilians in the host states

and those United Nations peacekeeping personnel who have sacrificed their lives on duty fighting insurgents to protect civilians in the host states.

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## **Abstract**

Throughout history, humanity has experienced, and is still suffering from, crimes committed during armed conflicts, which invariably make innocent and unarmed civilians the main victims. Of many other wartime sufferings endured by these civilians, their suffering caused by the failure of the United Nations (UN) peacekeeping operations in the host states has become a daunting challenge for the UN. This problem has emerged after the failure of the UN peacekeeping forces to prevent genocides in Rwanda in 1994 and Srebrenica in 1995, which caused hundreds of thousands of civilian lives to be lost. Despite serious efforts by the UN and international community to resolve this problem, the commission of crimes against civilians, such as killings, rapes and sexual violence, and violations of their human rights, by some of the UN peacekeepers and local army and/or insurgents (third parties) remain serious problems. After decades of genocides, the UN peacekeepers are still failing to protect civilians under the UN peacekeeping mandates. Concrete measures are lacking to address the failure of the UN peacekeepers to prevent crimes against civilians in many UN peacekeeping operations.

This thesis singles out and examines the failures of the UN-mandated peacekeeping missions to protect civilians from atrocity crimes committed by some of the UN peacekeeping personnel and third parties in the host states. In particular, it focuses on the UN peacekeeping operations in the Congo and South Sudan to analyse the reasons for their failures, which is the first step in determining whether the incidents of these crimes are deliberate neglect or the outcomes of inability to prevent their commission. These two case studies would help suggest a suitable strategy to prevent prospective offenders from targeting civilians and determine the jurisdictional gaps that must be

bridged and the shortcomings of the UN peacekeeping operations to be addressed. These issues are critically analysed in a bid to answer the central research question of the thesis: How can UN peacekeeping operations be conducted more effectively to provide adequate civilian protection in the host states? The thesis explains the reasons that the protection of civilians during the UN peacekeeping operations is paramount and must be addressed urgently; the duties of UN peacekeeping forces and the reasons they go unpunished when they neglect their duty; and the legal steps required to establish an accountability regime within the UN.

By way of improving the protection of civilians in armed conflicts, the thesis recommends some measures to be adopted, including (a) scrapping the impunity of the UN peacekeepers when they themselves commit crimes or deliberately neglect their duty to prevent the crimes being committed by third parties against civilians that they are mandated to protect; (b) examining whether their immunity can be waived to prosecute them if their failure is considered a crime; (c) criminalising their deliberate neglect as a crime of omission to ensure that the UN peacekeepers are aware that they will be held responsible for their own criminal conducts and for not preventing criminal activities against civilians by the third parties; (d) prescribing legal ways to criminalise the failure in duty as a crime of omission; and (e) establishing an independent judicial body with necessary jurisdiction to prosecute those responsible.

The thesis purports to challenge the status quo of UN impunity for its peacekeeper perpetrators prevailing over justice to victims in an era when immunity is no defence against gross violation of human rights and dignity amounting to heinous crimes in international law.

### **Statement of Originality**

This work has not previously been submitted for a degree or diploma in any university.

To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Tareq Hamid Al-Fahdawi

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## **List of Abbreviations**

CAR	Central African Republic
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
FDLR	Democratic Forces for the Liberation of Rwanda
HRW	Human Rights Watch
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGAD	Intergovernmental Authority on Development
IHL	International humanitarian law
IHR	International human rights law
LOAC	Law of Armed Conflict
M23	23 March Movement
MINUSCA	UN peacekeeping mission in CAR
MONUC Congo	UN peacekeeping mission in the Democratic Republic of the Congo
MONUSCO	UN Organization Stabilization Mission in the DRC
ROE	Rules of engagement
SEA	Sexual exploitation and abuse
SOFA	Status of Forces Agreement
SPLA	Government's Sudan People's Liberation Army
SPLAIO	pro-Machar Sudan People's Liberation Army in Opposition
SPLM	Sudan People's Liberation Movement
UNAMIR	United Nations Assistance Mission for Rwanda
UNMISS	United Nations Mission in the Republic of South Sudan
UNOSOM I	First UN peacekeeping mission in Somalia
UNSC	United Nations Security Council
US	United States

## **List of International Statutes/ Instruments**

*Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*, signed 17 November 2008, ILM (entered into force 1 January 2009)

*Agreement on Military Exchanges and Visits between the Government of the United States of America and the Government of Mongolia*, signed 26 June 1996

*Agreement on the Status of the United Nations Assistance Mission for Rwanda* (UNAMIR), No. 30482 (signed and entered into force 5 November 1993)

*Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)

*Convention on Cluster Munitions* that prevents the use of cluster munitions owing to the random killing of civilians. *Convention on Cluster Munitions*, open for signature 30 May 2008 (entered into force 1 August 2010)

*Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) ('General Convention')

*Convention on the Safety of United Nations and Associated Personnel*, GA Res 49/59, UN GAOR, 84<sup>th</sup> plen mtg, UN Doc A/RES/49/59 (9 December 1994)

*Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, St. Petersburg, 29 November – 11 December 1868.

*European Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 November 1950, ETS 5 (entered into force 3 September 1953)

*Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, open for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950)

*Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, open for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950)

*Geneva Convention (III) Relative to the Treatment of Prisoners of War*, open for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950)

*Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

*Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, open for signature 18 October 1907 (entered into force 26 January 1910)

*International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

*Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel*, GA Res 60/42, UN GAOR, 60<sup>th</sup> sess, 8<sup>th</sup> plen mtg, Agenda Items 83, UN Doc A/RES/60/42 (6 January 2006)

*Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978)

*Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978)

*Rome Statute of the International Criminal Court*, open for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002)

*The US-Afghan Bilateral Security Agreement*, opened for signature 6 April 2002 (signed and entered into force 13 April 2002)

*Vienna Convention on Diplomatic Relations*, opened for signature 14 April 1961 (signed and entered into force 24 April 1964)

*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 3311 (entered into force 27 January 1980)

*Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1986, UN Doc A/CONF.129/15.

## List of Cases

*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226

*Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998)

*Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998)

*Prosecutor v Jean-Bosco Barayagwiza et al (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-99-52-A, 28 November 2007)

*Prosecutor v Jean Mpambara (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-01-65-T, 11 September 2006)

*Prosecutor v Jean-Pierre Bemba Gombo (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016)

*Prosecutor v MRKSIC et al (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-95-13/1-A, 5 May 2009)

*Prosecutor v Simon Bikindi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-72, 2 December 2008)

*Prosecutor v Tadic (Appeals Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-94-1-A, 15 July 1999)

*Prosecutor v Mile Mrksic Veselin Sljvancanlin* (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-95-13/1-R.1, 8 December 2010)

*Prosecutor v Zlatko Aleksovski (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY- IT-95-14/1-T, 24 March 2000)

*Prosecutor v. Radoslav Brdanin (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-T, 9 December 2003)

*Prosecutor v. Zdravko Mucic et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 8 April 2003)

*Prosecutor v. Zejnil Delalic et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-A, 20 February 2001)

*Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174



*Prosecutor v. Zejnil Delalic et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998)

*Prosecutor v Tihomir Blaskic (Appeals Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY-IT-95-14-A, 29 July 2004)

### **Other Cases**

*Al-Skeini and Others v. UK*, (2011) Appl. No. 55721/07

*Bankovic v. Belgium and 16 Other Contracting States* (2001) Appl. No. 52207/99

*R v Dytham* (1979) QB 722

*R v Stone and Dobinson* (1977) QB 354

*R v Pittwood* (1902) TLR 37

*United States, Appellee, v. Frank J. RONGHI* (2004) Appellant, 60 M.J. 83

# Chapter 1

## Introduction

### 1.1 Background

‘[I]f the rule of law means anything at all, it means that no one, including peacekeepers, is above the law’<sup>1</sup>

The crimes of the United Nations (UN) peacekeepers, and/or national armies<sup>2</sup> and insurgents (the third parties)<sup>3</sup> against civilians in the UN peacekeeping operation areas have been some of the most serious crimes in recent years because of the increasing number of victims.<sup>4</sup> In response to these crimes, the protection of civilians has been mandated by the United Nations Security Council (UNSC) in most of the UN peacekeeping operations.<sup>5</sup> These mandates are based on a broad range of obligations under *jus ad bellum*, the UN Charter, international humanitarian law (IHL) and international human rights (IHR) law.<sup>6</sup> Although this mandate has included military

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<sup>1</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004) para 33.

<sup>2</sup> Several cases involve national armies committing crimes against the people of their own countries, such as the crimes committed by the army of the South Sudanese against their civilians. In addition, see: United Nations, ‘UN report details “devastating cruelty” against the Rohingya population in Myanmar’s Rakhine province’, *UN News* (online) 3 February 2017). <<http://www.un.org/apps/news/story.asp?NewsID=56103#.WLaGrfl96Uk>> (accessed 1 March 2017).

<sup>3</sup> The three main elements in the host states are the UN peacekeeping forces, civilians and third parties represented by insurgents and the national army of the host states.

<sup>4</sup> For example, the crimes committed by the insurgent groups in the Congo and South Sudan, where numerous civilians were killed.

<sup>5</sup> UN Security Council Resolution 1289. *The Situation in Sierra Leone*, SC Res 1289, UN SCOR, 4099<sup>th</sup> mtg, UN Doc S/RES/1289 (7 February 2000). This resolution included one of the main important mandates to take necessary action to ensure the security and freedom of Sierra Leone. In addition, the protection of civilians, including protection from violations of IHL and IHR abuses: *The Situation concerning the Democratic Republic of the Congo*, SC Res 1925, UN SCOR, 6324<sup>th</sup> mtg, UN Doc S/RES/1925 (28 May 2010) art 12(c).

<sup>6</sup> Although the UN General Assembly has adopted a number of resolutions that IHL is the same as IHR, it cannot be the same owing to the application in different circumstances, such as the basic principles for the protection of civilian populations in armed conflicts, GA Res/25/2675 (09 Dec 1970), and respect for human rights in armed conflicts, GA Res/25/2676 (09 Dec 1970). For more information, see Siobhán

intervention for the protection of civilians, in numerous cases the UN peacekeeping forces cannot protect, or fail to protect, them. In these instances, the third parties or/and the UN peacekeepers have committed violations and crimes against civilians, often with impunity. This study will address not only the dilemma of the crimes committed by the third parties, but also the responsibility of the UN peacekeeping forces and the legal consequences and accountability of their failure to protect civilians.

The response to preventing crimes in the host states became especially critical after the failure of the UN peacekeeping forces to prevent genocides in Srebrenica in 1995<sup>7</sup> and Rwanda in 1994.<sup>8</sup> The former Secretary-General launched a panel to investigate this failure of the UN peacekeepers in the host states and to determine ways to prevent such crimes.<sup>9</sup> The UN adopted the panel's report, which mentions that the use of force is important to prevent any violation in the host states.<sup>10</sup> Since then, the UN peacekeepers are responsible for any crimes that may be committed against civilians.<sup>11</sup> Nonetheless, third parties still commit crimes against civilians, although the UN peacekeeping forces

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Wills, *Protecting Civilians: The Obligations of Peacekeepers* (Oxford University Press, 2009) 111. Notably, the UN Security Council authorised use of force for self-defence in two exceptions: the main right to intervene to promote or restore democracy and the right to prevent serious human rights abuses or any violation to IHL. For more information, see Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Douglas & McIntyre, 2005) 85.

<sup>7</sup> *Report of the UN Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, 54<sup>th</sup> sess, Agenda Item 42, UN Doc A/54/549 (15 November 1999).

<sup>8</sup> United Nations, *Report of the Independent Inquiry into the Actions of the UN During the 1994 Genocide in Rwanda* <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>> (accessed 07 April 2017).

<sup>9</sup> Wills, *Protecting Civilians*, above n 6, 40.

<sup>10</sup> *Report of the Panel on United Nations Peace Operations* ('Brahimi Report'), UN Doc A/55/305 - S/2000/809.

<sup>11</sup> *Ibid* 48–64.

have the responsibility and ability in most cases to protect civilians in their host states.<sup>12</sup> Therefore, the problem of continuing crimes against civilians raises the question whether the UN peacekeeping forces have the responsibility of protecting civilians in the host states or not. If they have, the obvious question is: What is their accountability for deliberate failures?

The success of the UN peacekeepers as regards their duties to protect civilians in the host states is important owing to the belief that if the UN peacekeeping forces fail, civilians will be a target for the third parties or other criminal elements. The targeting of civilians has confirmed that upholding IHR is the most vital mandate for the UN peacekeeping operations;<sup>13</sup> however, it will not be enough without accountability for any human rights violations that the third parties or the UN peacekeepers themselves may commit. Therefore, the question here is how civilians of the host states can be protected from the third parties. The absence of responsibility to protect and be held accountable for failure may result in the failure of the UN peacekeeping operations. Such failures are likely to create disorder and lawlessness followed by a chain of unwanted criminal consequences of the rampant commission of mass atrocities and other crimes by the third parties.<sup>14</sup> In addition, crimes by the UN peacekeepers will be taken into consideration in this thesis to explore their accountability when they commit

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<sup>12</sup> *Mandate for MONUC (UN Organization Mission in the Democratic Republic of the Congo)*, SC Res 1291, UN SCOR, 4104<sup>th</sup> mtg, UN Doc S/RES/1291 (24 February 2000); *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1493, UN SCOR, 4797<sup>th</sup> mtg, UN Doc S/RES/1493 (28 July 2003).

<sup>13</sup> Erin A Weir, *Greater Expectations: UN Peacekeeping & Civilian Protection* (Refugees International, 2009) 4.

<sup>14</sup> Martin Tsamenyi, Sam K N Blay and Robert W Piotrowicz, *Public International Law: An Australian Perspective* (Oxford University Press, 2005) 246.

an unlawful act against civilians and its effect on the protection of civilians.<sup>15</sup> The UN peacekeepers have been involved in numerous cases of sexual exploitation and abuse (SEA) against women and children in the host states in different operations of the UN peacekeeping forces.<sup>16</sup>

In 2014, allegations were raised that the UN peacekeepers in the Central African Republic (CAR) exploited their position and the need of civilians for food or money to subject a large number of young children to SEA. Although these behaviours are totally prohibited under international and domestic laws alike, no necessary steps were taken against those committing these misconducts and or to report these allegations to the UN.<sup>17</sup> In 2014, in the same host state CAR, three girls were forced by a French military commander in 2014 to have sex with a dog, and in 2016, a child was raped and sexually abused by UN and French peacekeepers, and others. In 2017 and in the first half of 2018, there were 156 cases reported of SEA by UN personnel, including of child victims

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<sup>15</sup> For example, regarding the common crimes that UN peacekeepers may commit against civilians in host states, recently, in March 2016: 'More than 100 girls and women have come forward with new sexual abuse accusations against international peacekeepers in Central African Republic, the UN said Thursday, calling allegations that a French military commander forced three girls to have sex with a dog "shocking to the core".' For more information, see: Edith M Lederer, 'UN Announces 108 New Alleged Sexual Abuse Victims in Central African Republic', *The Stream* (online), 31 March 2016 <<https://stream.org/un-announces-108-new-alleged-sexual-abuse-victims-central-african-republic/>>(accessed 21 July 2017); <<http://www.apnewsarchive.com/2016/More-than-100-girls-and-women-have-come-forward-with-new-sexual-abuse-accusations-against-international-peacekeepers-in-Central-African-Republic-the-UN-said-Thursday-and-3-girls-allege/id-5ed90531849c479ba116b3de2189a3d2>> (accessed 21 July 2017).

<sup>16</sup> The term 'sexual exploitation' means 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. See Kofi A Annan, *The UN Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003).

<sup>17</sup> Marie Deschamps, Hassan B Jallow and Yasmin Sooka, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers' (2015) 13 *Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic* (United Nations, DPKO: New York, 15 December 2015) para 1, i.

in 46 cases.<sup>18</sup> In another incident, during the UN peacekeeping mission in the Democratic Republic of the Congo (DRC), UN personnel part of the United Nations Mission in the Democratic Republic of Congo (MONUC) committed many SEA acts by exploiting the position and needs of the people, especially women.<sup>19</sup> Such crimes have been committed in many operations by the UN peacekeeping forces, but those in the DRC by MONUC personnel are significantly higher than elsewhere.<sup>20</sup> In 2018, an allegation was raised in South Sudan against the UN peacekeepers who had engaged in sexual activity with women living at the UN-protected civilian site in Wau.<sup>21</sup> In these cases, the UN peacekeepers, based on their mandates and IHL, had the responsibility to protect civilians from any crimes that may be committed, but they failed in their duty and the crimes did not stop.

Focusing on the crimes by the third parties and the responsibility of UN peacekeeping forces is crucial to prevent any offences against civilians. These problems and especially the failure of the UN peacekeeping forces to prevent misconducts against

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<sup>18</sup> *Sexual Exploitation and Abuse* <<https://conduct.unmissions.org/sea-victims>>. See also *Conduct in UN Field Missions*, <<https://conduct.unmissions.org/sea-victims>> (accessed 27 April 2018). See also *Supplementary Information to the Annual Report of the Secretary-General on 'Special Measures for the Protection from Sexual Exploitation and Abuse'* (A/72/751) <[https://conduct.unmissions.org/sites/default/files/dfs\\_supplementary\\_information\\_to\\_a-72-751.pdf](https://conduct.unmissions.org/sites/default/files/dfs_supplementary_information_to_a-72-751.pdf)> (accessed 20 December 2018).

<sup>19</sup> Sara Meger, 'Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo' (2010) 28(2) (2010/04/01) *Journal of Contemporary African Studies* 119, 126; *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 65<sup>th</sup> sess, Agenda Item 134, UN Doc A/65/742 (18 February 2011) para 9.

<sup>20</sup> *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 64<sup>th</sup> sess, Agenda Item 137 and 146, UN Doc A/64/669 (18 February 2010) para 9; *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 63<sup>rd</sup> sess, Agenda Item 123 and 132, UN Doc A/63/720 (17 February 2009) para 9.

<sup>21</sup> *UNMISS Acts on Allegations of Sexual Exploitation against Formed Police Unit* <<https://unmiss.unmissions.org/unmiss-acts-allegations-sexual-exploitation-against-formed-police-unit>> (accessed 20 December 2018).

civilians have caused the deaths of more than 35 000 civilians in the host states of Sudan and the DRC alone since 1990.<sup>22</sup> For example, in an attack in the DRC in 2014, insurgent groups killed 33 civilians.<sup>23</sup> The UN peacekeeping forces in the region did not respond even though the offensive on the camp occurred close to their base.<sup>24</sup> In July 2016, the UN peacekeepers refused to protect civilians during the fighting in South Sudan.<sup>25</sup> In most of the cases discussed in this study, the UN peacekeeping forces remained at their bases, rather than protecting civilians or achieving their obligations according to international law.

It is in the above context that this thesis raises the most important question based on the failure of UN peacekeeping forces: Are they criminally responsible for their failures and, if they are responsible, why they have gone unpunished? This thesis will also examine the reasons the third parties are still committing crimes against civilians without any intervention from the UN peacekeepers, even though the *Brahimi Report*

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<sup>22</sup> Paul D Williams, 'Enhancing Civilian Protection in Peace Operations: Insights from Africa' (2010) English (1) *Africa Center for Strategic Studies Research Papers* I, 20.

<sup>23</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC S/PV.7237, 7237<sup>th</sup> mtg, UN Doc S/PV./7237 (2014).

<sup>24</sup> Martin Kobler, the Head of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), noted that the UN peacekeepers failed to protect the refugee camp and they have not been held accountable for this failure. *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC S/PV.7237, 7237<sup>th</sup> mtg, UN Doc S/PV./7237 (2014).

<sup>25</sup> The government's soldiers and the opposition groups have 'committed widespread sexual violence against women who left those camps in search of food, and attacked international and national aid workers in a hotel and apartment complex'. All these crimes were in the area of UN peacekeeping forces, but they refused to intervene to protect the victims although protection is one of their primary duties. For more information, see Center for Civilians in Conflict, *Under Fire: The July 2016 Violence in Juba and UN Response* (5 October 2016) <<http://civiliansinconflict.org/resources/pub/under-fire-the-july-2016-violence-in-juba-and-un-response>> (accessed 11 March 2017). See also Jason Burke, 'UN Peacekeepers Refused to Help as Aid Workers were Raped in South Sudan – Report', *The Guardian* (online) 6 October 2016 <<https://www.theguardian.com/world/2016/oct/06/un-peacekeepers-refused-to-help-south-sudan-rebels-raped-aid-workers-report>> (accessed 11 March 2017).

states that the UN peacekeepers can use force to protect civilians.<sup>26</sup> The statement of responsibility and the international law perspective are crucial to show how they can be held responsible for their failure.<sup>27</sup> This thesis will also analyse international criminal liability for the sexual crimes and wilful killings that have been committed by the third parties and the UN peacekeepers against civilians.

The argument of this thesis is that if there is a responsibility to protect, there must be accountability for failures. If there is no accountability for the UN peacekeepers when they refuse, neglect and fail to protect civilian population, civilians can be an easy target for criminals and the very purpose of the UN peacekeeping operations is frustrated. In this respect, this thesis will examine the legal nature of the UN peacekeeping responsibility and will identify the type of accountability that the UN peacekeepers may incur because of the non-performance of their assigned and assumed responsibility.

The thesis will analyse its arguments through the illustration of the Rwandan genocidal mass killings and civilian massacre during the Bosnian war in which the UN peacekeepers failed to protect the unarmed and innocent civilian people who became the soft target of a surge of ugly nationalist and racist sentiments and desperately required protection.<sup>28</sup> Then the Secretary-General Kofi Annan argues that the failure

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<sup>26</sup> *Brahimi Report*, UN Doc A/55/305 - S/2000/809, 48–64.

<sup>27</sup> For instance, the failure of UN peacekeeping forces to protect civilians in Rwanda and Yugoslavia. Regarding the failure to protect civilians from insurgent groups, see: *Report of the UN Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, 54<sup>th</sup> sess, Agenda Item 42, UN Doc A/54/549 (15 November 1999), para 49. Regarding the genocide committed by insurgent groups in Rwanda, see: *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, S/1999/1257, 16 December 1999, paras 50–2.

<sup>28</sup> Nicole Winfield, 16 December 1999, *UN Failed Rwanda* <<https://www.globalpolicy.org/component/content/article/201-rwanda/39240.html>> (accessed 6 March 2017).



during these cases was the result of UN peacekeeping mission having an insufficient mandate to protect civilians in Rwanda, and the refusal of the UNSC to strengthen this mandate.<sup>29</sup> However, the UN peacekeepers currently have the authorisation to use force, which is the reason that any offence committed during the UN peacekeeping operations must be the responsibility of the UN peacekeepers.

These points indicate the need for reforms in the laws that govern the responsibilities of the UN peacekeepers to protect civilians and prevent their suffering. This thesis will address the problems related to the crimes of the third parties in the host states by analysing all aspects of the legal system that relate to the host states' area.<sup>30</sup> This will be achieved via examination of the ways that civilians can be protected from the crimes of the third parties and the discussion of methods to address the legal gaps that allow them to commit these crimes.

The case studies for this thesis will be offences committed by the third parties, in addition to SEA committed by the UN peacekeepers against civilians during the UN peacekeeping operations. The first case will be the attack by insurgents on the refugee camp in the DRC, and the second will be the refusal by the UN peacekeepers to protect civilians in South Sudan from government soldiers. These examples will be used to explain the responsibility of the UN peacekeepers and that a legal mechanism for their accountability is required for civilian protection. The central legal gap identified in this thesis is that there is no accountability for the crimes by the third parties or the failure of the UN peacekeepers to protect civilians. In addition, the legal system for UN peacekeeping forces focuses only on crimes committed directly by the UN

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<sup>29</sup> Ibid.

<sup>30</sup> 'All aspects of the legal system that relate to the host states' area' means the jurisdiction of host countries, home states and international jurisdiction.

peacekeepers, without any mention of their responsibility and accountability for their failure to perform their obligations to accomplish the mandated operation. For these reasons, focusing on the effects of the failures of the UN peacekeepers is important, because there is no guarantee that the UN peacekeeping forces will accomplish their duties if they are not held accountable for their failure to fulfil their responsibilities in a given mission.

Therefore, this thesis will essentially be a study of the responsibility of the UN peacekeepers and their accountability for failing in their obligations. Finally, the thesis will offer certain innovative recommendations towards creating a legally subsumable accountability regime to maximise the accomplishments of the UN peacekeeping operations, or at least minimise the instances of failures that are more often than not caused by gaps and caveats in their legal mandates.

### **1.1.1 Protection of civilians**

According to the UNSC, in the mandates of the UN peacekeeping operations, the protection of civilians can be defined as ‘all necessary action, up to and including the use of force, aimed at preventing or responding to threats of physical violence against civilians, within capabilities and areas of operations, and without prejudice to the responsibility of the host government to protect its civilians’.<sup>31</sup> Since this definition must be adopted in all UN peacekeeping missions, the UN peacekeepers must prevent the third parties from committing any misconduct and atrocities against civilians.

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<sup>31</sup> United Nations Department of Peacekeeping Operations, *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions* <<http://dag.un.org/bitstream/handle/11176/89597/2015.02%20POCGuidelinesforMilComp%20OMA%20Feb15%20Guidelines.pdf?sequence=19&isAllowed=y>> (accessed 26 March 2017).

In addition, many resolutions of the UNSC expressly refer to the protection of civilians during the UN peacekeeping operations. As an example of a resolution that focuses on the protection of civilians, in 2010, UNSC Resolution 1925 was adopted to protect civilians in the DRC by supporting the government of the DRC to protect civilians ‘from violations of IHL and human rights abuses’. The resolution included a ‘zero-tolerance policy’ regarding violations of human rights and humanitarian law.<sup>32</sup>

### **1.1.2 The UN peacekeeping forces**

The UN peacekeeping forces were established by the international community to restore international peace owing to the complexity of global security and the increasing conflicting interests among the UN member states and the non-member states.<sup>33</sup> The first deployment of the UN peacekeeping forces was in 1948 in the Middle East during the Arab–Israel war. To date, the UN has deployed more than 70 peacekeeping missions worldwide.<sup>34</sup> The UN experienced some problems during the establishment of the UN peacekeeping operations, and most of these problems were logistical. One problem was regarding the UN’s provision of personnel to participate in the UN peacekeeping activities, since it does not have an army.<sup>35</sup> In response to this dilemma, the UN resolved to choose peacekeepers from its member states under Article 43 (1) of *the Charter of*

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<sup>32</sup> *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1925, UN SCOR, 6324<sup>th</sup> mtg, UN Doc S/RES/1925 (28 May 2010) art 12(c).

<sup>33</sup> United Nations Office of Public Information, *The Blue Helmets: A Review of United Nations Peacekeeping* (United Nations, Dept. of Public Information, 1985) 3. See also Trevor Findlay, *The Use of Force in UN Peace Operations* (Stockholm International Peace Research Institute, 2002) 4.

<sup>34</sup> United Nations, Historical Timeline of UN Peacekeeping, *United Nations Peacekeeping* <<https://peacekeeping.un.org/en/historical-timeline-of-un-peacekeeping>> (accessed 7 December 2019).

<sup>35</sup> Olivera Simic, *Regulation of Sexual Conduct in UN Peacekeeping Operations* (Springer, 2012) 26.

*the United Nations*.<sup>36</sup> This resolution enabled the UN to gather enough troops to send to conflicted regions without recruiting an army of its own.

Currently, there are 125,000 peacekeeping personnel from member states operating 16 missions globally.<sup>37</sup> The peacekeeping personnel include individuals from different professions and training, although the majority of them are disciplined forces. They include military personnel, police and international officials. Military personnel number 92,628, police 13,181 and foreign officials 16,930.<sup>38</sup>

### **1.1.3 Principles of the UN peacekeepers**

Although the deployment of the UN peacekeepers occurs under the umbrella of the UN and the international community, the UNSC explained that three basic principles must be applied in their mission to be eligible to work in the host state.<sup>39</sup> These basic principles are the consent of the parties,<sup>40</sup> impartiality of the UN peacekeepers and the non-use of force except in self-defence and defence of the mandate.<sup>41</sup> Impartiality is

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<sup>36</sup> *What is Peacekeeping? United Nations Peacekeeping* <<https://peacekeeping.un.org/en/what-is-peacekeeping>> (accessed 7 December 2019).

<sup>37</sup> United Nations, *Partnerships, United Nations Peacekeeping* <[http://www.un.org/en/peacekeeping/images/PKD\\_Infographic\\_web.jpg](http://www.un.org/en/peacekeeping/images/PKD_Infographic_web.jpg)> (accessed 8 March 2017).

<sup>38</sup> Ibid.

<sup>39</sup> UN Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (United Nations, Department of Peacekeeping Operations, 2008) 31.

<sup>40</sup> Consent is important for the UN peacekeeping forces when deployed in the host states, but there are three 'different levels of consent' that could be given by the conflicting parties: It could be full consent, where all of the parties to the conflict accept the UN peacekeeping operation; legal consent, where the UN peacekeeping operation is established by the UN (such as in the case of Bosnia) or non-consent, such as in the case in Somalia where none of the parties consented to the UN peacekeeping operation. For more information, see Letter dated 24 July 1992 from the representatives of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama to the United Nations addressed to the UN Secretary-General, UN GAOR, 46th sess, Agenda Item 31, UN Doc A/46/954 (28 July 1992); and Duane Bratt, 'Explaining Peacekeeping Performance: The UN in Internal Conflicts' (1997) 4(3) *International Peacekeeping* 45, 47.

<sup>41</sup> *United Nations Peacekeeping Operations: Principles and Guidelines* (United Nations, Department of Peacekeeping Operations, 2008) 31. See also *What Is Peacekeeping? United Nations Peacekeeping* <<https://peacekeeping.un.org/en/what-is-peacekeeping>> (accessed 7 December 2019).

considered essential for the UN peacekeepers' work with the conflicting parties, and neutrality for the application of their responsibility.<sup>42</sup> When the UN peacekeepers are not impartial, they cannot achieve their duty of protecting civilians non-discriminatorily and may not be able to bring peace and stability to the host state.

The use of force during the UN peacekeeping operation is limited and must be carried out according to authorisation from the UNSC. Most of these operations against the insurgent groups are intended to bring peace and stability to the host state.<sup>43</sup> The UNSC can take measures when it finds any threat to international peace and security under Chapter VII (Articles 39–42 in particular) of *the Charter of the United Nations*, although Article 2(4) of *the Charter of the United Nations* prohibits the use of force. For instance, the UNSC adopted Resolution 1373 for Libya in 2011, which authorised the international community to use force to protect civilians according to Chapter VII of *the Charter of the United Nations*. Accordingly, the use of force was allowed in response to an armed attack on civilians to protect them.<sup>44</sup> However, civilians were still attacked, and the UN peacekeeping forces did not take the necessary action to prevent the crimes against them.<sup>45</sup>

## 1.2 Objectives of the study

This study aims to show there is no real protection for civilians from attacks of the third parties in the host states, and that civilians require necessary protection. For this

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<sup>42</sup> Dominick Donald, 'Neutrality, Impartiality and UN Peacekeeping at the Beginning of the 21st Century' (2002) 9(4) *International Peacekeeping* 21, 24.

<sup>43</sup> United Nations, *What Is Peacekeeping? United Nations Peacekeeping* <<http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml>> (accessed 9 March 2017).

<sup>44</sup> Marrack Goulding, 'The Use of Force by the United Nations' (1996) 3(1) *International Peacekeeping* 1, 7.

<sup>45</sup> Gregory L Naarden and Jeffrey B Locke, 'Peacekeeping and Prosecutorial Policy: Lessons from Kosovo' (2004) 98(4) *American Journal of International Law* 727, 778.

purpose, this thesis will examine the responsibility of the UN peacekeepers, their duties in the host states and their accountability if any. Responsibility without accountability and the jurisdictional gap allow the UN peacekeepers to go unpunished for their failure and/or neglect of duties. This thesis provides a better understanding of the UN peacekeeping law and how the crimes of the third parties have contributed to the failures of the UN peacekeeping missions. The specific objectives are:

- 1- To articulate and analyse the accountability of the UN peacekeeping forces in performing their duties in the host states;
- 2- To explain how the immunity of the UN peacekeepers can affect the safety of civilians in the host states;
- 3- To show that the lack of accountability for peacekeepers can be harmful and could increase the crimes of the third parties against the population of the host states;
- 4- To examine whether the UN peacekeepers can be held accountable for their crimes and the crimes committed by the third parties in the DRC and South Sudan; and
- 5- To consider the challenges and prospects of the application of the criminal jurisdiction of the host state if the UN peacekeepers themselves are involved in committing crimes within the territorial jurisdiction of the host states.<sup>46</sup>

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<sup>46</sup> The prosecution of UN peacekeepers under their home states' law may create a jurisdiction gap because some states, such as New Zealand, do not have jurisdiction over unlawful acts if committed out of their territory. For more information: UNGA Legal Committee, 'Jurisdictional Gaps' Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions', GA/L/3342 (10 October 2008).

### **1.3 Scope of the thesis**

This thesis limits its scope to a critical examination of the responsibility of the UN peacekeeping operations and the UN peacekeepers and their accountability regime for the failure of performing this responsibility. It is limited to two types of crimes committed by the UN peacekeepers in the host states: (a) direct criminal acts, such as rapes and sexual violence, killings and other exploitations of their position; and (b) the crimes of omission committed when they neglect their duty to protect civilians from the crimes of the third parties (national army personnel and local insurgents of the host states). This study covers only the criminal conducts and associated criminal responsibility, and the prosecution of the UN peacekeepers to the exclusion of the crimes committed by the third parties, who are subject to the national law and jurisdiction of the host states.

Moreover, this study does not deal with the implementation/enforcement aspect of the accountability regime. The main reasons are twofold. First, the implementation/enforcement aspect squarely falls within the mandate of the UNSC, which has existing implementation/enforcement mechanisms. Second, whether the existing implementation/enforcement mechanisms are resorted to is largely a political decision of the UNSC, which is an inherent decision-making problem of the UNSC. Such decisions are made almost entirely based on the geopolitics, geo-economics and strategic interests of UNSC members, particularly the veto-wielding five permanent members who pursue, more often than not, their competing and conflicting self-interest beyond the realm of international law and the UN Charter.

The permanent members can halt any resolution in regard to their own the UN peacekeeping forces and those of their allies. For this reason, immunity was granted for the UN peacekeepers in numerous missions because their home states threatened to veto

the renewal of all the UN peacekeeping operations unless their contingents were granted immunity. For example, the veto threat of the US compelled UNSC Resolution 1422 on 12 July 2002, which granted immunity to the US troops for 12 months and this immunity had to be renewed in 2003.<sup>47</sup> In 2004, after the worldwide publication of widespread abuses and tortures of the Iraqi prisoners in the Abu Ghraib jail, the UNSC did not renew this immunity any further. The US continued this campaign of immunity for its peacekeepers at the International Criminal Court (ICC) and signed bilateral agreements with the ICC state parties not to surrender its peacekeepers to the ICC for the commission of crimes in the UN peacekeeping operation areas.<sup>48</sup>

#### **1.4 Significance of the study**

The thesis will make a significant contribution to research because it will provide relevant information that relates to the relationship between the UN peacekeepers and the safety of civilians. The legal gaps in UN regulations of the UN peacekeepers in the host states will be addressed in this thesis. Additionally, the thesis will establish the procedure that should be followed by the UN peacekeepers and how the host states should deal with the UN peacekeepers that are reluctant to protect civilians.

This study is important for two principal reasons. First, the protection of civilians during the UN peacekeeping operations is paramount and therefore this issue needs to be addressed urgently. Second, the UN peacekeepers have caused civilian suffering during the UN peacekeeping operations; however, there has been no accountability or punishment for most of their crimes. This thesis will consider the duties of the UN peacekeeping forces and the reasons they go unpunished when they neglect their duty.

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<sup>47</sup> M Rafiqul Islam, *International Law: Current Concepts and Future Directions* (LexisNexis Butterworths, 2013) 547.

<sup>48</sup> Ibid.



It will identify the laws and conventions that provide prosecution for the UN peacekeeping forces and suggest reforms to the legal system that allows them to avoid accountability. In so doing, the study will focus on an incident where an insurgent group killed 33 civilians in the DRC in 2014, and the crimes against civilians in South Sudan. These cases are significantly crucial for this study because there is an explicit recognition of the failure by the UN peacekeeping forces to protect civilians.<sup>49</sup>

### **1.5 Research questions**

This thesis examines the crimes committed by the third parties (local army and insurgents) and the UN peacekeepers in the host states against civilians during the UN peacekeeping operations. The thesis critically evaluates the responsibility of the UN peacekeepers engaged in the UN peacekeeping operations. It concentrates mainly on the two sources of the UN peacekeepers' responsibility: (a) the commission of crimes against civilians by the UN peacekeepers themselves and (b) their failure to protect civilians against the crimes of the third parties in the host states. Therefore, the study concentrates on the following two strategic questions:

- 1- How can the UN peacekeeping operations be conducted more effectively to provide adequate civilian protection in armed conflicts in the host states?
- 2- What are the responsibilities of the UN peacekeepers for protecting civilian populations and what are the mechanisms to make the UN peacekeepers accountable for their actions, particularly when they fail to protect?

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<sup>49</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC S/PV.7237, 7237<sup>th</sup> mtg, UN Doc S/PV./7237 (2014) 3.

To understand such responsibilities and the relevant mechanisms, the research questions will be divided into the following subsidiary questions:

1- Are the role and mandates of the UN peacekeepers in the host states adequate to prevent the crimes of the third parties from being a criminal offence?

Answering this question requires an analysis of the existing provisions of international law that attach criminal liability to the actions (or inaction) of the UN peacekeepers. The primary issue is to determine whether non-action can be a criminal offence during the UN peacekeeping operations.

2- Do the contemporary provisions of IHL make the UN peacekeepers accountable for their actions/inaction?

Its answer will be based on the assumption that non-accountability for the UN peacekeepers can be harmful and will explore the international law surrounding the UN peacekeeping forces.

3- How can the UN peacekeepers be held responsible for the crimes committed by the third parties in the host states?

An answer to this question will be helpful in ensuring that the UN peacekeeping forces are responsible for adopting all necessary measures to protect civilians.

4- Is there any accountability regime for the UN peacekeepers? Who has or will have the jurisdiction to enforce accountability for (a) the failure of the UN peacekeepers to protect civilians according to the mandate of the UN peacekeeping mission; and (b) the commission of crimes by the UN peacekeepers themselves in the host state under its domestic criminal law?

5- If the UN peacekeeping forces have immunity, how can their legal accountability be established?

This question will discuss the effect of the immunity of the UN peacekeepers and when this immunity can be waived. This question is important because immunity is the reason that most of the UN peacekeepers cannot be prosecuted.

This study will take the cases of the DRC and South Sudan as original examples to analyse the responsibilities of the UN peacekeepers in both states, and how the legislative gaps allow the UN peacekeeping forces to go unpunished. They will assist in explaining (a) why the responsibility to protect civilians is the primary duty of the UN peacekeepers; (b) the failure to protect civilians and whether such failure can constitute a crime, which will involve the complexity of the act of failure and/or omission in several cases; (c) the jurisdiction of the host states over the UN peacekeepers; and (d) who can prosecute them.

The failure of the UN peacekeepers to protect the refugee camp in the DRC and in South Sudan are important cases for this thesis. They will show how civilians suffer when the UN peacekeepers fail to perform their duties. They also highlight how the UN peacekeepers can commit crimes through the third parties in the host states. In these cases, although they had the authorisation to use force and were able to prevent the third parties from attacking civilians, they took no action. These cases will provide evidence regarding whether the UN peacekeeping forces are responsible for the crimes of the third parties in the host states.

The prosecution of the UN peacekeepers is significant for a number of reasons. One of these reasons is that prosecution will reduce the crimes of the UN peacekeepers in the host states. This thesis will discuss the effects of immunity of the UN peacekeepers and

what may happen when this privilege is waived. This discussion is necessary because immunity is part of the reason that the host states have no jurisdiction over the UN peacekeepers, who can commit crimes and/or deliberately neglect the duties of the missions with impunity.

### **1.6 Research methodology**

This thesis is a legal analysis and the methods adopted are a blend of doctrinal and applied aspects of law in that the theoretical framework of the law is applied to a factual situation to test its effectiveness in real-life situations. It applies international law and the UN Charter in the factual situation of the UN peacekeeping operations in the host states.<sup>50</sup> The doctrinal approach is applied to the phenomenon of the crimes of the third parties against civilians in the host states of the UN peacekeeping forces. Notably, the participatory research method will be applied by including the legal aspect that is related to the responsibility to protect civilians in the host states. It is only by using a political framework that the problems faced by underprivileged groups and, in this case civilians who are exposed to war risks, can be well understood.<sup>51</sup> This will ultimately make it possible to understand the political issues that can improve the security of civilians during the UN peacekeeping operations. The theoretical framework adopted will include independent variables, for example, job freedom and compensation, which can influence the motivation levels of the UN peacekeepers.<sup>52</sup>

The thesis will show that the UN peacekeeping forces cannot provide sufficient

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<sup>50</sup> Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007) 19.

<sup>51</sup> Judi Marshall and Peter Reason, 'Quality in Research as "Taking an Attitude of Inquiry"', (2007) 30(5) *Management Research News* 368–80.

<sup>52</sup> Ibid.

response to the offences against civilians of the host states if the international law is not applied objectively to the failure of the UN peacekeepers in their duties. This thesis aims to identify the essential elements that have led to the third parties committing crimes in the UN peacekeeping areas and suggests reforms for the legal system that relate to the insurgent groups and the UN peacekeeping forces to avoid such offences and impunity in the future.

This thesis is original in that it will concentrate on the responsibility of the UN peacekeepers for the crimes committed by the third parties and the UN peacekeepers' own criminal acts against civilians. To resolve this problem, this thesis will focus on the legal system surrounding the UN peacekeeping forces, the UN Charter and international law. It will address the jurisdictional gap that allows criminals (such as insurgents, the national armies or the UN peacekeepers who commit crimes against civilians) responsible for crimes against civilians of the host states to go unpunished. Moreover, it will analyse the jurisdiction of the host states over the UN peacekeepers if they commit crimes in their territory. This thesis will focus on the legal gap caused by the immunity of the UN peacekeepers in the host state jurisdiction that prevents prosecuting those peacekeepers for their own crimes and/or deliberate failures to prevent the third parties from committing crimes against civilians. This legal vacuum warrants reform necessary to fill the existing legal gap to establish an accountability regime.

### **1.7 Literature review**

The literature review will focus on research related to the responsibilities and normative frameworks that govern the UN peacekeepers in the host states with a view to identifying gaps in the existing literature. It will describe the mechanisms that should be adopted by the UN to reduce the failures to prevent the crimes of the third parties.

This section will provide an analysis of studies by researchers who have already written about the crimes of the UN peacekeepers in the host states. It will begin with a discussion of crimes committed against civilians in the host states by the UN peacekeepers, to clarify how the UN peacekeepers are responsible when they commit crimes and how the protection of civilians is a part of their duties that must be achieved. It will also discuss how their failure affects civilians, especially when they fail to prevent insurgent groups from attacking civilians. Additionally, ways that the UN peacekeepers might be prosecuted for their crimes will be discussed and an explanation of whether the UN peacekeepers can be held accountable will be provided. This discussion is essential because civilians have been suffering from crimes committed by the third parties and the failures of the UN peacekeepers for a long time.

The UN peacekeepers have been involved in many crimes against civilians that were a breach of international law, the law of the home states and the law of the host states. The most common crimes perpetrated against civilians are the crimes of killing, trafficking, sexual offences and exploitation for benefits.<sup>53</sup> These crimes form the bulk of crimes committed by the UN peacekeepers. For this reason, most of the scholars in this area focus on who is responsible for these crimes. The UN has presented several reports on the issue of offences committed by peacekeepers. An example of such a report is the 2002 comprehensive report in which the UN acknowledged that the UN peacekeepers and the UN personnel committed numerous crimes against civilians in

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<sup>53</sup> Anthony J Miller, 'Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations' (2006) 39(1) *Cornell International Law Journal* 71, 72.

the host states.<sup>54</sup> The initial investigation was conducted in West African countries, such as Guinea, Liberia and Sierra Leone. Investigations into the crimes revealed that the most common crimes committed by the UN peacekeepers were sexual offences.<sup>55</sup> The UN General Assembly adopted the investigation's resolution (A/RES/57/306) to criminalise these offences and explained that sexual offences and exploitation were committed against refugees.

In an attempt to resolve the most common crimes, the UN General Assembly adopted a 'zero-tolerance policy' in 2003.<sup>56</sup> This policy has provided an important mechanism for clarifying crimes that the UN personnel may commit in the host states. The definitions of these offences are also included in this policy. These crimes are considered unacceptable misconduct by the UN personnel since they violate international legal norms and standards. These crimes should be prevented to protect civilian populations in the host states, especially women and children.<sup>57</sup> In this case, the UN peacekeepers or any UN personnel will be responsible when they commit any misconduct. Criminalising the conduct of the UN personnel is a significant change to the legal system of the UN peacekeeping operations. However, deep analysis of the legal system will clearly explain there has been no meaningful change to the protection of civilians, because the UN peacekeepers are not held accountable for their crimes and they are not even held responsible for achieving their duties. They must be held

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<sup>54</sup> *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 122, UN Doc A/57/465 (11 October 2002) ('*Investigation into West Africa*') 4 and 10.

<sup>55</sup> *Investigation into West Africa*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 122, UN Doc A/57/465 (11 October 2002) 4 and 10.

<sup>56</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003).

<sup>57</sup> *Ibid.*

criminally liable for their crimes; however, the question is how to prosecute them if they have immunity from prosecution.

Criminal liability has been discussed in a variety of academic literature focusing on the responsibilities and accountability of the UN peacekeepers for crimes they commit in the host states. One study, for example, focused on the crimes of the UN peacekeepers and their prosecution under various circumstances.<sup>58</sup> The most important point argued by this study is that the UN will be liable for unlawful acts committed by the UN peacekeepers. However, this argument raises the question whether the UN peacekeepers will be responsible for their crimes and their failure to fulfil their duties. The question arises out of differences between the crimes committed by them and the crimes of the insurgent groups. Offences such as rape, human trafficking and exploitation can be prosecuted under established doctrines on human rights but prosecuting them for failing in their duties and responsibilities is another matter.<sup>59</sup>

There is also literature that has focused on the liability of the UN peacekeepers and their legal position in the host states.<sup>60</sup> They are responsible for human rights violations in the host states. This paper, however, focuses on the preparation for the misconduct instead of dealing with how to prosecute the UN peacekeepers for their violations. There is literature that has focused on the gap in legislation in the home states and notes

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<sup>58</sup> Russell Buchan, 'UN Peacekeeping Operations: When Can Unlawful Acts Committed by Peacekeeping Forces be Attributed to the UN?' (2012) 32(2) *Legal Studies* 282.

<sup>59</sup> Marcelo Ferrante, 'Causation in Criminal Responsibility' (2008) 11(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 470.

<sup>60</sup> Tom Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability should be Apportioned for Violations of Human Rights by Member State Troop Contingents serving as United Nations Peacekeepers' (2010) 51(1) *Harvard International Law Journal* 113.



that the UN peacekeepers cannot be prosecuted in their home states because there is no jurisdiction to prosecute their citizens for crimes committed out of their territory or, where the countries are competent, they are unwilling to pursue them.<sup>61</sup> Similarly, Krieger focused on the prosecution of offences perpetrated by the UN peacekeepers and ways to prosecute them. He argues that the home states must close the jurisdictional gap to prosecute the UN peacekeepers for crimes of act or omission.<sup>62</sup>

The problem of the home state prosecutorial jurisdiction as mentioned in this discussion needs to be analysed. If the responsibility to close the jurisdictional gap were to fall to the home states, these states may not be impartial with regard to the prosecution of the UN peacekeepers. In addition, not all countries are willing to prosecute personnel who commit crimes overseas. It could be an opportunity for impunity. In the host states, the accountability problem could be more complicated because the UN peacekeepers have immunity from the jurisdiction of the host states.<sup>63</sup> At this point, to prosecute the UN peacekeepers, their immunity must be waived.<sup>64</sup> There are also some arguments that the jurisdictional gap is sometimes due to the lack of a proper judicial system in the host state because of instability and, for this reason, they cannot prosecute the UN peacekeepers.<sup>65</sup>

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<sup>61</sup> Melanie O'Brien, 'Protectors on Trial? Prosecuting Peacekeepers for War Crimes and Crimes Against Humanity in the International Criminal Court' (2012) 40(3) *International Journal of Law, Crime and Justice* 223, 224.

<sup>62</sup> Heike Krieger, 'Addressing the Accountability Gap in Peacekeeping: Law-Making by Domestic Courts as a Way to Avoid UN Reform?' (2015) 62(2) *Netherlands International Law Review* 259.

<sup>63</sup> Róisín Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity' (2011) 16(1) *Journal of Conflict and Security Law* 63, 69.

<sup>64</sup> Andrew Ladley, 'Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations' (2005) 1(1) *Politics and Ethics Review* 81, 82.

<sup>65</sup> Gabrielle Simm, 'International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers' (2011) 16(3) *Journal of Conflict and Security Law* 473, 481.

Gabrielle Simm<sup>66</sup> has discussed jurisdiction over the UN peacekeepers, the responsibility of states and international organisations for the crimes and the UN peacekeepers' immunity that prevents judicial action against them. She further argues that the strength of international law lies in setting standards, but some of its standards are problematic and there are some shortcomings in the monitoring and enforcement mechanisms.<sup>67</sup> According to this article, the Secretary-General can waive the immunity of the UN peacekeepers; however, there are no criteria for waiving their immunity or prosecuting them. Although Nigel D White and Sorch MacLeod<sup>68</sup> argue that immunity should be waived when crimes result from non-official tasks, this is considered a violation of s 20 of the *Convention on the Privileges and Immunities of the UN* (1946 Convention) that grants the Secretary-General the right to waive the UN peacekeepers' immunity when the Secretary-General feels it is necessary. The question here is whether the UN peacekeepers are liable for their failures and how to prosecute them if their immunity has been waived.

The responsibility for failure has been mentioned on many occasions in international law. Article 86(1) of Additional Protocol I provides that the parties are responsible for preventing grave violations and measures should be taken to ensure that there is no violation for failure to act; however, this responsibility is only raised if there is a legal

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Nigel D White and Sorch MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19(5) *European Journal of International Law* 965.

duty to act.<sup>69</sup> Articles 25(3) (a), 28, 30(1) and 33(1) of the ICC criminalise failure in the performance of duties by omission. According to this argument, non-provision of protection for civilians is considered a crime; however, there is no mention of this offence in the laws relating to the UN peacekeepers. This is the primary reason the UN peacekeepers go unpunished when they deliberately neglect their duties.<sup>70</sup> The criminalisation in international law for the failure in duty does not mean the UN peacekeepers are liable for their failure.

It is widely understood that previous studies have taken into consideration the various aspects of prosecution and punishment for crimes committed by the UN peacekeepers. An effort has been made to shed some light on both sides of the issue to facilitate understanding from a non-biased perspective. The above literature has demonstrated that the UN peacekeepers are responsible for their crimes in the host states and for the duties that have been mandated by the UNSC. Their crimes against civilians have also been considered breaches of international law; hence, the adoption by the UNSC of a zero-tolerance policy for the UN peacekeepers who commit sexual offences or exploit their position for benefit in the host states.

However, the issue of the liability of the UN peacekeepers for their failure to act to protect civilians from the insurgent groups still must be analysed and resolved. Although the above studies focus on the protection of civilians from crimes committed by the UN peacekeepers, they miss the main problems that kill a large number of civilians each year, such as the failure of the UN peacekeepers to prevent armed groups

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<sup>69</sup> Miller, above n 53. See also Michael Duttwiler, 'Liability for Omission in International Criminal Law' (2006) 6(1) *International Criminal Law Review* 1, 15.

<sup>70</sup> Lars C Berster, "Duty to Act" and "Commission by Omission" in International Criminal Law' (2010) 10(5) *International Criminal Law Review* 619, 644.

from committing crimes against civilians. Even international law does not mention their responsibility for inaction, and this creates a legal gap that allows the UN peacekeepers to avoid responsibility for their failure to protect civilians. Therefore, this thesis will focus on this critical gap that has been missed in most of the previous literature, to provide necessary protection for civilians and a better understanding of the legal system that deals with the UN peacekeeping operations.

### **1.8 Structure of the thesis**

This thesis is divided into the following seven chapters.

Chapter 1 includes an overview and discusses the central problem of this thesis, covering the crimes of the insurgent groups in the host states of the UN peacekeeping operations and the studies that discuss this issue. The problems civilians face in the host states from the legal system of the UN peacekeeping forces are demonstrated. The methodology and research questions that will be used to analyse the problems of the crimes of the insurgent groups and the effect on civilians are also mentioned in this chapter.

Chapter 2 analyses the system of the UN peacekeeping forces and their duties to show how they are responsible for protecting civilians of the host state. The discussion will begin with the liability of the UN peacekeepers in the host states to clarify the duties that must be achieved. The main issues addressed in this chapter include how the use of force can be a duty for the UN peacekeepers in their mission to protect civilians, and whether their failure to use it can constitute a failure of duty. The legal framework for accountability of the UN peacekeepers will also be discussed with the aim of discovering how the UN peacekeepers can be prosecuted for their failures. The legal framework relevant to the UN peacekeepers includes three different legal systems that

share accountability over them. Each of these legal regimes has a different jurisdiction to prosecute peacekeepers. Analysis of the jurisdiction over the UN peacekeepers will demonstrate whether prosecution for failing in their duty is possible, and who is responsible for prosecuting them.

Chapter 3 addresses the obligations of the UN peacekeepers according to IHL because in recent years it has become essential for the protection of civilians, particularly in the context of protecting civilians in the host states of the UN peacekeeping forces. This chapter will analyse the responsibilities of the UN peacekeepers under IHL and why civilians are still suffering from insurgents' attacks during the UN peacekeeping missions.<sup>71</sup> Since IHL is the main, important part of international law during any military operations, the agreements, treaties or conventions between states must be applied during peacekeeping operations.<sup>72</sup> This is particularly relevant regarding the Fourth Geneva Convention<sup>73</sup> and the two further conventions Additional Protocols of 1977 that are related to the protection of victims of armed conflict.<sup>74</sup> This chapter will

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<sup>71</sup> Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' (International Committee of the Red Cross, 2009) 11.

<sup>72</sup> ICRC, *What is International Humanitarian Law?*  
<[https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf)> (accessed 17 March 2017).

<sup>73</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, open for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, open for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, open for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

<sup>74</sup> *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

provide an overview of the work of the UN peacekeeping forces in wartime when their duties include the protection of civilians.

This chapter also discusses the obligations of the UN peacekeepers according to IHR and shows how the UN peacekeepers can play the main role in protecting IHR. In addition, to promote human rights during the UN peacekeeping operations, the UN adopted IHR and considers it a ‘core pillar’ for the UN work in the host states.<sup>75</sup> The UN peacekeepers are under an obligation to protect civilians from the abuse of their human rights because this protection is considered a part of IHR in the host states.<sup>76</sup> This chapter explains the protection of civilians during the UN peacekeeping operations and shows how the UN peacekeeping forces are liable if the insurgent groups violate IHR. This is because IHR is neglected and violated in most of the UN peacekeeping operations despite the existence of guidelines stating the protection of IHR is a core principle of the UN peacekeepers.<sup>77</sup> This chapter is also crucial to answering why there are abuses of human rights in the host states despite the UN peacekeepers being responsible for preventing any IHR violation.

Chapter 4 will investigate the failure of peacekeepers to protect civilians from the crimes of insurgents and the host states’ national armies. Although the UN peacekeepers have failed to prevent crimes against civilians in numerous cases, this study will focus on the cases of the DRC and South Sudan as the most recently committed. The failure

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<sup>75</sup> *Human Rights* <<http://www.un.org/en/peacekeeping/issues/humanrights.shtml>> (accessed 17 March 2017).

<sup>76</sup> *Charter of the United Nations* art 1.3: ‘To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’. See also Md Kamal Uddin, ‘Human Rights Violations by UN Peacekeepers: An End to Impunity’ (2014) 25(1) *Security and Human Rights* 130.

<sup>77</sup> Md Kamal Uddin, above n 76, 130, 131.

of the UN peacekeepers in the DRC to protect the refugee camp in 2014 is an important case for this thesis, because it shows how civilians suffer when the UN peacekeepers fail to perform their duties. It also highlights how the failure of the UN peacekeepers can be criminal conduct. In this case, although they had the authorisation to use force and could have prevented the insurgent groups from attacking civilians, they did nothing. This case will be evidence for how their failure can be a crime in some circumstances and how these failures go unpunished. This chapter will also discuss the crimes committed in South Sudan during the UN peacekeeping mission. At least 73 people were killed during this mission on 7 July 2016 when the UN peacekeepers refused to protect civilians from opposition groups. This chapter will provide solid evidence regarding how failure as regards duty is a serious problem, and it seeks to determine whether these failures can be considered crimes under the responsibility of the UN peacekeepers.

Chapter 5 addresses the confusion in the international legal position of the UN peacekeepers and how the failure to achieve their duties may be a crime. In most cases, proving the failure of duty as a crime is complex. The offence is adopted when the offenders did nothing or deliberately neglected their duty. For this reason, legal jurists and scholars are trying to analyse this phenomenon to explore whether it can be adopted as a crime. This chapter will analyse and explain the jurisprudence's opinion and discuss the perpetration of the offence. The legal scholars argue for considering the failure as a crime; all elements for these crimes must be present otherwise, there is no criminal penalty for doing nothing. It is important to explore this crime and when offenders can be criminally responsible for the failure. This chapter will discuss the elements of this crime as an important point for the criminal offence of neglect. Because of the increasing failures of the UN peacekeepers, the chapter also discusses whether the

failure of the UN peacekeeping forces is considered a crime based on the existing international criminal law and will show how this law deals with failure as a crime.

Chapter 6 examines the issue of prosecuting the UN peacekeepers when they commit any offence. Their prosecution is complicated because of the immunity they have from the jurisdiction of the host states. This chapter will be substantial because it will demonstrate how to prosecute the UN peacekeepers if they are criminally responsible for their failure. The jurisdiction of the host states and the home states and the international jurisdiction will be investigated to explain how they deal with the crimes committed by the UN peacekeepers when they have immunity.

Chapter 7 will summarise the main points and arguments, drawing upon the findings of the preceding six chapters. Recommendations will be made to ensure that the UN peacekeepers are held accountable for committing any crimes and failing in their duty to protect civilians in the host states. Other recommendations include (a) possible ways to minimise, if not avoid, the recurring instances of crimes committed by the third parties (national army and insurgent groups of the host states) by increasing the capability and accountability of the UN peacekeepers; and (b) some modifications to the legal system of the UN peacekeeping forces to ensure the adequate protection of civilians in conflict zones of the host states, one of the fundamental purposes of all UN peacekeeping missions.



## **Chapter 2**

### **Role and Mandates of the UN Peacekeepers in Host States**

#### **2.1 Introduction**

In recent years, the UN peacekeepers have increasingly failed to use force to prevent the third parties from committing crimes against civilians. One of the most recent cases is that of the crimes committed against civilians in the CAR in 2017. In this case, the presence of the UN peacekeepers did not prevent the destruction of houses and killing of civilians, which was similar to the civilian massacre in Srebrenica, an UN-declared safe area, in July 1995, that was under the protection of the agreement on the UN's forces and operations in Croatia (Dutch UN peacekeepers). Another example was the failure to prevent crimes against the refugee camp in the DRC in 2014, which will be discussed in an independent chapter as a case study for this thesis. Thus, an analysis of the reasons behind the ability of the third parties to commit, and the inability of the UN peacekeepers to prevent, crimes against civilians of the host states is required.

The aim is to understand the reasons behind the non-use of force to protect civilians and halt attacks against them, even though the UN peacekeeping forces have the authorisation to do so. Other significant factors must be understood, for example, the UN peacekeeping operations, the concept of the use of force and the law surrounding the UN peacekeeping forces. Understanding all these factors will help identify the ambiguity in the concept of the use of force as one of the main reasons for these crimes. The main issue surrounding the UN peacekeeping operations is how the UN peacekeepers use force during these missions. The analysis will clarify the function of

the UN peacekeeping forces and make their duty and purpose in the host states more understandable.

This chapter will articulate the responsibility of the UN peacekeepers to protect civilians based on the historical development of the UN peacekeeping forces, and the protection of civilians before and after the *Brahimi Report*. It will show how the legal framework behind the accountability of the UN peacekeepers works, and the law surrounding the prosecution of the UN peacekeepers when a mission fails to prevent crimes against civilians. It will also provide the foundation for subsequent chapters to highlight the function of the UN peacekeeping forces in the host states and reasons for crimes by the third parties against civilians of the host states, and explore the options aimed at the establishment of a suitable mechanism to improve the protection of civilians.

## **2.2 Responsibility of the UN peacekeepers to protect civilians**

Holding states and international organisations liable for breaching international law is the primary purpose of the law of international responsibility.<sup>1</sup> Therefore, the responsibility during the UN peacekeeping operations can be divided in some circumstances between two sides, that is, the host states and the UN peacekeeping forces. Understanding the circumstances and criteria behind the adoption of responsibility is very important for improving the protection of civilians because it will clarify the ambiguity in responsibility.<sup>2</sup> Therefore, the question here is when and how each part should be responsible.

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<sup>1</sup> Gabrielle Simm, *Sex in Peace Operations* (Cambridge University Press, 2013) 64.

<sup>2</sup> To explain the position of the legal personality of UN peacekeeping forces, these are a subsidiary organ of the UN (i.e., international organisation). For more information, see Róisín Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Martinus Nijhoff Publishers, 2014) 255.

In 2009, the Millennium Summit report examined the responsibility of states to protect civilians within their own borders. Secretary-General Ban Ki-Moon mentioned in the report, ‘Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes, and crimes against humanity’.<sup>3</sup> Responsibility has also been mentioned in Article 1 of the *Responsibility of States for Internationally Wrongful Acts 2001* as ‘Every internationally wrongful act of a State entails the international responsibility of that State’. The elements of the wrongful act have been stated in Article 2 as an action or omission that can be considered a breach of an international obligation.<sup>4</sup> Therefore, the host states of the UN peacekeeping forces are responsible for the breach of international law<sup>5</sup> and are responsible for their failure to prevent crimes against civilians.<sup>6</sup> However, the main issue that always creates confusion for the protection of civilians in the host states of the UN peacekeeping operations is how the UN peacekeeping forces are responsible for such protection if the protection is the responsibility of the host governments inside their borders.<sup>7</sup>

The UN peacekeeping forces may be responsible for many of the UN peacekeeping operations in the cases where the governments of the host states are unable to protect their civilians after the collapse of the functional system and these states are unable to

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<sup>3</sup> Ban Ki-Moon, *Implementing the Responsibility to Protect*, A/63/677, (12 January 2009) para. 3.

<sup>4</sup> United Nations, *Responsibility of States for Internationally Wrongful Acts 2001* <[http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)> (accessed 16 October 2017).

<sup>5</sup> Gabrielle Simm, ‘International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers’ (2011) 16(3) *Journal of Conflict and Security Law* 473, 487.

<sup>6</sup> *International Humanitarian Law and the Responsibility to Protect: A Handbook* <[http://www.redcross.org.au/files/IHL\\_R2P\\_responsibility-to-protect.pdf](http://www.redcross.org.au/files/IHL_R2P_responsibility-to-protect.pdf)> (accessed 13 October 2017).

<sup>7</sup> Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (Oxford University Press, 2009) 66.

discharge their duties. For example, Somalia has no functional government and has been considered a collapsed state since 1991.<sup>8</sup> All states have the responsibility to protect their civilians from atrocity crimes, which include genocide, crimes against humanity and war crimes.<sup>9</sup> In Somalia, because of the failure by the state to provide protection for its civilians and it being a collapsed state, the intervention to protect has become a responsibility for the international community. Therefore, in 2007 the UN operated a peacekeeping mission through the African Union (the African Union Mission in Somalia) to protect ‘all those involved in a national reconciliation congress involving all stakeholders’.<sup>10</sup> This is because the intervention, according to international law, can be adopted ‘unilaterally by a state or collectively by a group of states, or by an international or regional organisation, aimed at terminating human rights violations and the persecution of civilians in another state’.<sup>11</sup> For this reason, the response of the international community was the intervention based on Chapter VII of *the Charter of the United Nations* and authorised by the UNSC.

The intervention in Somalia and the ways it was handled by the international community show how the responsibility and the balance of power between the host states of the UN peacekeeping operations and the UN peacekeeping forces can be changed. This is very significant for the protection of civilians when states fail and

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<sup>8</sup> Oscar Gakuo Mwangi, ‘State Collapse, Peace Enforcement and the Responsibility to Protect in Somalia’ (2015) 19(8) *International Journal of Human Rights* 1227.

<sup>9</sup> Ibid 1228.

<sup>10</sup> *The Situation in Somalia*, SC Res 1744, UN SCOR, 5633<sup>th</sup> mtg, UN Doc S/RES/1744 (21 February 2007).

<sup>11</sup> M Rafiqul Islam, *International Law: Current Concepts and Future Directions* (LexisNexis Butterworths, 2013) 318; Humanitarian Intervention, *Advisory Council on International Affairs (AIV)* <<http://aiv-advice.nl/69r/publications/advisory-reports/humanitarian-intervention>> (accessed 17 October 2017).

shows how the UN peacekeepers are responsible for providing protection for civilians from any attack by the third parties.<sup>12</sup> In addition, the need to secure the protection of civilians has led leaders of the international community to take important steps to develop the duties of the UN peacekeeping forces. Since 1999, the protection of civilian population has become a principal duty for the UN peacekeeping forces and has been mandated for all the UN peacekeeping operations.<sup>13</sup> To explain the significance of the duties of the UN peacekeepers and their effect on civilians in the host states, the duties for each type of the UN peacekeeper must be analysed individually.

### **2.2.1 Historical development of peacekeeping functions of the UN**

The beginning of the UN peacekeeping operations in 1948 included only military personnel who were authorised by the UNSC as military observers in the Middle East.<sup>14</sup> Subsequently, civilians of the host states showed their need for personnel who had experience in dealing with civilians and human rights and improving the enforcement of the law. For this reason, in 1960 the composition of the UN peacekeeping force was

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<sup>12</sup> United Nations Department of Peacekeeping Operations, *Protection of Civilians: Implementing Guidelines for Military Components of United Nations Peacekeeping Missions* <<http://dag.un.org/bitstream/handle/11176/89597/2015.02%20POCGuidelinesforMilComp%20OMA%20Feb15%20Guidelines.pdf?sequence=19&isAllowed=y>> (accessed 11 March 2017).

<sup>13</sup> *Report of the Panel on United Nations Peace Operations*, UN Doc A/55/305-S/2000/809, ('*Brahimi Report*') para 62. See also: Trevor Findlay, *The Use of Force in UN Peace Operations* (Stockholm International Peace Research Institute, 2002) Appendix 3; United Nations, *United Nations Infantry Battalion Manual Volume II*, p. 254 <<https://peacekeeping.un.org/sites/default/files/peacekeeping/en/UNIBAM.Vol.II.pdf>> (accessed 7 December 2019). Moreover, only one peacekeeping mission deployed since 1999 did not have the protection of civilians' mandate—the United Nations Supervision Mission in Syria. See *The Situation in the Middle East (Syria)*, SC Res 2043, UN SCOR, 6756<sup>th</sup> mtg, UN Doc S/RES/2043 (14 April 2012). For more information, see H Willmot and S Sheeran, 'The Protection of Civilians' Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices' (2013) 95(891) *International Review of the Red Cross* 517, 519.

<sup>14</sup> United Nations, Historical Timeline of UN Peacekeeping, *United Nations Peacekeeping* <<https://peacekeeping.un.org/en/historical-timeline-of-un-peacekeeping>> (accessed 7 December 2019).

changed to include police and civilian peacekeepers.<sup>15</sup> This change included a change in the duty of the UN peacekeeping operations, including a special responsibility for civilian and police personnel, which was appropriate for civilians' issues. The reason for the change was that the military-only composition was unable to function adequately to implement practices and policies related to law and order. Therefore, a clear understanding of the duty of the UN peacekeepers is important for this study to show how they can be held responsible for not protecting civilians in the host states.

The duties and responsibilities of police personnel are different from that of those considered the first personnel, which is the military. The UN police forces help install policing structures, provide advice related to policy in the host state, ensure official application of the law within the standards of IHR and restore public safety in the host state.<sup>16</sup> The third type of the UN peacekeeping personnel are civilian personnel, who perform duties concerning civil affairs and are deployed at the host state. Given the importance of the UN civilian peacekeeping forces, on 31 May 2018, the UN increased the number of this type of personnel to be 4,539 international civilian personnel<sup>17</sup> and deployed such personnel in different peacekeeping missions worldwide.<sup>18</sup> The differences in the types of the UN peacekeepers means their mandated duties are different, but they have some common duties. The common duties have been

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<sup>15</sup> Ibid.

<sup>16</sup> United Nations, *United Nations Peacekeeping*, Building Rule of Law and Security Institutions <<https://peacekeeping.un.org/en/building-rule-of-law-and-security-institutions>> (accessed 7 December 2019).

<sup>17</sup> United Nations Peacekeeping, *Peacekeeping Operations Fact Sheet* <<http://www.un.org/en/peacekeeping/about/>> (accessed 7 December 2019).

<sup>18</sup> United Nations, *Partnerships, United Nations Peacekeeping* <[http://www.un.org/en/peacekeeping/images/PKD\\_Infographic\\_web.jpg](http://www.un.org/en/peacekeeping/images/PKD_Infographic_web.jpg)> (accessed 8 March 2017).

emphasised by the UNSC in all resolutions that have been adopted to launch the UN peacekeeping operations.

One of the fundamental common duties mandated for all of the UN peacekeeping operations is the protection of civilians.<sup>19</sup> The purpose of allowing for differences in duties is to accommodate the differences in the nature of the conflict in the host states, such as the cultural, geographic and religious context. For this reason, the UNSC provides a clear framework for different missions to achieve their duties in different contexts. For example, when the UN peacekeeping operations were first established in 1948, the UN peacekeepers' duties were limited to monitoring conflicting parties in the conflict area.<sup>20</sup> However, currently the duties of the UN peacekeeping forces are more complicated because these forces are now mandated with a greater level of responsibility to restore security in the host state.<sup>21</sup> Therefore, the differences presented above are significantly important to show which component of the UN peacekeepers should be responsible for preventing the third parties from committing crimes against civilians.

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<sup>19</sup> *Protection of Civilians in Armed Conflict*, SC Res 1674, UN SCOR, 5430<sup>th</sup> mtg, UN Doc S/RES/1674 (28 April 2006); *Women and Peace and Security*, SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000); *Protection of Civilian Persons in Time of War*, SC Res 1612, UN SCOR, 5235<sup>th</sup> mtg, UN Doc S/RES/1612 (26 July 2005).

<sup>20</sup> *The Situation in the Middle East*, SC Res 1701, UN SCOR, 5511<sup>th</sup> mtg, UN Doc S/RES/1701 (11 August 2006).

<sup>21</sup> UN, *United Nations Peacekeeping Operations: Principles and Guidelines* (UN, DPKO, 2008) 18.

## 2.3 Development of the protection of civilians

### 2.3.1 Obligations of the UN peacekeepers before the *Brahimi Report*

From 1948 to 2000, before the *Brahimi Report*, the UN launched more than 50 peacekeeping operations.<sup>22</sup> In several of these operations, the UN peacekeepers failed in their duty to protect civilians or stabilise the host states because they had a limited mandate that restricted their ability to protect civilians.<sup>23</sup> Therefore, the UN peacekeepers were unable to prevent abuses of human rights despite the former Secretary-General of the UN Dag Hammarskjöld stating that the UN peacekeepers ignoring ‘gross human rights abuses’ was incompatible with the norms of the UN.<sup>24</sup> This serious problem was not the main priority of the UN peacekeeping forces, even though without the protection of civilians, there was no benefit from the UN peacekeeping operation.

The countenancing of crimes against civilians during the Cold War made the international community consider the use of force as a viable option for protecting civilians.<sup>25</sup> Therefore, it is necessary to understand the reasons the UN peacekeepers ignored the abuses of human rights to understand whether these abuses were ignored for criminal purposes or because the UN peacekeepers were unable to prevent these

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<sup>22</sup> *List of Peacekeeping Operations 1948–2017* <  
[https://peacekeeping.un.org/sites/default/files/unpeacekeeping-operationlist\\_1.pdf](https://peacekeeping.un.org/sites/default/files/unpeacekeeping-operationlist_1.pdf)> (accessed 7 December 2019).

<sup>23</sup> For example, their failure in Srebrenica and Rwanda. For more information, see *Report of the UN Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, 54<sup>th</sup> sess, Agenda Item 42, UN Doc A/54/549 (15 November 1999) para 49; *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN Doc S/1999/1257 (16 December 1999) para 50.

<sup>24</sup> Wills, above n 7, 18.

<sup>25</sup> *Ibid.*



abuses. One example is the genocide in Rwanda when 800 000 people were killed without intervention from the UN peacekeeping forces to prevent or limit the massacres.<sup>26</sup> The main reason that caused the failure of the international community to prevent the killing of the Rwandese people as argued by the former UN Secretary-General Kofi Annan ‘was the lack of resources and the political commitment devoted to developments in Rwanda and the United Nations to presences there’.<sup>27</sup>

For the above reason, the UN Secretary-General during that time launched an Independent Inquiry to understand the reaction of the UN peacekeepers to the genocide. The Independent Inquiry found that the principal reason for the failure of the UN peacekeepers in Rwanda was that they had an insufficient mandate to protect civilians, and that the UNSC refused to strengthen this mandate.<sup>28</sup> However, such a reason is not acceptable because failure to protect civilians owing to an insufficient mandate is incompatible with the principal purpose of the creation and mobilisation of UN peacekeeping forces, which is the responsibility of stabilising the host states.

#### **2.3.1.1 Example of the first peacekeeping mission in Somalia (UNOSOM I)**

The ambiguity in the duties of the UN peacekeeping forces in most UN peacekeeping operations caused instability in the host states and among civilians. One of the UN peacekeeping operations that experienced this problem and reflects on public matters related to all sectors occurred in Somalia. This section discusses the example of the first UN peacekeeping mission in Somalia (UNOSOM I) in 1992 to demonstrate the failure

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<sup>26</sup> *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN Doc S/1999/1257 (16 December 1999) para 3.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 4. See also *UN Failed Rwanda* <<https://www.globalpolicy.org/component/content/article/201-rwanda/39240.html>> (accessed 6 March 2017).

of the UN peacekeepers in their mission to protect civilians in the host state before the *Brahimi Report*. This example demonstrates that in Somalia, the mandates adopted by the UNSC caused the inability of the UN peacekeepers to prevent crimes against civilians. In 1992, the UNSC adopted Resolution 751 to establish UNOSOM I to monitor the ceasefire in Mogadishu, the capital of Somalia.<sup>29</sup> In addition, this operation was established to protect the UN personnel and help the delivery of humanitarian supplies to distribution centres.<sup>30</sup> The UN mandate for this mission did not mention the protection of civilians despite Somalia being a failed state.<sup>31</sup> Although the mission to monitor the ceasefire was conducted reasonably well, there was looting in Mogadishu and attacks on the UN personnel.<sup>32</sup> Thus, the UNSC adopted a resolution to extend the mandate to maintain the ceasefire and avoid deterioration of the humanitarian situation on 28 August 1992.<sup>33</sup> During the same mission, the UNSC adopted Resolution 794 on 3 December 1992 to ‘establish a safe environment for the delivery of humanitarian assistance’.<sup>34</sup>

None of the resolutions adopted by the UNSC during UNOSOM I mentioned the use of force to protect civilians or prevent abuses of human rights. The absence of a mandate

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<sup>29</sup> *The Situation in Somalia*, SC Res 751, UN SCOR, 3096<sup>th</sup> mtg, UN Doc S/RES/751 (24 April 1992).

<sup>30</sup> United Nations, *Somalia—UNOSOM I Mandate* <<https://peacekeeping.un.org/mission/past/unosom1mandate.html>> (accessed 7 December 2019) See also Ramesh Thakur, ‘From Peacekeeping to Peace Enforcement: The UN Operation in Somalia’ (1994) 32(03) *Journal of Modern African Studies* 387, 388.

<sup>31</sup> Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge University Press, 2007) 51.

<sup>32</sup> *Ibid* 52.

<sup>33</sup> *The Situation in Somalia*, SC Res 775, UN SCOR, 3110<sup>th</sup> mtg, UN Doc S/RES/775 (28 August 1992).

<sup>34</sup> *The Human Tragedy and the Conflict in Somalia*, SC Res 794, UN SCOR, 3145<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992).

for the protection of civilians in the host states has led to the violent death of many civilians in countries such as Somalia, Rwanda and Serbia, despite the UN peacekeepers operating in these states. It is clear that there have been problems with the efficacy of the UN peacekeeping forces; however, the question is whether these problems are due only to the absence of a mandate to protect civilians. The lack of such a mandate led the UN to take serious steps to address this issue by establishing the panel that created the *Brahimi Report*. However, the crucial question here is whether the UN peacekeeping forces have been able to protect civilians more effectively after the *Brahimi Report*. Answering this question will lead to clarifying the central problem of this study, which is the failure of the UN peacekeeping forces to protect civilians.

### **2.3.2 The *Brahimi Report***

In 2000, the UN began an operation to analyse its peacekeeping system and undertake a comprehensive review of the security activities of the UN peacekeeping forces.<sup>35</sup> This operation was instituted because of two reports published before 1999. One detailed the genocide in Rwanda in 1994 and how the failure of the UN peacekeeping forces had a grave effect on civilians in that country. The other detailed the failure of the UN peacekeeping forces to protect the population of Srebrenica (Bosnia and Herzegovina) in 1995.<sup>36</sup> These reasons made the former UN Secretary-General Kofi Annan decide to appoint a panel tasked with assessing the ‘shortcomings of the then existing peace operations system’ and make realistic recommendations to protect civilians of the host

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<sup>35</sup> *Brahimi Report*, UN Doc A/55/305-S/2000/809.

<sup>36</sup> *Ibid.*

states.<sup>37</sup> The panel was under the leadership of the former foreign minister of Algeria Lakhdar Brahimi.<sup>38</sup>

In identifying the weaknesses of the UN peacekeeping operations and making recommendations, the panel's principal focus was determining how to build the UN capacity to contribute to peace operations during preventive and post-conflict times.<sup>39</sup> The panel created an extensive report referred to as the *Brahimi Report*. This report focused on providing better 'peacekeeping, peace-building, development and humanitarian assistance'.<sup>40</sup> A focus of the report was to identify the weaknesses in the legal system of the host state that caused civilians to suffer from misconduct from the third parties in the host state. Importantly, the *Brahimi Report* identified that UN peacekeeping forces suffer from an inability to prevent violence and attacks on civilians.<sup>41</sup> The *Brahimi Report* suggested that some significant points must be changed to provide a substantial remedy for the weak points in the work of UN peacekeeping forces. The *Brahimi Report* stated that 'without significant institutional change, increased financial support, and renewed commitment on the part of Member States', the UN peacekeeping forces would not be able to achieve their duties in the host states.<sup>42</sup> In addition, it indicated:

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<sup>37</sup> Ibid.

<sup>38</sup> Alex Bellamy, Paul Williams and Stuart Griffin, *Understanding Peacekeeping* (Polity, 2010) 129.

<sup>39</sup> *Brahimi Report*, UN Doc A/55/305-S/2000/809, para 6 (f).

<sup>40</sup> Ibid.

<sup>41</sup> Ray Murphy, 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians' (2016) 21(2) *Journal of Conflict and Security Law* 209, 212.

<sup>42</sup> *Brahimi Report*, UN Doc A/55/305-S/2000/809, 1.

there are many tasks which the United Nations peacekeeping forces should not be asked to undertake, and many places they should not go. But when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence with the ability and determination to defeat them.<sup>43</sup>

These recommendations were further steps for improving the discharge of duties by the UN peacekeeping forces and to show that the UN peacekeepers must prevent any attack. However, the question remains regarding what the reaction of the international community was when the UN peacekeeping forces omitted to use force to prevent the crimes or they had no ability to protect civilians. Therefore, to demonstrate whether or not the *Brahimi Report* has had an effect on the accountability of the UN peacekeepers or on their duty to protect civilians, the following sections will provide an in-depth comparison of the UN peacekeeping operations after the adoption of the *Brahimi Report*.

### **2.3.3 Obligations of the UN peacekeepers after the *Brahimi Report***

The UNSC has launched 20 peacekeeping missions since the *Brahimi Report* was adopted on 21 August 2000.<sup>44</sup> Although the mandate to use force to protect civilians has been adopted by the UN since the *Brahimi Report*, the UN peacekeeping operations have continued to have problems with protecting civilians.<sup>45</sup> Civilians have continued

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<sup>43</sup> Ibid.

<sup>44</sup> *List of Peacekeeping Operations 1948–2017* <  
[https://peacekeeping.un.org/sites/default/files/unpeacekeeping-operationlist\\_1.pdf](https://peacekeeping.un.org/sites/default/files/unpeacekeeping-operationlist_1.pdf)> (accessed 7 December 2019).

<sup>45</sup> Willmot and Sheeran, above n 13, 530.

to suffer abuses of human rights in the host states. For example, civilians in the CAR and Chad suffered greatly during the UN peacekeeping mission launched in 2007.<sup>46</sup>

The UN peacekeeping mission in CAR and Chad (MINUSCA) was launched seven years after the adoption of the *Brahimi Report*. The mandate on this mission was to protect civilians from the activities of armed groups and any other attacks in eastern Chad, north-eastern CAR and western Sudan that threatened them. The operations in these states have legitimate purposes, which are for the stability and avoidance of serious violations of human rights and IHL.<sup>47</sup> During this UN peacekeeping operation, the UN peacekeepers had sufficient mandates to protect civilians,<sup>48</sup> which made the UNSC consider this operation a success.<sup>49</sup> Any success of this mission was owing to the mandates that were adopted to increase the ability of the UN peacekeepers to use force to protect civilians and prevent abuses of human rights. However, despite the improvements in this UN peacekeeping operation, the criminal activity of insurgent groups continued to ‘primarily affect civilian population and humanitarian efforts’.<sup>50</sup>

Although the *Brahimi Report* is the best physical step that has been taken to develop the UN peacekeeping forces, it is criticised for ignoring the prevention of crimes against civilians that the third parties or any other criminal elements commit.<sup>51</sup> An in-depth

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<sup>46</sup> *The Situation in Chad, the Central African Republic and the Subregion*, SC Res 1778, UN SCOR, 5748<sup>th</sup> mtg, UN Doc S/RES/1778 (25 September 2007).

<sup>47</sup> Ibid.

<sup>48</sup> *Letter Dated 21 April 2009 from the UN Secretary-General Addressed to the President of the Security Council*, UN Doc S/2009/214 (23 April 2009) para 9.

<sup>49</sup> *Report of the UN Secretary-General on the United Nations Mission in the Central African Republic and Chad*, UN SCOR, UN Doc S/2010/611 (1 December 2010).

<sup>50</sup> *Letter Dated 21 April 2009 from the UN Secretary-General Addressed to the President of the Security Council*, UN Doc S/2009/214 (23 April 2009) para 11.

<sup>51</sup> Bellamy, Williams and Griffin, above n 38, 137.

examination of the strategic goals of the *Brahimi Report* revealed that the protection of civilians is not explicitly mentioned in the report. By not mentioning the protection of citizens, the position of the UN peacekeepers to prevent the crimes of the third parties in the host states has remained ambiguous. This problem has been included here to show that although the panel was established because of the failure of the UN peacekeeping operations to prevent genocides committed by the two states, it failed to emphasise solid protection for civilians.

The *Brahimi Report* is considered to have taken a step back because the protection of civilians had been adopted by the resolution of the UNSC in September 1999. In this resolution, the UNSC drew on IHL, IHR and refugee law to mandate the best protection for civilians in the host states.<sup>52</sup> This resolution arose from the serious misconduct committed against civilians by insurgents or other armed elements and the urgent need to deter crimes of insurgents or others against civilians. Therefore, the problem of how to ensure the protection of civilians continues, and the legal system surrounding the UN peacekeeping forces continues to require modification, not only to prevent crimes committed by insurgents against civilians but also to prosecute the UN peacekeepers for their failures.

Criticisms of the report include its failure to discuss an accountability mechanism for the UN peacekeepers despite these issues requiring urgent attention. The non-availability of such an independent accountability mechanism means that the crimes against civilians during the UN peacekeeping operations continue. Therefore, the ability of the UN peacekeeping forces to be deployed rapidly with all the equipment they

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<sup>52</sup> *The Protection of Civilians in Armed Conflict*, SC Res 1265, UN SCOR, 4046<sup>th</sup> mtg, UN Doc S/RES/1265 (17 September 1999).

require for protecting civilians or preventing misconduct must be enhanced.<sup>53</sup> The effects of this failure of the report are evident in the fact that there has been no change thus far to prevent crimes committed by the third parties of the host states against civilians despite the *Brahimi Report* being adopted in 2000. This demonstrates that although the *Brahimi Report* has authorised the UN peacekeepers to use force to stabilise and protect in the host states and has made important improvements in the UN peacekeeping operations, it has not resolved all the problems with these missions and has failed to ensure full protection of civilians. To show the subsequent effect of the *Brahimi Report* and provide an example that shows it has had no effect on improving the protection of civilians, the MINUSCA will be analysed.

#### **2.3.3.1 MINUSCA**

This section provides an example of a UN peacekeeping mission after the *Brahimi Report* and examines whether the protection of civilians is still an issue or has improved. After the release of the *Brahimi Report*, it was expected that the protection of civilians would be significantly improved since the Secretary-General desired to extend the protection by giving the UN peacekeepers explicit authority to protect civilians during conflict situations.<sup>54</sup> However, years after the *Brahimi Report* was adopted in 2000, crimes against civilians are still being committed by the UN peacekeepers and the third parties. For example, 144 allegations of sexual exploitation were raised in different UN peacekeeping operations in 2016 and 2017.<sup>55</sup> These allegations are evidence that civilians in the host states still require improved protection. To prove that there has been

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<sup>53</sup> Wills, above n 7, 42.

<sup>54</sup> *Brahimi Report*, UN Doc A/55/305-S/2000/809, 62.

<sup>55</sup> Conduct in UN Field Missions, *Sexual Exploitation and Abuse* <<https://conduct.unmissions.org/sea-overview>> (accessed 24 April 2017).



no significant change in the protection of civilians thus far, MINUSCA,<sup>56</sup> which started in 2014, is included here as evidence of the tragedies experienced by civilians.<sup>57</sup>

MINUSCA was adopted to protect IHR and IHL in CAR, and the UNSC placed the protection of civilians as a top priority for the mission.<sup>58</sup> This case demonstrates that the mandates of the UN peacekeepers that were adopted in CAR were insufficient to prevent crimes against civilians and there should be a legal responsibility for the failure to protect civilians. According to a Human Rights Watch (HRW) report, numerous crimes were committed by insurgents only until 2015, which was during the UN peacekeeping operation.<sup>59</sup> Although MINUSCA was supposed to protect civilians, HRW found that insurgents still committed crimes against them. The insurgents, including Seleka and Animist anti-Balaka groups, used special fighting tactics that resulted in the killing of civilians and razing of villages. In addition, they forced tens of thousands of people from their homes and into the bush, where hundreds died.

This case clearly shows that the *Brahimi Report* had no adequate effect on the UN peacekeeping operations and the protection of civilians is still a challenge.<sup>60</sup> These challenges in several areas, such as the legal system, still require reforms and

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<sup>56</sup> This case has been adopted as an example of a recent UN peacekeeping mission to show their failure to protect civilians.

<sup>57</sup> *List of Peacekeeping Operations 1948–2017* <[https://peacekeeping.un.org/sites/default/files/unpeacekeeping-operationlist\\_1.pdf](https://peacekeeping.un.org/sites/default/files/unpeacekeeping-operationlist_1.pdf)> (accessed 7 December 2019).

<sup>58</sup> *Central African Republic*, SC Res 2149, UN SCOR, 7153<sup>rd</sup> mtg, UN Doc S/RES/2149 (10 April 2014) art 30.

<sup>59</sup> *Central African Republic: Civilians Targeted in War* <<https://www.hrw.org/news/2017/07/05/central-african-republic-civilians-targeted-war>> (accessed 13 September 2017).

<sup>60</sup> Willmot and Sheeran, above n 13, 530.

clarification to improve the protection of civilians from the third parties in the host states. This is because in the *Brahimi Report* the use of force is mentioned only when the UN peacekeeping forces need it to defend themselves.<sup>61</sup> Thus, this limitation in the use of force means they cannot prevent any attack against civilians, and not including the use of force to protect civilians in their mandate is a reason they fail in their duty. Therefore, it is clear that the use of force is very important for all the UN peacekeeping forces and is considered the main way to keep civilians safe when they face any attack from the third parties or any other criminal groups. The next section will focus on the authorisation of the use of force to discover how it can be used and the position of international law when it is used for the protection of civilians.

## **2.4 Use of force during the UN peacekeeping operations**

The carefully crafted and priority purpose of the UN system is to make wars illegal and unnecessary.<sup>62</sup> However, the use of force has been adopted in special circumstances mentioned in Article 2(4) of *the Charter of the United Nations*, and it is allowed only in two exceptional circumstances: self-defence and to maintain international peace (that is, the UNSC may sanction the use of force to restore international peace and security in certain situations).<sup>63</sup>

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<sup>61</sup> *Brahimi Report*, UN Doc A/55/305-S/2000/809, 48.

<sup>62</sup> Thomas M Franck and Faiza Patel, 'Agora: The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War: The Old Order Changeth' (1991) 85 *American Journal of International Law* 63.

<sup>63</sup> Article 51 of *the Charter of the United Nations*; this article is important in ensuring that it is clear to UN peacekeeping forces when they should avoid the use of force; for more information, see Section 1.1.3 of this thesis: The principles of the UN peacekeepers.

#### **2.4.1 Effects of the use of force during the UN peacekeeping operations**

The consequences of Article 2(4) and the failure of the UN peacekeeping forces to protect civilians in Bosnia and Rwanda mean that the use of force has increased in the UN peacekeeping operations. In Bosnia alone, 200 000 civilians were killed because of the failure of the UN peacekeepers to protect them, and in Rwanda, genocide against civilians was committed in 1994 for a similar reason. Ruth Wedgwood argues that ‘the heart of the failure was minimalism in the use of force’.<sup>64</sup> Failure to prevent these tragedies in Bosnia and Rwanda was the main reason that the use of force in the UN peacekeeping operations was later authorised, even though the UN often shows an unwillingness to use such force.<sup>65</sup> Therefore, the explanation behind the use of force and the exceptions based on Article 2(4) must be analysed to show the effect of the use of force on the protection of civilians.

This discussion stated that the use of force was the main method for protecting civilians in the UN peacekeeping operations; however, it can only be used when this is clearly stated in the mandate.<sup>66</sup> Exception to the use of force for self-defence is allowed by Article 51 of *the Charter of the United Nations*, and exception to the use of force for maintaining international peace is allowed by Article 1 of *the Charter of the United Nations*, which state that the main purpose of the UN is to ensure a peaceful co-existence among nations of the world. Maintaining global peace can be achieved

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<sup>64</sup> Ruth Wedgwood, ‘United Nations Peacekeeping Operations and the Use of Force’ (2001) 5 *Washington UJL and Policy* 69, 75.

<sup>65</sup> *Ibid.*

<sup>66</sup> Willmot and Sheeran, above n 13, 530.

through ‘effective collective measures’,<sup>67</sup> which are executed according to international law, principally to suppress acts of aggression or other breaches of global peace.

The UNSC can authorise the use of force to protect international security; however, the use of force must be the last resort in international relationships. This is why the UNSC must conduct several deliberations to authorise the use of force.<sup>68</sup> For example, a UNSC resolution of 1992 authorised the UN peacekeepers to use force in Somalia as enshrined in Chapter VII of *the Charter of the United Nations*.<sup>69</sup> In this resolution, the UN peacekeeping mission was allowed to use force owing to the need for self-defence and to ensure a secure environment for humanitarian relief. Since the Cold War, the UN has expanded the UN peacekeeping operations for supporting unstable states to overcome crises and to rebuild their security and political systems. The aim of increasing the use of force in the UN peacekeeping operations is to enable this rebuilding of security and political systems.<sup>70</sup> The UN peacekeeping forces are deployed by the UNSC to create stability in the host states and must be allowed to use all the resources they need to succeed in their missions. However, the failure in the duty of the UN peacekeeping personnel to protect civilians and these forces actively committing crimes are significant problems for peacekeeping missions in the host states.<sup>71</sup>

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<sup>67</sup> Article 1 of *the Charter of the United Nations*.

<sup>68</sup> EM Miller, ‘Legal Aspects of the United Nations Action in the Congo’ (1961) 55(1) *American Journal of International Law* 1, 9.

<sup>69</sup> *The Human Tragedy and the Conflict in Somalia*, SC Res 794, UN SCOR, 3145<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992).

<sup>70</sup> Baba Gürol and Stephen Slotter, ‘Successful Peacekeeping by Regional Organizations: Necessarily Hybrid’ (2014) 10(37) *Uluslararası Hukuk ve Politika* 1, 3.

<sup>71</sup> Prince Zeid Ra’ad Zeid Al-Hussein, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 77, UN Doc A/59/710 (24 March 2005) 1 (‘*Zeid Report*’).

Before 1999, in several missions the UN peacekeeping forces failed to protect civilians.<sup>72</sup> These failures have encouraged the UNSC to mandate them the use of force to prevent any attack against civilians.<sup>73</sup> The first UN peacekeeping mission for which the UNSC authorised the use of force to protect civilians was in the DRC in 2000,<sup>74</sup> that is, after the adoption of the *Brahimi Report*. The adoption of the mandate to use force to protect civilians constitutes a significant change in the rules of engagement (ROE) related to the UN peacekeeping forces. Therefore, ROE are significantly important for the use of force during the UN peacekeeping operations since they are designed based on the specific mandate of the mission and their situation in the host states. It is thus necessary to discuss ROE in the UN peacekeeping operations and show military doctrine and the different challenges faced during these operations.

#### **2.4.2 Rules of engagement in the UN peacekeeping operations**

The UN Charter authorises the UNSC to establish the UN peacekeeping operations because this organ (the UNSC) has the ‘primary responsibility for international peace and security’.<sup>75</sup> The design of each mission must meet the requirements of the situation in the host state. Therefore, specific ROE must exist to clarify the target of the mission and the manner in which peacekeepers can use force. After the adoption of the *Brahimi*

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<sup>72</sup> For example, the failure of peacekeeping forces to protect civilians in Yugoslavia and Rwanda, documented in the *Report of the UN Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, 54<sup>th</sup> sess, Agenda Item 42, UN Doc A/54/549 (15 November 1999) para 49 and *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN Doc S/1999/1257 (16 December 1999) paras 50–2.

<sup>73</sup> Except in monitoring missions, such as the UN supervision mission in Syria; see *The Situation in the Middle East (Syria)*, SC Res 2043, UN SCOR, 6756<sup>th</sup> mtg, UN Doc S/RES/2043 (14 April 2012).

<sup>74</sup> *Mandate for MONUC (UN Organization Mission in the Democratic Republic of the Congo)*, SC Res 1291, UN SCOR, 4104<sup>th</sup> mtg, UN Doc S/RES/1291 (24 February 2000) paras 7–8.

<sup>75</sup> Unit DPKO, *Handbook on United Nations Multidimensional Peacekeeping Operations* (UN, 2003) 3.

*Report*, ROE<sup>76</sup> started to include the use of force to prevent crimes in the host states as a priority for each mission. Therefore, to understand the responsibility of the UN peacekeepers, ROE must also be clearly understood.

ROE have been defined by the Joint Chiefs of Staff as ‘directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces.’<sup>77</sup> According to Alexander L George, ROE are considered on a case-by-case basis, and determine the boundaries of autonomy for commanders and the manner in which they can act.<sup>78</sup> There are two different approaches that the commanders of military contingents can take. The first approach is by receiving general orders that allow the commander a wide range of actions unless prevented by a higher authority (i.e., command by negation). The second approach is that orders can be taken only when another authority gives the authorisation to act by way of positive command.<sup>79</sup>

The principles of ROE that must be undertaken by the military peacekeepers involve preventing any attack on civilians. ROE must also consider IHL; therefore, the laws of the host state and the UN Charter rules are crucial to all the UN peacekeeping operations.<sup>80</sup> The use of force has been adopted in all the UN peacekeeping operations

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<sup>76</sup> The term ‘rules of engagement’ was first used in 1954 by the US Navy. In 1958, it was used formally by the Joint Chiefs of Staff. For more information, see Martin Faix, ‘Rules of Engagement Some Basic Questions and Current Issues’ (2010) 1 *Czech Yearbook of International Law* 133, 135.

<sup>77</sup> *Naval Rules of Engagement: Management Tools for Crisis*  
<<https://apps.dtic.mil/dtic/tr/fulltext/u2/a228098.pdf>> (accessed 29 April 2019).

<sup>78</sup> Alexander L George, ‘Crisis Management: The Interaction of Political and Military Considerations’ (1984) 26(5) *Survival* 223, 227.

<sup>79</sup> *Ibid* 227.

<sup>80</sup> Laurie R Blank, ‘Rules of Engagement and Legal Frameworks for Multinational Counter-piracy Operations’ (2013) 46(1–2) *Case Western Reserve Journal of International Law* 397, 405.

after the adoption of the *Brahimi Report*, even when not specifically mentioned in the mandate because the report presumed the authority to protect civilians in all the UN peacekeeping missions;<sup>81</sup> therefore, ROE must be in all the UN peacekeeping operations. ROE refer to the orders issued by the commander of the UN forces to troops for organising when, where and against whom they may use force.<sup>82</sup> These orders are defined as ‘directives specifying the circumstances and limitations under which military forces will initiate and/ [or] maintain combat with the enemy’.<sup>83</sup>

The UN ROE differ from mission to mission because ROE depend on the situation in the conflict zone and the mandate of the UN peacekeeping mission.<sup>84</sup> ROE are based on a principal component: IHL or the laws of armed conflict (LOAC), which are represented by the four Geneva Conventions. These conventions are intended to protect anyone who has not participated in, or is no longer involved in, the conflict.<sup>85</sup> All the rules of IHL relate to the UN peacekeeping missions because these missions are often deployed in areas that have experienced conflict and where violations may be recommitted. The other ROE relate to military strategies (or the goals that the military need to achieve to accomplish their mission) and the command policy of the state,<sup>86</sup>

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<sup>81</sup> Willmot and Sheeran, above n 13, 530.

<sup>82</sup> Encyclopaedia Britannica, ‘Rules of Engagement (ROE)’ (2016) <<http://www.britannica.com/topic/rules-of-engagement-military-directives>> (accessed 25 April 2017).

<sup>83</sup> Findlay, above n 13, 14.

<sup>84</sup> Unit DPKO, *Handbook on United Nations Multidimensional Peacekeeping Operations* (UN, 2003) 140.

<sup>85</sup> *Convention (IV), Relative to the Protection of Civilian Persons in Time of War* (Geneva, 12 August 1949) art 4.

<sup>86</sup> Blank, above n 80, 405.

which means mostly the states are responsible to direct their military forces to protect civilians.

The guidelines of ROE are presented in an ROE Handbook, which explain that ROE are limited to particular circumstances, peacekeepers are allowed to use force to perform their duties and the types of military force that may be employed.<sup>87</sup> These rules are designed to ensure that peacekeeping personnel can organise their dealings with the host states in their planning and directives. However, the UN has neglected to provide a law that should be used in all the UN peacekeeping operations and the UNSC has not clarified the complexity of ROE in relation to peacekeeping missions. Therefore, ROE are subject to changes in different missions, but there is no clear delineation of the responsibility of peacekeeping personnel when they commit misconduct. Thus, the UN peacekeepers are forced to carry ‘pocket cards’ in their uniform.<sup>88</sup> These pocket cards provide details of ROE to which the personnel must adhere to during their mission, and outline the rules relating to their authorisation to use force.<sup>89</sup>

The mechanisms of ROE are not adequate to protect civilians of the host states unless the UN places a clear obligation on the UN peacekeepers to prevent any attack on civilians. Thus, if peacekeeping forces are to discharge their duty and complete their missions successfully, ROE must be clarified by the UNSC, and the UN peacekeeping teams must have sufficient ability to achieve their goals and objectives.<sup>90</sup> If no action is

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<sup>87</sup> International Institute of Humanitarian Law, *Rules of Engagement Handbook* <<http://iihl.org/wp-content/uploads/2017/11/ROE-HANDBOOK-ENGLISH.pdf>> (accessed 25 April 2018).

<sup>88</sup> Alan Cole, *Rules of Engagement Handbook* (International Institute of Humanitarian Law, 2009) 71.

<sup>89</sup> Bruce Oswald, Helen Durham and Adrian Bates, *Documents on the Law of UN Peace Operations* (Oxford University Press, 2010) 562.

<sup>90</sup> Faix, above n 76, 141.



taken to ensure that ROE are clearer and more comprehensive in their ability to increase the capacity of peacekeepers to handle all crimes or violations, responsibility can occur only for offences that can be prevented based on the ability of the UN peacekeepers as stated in the ROE. The Permanent Mission of the Republic of the Philippines to the UN stated that a ‘lack of strong mandates and robust ROE in hostile environments hampers the success of [the UN] peacekeeping operations’.<sup>91</sup> This statement explained that ‘robust’<sup>92</sup> implied that the UN peacekeeping missions must have powerful systems to enable them to resolve all the challenges and obstacles they meet as they execute their duties and responsibilities. The strength of the UN peacekeeping forces provides a good opportunity to improve the protection of civilians of the host states, since the UN peacekeepers can use force.

The UN peacekeeping forces must be able to achieve their mission successfully and defend themselves from any attack by the third parties in the conflict zone.<sup>93</sup> Therefore, the military ability of the UN peacekeeping forces during their deployment must be stronger than that of the third parties in the host states if they are to prevent them from committing crimes against civilians.<sup>94</sup> In the absence of appropriate ROE that can allow the UN peacekeeping forces the ability to react to attacks by the third parties against

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<sup>91</sup> *The Meeting of the UNSC*, 59<sup>th</sup> year, SC Dec, 4970<sup>th</sup> mtg, UN Doc S/PV/4970 (17 May 2004).

<sup>92</sup> The interpretation of ‘robustness’ here highlights the difference of this concept from the realities of ROE. That is, ‘ROE’ means that authority is given to the commanders to manage the use of force to ‘accomplish the team mission’, while ‘robustness’ refers to the capability that is afforded to the UN peacekeepers to execute their functions in the area of operations. For more information, see Findlay, above n 13, 16.

<sup>93</sup> *Brahimi Report*, UN Doc A/55/305-S/2000/809, 9.

<sup>94</sup> The peacekeepers have a mandate to prevent crimes that are committed in the mission area. For example, for the UN peacekeeping mission in Sierra Leone, the UN peacekeepers’ mandate included the duty of crime prevention. For more information, see *The Situation in Sierra Leone*, SC Res 1270, UN SCOR, 4054<sup>th</sup> mtg, UN Doc S/RES/1270 (22 October 1999).

civilians and the UN peacekeepers, carrying out the UN peacekeeping duties can be difficult, and could endanger the lives of civilians and the UN peacekeepers.<sup>95</sup> The question here is whether the UN peacekeepers should be prosecuted for their failure when they have the ability to protect, but deliberately neglect the necessary measures to prevent the crimes against civilians. This question is very important because the inability of the UN peacekeeping forces is not always the reason for these crimes against civilians and the reason could be deliberate neglect because of non-accountability. The jurisdiction over the UN peacekeepers will be examined in the next section.

## **2.5 Mechanisms to prosecute the UN peacekeepers**

Theoretically, the UN peacekeepers who commit crimes during the UN peacekeeping operations are subject to the UN laws, the laws of the host states and their home state law.<sup>96</sup> However, the accountability of the UN peacekeepers is still unclear even though allegations of misconduct, such as sexual exploitation of civilians, committed during the UN peacekeeping operations have increased in recent years.<sup>97</sup> This increase is reflected in the academic research that has been conducted to examine such problems and to analyse the responsibility of the UN peacekeepers in such breaches of conduct.<sup>98</sup> In addition, the legal system does not indicate the responsibility of the UN peacekeeping

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<sup>95</sup> Faix, above n 76, 141.

<sup>96</sup> The host states can prosecute UN peacekeepers if they have no immunity, or if it is waived. For more information, see Andrew Ladley, 'Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations' (2005) 1(1) *Politics and Ethics Review* 81, 85.

<sup>97</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003)1.

<sup>98</sup> Razack Sherene, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping, and the New Imperialism* (University of Toronto Press, 2004); Paul Higate, 'Peacekeepers, Masculinities, and Sexual Exploitation' (2007) 10(1) *Men and Masculinities* 99.

forces for the crimes committed by the third parties if the UN peacekeepers are responsible for the failure to prevent these crimes.<sup>99</sup>

Some international criminal tribunals and courts, notably the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the ICC, have stated that any failure by the UN peacekeepers to protect civilians during wartime is a crime and those who fail to protect civilians will be responsible for all crimes that arise from this failure<sup>100</sup> (also examined in the next chapter). Although these tribunals and courts have mentioned the failure to protect as a crime, not all cases of failure to protect can be considered a crime for the UN peacekeepers because the elements that criminalise the failure may not involve failure to protect civilians in all cases.<sup>101</sup> If the failure is due to an inability to prevent crimes, then the UN peacekeepers may not be responsible for the crimes. Therefore, it is important to discuss international criminal law in relation to the failure of duty to demonstrate the circumstances under which the UN peacekeepers can be prosecuted. However, the issue of accountability for all crimes committed by the UN peacekeepers and how the UN peacekeepers' immunity affects jurisdiction is complicated. When the UN peacekeeping personnel commit any crime, their immunity prevents the judicial jurisdiction of the host states, and they are under the jurisdiction of the home states.<sup>102</sup>

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<sup>99</sup> Simm, above n 1, 65.

<sup>100</sup> Antonio Cassese, *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011) 523.

<sup>101</sup> The elements of crime will be discussed in Chapter 5.

<sup>102</sup> *Revised Draft Model Memorandum of Understanding*, UN GAOR, 61<sup>st</sup> sess, UN Doc A/61/19 (12 June 2007) pt III, annex.

In addition, if the UN peacekeeping forces belong to the UN, how can the UN personnel be under the jurisdiction of international law? To answer this question, the jurisdiction of the home state, the host state and international law must be examined. The reasons that the UN peacekeeping personnel go unpunished when they commit crimes or fail to protect civilians must also be examined, and the court that has jurisdiction over them must be ascertained. To discover these aspects, all elements of jurisdiction related to the UN peacekeepers must be examined. The jurisdiction over the UN peacekeeping operations will be discussed in Chapter 6 of this thesis; however, a brief discussion is provided here to help ensure that this jurisdiction is understood. Therefore, who is or should be responsible for prosecuting the UN peacekeepers if they have committed certain crimes or failed to perform their duties will be examined in this chapter. The responsibilities of the home state, the host state and international bodies will be analysed in the next three subsections. In each case, the discussion will be followed by an analysis of possible hurdles in any particular course of action to prosecute the wrongdoers.

### **2.5.1 Jurisdiction of home state**

The home state is the first state to have the responsibility to prosecute the UN peacekeepers if they commit any misconduct in the host states.<sup>103</sup> This is because the UN is not a state; it is an organisation representative of the international community.<sup>104</sup> If an international organisation is part of any case before ICCs, these courts will have no jurisdiction over the international organisation because these courts have jurisdiction only over states. For example, according to Article 34(1) of International Court of Justice (ICJ) Statute, the ICJ has jurisdiction only over states. This means that

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<sup>103</sup> Simm, above n 5.

<sup>104</sup> United Nations, *Overview* <<http://www.un.org/en/sections/about-un/overview/index.html>> (accessed 27 April 2017).

international courts have no jurisdiction over the personnel of the UN because they are part of an international organisation.<sup>105</sup>

There are several cases of crimes committed by the UN peacekeepers in which they were prosecuted in their home state, for example, when Canadian peacekeepers committed crimes in Somalia, they were prosecuted in Canada.<sup>106</sup> The home state has jurisdiction over the UN peacekeepers because any member of the UN peacekeeping personnel, military, police or civilian, must be subject to their home state's national law owing to the immunity and privileges that they have. The UN General Assembly meeting in 2007<sup>107</sup> provided that in the case of misconduct during the UN peacekeeping missions, the host states cannot prosecute the UN peacekeepers because the UN peacekeepers have immunity in the host state or because the host state has no functioning government (Somalia, Haiti and the Balkans).<sup>108</sup> In such cases, the host state has no government or judicial system to punish crimes, which is why the US civilians working in the host states and committing crimes have gone unpunished in those states. Moreover, these civilians went unpunished in the US<sup>109</sup> because the law in

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<sup>105</sup> Article 43(1) of *the Charter of the United Nations*.

<sup>106</sup> *Report of the Independent Expert on the Situation of Human Rights in Somalia*, UN ESCOR, 54<sup>th</sup> sess, 21<sup>st</sup> mtg, UN Doc E/CN.4/1998/96 (16 January 1998) 110–21.

<sup>107</sup> *Revised Draft Model Memorandum of Understanding*, UN GAOR, 61<sup>st</sup> sess, UN Doc A/61/19 (12 June 2007) pt III art 7.

<sup>108</sup> Ladley, above n 96, 81, 86.

<sup>109</sup> The US was the home state for the UN peacekeepers who were working in Somalia, Haiti and the Balkans.

the US covers only crimes committed by civilian personnel working with military forces, not the crimes of civilians working as staff on an international mission.<sup>110</sup>

Therefore, it is evident that the home state may initiate an investigation and send officials to identify misconduct that has been committed by the UN peacekeepers in the host states. In such cases, the UN must be immediately informed that the government that contributed the UN peacekeepers would like to begin an investigation. The investigating government must obtain support from the UN for the national investigators.<sup>111</sup> However, the investigation of crimes that are committed by the UN peacekeepers in a foreign state can lead to ‘diplomatic hurdles’,<sup>112</sup> because investigating crimes committed on foreign territory is one of the difficulties facing the investigators.

Other problems can arise when an investigator wants to interview witnesses or meet the victims of crimes committed by the UN peacekeepers, particularly when a victim has been raped by a UN peacekeeper. One such problem is the social stigma and shame that might be experienced by the victims of such crimes. For example, according to an HRW report, when the UN peacekeepers in Somalia committed sexual crimes, only ‘2 out of the 21 women and girls interviewed by HRW had filed a complaint with Somali or other authorities.’<sup>113</sup> The other victims did not complain because they were concerned about

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<sup>110</sup> On 30 March 2000, this distinction in US law was noted by Chairman Steve Chabot in the US House of Representatives during a debate on introducing US legislation that would provide for jurisdiction. For more information regarding the jurisdiction on crimes of the staff of international missions, see Ladley, above n 96, 86.

<sup>111</sup> *Revised Draft Model Memorandum of Understanding*, UN GAOR, 61<sup>st</sup> sess, UN Doc A/61/19 (12 June 2007) pt III art 7, 4A, 4G.

<sup>112</sup> Reinhold Gallmetzer, ‘Prosecuting Persons Doing Business with Armed Groups in Conflict Areas: The Strategy of the Office of the Prosecutor of the International Criminal Court’ (2010) 8(3) *Journal of International Criminal Justice* 947, 949.

<sup>113</sup> Laetitia Bader and Samer Muscati, *The Power These Men Have Over Us* (Human Rights Watch, 2014) 3.

the social stigma associated with being raped. Another consideration that could prevent victims from reporting crimes committed by the UN peacekeepers is that the UN peacekeepers might then choose not to protect them from insurgent groups.<sup>114</sup> Another hurdle for such investigations is that given the victims are in the host state, the investigation must be held in the host state, which could be dangerous to the investigator because most of the host states are not stable and may be in a conflict area that has insurgent groups. For example, in Somalia, the presence of the Al-Shabaab insurgent group was considered sufficient reason to prevent investigators from contacting civilians.<sup>115</sup>

### **2.5.2 Jurisdiction of host states**

Home states have jurisdiction over the UN military peacekeepers when they have committed misconduct in the territory of the host states according to the agreement between the home states and the UN.<sup>116</sup> However, it is important to enquire about the host state's jurisdiction over the UN peacekeepers when they have committed misconduct within the territory of the host state, and whether the UN peacekeepers can be prosecuted outside their home states. This question is very important because it shows the jurisdiction of the host states. Therefore, the main point here is to understand the jurisdiction and discover whether or not it is applicable to the UN peacekeepers.

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<sup>114</sup> Ibid; the insurgent group in Somalia (Al-Shabaab) has been involved in numerous crimes against civilians. For more information about this group and its violations of human rights, see Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor* (University of California Press, 2004).

<sup>115</sup> Bader and Muscati, above n 113, 10.

<sup>116</sup> *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Model Status of Forces Agreement for Peacekeeping Operations*, UN Doc A/45/594 (Model SOFA) (9 October 1990) art 47(b).

Jurisdiction refers to the power granted to a state's government or its courts by its constitution and can refer to jurisdiction over an individual or the subject matter inside the territory. Powers of jurisdiction allow the court of any state to prosecute anyone who breaks the law inside its borders, even if the person is from another state. States have jurisdiction over any crime committed inside their borders because such crimes affect the state as a system and the population living in the state. In addition, if the individual who has committed a crime is a foreigner, their home state may not consider their actions a crime. For this reason, Kalshoven argues that any person who enters any other state must be under the jurisdiction of that state.<sup>117</sup> However, there is an exception from such jurisdictional powers of the host state when the host state provides immunity from its jurisdiction to official representatives of other states in its territory. In addition, there is an exception from the jurisdiction of the host state for the personnel of international organisations who have immunity (i.e., the UN peacekeepers).<sup>118</sup> The complicated question here is, if the UN peacekeepers enjoy immunity, can they be prosecuted by the host states? The mention of immunity here is crucial because the host states cannot ignore it for any reason and the only authority who has the power to waive it is the Secretary-General of the UN.<sup>119</sup>

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<sup>117</sup> F Kalshoven, 'Criminal Jurisdiction over Military Persons in the Territory of a Friendly Foreign Power' (1958) 5(2) *Netherlands International Law Review* 165, 165.

<sup>118</sup> The exception according to the UN SOFA. For more information, see *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Model Status of Forces Agreement for Peacekeeping Operations*, UN Doc A/45/594 (Model SOFA) (9 October 1990) art 47(b). 'Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them in [host state/territory]'.

<sup>119</sup> Elizabeth F Defeis, 'UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' (2008) 7 *Washington University Global Studies Law Review* 185, 192. In addition, the waiver of immunity will be discussed in Chapter 6 of this thesis.



The matter of immunity means that the UN does not attempt to prevent crimes of the UN peacekeeping forces in the host states. In 2006, the UN General Assembly established a committee of legal experts according to its Resolution 59/300.<sup>120</sup> The principal purpose of this committee was to ensure the legal accountability of UN peacekeeping personnel. The group of legal experts recommended that the host states should exercise jurisdiction over crimes committed by the UN peacekeepers.<sup>121</sup> Such a move could be important in obtaining access to witnesses and facts surrounding crimes.<sup>122</sup> However, the principal problem with this measure is that the host state jurisdiction could be restricted when the offenders are representatives of other states and have immunity under the national law of the host state. Such immunity depends on the relationship between the host state and the home state, and, in some cases, the host state cannot prosecute an individual from another state.

The matter of jurisdiction of the host states over an international organisation is highly complicated because jurisdiction is often limited or does not exist for such organisations. For example, when the UN peacekeepers commit any crime in the host state, it is their home state and not the host state that has jurisdiction over them. An additional issue is that the host state may hesitate to prosecute foreign forces because these forces may be more powerful than those of the host state.<sup>123</sup> In addition, while in some circumstances, the UN peacekeepers are deployed in a stable state (in a non-conflict area), their immunity prevents the host state from prosecuting them for any

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<sup>120</sup> *Pursuant to Support Account for Peacekeeping Operations*, GA Res 59/300, UN GAOR, 59<sup>th</sup> sess, Agenda Item 123, UN Doc A/RES/59/301 (31 August 2005, adopted 22 June 2005).

<sup>121</sup> UN GAOR, 66<sup>th</sup> sess, Agenda Item 32, UN Doc A/60/980 (16 August 2006) 30.

<sup>122</sup> *Ibid.*

<sup>123</sup> Simm, above n 5, 481.

crime they commit.<sup>124</sup> Again, one of the things that prevents their prosecution in such circumstances is that most of the UN peacekeeping missions are deployed in states that have unsuitable judicial systems to prosecute them.<sup>125</sup> Another problem is that if the UN peacekeepers are prosecuted by the host state, their home state will probably no longer send the UN peacekeepers to work in those states. These factors combined mean that the host state has no jurisdiction to prosecute crimes committed by the UN peacekeepers. A fortiori, the host states cannot prosecute the UN peacekeepers for their failure to protect civilians.

### **2.5.3 Jurisdiction of international law**

This section investigates the position of international law to determine whether it has the ability to prosecute crimes committed by the UN peacekeepers. This investigation is necessary because it is of great relevance to the principal problem of the thesis, which is to discover whether any law has jurisdiction over the active or passive crimes of the UN peacekeepers, such as the failure to protect or the deliberate neglect of duty. It is important to investigate this issue because the UN peacekeepers have been accused of being involved in numerous crimes in the host states.<sup>126</sup> These crimes include sexual crimes and murder, and some of these crimes can be considered crimes of omission by the failure to prevent crimes committed by the third parties against civilians. The highly complicated question that must be answered is whether international law can prosecute the UN peacekeepers for crimes committed in the host state. This study has identified

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<sup>124</sup> Siobhán Wills, 'Continuing Impunity of Peacekeepers: The Need for a Convention' (2013) 4(1) *Journal of International Humanitarian Legal Studies* 47, 50.

<sup>125</sup> Marco Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010) 15(2) *Journal of Conflict and Security Law* 347, 365.

<sup>126</sup> UN News Centre, *Senior UN Official Outlines Steps Taken in Response to Central African Republic Abuse Allegations* <<http://www.un.org/apps/news/story.asp?NewsID=51857#.VhW05PmqpBc>> (accessed 28 April 2017).

crimes that can be prosecuted under international law to determine whether crimes committed by the UN peacekeepers are considered international crimes. The crimes defined in Common Article 3 of the Geneva Conventions and Article 5 of the Rome Statute as international crimes are war crimes, crimes against humanity, genocide and aggression.<sup>127</sup> Therefore, the UN peacekeepers could be prosecuted for crimes that fall under any of these categories.

The principal crimes of which the UN peacekeepers have been accused are crimes against women in the host states.<sup>128</sup> The UNSC focused Resolution 1325 from 2000<sup>129</sup> on the protection of women during armed conflict to avoid crimes that could be committed against them by conflicting parties. During MINUSCA, the UN personnel committed numerous crimes against civilians—for example, a police officer raped a young girl.<sup>130</sup> According to the last report (dated 17 August 2015) of MINUSCA, there have been 57 reported cases of various acts of misconduct by the UN peacekeepers in the CAR.<sup>131</sup>

While some of these crimes represent a commission of misconduct or are classified as crimes in the host state, cases of misconduct or crimes committed by the UN

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<sup>127</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute') art 5.

<sup>128</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003) 1.

<sup>129</sup> *Women and Peace and Security*, SC Res 1325, UN SCOR, 4213<sup>th</sup> mtg, UN Doc S/RES/1325 (31 October 2000) para 10.

<sup>130</sup> United Nations, 'Central African Republic: Meeting Reported Victim of Sexual Assault, UNICEF Provides 'Every Possible Help'', *UN News* (online) 16 August 2015 <<http://www.un.org/apps/news/story.asp?NewsID=51648#.VflfBGeDRZ>> (accessed 16 April 2017).

<sup>131</sup> United Nations, 'UN Mission Vows Full Investigation into Allegations of Abuse by Peacekeepers in Central African Republic', *UN News* (online) 17 August 2015 <<http://www.un.org/apps/news/story.asp?NewsID=51654#.VflfrxGeDRZ>> (accessed 25 April 2017).

peacekeepers can be considered international crimes that can be prosecuted under international law. Most crimes committed by the UN peacekeepers come under the category of sexual crimes; therefore, they can be considered international crimes. According to Article 7(g) of the ICC Statute, the ICTY and the ICTR, sexual crimes are considered crimes against humanity when they are systematic or widespread. Therefore, any sexual crimes committed by the UN peacekeepers can come under the jurisdiction of international criminal law.

However, none of the UN peacekeepers has yet been prosecuted before an international court. This is because the crimes of the UN peacekeepers are considered ‘unsystematic’ and, to fall under international jurisdiction, such crimes must be committed as part of a widespread or systematic attack according to Article 8 of the ICC Statute.<sup>132</sup> Thus, while some elements of crimes committed by the UN peacekeepers fall under international law, they are not considered international crimes because they are not committed in a widespread or systematic manner. Additionally, the UN peacekeepers can cause harm to civilians when they fail to discharge their duty, which is simply to prevent crimes.<sup>133</sup> Therefore, the international jurisdiction over the UN peacekeeping forces must be examined, particularly when they fail in their duty to protect civilians.

## **2.6 Conclusion**

This chapter has highlighted the legal system surrounding the UN peacekeepers and discussed how the responsibility for the protection of civilians is adopted during the UN peacekeeping operations. Although not all the UN peacekeepers in all operations

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<sup>132</sup> Melanie O’Brien, ‘Protectors on Trial? Prosecuting Peacekeepers for War Crimes and Crimes against Humanity in the International Criminal Court’ (2012) 40(3) *International Journal of Law, Crime and Justice* 223, 227. See also the following chapter of this thesis, which provides an in-depth examination of the factors impeding international law from prosecuting peacekeepers.

<sup>133</sup> UN peacekeepers are responsible for their failure in action if the action is mandated as their duty, but if the action is not mandated as their duty, they are not responsible for this failure.

commit misconducts, the law related to the UN peacekeeping operations must be changed to prevent and prosecute crimes being committed against civilians in the host states.

This chapter has found that the principal problems lie with the system of the UN peacekeeping operations. It is clear that the *Brahimi Report* has had no real effect on the protection of civilians and there is still a challenge for the UN peacekeeping operations system.<sup>134</sup> This is because the use of force was authorised only when the UN peacekeeping forces required it to defend themselves.<sup>135</sup> This limitation in the scope of use of force means they cannot forcibly prevent any attack against civilians, and it is this limited mandate that has become a readily available defence against their failures in their duty. However, the adoption of the use of force after the *Brahimi Report* to protect civilians does not change the situation for civilians because the crimes are still being committed.<sup>136</sup> Therefore, the authorisation to use force is still inadequate to protect civilians because the UN peacekeepers may not have the ability to prevent the crimes committed forcibly. Further, the lack of clear responsibility of the UN peacekeepers in all mandates to oblige them to discharge the duty to protect civilians in the host states may make them indifferent towards the duty.

The other problem is that if the UN peacekeepers fail in their duty to protect civilians or commit crimes against them, then there are no clear accountability mechanisms for prosecution, and they can easily go unpunished. All the UN peacekeepers should be responsible for preventing any violation in the host states and must be considered by

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<sup>134</sup> Willmot and Sheeran, above n 13, 530.

<sup>135</sup> *Brahimi Report*, UN Doc A/55/305-S/2000/809, para 48.

<sup>136</sup> *Mandate for MONUC (UN Organization Mission in the Democratic Republic of the Congo)*, SC Res 1291, UN SCOR, 4104<sup>th</sup> mtg, UN Doc S/RES/1291 (24 February 2000) paras 7–8.

the UN since the UNSC has authorised the use of force for the protection of civilians. In addition, the UN peacekeepers are not legally liable for the failure to protect civilians because there is no legal system that is able to criminalise failure to protect in the host states, and the criminalisation for the crimes that they have committed against civilians is not prosecutable locally owing to their immunity in the host states.

The chapter has identified the gap that exists in the legal systems of the UN in ensuring the criminal liability of the UN peacekeepers for their failure in duty or their misconduct against civilians. This gap in the legal system with the immunity that has been granted to the UN peacekeepers in the host states means they often go unpunished for their crimes. Until the UN can punish its peacekeepers for their failure to perform the mandated duty, the suffering of civilians in the host states will continue unabated, which will remain a daunting challenge for the credibility of future UN peacekeeping operations.

## Chapter 3

### Obligations of the UN Peacekeepers to Protect Civilians under International Humanitarian Law

#### 3.1 Introduction

In recent years, IHL or the law of war has been a defining turning point for the protection of civilians in armed conflicts, particularly in the host states of the UN peacekeeping forces. This is because the deployment of the UN peacekeeping forces frequently occurs in conflict areas.<sup>1</sup> The increasing conflicts in the host states and the crimes against civilians by the third parties in these states or by the UN peacekeepers show the importance of the applicability of IHL in the host states. This chapter raises an important issue to clarify the ambiguity in the responsibility of the UN peacekeeping forces to prevent crimes against civilians by analysing how IHL is positively applicable when the UN peacekeeping forces are engaged in conflict. This issue was raised for three purposes: First, it shows the obligations of the UN peacekeeping forces according to IHL, and second, it explains how IHL represents the main rule to prevent crimes against civilians. The third purpose is to analyse the position of IHL when the UN peacekeeping forces use force in their operations.

The UN peacekeeping forces launch their operations on behalf of the international community and ‘thus have a “just cause”, so to speak, to use force’,<sup>2</sup> which can cause confusion in the applicability of IHL. Therefore, this chapter analyses the responsibility of the UN peacekeeping forces and whether or not they are responsible for preventing

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<sup>1</sup> Tristan Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’ (2013) 95(891–2) *International Review of the Red Cross* 561, 574.

<sup>2</sup> Katarina Grenfell, ‘Perspective on the Applicability and Application of International Humanitarian Law: The UN Context’ (2013) 95(891–2) *International Review of the Red Cross* 645.

crimes against civilians, which is significant for the analysis of the cases of the DRC and South Sudan in subsequent chapters.

Another reason for raising the issue of applicability of IHL is that it imposes a responsibility on the warring parties to protect civilians during conflict.<sup>3</sup> However, the UN was unwilling to apply IHL during the UN peacekeeping operations because the UN is not considered a state to accept the application of IHL<sup>4</sup> and the UN is not a party to any IHL treaties, including the Geneva Conventions and their Additional Protocols.<sup>5</sup> Richard Glick in 1995 argued that although the UN peacekeeping forces are subject to customary IHL, ‘the United Nations treats the subject as a political issue and not as a fundamental legal obligation’.<sup>6</sup> In the meantime, the conditions and scope for the application of IHL continue to require clarification, particularly when the UNSC makes robust the mandates of the UN peacekeeping forces. Therefore, to analyse the argument that IHL is the law that must be applied during wartime, this chapter will show how and under which circumstances IHL can be applicable in the UN peacekeeping operations.

### **3.2 Fundamental principles and rules of IHL applicable to the UN peacekeepers**

The principles of IHL are necessary for the UN peacekeeping operations because they attempt to prevent crimes that could be committed by insurgent groups or any other parties to a conflict. During the UN peacekeeping operations, civilians have usually

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<sup>3</sup> Common Article 3 of the Geneva Conventions.

<sup>4</sup> Daphna Shrager, ‘UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage’ (2000) 94(2) *American Journal of International Law* 406, 406.

<sup>5</sup> *Human Rights in Armed Conflict*, UN doc A/8781, UN GAOR, 27<sup>th</sup> sess, Agenda Item 49, UN Doc A/8781 (20 September 1972); also see Grenfell, above n 2, 647.

<sup>6</sup> Richard D Glick, ‘Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces’ (1995) 17 *Michigan Journal of International Law* 53, 54.



suffered from a violation of IHL by the third parties or by the UN peacekeepers. For example, the failures of the UN peacekeeping forces to protect civilians in Darfur cost thousands of them their lives.<sup>7</sup> Moreover, the allegations of SEA have also been mentioned against the UN peacekeeping mission in the Democratic Republic of Congo (MONUC).<sup>8</sup> To discuss whether the UN peacekeeping forces will be criminally responsible in cases of violations committed by insurgents, the principles of IHL must be identified.

IHL is composed of four principles, namely, the prevention of unnecessary suffering, military necessity, proportionality and distinction.<sup>9</sup> IHL protects civilians from any potential attack by warring parties; therefore, any action that could cause unnecessary suffering is prevented. One of the main reasons for unnecessary suffering is the weapons used during wartime.<sup>10</sup> Examples of such weapons that have been prevented from being used include nuclear weapons or mass destruction weapons that could have caused unnecessary suffering for combatants and civilians in the conflict area.<sup>11</sup> This is because the combatants are also protected from unnecessary suffering.<sup>12</sup> The weapons used

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<sup>7</sup> *The Failure of the UN/African Union Mission in Darfur: A Summary of Recent Assessments* <<http://sudanreeves.org/2018/05/16/the-failure-of-the-un-african-union-mission-in-darfur-recent-assessments/>> (accessed 17 July 2018).

<sup>8</sup> *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1925, UN SCOR, 6324<sup>th</sup> mtg, UN Doc S/RES/1925 (28 May 2010).

<sup>9</sup> International Committee of the Red Cross (ICRC), *International Humanitarian Law: Answers to your Questions* <[https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0703.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0703.pdf)> (accessed 11 July 2019). See also Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90(2) *American Journal of International Law* 238, 240.

<sup>10</sup> Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, 2008) 153.

<sup>11</sup> Ibid.

<sup>12</sup> *Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 35.

during wartime should follow some general principles to be acceptable. These principles are divided into the following three main views:<sup>13</sup> The weapons are prohibited if they cause or would inevitably cause the death of personnel;<sup>14</sup> the weapons could cause unnecessary suffering of adverse personnel;<sup>15</sup> or the weapons have ‘indiscriminate effects’ in the conflict area where they cannot distinguish between civilians and the military.<sup>16</sup> These principles, which are for the use of weapons, are not applicable to all types of weapons. However, the UN peacekeeping forces must limit the use of force to only when it is necessary for ‘self-defence and in the defence of a mandate authorized’ by the UNSC.<sup>17</sup> Therefore, the use of force during the UN peacekeeping operations must be directed to protect civilians without causing any unnecessary suffering even for the fighters of the third parties.

The principle of military necessity is considered a ‘plea’ as regards the use of force and was adopted during the 19th century by states to prevent breaches of international obligations.<sup>18</sup> Additionally, it is one of the principles used in armed conflict by IHL to organise the fighting between the conflict parties or the measures in the LOAC that can justify the violation of the rules of international law.<sup>19</sup> The conflict parties are allowed

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<sup>13</sup> Kolb and Hyde, above n 10.

<sup>14</sup> For example, the *Convention on Cluster Munitions* that prevents the use of cluster munitions owing to the random killing of civilians. *Convention on Cluster Munitions*, open for signature 30 May 2008 (entered into force 1 August 2010); *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, St. Petersburg, 29 November – 11 December 1868, para 4.

<sup>15</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 78.

<sup>16</sup> Ibid.

<sup>17</sup> *Report of the Special Committee on Peacekeeping Operations*, UN GAOR, 2012<sup>st</sup> sess, UN Doc A/66/19 (11 September 2012) 25.

<sup>18</sup> Judith Gail Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 5.

<sup>19</sup> Michael N Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’ (2010) 50(4) *Virginia Journal of International Law* 795, 796.

to use any amount of force to win and defeat the enemy with the least possible expenditure.<sup>20</sup> Although force can be used for military necessity, the armed forces cannot ignore humanitarian considerations and must deal with other principles of IHL.<sup>21</sup> Therefore, international law conventions manage military necessity, such as when the Geneva Convention IV protects certain property ‘except where such destruction is rendered necessary by military operations.’<sup>22</sup> Thus, the armed forces or the UN peacekeepers must take into consideration the proportionality to balance when it is necessary to use force to protect civilians from the effects of war.

Proportionality is a term that transcends international law, and its meaning depends on IHL and IHR.<sup>23</sup> Proportionality is very close to military necessity, and it tries to create a balance between military necessity and the principle of unnecessary suffering. The doctrine of proportionality conditionally permits the violation of IHR for the military necessity purpose or in case unavoidable to minimize civilian harm.<sup>24</sup> This is what has been mentioned in the St. Petersburg Declaration of 1868. It states ‘that the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy’.<sup>25</sup> The proportionality generally has been raised after

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<sup>20</sup> Ibid 797.

<sup>21</sup> For example, Article 52 of Addition Protocol I lists those objects that can be attacked during wartime.

<sup>22</sup> *Convention (IV), Relative to the Protection of Civilian Persons in Time of War* (Geneva, 12 August 1949) art 53. For more information, see Schmitt, above n 19, 798.

<sup>23</sup> Jason D Wright, “‘Excessive’ Ambiguity: Analysing and Refining the Proportionality Standard’ (2013) 94(886) *International Review of the Red Cross* 823, 830.

<sup>24</sup> Fenrick, William J, 'The Rule of Proportionality and Protocol in Conventional Warfare' (1982) 98 *Mil. L. Rev.* 91,95.

<sup>25</sup> Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight < <https://ihl->

the World War II as an important rule and element to improve the protection of civilians by stating;

In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.<sup>26</sup>

Consequently, Article 4 of the International Convention on Civil and Political Rights and Article 15 of the European Convention on Human Rights (ECHR) explained that in case of any extreme circumstances such as during the time of war makes the obligations of human rights treaties subject to derogate.<sup>27</sup> Therefore, the adoption of proportionality as a principle in IHL is to protect civilians and reduce, if not prohibit, attack against them.

Adopting the principle of proportionality in international conventions is one of the essential important steps that paved the way to improve the protection of civilians during the time of war, although it has not stopped the happening of such attacks. For example, the Hague Convention IV adopted the proportionality principle when it

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[databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C](https://databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C) > (accessed 16 December 2019).

<sup>26</sup> Medenica, Olivera, 'Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality' (2001) 23 *Loy. LA Int'l & Comp. L. Rev.* 329, 265

<sup>27</sup> *International Covenant on Civil and Political Rights*, open for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); and *European Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

limited the use of force or injuring the enemy.<sup>28</sup> This convention states that the harm against civilians or combatants should be limited and whoever uses force must take all measure to prevent any damage from occurring. These points were also stated in the Additional Protocols of the Geneva Conventions in 1977 as it has been mentioned in Article 51(5)(b) of the Additional Protocol I, which state that proportionality must be considered in all armed conflict to avoid any suffering to civilians or those who are no longer involved in the hostilities.<sup>29</sup>

According to the above statement, the principle of proportionality in these conventions referred to must be applied in all armed conflicts, even when the armed force belongs to the UN, that is, the UN peacekeeping forces. However, this application must be after an examination of the use of force throughout these military operations of the UN peacekeeping forces to determine its proportionality aspect. Besides, it is essential to concentrate on how the military targets can be selected, the amount of force and the result of harm on civilians. In this case, the doctrine of proportionality addresses the protection of civilians in terms of preventing damage or injury to the civilian population. Otherwise, the doctrine will be exploited by military forces to commit crimes against civilians with the inability to claim that the principle of proportionality is breached.

The principle of distinction is one of the essential principles of IHL that distinguish civilians from combatants during wartime. This term is stated in international conventions to distinguish civilians or their objects and how they cannot be attacked,

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<sup>28</sup> *Hague Convention (IV) regarding the Laws and Customs of War on Land* and its annex: *Regulations concerning the Laws and Customs of War on Land*, open for signature 18 October 1907 (entered into force 26 January 1910) art 22.

<sup>29</sup> For more information, see *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 51.

that is, prisoners of war, hospitals and civilians, from those targets that are legitimate to attack.<sup>30</sup> The main purpose of all conventions related to armed conflict is to protect civilians and ensure that the armed forces take all necessary measures to prevent civilians from being the fuel of the scourge of war. This protection will be for all civilians and their objects unless they are involved in hostilities; however, the principles of proportionality will be considered during all times of war. The international law in most of the adopted conventions concerning armed conflicts mandates the protection of civilians in all circumstances and prevents any attack against them that could cause harm when the ability to distinguish between civilians and combatants is lacking.<sup>31</sup>

This discussion has explained the importance of the protection of civilians during wartime; however, how the insurgent groups are required to adopt these rules to protect civilians especially during the UN peacekeeping operations is very difficult to answer. This is because most of the UN peacekeeping operations are deployed in collapsed or near dysfunctional states and their insurgent groups do not apply or comply with IHL in their fighting. The issues here are whether IHL will be applied only by the UN peacekeeping forces, and if they must apply IHL, does this include any responsibility to prevent attacks by the third parties against civilians? Before examining the responsibility of the UN peacekeeping forces to prevent crimes against civilians, the applicability of IHL during the UN peacekeeping operations must be explored.

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<sup>30</sup> This responsibility is based on art 48 of *Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

<sup>31</sup> *Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 57.

### 3.3 Applicability of IHL in the UN peacekeeping operations

While IHL clearly applies to all conflict parties during an armed conflict to protect civilians, the situation is different with the UN peacekeeping forces because these forces represent an international organisation, not their home states. The problem here is that there are particular criteria that must be a part of any IHL treaty. One of these criteria is that the contracting party must be a state; therefore, the UN cannot be a party to IHL because it is an organisation, not a state. Thus, the UN peacekeeping forces cannot be bound by IHL obligations because they belong to an international organisation.<sup>32</sup> However, the UNSC has increased the mandates to the UN peacekeeping forces involved in armed conflict for the purpose of civilian protection.<sup>33</sup> Therefore, the situation of the UN peacekeeping operations and the applicability of IHL must be discussed in depth to clarify the position of IHL when the UN peacekeeping forces engage in a conflict.

A robust legal debate at the UN considered whether the UN peacekeeping forces can be a party to a conflict and how they can operate under the obligations of IHL. An example used in this debate is that the UN Office of Legal Affairs showed after the ‘Bihac

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<sup>32</sup> Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (Oxford University Press, 2009) 90.

<sup>33</sup> See the *Mandate for MONUC (UN Organization Mission in the Democratic Republic of the Congo)*, SC Res 1291, UN SCOR, 4104<sup>th</sup> mtg, UN Doc S/RES/1291 (24 February 2000); *Mandate for UNMIL (UN Mission in Liberia)*, SC Res 1509, UN SCOR, 4830<sup>th</sup> mtg, UN Doc S/RES/1509 (19 September 2003); *Mandate for UNOCI (UN Operation in Côte d’Ivoire)*, SC Res 1528, UN SCOR, 4918<sup>th</sup> mtg, UN Doc S/RES/1528 (27 February 2004); *Mandate for MINUSTAH (UN Stabilization Mission in Haiti)*, SC Res 1542, UN SCOR, 4961<sup>st</sup> mtg, UN Doc S/RES/1542 (30 April 2004); *Mandate for UNMIS (UN Mission in the Sudan)*, SC Res 1590, UN SCOR, 5151<sup>st</sup> mtg, UN Doc S/RES/1590 (24 March 2005); *Mandate for UNAMID (AU-UN Hybrid Operation in Darfur)*, *Reports of the UN Secretary-General on the Sudan*, SC Res 1769, UN SCOR, 5727<sup>th</sup> mtg, UN Doc S/RES/1769 (31 July 2007); *The Situation in Chad, the Central African Republic and the Subregion*, SC Res 1778, UN SCOR, 5748<sup>th</sup> mtg, UN Doc S/RES/1778 (25 September 2007); *The Situation in Sierra Leone*, SC Res 1270, UN SCOR, 4054<sup>th</sup> mtg, UN Doc S/RES/1270 (22 October 1999); *The Situation in Burundi*, SC Res 1545, UN SCOR, 4975<sup>th</sup> mtg, UN Doc S/RES/1545 (21 May 2004).

incident'<sup>34</sup> that the obligations under the Geneva Conventions are only applicable to states, which means since the UN peacekeeping forces are not a state, they are only legally obligated by the UNSC mandate.<sup>35</sup> In addition, the UN argued that the UN peacekeeping forces cannot be a party since the UN is limited to a 'High Contracting Power' under the Geneva Conventions.<sup>36</sup> However, in 1999 the Secretary-General issued a bulletin stating that the UN peacekeeping forces have obligations under IHL where they are actively engaged as combatants.<sup>37</sup>

Focusing on the UN peacekeeping forces is crucial for two reasons. First, these forces represent and operate on behalf of the UN. Second, the UN started to engage in armed conflict via the UN peacekeeping forces, which are mostly involved in conflicts. An understanding of these two reasons involves examining the legal personality of the UN and the definition of armed conflict according to IHL, and in addition, the position of IHL from the humanitarian intervention authorised by the UNSC under Chapter VII. This is because at the UN World Summit in 2005, the protection of the population from 'genocide, war crimes, ethnic cleansing and crimes against humanity' was formally accepted by the member states that were mainly concerned with protecting their own communities.<sup>38</sup> The member states, as the international community, accepted

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<sup>34</sup> The safe area located in Bihac: The case had been raised in 1994 when the Serb troops advanced to attack it although there was a hospital in the middle of their line of advance. The challenge was the Canadian commander of the UN peacekeeping forces showed no sign of protecting the hospital or taking any action to stop the attack; see Ray Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (Cambridge University Press, 2007) 246.

<sup>35</sup> Ibid 247.

<sup>36</sup> Ibid.

<sup>37</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (6 August 1999).

<sup>38</sup> *2005 World Summit Outcome*, GA Res 60/1, UN GAOR, 60<sup>th</sup> sess, 8<sup>th</sup> plen mtg, Agenda Items 46 and 120, Supp No 49, UN Doc A/RES/60/1 (24 October 2005) para 138.



responsibility to protect civilians when their government could not discharge its duty to protect them.<sup>39</sup> Therefore, because the protection of civilians could be through humanitarian intervention or the UN peacekeeping operations as mentioned in the United Nations World Summit, it is essential to understand the responsibility based on IHL in both these situations.<sup>40</sup>

### **3.3.1 Applicability of IHL to humanitarian intervention**

Humanitarian intervention means ‘forcible intervention’ that could occur by a single or many states or by a regional organisation.<sup>41</sup> The aims of intervention are to terminate human rights violations and the persecution of civilians in another state.<sup>42</sup> Islam explains four features to distinguish intervention from the other uses of force.<sup>43</sup> The features are that intervention is different from self-defence because it is not conducted by ‘nationals of the intervening state or states’ alone; the authorisation of the UN and Chapter VII is not required to launch these operations; interventions can be adopted without the consent of the intervened state; and the main purpose is to prevent the abuse of human rights. These points clearly show how the UN peacekeeping operations are deferent to humanitarian intervention. Therefore, the complicated intervention and possibility of civilians being in the area of conflict raise the question whether the rules of IHL are applicable.

A state or group of states can launch humanitarian intervention within the broad

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<sup>39</sup> Ibid para 139.

<sup>40</sup> Ibid para 92.

<sup>41</sup> M Rafiqul Islam, *International Law: Current Concepts and Future Directions* (LexisNexis Butterworths, 2013/2014) 318.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

meaning as discussed, and humanitarian intervention is under the command of the states that launch the intervention, not under the command of the UN. Therefore, when these states lead the military operations that are authorised or not by the UNSC, IHL is applicable because they remain under the control of their governments.<sup>44</sup> Examples of operations that were authorised by the UNSC under Chapter VII include the mission in Somalia in 1992,<sup>45</sup> NATO's mission in the former Yugoslavia in 1990,<sup>46</sup> the United Nations Assistance Mission for Rwanda (UNAMIR)<sup>47</sup> and the NATO operation in Libya in 2011.<sup>48</sup>

These operations illustrate clearly the possibility of obtaining authorisation from the UNSC. However, the reasons behind launching operations without authorisation need explanation. In these instances, such an operation will be launched to avoid wasting the time of the UN and to avoid a veto from the member states, which will result in more civilian victims; thus, it is for humanitarian necessity.<sup>49</sup> One such operation is the NATO operation launched on 24 March 1999 to prevent the massacre in Kosovo.<sup>50</sup> In

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<sup>44</sup> Keiichiro Okimoto, 'Violations of International Humanitarian Law by United Nations Forces and their Legal Consequences' (2003) 6 *Yearbook of International Humanitarian Law* 199, 204.

<sup>45</sup> *The Human Tragedy and the Conflict in Somalia*, SC Res 794, UN SCOR, 3145<sup>th</sup> mtg, UN Doc S/RES/794 (3 December 1992).

<sup>46</sup> SC Res 787, UN SCOR, 3137<sup>th</sup> mtg, UN Doc S/RES/787 (16 November 1992); assistance for the UN Protection Force in carrying out its mandate in Bosnia and Herzegovina shall apply also to such measures taken in Croatia, SC Res 958, UN SCOR, 3461<sup>th</sup> mtg, UN Doc S/RES/958 (19 November 1994). See also Okimoto, above n 44, 204.

<sup>47</sup> *Establishment of a Temporary Multinational Operation for Humanitarian Purposes in Rwanda until the Deployment of the Expanded UN Assistance Mission for Rwanda*, SC Res 929, UN SCOR, 3392<sup>th</sup> mtg, UN Doc S/RES/929 (22 June 1994).

<sup>48</sup> *The Situation in Libya*, SC Res 2009, UN SCOR, 6620<sup>th</sup> mtg, UN Doc S/RES/2009 (16 September 2011).

<sup>49</sup> Alex J Bellamy, 'Humanitarian Intervention' in Dunn Cavelty, Myriam and Victor Mauer (eds), *The Routledge Handbook of Security Studies* (Routledge, 2009) 434.

<sup>50</sup> *The Situation in Kosovo*, SC Res 1203, UN SCOR, 3937<sup>th</sup> mtg, UN Doc S/RES/1203 (24 October 1998). See also Dino Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force Against

this case, although NATO had no authorisation to use force, there was a legal basis for the military action because it was for humanitarian purposes.<sup>51</sup> The reasons to launch this operation without UN authorisation were the likely opposition by some of the permanent members of the UNSC, such as Russia, to prevent the use of force and the potential use of the veto against any decision proposed by other members.<sup>52</sup> This operation shows the difference in the view of the permanent members of the UNSC regarding launching an operation outside the UNSC. The investigation of humanitarian intervention in this section has shown that there is no legal barrier to the applicability of IHL in all of these operations regardless of whether these are authorised by the UNSC, because the leadership of the forces are under their governments. However, the question here is whether IHL is applicable during the UN peacekeeping operations even though they are under the control of the UN. This is the main point of discussion for the next section.

### **3.3.2 Nature of IHL during the UN peacekeeping operations**

The nature of conflicts has increased the suffering of civilians and makes IHL the fundamental law during wartime. The importance of IHL here raises a crucial question whether IHL, as a part of international law that is specified in the ‘relations between States’, can be applied during operations that are launched on behalf, or under the command, of organisations.<sup>53</sup> This question has been introduced because IHL applies to armed conflict (international or internal) when the conflict is among states,

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the Federal Republic of Yugoslavia’ (2000) 49(2) *International & Comparative Law Quarterly* 330, 330.

<sup>51</sup> Adam Roberts, ‘Nato’s “Humanitarian War” over Kosovo’ (1999) 41(3) *Survival* 102, 105.

<sup>52</sup> Bellamy, above n 49, 433.

<sup>53</sup> *What is International Humanitarian Law?*  
[https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf) (accessed 17 March 2017).

governmental authorities and armed groups according to Article 2(1)(a) of the Vienna Convention.<sup>54</sup> Moreover, organisations cannot be a part of international treaties, which mean only states can be bound by IHL. Thus, the previous section showed that the application of IHL is not problematic during humanitarian interventions since the forces are led by their governments. However, the applicability of IHL when the UN commands the UN peacekeeping forces as a subsidiary organ remains a perplexing issue that needs to be addressed.

The UN has always declared to respect the ‘principles and spirit’ of the law of war even though it is not a state that carries out the obligations of IHL treaties or considered a ‘party’ to the conflict.<sup>55</sup> Therefore, the circumstances that may lead to IHL being applied during the UN peacekeeping operations should be determined. This is because the applicability of IHL to the UN peacekeeping operations has a long history of debate. This can be observed when the UN peacekeepers engage in conflicts that might be considered acting in self-defence or when they discharge the mandate authorised by the UNSC according to Chapter VII of *the Charter of the United Nations*.<sup>56</sup> Therefore, in consideration of the applicability of IHL, a significant question has been raised: How are the UN peacekeeping forces, as an organisation, bound to respect the ‘principles and spirit’ of IHL? To answer this question, analysis of the legal personality of the UN and

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<sup>54</sup> Article 2(1)(a) of the Vienna Convention 27 defines a ‘treaty’ as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’. That means the Geneva Conventions and its Additional Protocols are international treaties, since they are agreements between States. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 3311 (entered into force 27 January 1980) <<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>> (accessed 17 March 2017). See also Malcolm N Shaw, *International Law* (Cambridge University Press, 2003) 1069.

<sup>55</sup> GA Res 46/185, UN GAOR, 46<sup>th</sup> sess, Agenda Item 74 (23 May 1991).

<sup>56</sup> Grenfell, above n 2, 645.

its position according to IHL and armed conflict is required, which is significant for showing how IHL is applicable in this context.

### **3.3.2.1 Legal personality of the UN and the position of IHL**

The UN was established after the Second World War in 1945 as an international organisation, as mentioned in Article 3 of *the Charter of the United Nations*. Maintaining international peace and security is its primary purpose according to Article 1 of *the Charter of the United Nations*. The personality of the UN has been shown in its Charter,<sup>57</sup> as well as in the annual report of ICJ in 1949.<sup>58</sup> This report showed it was an international organisation, not a state. Considering the UN as an organisation makes the application of IHL during the UN peacekeeping operations more complicated in some respects. One of these problems, that is, the fact that the UN is not a state, means that it cannot discharge the obligations or be a part of the conventions,<sup>59</sup> and because the UN peacekeeping forces represent the UN, IHL is not applicable during their operations. Therefore, the possibility of non-applicability of IHL during the UN peacekeeping operations reflects negatively on the protection of civilians, especially from insurgents, because the priority of IHL is the protection of civilians.<sup>60</sup> Therefore, an examination of the legal position of the UN from the application of IHL is very significant.

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<sup>57</sup> The ICJ considered the UN and its organs have a legal personality and the power to carry out decisions by the UNSC, including legal capacities, privileges and immunities of the UN. Moreover, the UN has the ability to adopt agreements between the organisation and its Members and has a detached position from its Member States; the UN has the duty to remind its member states of their obligations; and its primary responsibility is maintaining international peace and security. For more information, see *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 8.

<sup>58</sup> Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations' (1970) 44 *Britain YB International Law* 111, 131.

<sup>59</sup> Ray Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?' (2003) 14(2) *Criminal Law Forum* 153, 154.

<sup>60</sup> Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (International Committee of the Red Cross, 2009) 11.

IHL is the central part of international law during any military operation; therefore, the agreements, treaties and conventions among states must show their view from the UN peacekeeping operation position.<sup>61</sup> This is particularly true for the Geneva Conventions<sup>62</sup> and the two Additional Protocols of 1977 that are related to the protection of victims of armed conflict.<sup>63</sup> These conventions and protocols describe the situations with civilians during armed conflicts and prescribe measures for protection because civilians are entitled to protection at all times unless they take part in the hostilities.<sup>64</sup> These conventions not only protect civilians, but also protect any persons who did not participate in the hostilities or who is no longer participating.<sup>65</sup> Hence, this discussion raises the question: How can IHL be applied to the UN peacekeeping forces?

Common Article 2 of the Geneva Conventions states, ‘The present Convention[s] shall apply to all cases of declared war or of any other armed conflict which may arise

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<sup>61</sup> *What is International Humanitarian Law?* (5 April 2016) <[https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf)> (accessed 17 March 2017).

<sup>62</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, open for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, open for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, open for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) and *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

<sup>63</sup> *Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), and *Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

<sup>64</sup> According to Common Article 3 of the four Geneva Conventions.

<sup>65</sup> *Principles and Guidelines for UN Peacekeeping Operations* <[http://media.peaceopstraining.org/course\\_promos/principles\\_and\\_guidelines/principles\\_and\\_guidelines\\_english.pdf](http://media.peaceopstraining.org/course_promos/principles_and_guidelines/principles_and_guidelines_english.pdf)> (accessed 29 April 2019).

between two or more of the High Contracting Parties'.<sup>66</sup> Thus, these conventions apply only to states because organisations cannot be one of the contracting parties that are mentioned in the *Vienna Convention on the Law of Treaties 1969* because the "Party" means a state which has consented to be bound by the treaty and for which the treaty is in force'.<sup>67</sup> Accordingly, because the UN is not a state, it cannot be a party to these conventions.

However, although it has been mentioned that IHL is only applicable to states and the UN peacekeeping forces are considered an organisation, it is applicable to the latter when they are engaged in the conflict or they use force for self-defence.<sup>68</sup> The Secretary-General's bulletin stated a different opinion from that in the above discussion and showed that the IHL was 'applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement'.<sup>69</sup> Here, the crucial point is the application of IHL during the UN peacekeeping operations to protect civilians of the host states and prevent serious violations such as 'genocide, mass expulsion or systematic rape'.<sup>70</sup>

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<sup>66</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, open for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

<sup>67</sup> *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1986, UN Doc A/CONF.129/15, art 2(1)(g).

<sup>68</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (6 August 1999) s 1.1.1: 'The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to UN forces when in situations of armed conflict, they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.'

<sup>69</sup> *Ibid* art 1.1.

<sup>70</sup> Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Douglas & McIntyre, 2005) 85.

The application of IHL during the UN peacekeeping operations to protect civilians has also been mentioned in other reports, including the report of the Secretary-General to UNSC S/1999/957 in 1999. This report stated that although some of the UN peacekeeping forces had ‘given their lives’ to protect civilians of the host states during armed conflict, some of them had committed ‘unacceptable behaviour, including abuses of civilian population’.<sup>71</sup> To find a solution for these problems, respect for IHL was included in this report for all the UN peacekeepers. Another report stated that IHL was applicable when the UN peacekeeping forces engaged as combatants, and they would be responsible for any violations of IHL they committed.<sup>72</sup> Therefore, the extracted information from the analysis of the reports showed that IHL was applicable to the UN peacekeeping operations.

### **3.3.2.2 Armed conflict according to IHL**

One of the main issues relating to the application of IHL on the UN peacekeeping forces is whether they could be a party to an armed conflict or not. This issue should be addressed with caution, since the possibilities for them to engage in the area of armed conflicts make the examination and understanding of armed conflicts significant. Since 1990, the UN peacekeeping forces started being involved in conflicts for reasons of self-defence, because they were usually attacked when they were deployed to support government forces, mainly against insurgent groups.<sup>73</sup> Therefore, identifying the

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<sup>71</sup> *Report of the UN Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN Doc S/1999/957 (8 September 1999) para 61.

<sup>72</sup> *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters*, UN GAOR, 51<sup>st</sup> sess, Agenda Item 129 and 140(a), UN Doc A/51/389 (20 September 1996) para 16.

<sup>73</sup> Stephen Mathias, ‘UN Peacekeeping Today: Legal Challenges and Uncertainties’ (2017) 18(2) *Melbourne Journal of International Law* 138, 142.



meaning of armed conflict is necessary to monitor the situation of conflict that the UN peacekeeping forces are responsible for based on IHL. Although not one of the conventions has defined the term ‘armed conflict’, the International Committee of the Red Cross mentioned it broadly.<sup>74</sup> The International Committee of the Red Cross obtained entrustment from the parties of the Geneva Conventions to work towards understanding IHL, and it provided a legal definition for the armed conflict and divided it to international armed conflict and non-international armed conflict.<sup>75</sup> The types of armed conflict will be discussed in brief to show how they differ and how they relate to the position of the UN peacekeeping forces.

According to Common Article 2 of the Geneva Conventions, international armed conflict can be a war that ‘may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’. In this case, international armed conflict can only be between states irrespective of whether one of the sides recognises the war. This is an easy way to identify the situation of war. In addition, international armed conflict has been generally defined by the ICTY as ‘an armed conflict exists whenever there is a resort to armed force between States’.<sup>76</sup> Thus, the character of the parties to the armed conflict determines whether the conflict is an international armed conflict or not. In this case, because the UN peacekeeping forces

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<sup>74</sup> Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 1 *Yearbook of International Humanitarian Law* 3, 6.

<sup>75</sup> ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* Opinion paper, March 2008 <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> (accessed 23 February 2018).

<sup>76</sup> *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (The Hague, the Netherlands, 2 October 1995) <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>> (accessed 26 February 2018).

are not a state and work on behalf of an international organisation, they cannot be a part of armed conflict.

Non-international armed conflict has been mentioned in Common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II. Common Article 3 states, ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. Therefore, all parties to the conflict are responsible for applying ‘a minimum certain’ as mentioned in Common Article 3 (1) and (2) when armed groups are involved.<sup>77</sup> This article has shown that when the conflict is internal, it is considered a non-international armed conflict. Moreover, if the conflict is launched with the opposition to the government without combatants of other states, then the conflict is considered a non-international armed conflict.<sup>78</sup> This type of conflict has also been mentioned in Article 1 of Additional Protocol II, which ‘develops and supplements’ Common Article 3 to the Geneva Conventions that should be applied to all conflicts that:

[T]ake place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>79</sup>

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<sup>77</sup> Josef Mrázek, ‘Armed Conflicts and the Use of Force’ (2010) 1 *Czech Yearbook of International Law* 97, 93.

<sup>78</sup> Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 152.

<sup>79</sup> Additional Protocol II art 1(2).

The ICTY has defined non-international armed conflict also and shows it as ‘protracted armed violence between governmental authorities and organized armed groups or between such groups in a State’.<sup>80</sup> More examples of non-international armed conflict are the wars in Iraq and in Afghanistan when the armed conflicts were between the governments of those states and insurgents, which do not include any combatants belonging to other states.<sup>81</sup> Therefore, non-international armed conflict became clear according to Common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II. However, the question here is what is the responsibility of the UN peacekeeping forces and the position of IHL when the UN peacekeeping forces engage in armed conflict?

### **3.3.3 Applicability of IHL**

The previous discussion mentioned that IHL is applicable during military operations authorised by the UNSC if the forces are under the command of their home states, and not the UN. Therefore, in this case, the forces are responsible for discharging their duties according to IHL. The question here is if the forces are commanded by the UN, how can IHL be applied? Will civilians be without protection from IHL even though they in the armed conflict area? Many scholars have stated that IHL cannot be applicable during UN operations because the UN is not a party to the Geneva Conventions or the Additional Protocols.<sup>82</sup> The adoption of these opinions as the main instrument for dealing with the prevention of crimes in the host states is a reason to deliberate failure

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<sup>80</sup> *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) para 70.

<sup>81</sup> Solis, above n 78, 153.

<sup>82</sup> Greenwood, above n 74, 17.

to protect civilians. However, another view states that when the UN peacekeeping forces are involved in an armed conflict, they are under an obligation of the customary IHL.<sup>83</sup> This opinion was adopted in the 1999 bulletin of the Secretary-General: ‘The fundamental principles and rules of IHL set out in the present bulletin are applicable to the UN peacekeeping forces when in situations of armed conflict, they are actively engaged therein as combatants.’<sup>84</sup>

However, Schermers and Blokker stated that the 1999 bulletin was merely an internal administrative document and did not include any legal adherence to UN peacekeeping forces.<sup>85</sup> The UN cannot take any action if the UN peacekeeping forces’ personnel violate the IHL except returning them to their home states; therefore, the Secretary-General’s bulletin has no legal binding.<sup>86</sup> Moreover, to apply IHL to the UN peacekeeping operations, the armed conflict must be in their deployment area, and they must act and engage in the conflict as combatants.<sup>87</sup> However, if the UN forces engage in conflict as combatants, then IHL can be applied.

The UN peacekeeping forces are always deployed in unstable countries, which are mostly non-international armed conflict areas.<sup>88</sup> In these situations, the engagement of

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<sup>83</sup> Ibid 18.

<sup>84</sup> Kofi A Annan, *The UN Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (6 August 1999) art 1.1.

<sup>85</sup> Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff Publishers, 2011) 1002.

<sup>86</sup> Róisín Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current ‘Status Quo’ and Responsibility under International Law* (Martinus Nijhoff Publishers, 2014) 107.

<sup>87</sup> Ibid 108.

<sup>88</sup> Ibid 109.

the UN forces makes the nature of the conflict unclear, namely, whether it will continue to be the same position when the UN peacekeeping forces are involved in non-international armed conflict because they belong to other states. This is very important because IHL that applies to international armed conflict is different from the law that applies to non-international armed conflict.<sup>89</sup> In response to this complicated situation, Burke has argued that it is internationalising the conflict ‘even if this is done under a UN mandate and with [the] UN authorisation’ because the UN peacekeeping forces belong to other states; therefore, the international armed conflict is between two states.<sup>90</sup> Based on this argument, when the UN peacekeeping forces are involved in any conflict even to support the government of the host states, they will change the nature of the conflict from non-international armed conflict to international armed conflict, because the UN and its forces are a foreign element in the conflict.

In addition, the involvement of the UN peacekeeping forces in conflict will not change the conflict from internal to international. Hence, Murphy argued that the nature of the conflict will not be affected by the engagement of the UN peacekeeping forces in conflict; if the conflict is a non-international armed conflict, it will not be changed to international armed conflict even if the UN peacekeeping forces belong to other states, such as the involvement of the UN peacekeeping forces in the conflict in Somalia.<sup>91</sup> This author stated that the character of the conflict, whether internal or international, will not affect the application of IHL if the UN peacekeeping forces are established

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<sup>89</sup> Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press, 2015) 50.

<sup>90</sup> Burke, above n 86, 109.

<sup>91</sup> Murphy, above n 59, 180.

according to Chapter VII; therefore, in both of these conflict situations, IHL is applicable.

Essentially, IHL is applicable to the UN peacekeeping forces if they participate in conflict as combatants against the armed forces in the host states.<sup>92</sup> The reason that makes the UN peacekeeping forces bound by IHL is the contingents that structure these forces from the contracting parties to the conventions and protocols of IHL.<sup>93</sup> According to Article 1 of the Geneva Conventions and Article 1 of Additional Protocol I, the conventions and protocols can be applied ‘in all circumstances’. In this instance, any forces that engage in hostility will be bound by IHL even when they are under the command of the UN because the home state is a contracting party to the conventions and protocols of IHL, and thus, their responsibility under IHL will not be waived.<sup>94</sup> In regard to the rights and duties of international organisations, especially the UN, the ICJ in an advisory opinion on the *Reparation for Injuries Suffered in the services of the UN* (Reparation case) states that ‘the UN is an international person which is a subject of international law and capable of possessing international rights and duties’.<sup>95</sup> In this instance, IHL can be applicable to the UN peacekeeping forces.

In addition, to ensure that their forces comply with the principles and spirit of IHL, the UN adopted the *Status of Forces Agreement* (SOFA) with the home states.<sup>96</sup> For

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<sup>92</sup> Katarina Mansson, ‘Implementing the Concept of Protection of Civilians in the Light of International Humanitarian Law and Human Rights Law: The Case of MONUC’ in *International Humanitarian Law and Human Rights Law* (Brill, 2008) 563, 564.

<sup>93</sup> Greenwood, above n 74, 17.

<sup>94</sup> Derek W Bowett and George Paterson Barton, *United Nations Forces: A Legal Study* (Lawbook Exchange, 2008) 504.

<sup>95</sup> Reparation case [1949] ICJ Rep 174; Okimoto, above n 44, 205.

<sup>96</sup> Greenwood, above n 74, 18.

example, during UNAMIR, the UN pledged that the forces would behave with ‘full respect for the principles and spirit of the general conventions applicable to the conduct of military personnel’.<sup>97</sup> For another SOFA, the agreement of the UN peacekeeping forces and operations in Croatia, which was signed in Zagreb on 15 May 1995, the UN ensured that the forces would respect ‘the principles and spirit’ of the conventions of IHL.<sup>98</sup> Both these cases mentioned the conventions that related to IHL were applicable to the conduct of military personnel.<sup>99</sup> Therefore, from the mentioned cases and other SOFA adopted between the UN and the home states of the UN peacekeeping forces, the UN is willing to respect IHL; however, the lack of the clarity in international legislation related to the applicability of international law on organisations is the main problem.

The investigation of whether IHL can be applied during the UN peacekeeping operations has shown that when the UN commands the forces or they work under its authorisation, they must observe the customary IHL and the relevant IHL conventions.<sup>100</sup> This conclusion was adopted by the Institut De Droit International, which was in Article 2 of its resolutions: ‘The humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all

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<sup>97</sup> *Agreement on the Status of the United Nations Assistance Mission for Rwanda* (UNAMIR), signed 5 November 1993, 1748 UNTS 30482 (entered into force 5 November 1993) <<https://treaties.un.org/doc/Publication/UNTS/Volume%201748/volume-1748-I-30482-English.pdf>> para 7, (accessed 12 April 2018).

<sup>98</sup> *Agreement on the United Nations Forces and Operations in Croatia*, signed at Zagreb on 15 May 1995, 1864 UNTS 31771 (entered into force on 15 May 1995) <<https://treaties.un.org/doc/Publication/UNTS/Volume%201864/v1864.pdf>> para 7a, (accessed 12 April 2018).

<sup>99</sup> These conventions include the four Geneva Conventions and their Additional Protocols as the two agreements mentioned.

<sup>100</sup> Greenwood, above n 74, 18.

circumstances by United Nations Forces which are engaged in hostilities.’<sup>101</sup> Therefore, the next section will examine the responsibility of the UN peacekeeping forces for the violation of IHL in the host states and show their duty to prevent crimes that may be committed against civilians.

### **3.4 Obligations to protect imposed by IHL**

It has been argued that IHL is applicable during the UN peacekeeping operations regardless of the nature of the conflict. The question here is what is the obligation of the UN peacekeeping forces and under which part will they be responsible? This question is very important for examining crimes, such as SEA, that have been committed by the UN peacekeepers against women in the host states and other crimes or whether the failure in their duty is a violation of IHL. When the Court of Appeal for the ICTR adopted the *Akayesu* decision, it mentioned that the Geneva Conventions are binding on all conflict parties.<sup>102</sup> This section will judge the crimes according to the Geneva Conventions and the Additional Protocols since these conventions are the major elements of IHL.<sup>103</sup> The most common crimes committed by the UN peacekeepers or the third parties include wilful killing and SEA, and will be discussed to determine the position of IHL, issues relating to international responsibility and how the UN is tackling these issues.

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<sup>101</sup> *Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged* (3 September 1971) <[http://www.idi-iiil.org/app/uploads/2017/06/1971\\_zag\\_03\\_en.pdf](http://www.idi-iiil.org/app/uploads/2017/06/1971_zag_03_en.pdf)> art 2, (accessed 13 April 2018).

<sup>102</sup> *Prosecutor v Akayesu* (Judgement) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998). See also Wills, above n 32, 96.

<sup>103</sup> International Committee of the Red Cross (ICRC), *Advisory Service on International Humanitarian Law* <[https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf)> (accessed 17 March 2017).



### 3.4.1 Wilful killing

The Geneva Conventions was adopted to protect victims of armed conflicts, including the wounded and sick, the shipwrecked, prisoners of war and civilians. All states became a party to these conventions, including the home states of the UN peacekeeping forces. The conventions have discussed the obligations of the conflict parties extensively to protect and prevent crimes that may be committed against protected categories. Wilful killing is one of the crimes that must be prevented because it is considered one of the grave breach crimes according to Article 147 of Geneva Convention IV.<sup>104</sup> In addition, according to Article 146 of Geneva Convention IV, '[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention' that has been mentioned in Article 147. However, these steps by the Geneva Conventions do not show any progress for the protection of civilians during the UN peacekeeping operations because of the crimes still being committed by the UN peacekeepers directly or through the deliberate neglect of their duties, which allows the third parties to still commit crimes.

Large number of civilians have been killed during the UN peacekeeping operations by the UN peacekeepers or insurgents. Although the killings that have been committed by the UN peacekeepers are considered grave breaches according to Article 147 of Geneva Convention IV, they were prosecuted before the courts of their home states or went

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<sup>104</sup> Article 147 of the Fourth Geneva Convention. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

unpunished. One such killing that was committed directly by the UN peacekeepers was in Somalia when Canadian peacekeepers killed Shidane Abukar Arone, a Somali teenager, in March 1993.<sup>105</sup> These killings are often accompanied by other crimes, such as the crime committed by a UN peacekeeper when he was serving with the UN mission in Burundi. A South African sergeant allegedly raped and killed a 14-year-old girl called Therese Nkeshimana.<sup>106</sup> Often, the crimes do not stop at killing and have included the suppression of demonstrations, such as the recent crime that was committed in Mali on 2 April 2015.<sup>107</sup> This crime resulted in the killing of three protesters according to the Spokesman for the UN Secretary-General Ban Ki-moon. These crimes are only a few examples of the killing committed by the UN peacekeepers during their operations, which are already known and have been discussed widely. These crimes are a violation of IHL according to Article 147 of Geneva Convention IV. However, even though the killing may be committed by insurgents in some cases, the UN peacekeepers are ultimately responsible for these violations (i.e., because they have failed to protect civilians).

The stopping of crimes committed by insurgents during the UN peacekeeping operations still needs to be taken seriously by the international community. This is because these crimes could become more dangerous for civilians since insurgents will

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<sup>105</sup> *Her Majesty the Queen v Lieutenant-Colonel Joseph Carol Aristide Mathieu* [1995] CMAC-379 Court Martial Appeal Court of Canada - Judgment: Ottawa, November 6, 1995 (hereinafter *R v Mathieu*. Numbers refer to the pages of the CMAC decision, not to paragraphs), and Sandra Whitworth, 'Militarized Masculinities and the Politics of Peacekeeping: The Canadian Case' in *Critical Security Studies in World Politics* (Lynne Rienner, 2005) 89, 1.

<sup>106</sup> *SA Soldier Facing Murder Charge in Burundi* <<http://genderlinks.org.za/programme-web-menu/south-africa-exports-a-culture-of-sexual-abuse-2006-03-10>> (accessed 11 July 2018).

<sup>107</sup> *UN Finds Police Peacekeepers Shot Dead Three Mali Protesters* <<https://www.reuters.com/article/us-mali-un-protests/u-n-inquiry-finds-peacekeepers-killed-three-mali-protesters-idUSKBN0MT1W020150402>> (accessed 11 July 2018).

become convinced that the UN peacekeepers cannot prevent them from committing crimes, which will be reflected in the security situation in the host states. Some examples are now presented to reveal the failure of UN peacekeeping forces to protect civilians in the host states. In April 1994, the Belgian peacekeeping contingent was based in Kigali (Rwanda); however, they withdrew even though they were responsible for protecting thousands of civilian refugees.<sup>108</sup> The result of this unorganised withdrawal was a massive massacre of these refugees by the militia the next day.

Another example of how civilians were killed owing to the failure of the UN peacekeepers and how this failure still repeats itself is the failure of the UN peacekeeping in Bosnia and Herzegovina. During this conflict, the UN established six ‘safe areas’ and the UN had the right to ‘deter attacks against the safe areas’.<sup>109</sup> However, a report by the UN Secretary-General in May 1994 stated that the use of force to protect the safe areas by the UN peacekeepers was authorised but because of a ‘lack of troops’ there was no guarantee that the safe areas would be protected.<sup>110</sup> Therefore, the Bosnian Serb army occupied Srebrenica (Bosnia and Herzegovina), which was appointed as one of the safe areas according to the report by the UN Secretary-General. Subsequently, on 12 July 1995, after the fall of Srebrenica, the Dutch contingent forced anyone that had no UN ID to leave the protected area (compound).<sup>111</sup>

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<sup>108</sup> Human Rights Watch, *Lasting Wounds: Consequences of Genocide and War for Rwanda’s Children* <<https://www.hrw.org/sites/default/files/reports/rwanda0403.pdf>> (accessed 25 May 2018).

<sup>109</sup> SC Res 836, UN SCOR, 3228<sup>th</sup> mtg, UN Doc S/RES/836 (4 June 1993).

<sup>110</sup> UN Security Council, *Report of the UN Secretary-General Pursuant to Resolution 844 (1993)*, S/1994/555, May 9, 1994.

<sup>111</sup> James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 206.

In addition, under the pressure of the Bosnian Serb army commander, the Dutch battalion refused entry to thousands of men into the compound to obtain protection, which caused a massacre over the next few days, with than 7,000 Muslim men and boys killed.<sup>112</sup> The decision that forced them to leave was the main reason for their deaths.<sup>113</sup> In 2002, the Dutch government was blamed for the failure of its contingent that was working as a UN force to offer protection in Srebrenica.<sup>114</sup> This blame has since been confirmed by the decision of the Court of Appeal that has put a legal responsibility for the failure to protect. These cases raise an important issue that must be examined by international criminal law, which is whether the failure in duty to protect those who need protection can be considered a crime.<sup>115</sup>

### **3.4.2 Sexual violence**

The UN peacekeepers as well as insurgents have committed numerous acts of SEA against women and children of the host states. According to the HRW, SEA has been reported during the UN peacekeeping operations in Bosnia and Herzegovina, the DRC, Cambodia, East Timor, Haiti, Sierra Leone, Liberia, CAR and South Sudan and other countries.<sup>116</sup> To discuss this issue in depth and explain the position of IHL, SEA must first be defined. Sexual exploitation was defined by the Secretary-General's bulletin in

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<sup>112</sup> Dan Saxon, 'Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia' (2005) 4(4) (2005/10/01) *Journal of Human Rights* 559, 559.

<sup>113</sup> André Nollkaemper, 'Dual Attribution Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9(5) *Journal of International Criminal Justice* 1143, 1145.

<sup>114</sup> Ibid.

<sup>115</sup> Since the intensive examination of this issue is significant for clarifying the vagueness of the responsibility, it will be discussed in another chapter to make clear whether or not their failure is considered a crime.

<sup>116</sup> Human Rights Watch, UN: *Stop Sexual Abuse by Peacekeepers*, <<https://www.hrw.org/news/2016/03/04/un-stop-sexual-abuse-peacekeepers>> (accessed 23 April 2018).

2003 as being ‘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’.

Sexual abuse has been defined as ‘the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions’.<sup>117</sup> These misconducts have been criminalised by IHL and any attack or violence against women is prohibited according to Article 27 of the Geneva Convention IV, which includes the crimes against ‘their honour, in particular against rape, enforced prostitution, or any form of indecent assault’. Here, it has been shown as evident that the sexual violence committed during the UN peacekeeping operations breached Article 27 of the Geneva Convention IV.

Although the UN peacekeeping forces are responsible for protecting civilians, as mentioned in the UN policy and IHL, they have committed a number of crimes against civilians in the host states. The Cambodian Women’s Development Association raised a serious issue during the UN Transitional Authority in Cambodia (1992–1993) whereby the number of prostitutes increased to 25,000 from 6,000 in 1992. This prostitution not only involved adults, but an increasing number of child prostitutes.<sup>118</sup> In this case, the UN was responsible for increasing prostitution because the protection of civilians and their dignity is one of its main duties.

In 2014, serious allegations were raised concerning the UN peacekeepers in CAR who ‘had sexually abused a number of young children in exchange for food or money’.

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<sup>117</sup> Kofi A Annan, *The UN Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003) para 1.

<sup>118</sup> Angela Mackay, *Sex and the Peacekeeping Soldier: The New UN Resolution*, <<https://peacenews.info/node/3602/sex-and-peacekeeping-soldier-new-un-resolution>> (accessed 26 April 2018).

Although the government of CAR prevented these crimes, no necessary steps were taken with the accused forces to end the abuse or direct staff to report the allegations to the UN. ‘Information about the allegations was passed from desk to desk, inbox-to-inbox, across multiple UN offices, with no one willing to take responsibility to address the serious human rights violations,’ as the discussion up to here has stated.<sup>119</sup> Moreover, in 2016, allegations of child rape and sexual abuse in CAR were raised against the UN and French peacekeepers; these allegations included three girls in CAR being forced by a French military commander in 2014 to have sex with a dog.<sup>120</sup> In these cases, the UN peacekeeping based on their mandates and IHL had the responsibility to protect civilians from any crimes that may be committed, but they failed in their duties and the crimes did not stop. Therefore, in recent years the UN statistics have shown that the protection of civilians in the host states must be improved and SEA prevented. In 2017 and the first half of 2018, there were 156 instances of SEA by the UN personnel reported, including child victims in 46 cases.<sup>121</sup>

The above cases show how civilians are still suffering and are not being humanely treated even though they are supposed to be protected in all circumstances from acts of violence or threats. The serious impact and continuation of SEA led the UN Secretary-

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<sup>119</sup> Marie Deschamps, Hassan B Jallow and Yasmin Sooka, ‘Taking Action on Sexual Exploitation and Abuse by Peacekeepers’ (2015) 13 *Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic* (United Nations, DPKO: New York, 15 December 2015) 1, i.

<sup>120</sup> ‘Sickening’ Sex Abuse Alleged in CAR by UN Peacekeepers’ *Al Jazeera* (online) 1 April 2016 <<https://www.aljazeera.com/news/2016/03/sex-abuse-alleged-car-peacekeepers-160331183645566.html>> (accessed 27 April 2018).

<sup>121</sup> Conduct in UN Field Missions, *Sexual Exploitation and Abuse* <<https://conduct.unmissions.org/sea-victims>> (accessed 27 April 2018). See also *Supplementary Information to the Annual Report of the Secretary-General on ‘Special Measures for the Protection from Sexual Exploitation and Abuse’* (A/72/751) <[https://conduct.unmissions.org/sites/default/files/dfs\\_supplementary\\_information\\_to\\_a-72-751.pdf](https://conduct.unmissions.org/sites/default/files/dfs_supplementary_information_to_a-72-751.pdf)> (accessed 20 December 2018).

General António Guterres to ‘outline a new victim-centred approach to prevent and respond to such abuses committed by those serving under the UN flag’.<sup>122</sup> However, the SEA did not end and the UN peacekeepers and the third parties are still committing crimes.<sup>123</sup> Therefore, this violation of IHL is in reference to the crimes committed by the UN peacekeepers, and at the same time a failure in their duties because they are responsible for protecting civilians. Accordingly, the analysis and understanding as to whether the UN peacekeeping forces are responsible for preventing crimes that may be committed against civilians in the host states according to IHL are very important to criminalise the failure in duties to protect civilians.

### **3.4.3 Responsibility of the UN peacekeeping forces to prevent crimes under IHL**

The UN peacekeeping forces became more responsible over time by upholding the responsibility of the international community to protect civilians ‘from mass atrocity crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity’.<sup>124</sup> The responsibility of the UN peacekeeping forces according to IHL has been raised in this section because the previous sections of this chapter stated that IHL was applicable during the UN peacekeeping operations since it had been mandated in numerous cases to protect civilians. One of these cases was in the DRC when the UN

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<sup>122</sup> *UN Announces New Approach to ‘Stamp Out’ Sexual Exploitation and Abuse* <<https://news.un.org/en/story/2017/03/552982-un-announces-new-approach-stamp-out-sexual-exploitation-and-abuse>> (accessed 4 May 2018).

<sup>123</sup> Kathryn Bolkovac submitted a report to her superiors detailing a sex trafficking ring among UN police officers, including Ukrainians, Pakistanis, Romanians, Germans and Americans, working in conjunction with local criminal gangs; she was fired. See Alastair Good, ‘Kathryn Bolkovac: Interview with the Original “Whistleblower”’, *The Telegraph* (online), 4 February 2011 <<https://www.telegraph.co.uk/culture/culturevideo/booksvideo/8303161/Kathryn-Bolkovac-interview-with-the-original-Whistleblower.html>> (accessed 25 April 2019). See also: Azad Essa, ‘Why do Some UN Peacekeepers Rape?’ *Al Jazeera* (online) 4 August 2017 <<https://www.aljazeera.com/indepth/features/2017/07/peacekeepers-rape-170730075455216.html>> (accessed 25 April 2019).

<sup>124</sup> Global Centre for the Responsibility to Protect, <[http://www.global2p.org/our\\_work/peacekeeping\\_and\\_civilian\\_protection](http://www.global2p.org/our_work/peacekeeping_and_civilian_protection)> (accessed 28 Jun 2018).

peacekeeping forces were mandated to provide ‘protection of civilians from violations of IHL and human rights abuses, including all forms of sexual and gender-based violence.’<sup>125</sup> The UN peacekeeping forces are responsible for preventing crimes that may be committed against civilians according to IHL.

The responsibility of the conflicting parties was stated in Common Article 1 of the Geneva Conventions when it put an obligation on the High Contracting Parties to ‘respect and ensure respect’ of the conventions ‘in all circumstances’.<sup>126</sup> This is the crucial Article in the Geneva Conventions since it imposes obligations on the conflicting forces to prevent any severe crimes against civilians, even those committed by the third parties; therefore, it is applicable to the contracting parties and their forces if they fail to discharge the obligations.<sup>127</sup> The ICJ in the *Nicaragua case* mentioned and confirmed the respect of IHL as an obligatory duty, which is ‘the general principles of humanitarian law’.<sup>128</sup> In this instance, the conflicting parties had the liability for the crimes that were committed in the conflict area whether they were deployed under the leadership of the UN or not. Therefore, the UN peacekeeping forces have the responsibility to prevent any action that could be considered misconduct according to

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<sup>125</sup> *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1925, UN SCOR, 6324<sup>th</sup> mtg, UN Doc S/RES/1925 (28 May 2010) [12(c)].

<sup>126</sup> *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, open for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

<sup>127</sup> Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (Oxford University Press, 3rd ed., 2004) 19.

<sup>128</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) [1986] V ICJ Pleadings 78, 78 (Judge Schwebel) 79 (Professor Glennon) para 220. See also Róisín Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law* (Martinus Nijhoff Publishers, 2014) 113.



IHL.<sup>129</sup> Nevertheless, the articles of the Geneva Conventions make the UN peacekeeping forces responsible for the crimes that may be committed as outlined below.

Article 29 of the Geneva Convention IV states, '[t]he party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of individual responsibility which may be incurred.'<sup>130</sup> Therefore, as a result of the application of the Geneva Conventions to the UN peacekeeping forces, the UN or the home states of the UN peacekeepers will be responsible for the crimes committed by the UN peacekeeping forces or if they fail to uphold their duty, regardless of the individual responsibility of the soldier. Hence, on confirming this responsibility and determining who violated the Geneva Conventions, those individuals will be prosecuted without any chance for impunity. Article 146 of the Geneva Convention IV imposed the obligation of the state parties to 'undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' of the Geneva Convention IV.<sup>131</sup>

SEA has been mentioned earlier in this section as one of the main crimes committed during the UN peacekeeping operations by the UN peacekeepers or the third parties. However, the problem is that SEA does not appear in Article 147 of the Geneva

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<sup>129</sup> '[T]he ICJ has recognised the UN as possessing rights and duties under international law, it naturally follows that when the UN fails to fulfil its duties under international law, it incurs responsibility.' For more information, see Okimoto, above n 44, 221.

<sup>130</sup> *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 29.

<sup>131</sup> *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 146.

Convention IV within the category of grave breaches ‘that give rise to universal jurisdiction and obligate states to pursue and prosecute violations’.<sup>132</sup> Article 147 of the Geneva Convention IV enumerates ‘grave breaches’ as ‘wilful killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or unlawful confinement of a protected person’.

However, if the SEA was committed during the armed conflict, it would be considered ‘grave breaches’ and it can be prosecuted. However, because the SEA may be considered a violation of IHL ‘under the categories of torture, inhuman treatment, or wilfully causing great suffering or injury to body or health’, the host states will be responsible to prosecute whoever committed the crimes; therefore, the UN peacekeepers are responsible for preventing these crimes according to IHL whether they committed the SEA directly or omitted to prevent the criminals based on Article 76(1) of Additional Protocol I and Article 4(2)(e) of Additional Protocol II.<sup>133</sup> However, even though the responsibility has been discussed and shows clearly that the protection of civilians is the main duty of the UN peacekeeping forces, crimes are still being committed against civilians.

### **3.5 Conclusion**

This chapter has critically examined the application of IHL during the UN peacekeeping operations, and the manner in which the UN peacekeeping forces are responsible for

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<sup>132</sup> David S Mitchell, ‘The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine’, (2005) 15 *Duke Journal of Comparative & International Law* 223, 238.

<sup>133</sup> Article 76(1) of the Additional Protocol I enumerates: ‘women shall be the object of special respect and shall be protected in particular against rape, enforced prostitution and any other form of indecent assault.’ Article 4(2)(e) of Additional Protocol II prohibits ‘outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault’.

protecting civilians from crimes by the third parties in the host states. IHL in the Geneva Conventions and the Additional Protocols embodies strict provisions for the protection of civilians. The main finding is that these conventions containing IHL principles and rules are applicable to the UN peacekeeping forces, and they are responsible for any violations in the host states. This finding is in line with the 1999 bulletin of the Secretary-General that states: ‘The fundamental principles and rules of IHL set out in the present bulletin are applicable to [the] UN forces when in situations of armed conflict, they are actively engaged therein as combatants.’

The strategies for the application of IHL to the UN peacekeeping operations is based on Article 1 of the Geneva Conventions and Article 1 of the Additional Protocol I as these conventions and protocols can be applicable ‘in all circumstances’, and make the forces bound by IHL even when they are under UN command. These conventions show that the responsibility of the parties to the conventions and protocols of IHL will not be waived in all circumstances. Consequently, the ICJ in its advisory opinion in *Reparation* case showed that ‘the UN is an international person which is a subject of international law and capable of possessing international rights and duties’;<sup>134</sup> therefore, IHL can apply to the UN peacekeeping forces.

However, there is an outstanding issue that requires further study, which is whether the failure of the UN peacekeeping forces is a crime according to international criminal law. This chapter has shown that the application of IHL is insufficient to prevent the crimes committed against civilians. As a further sanction or deterrent, is it possible to prosecute those personnel of the UN peacekeeping forces who choose to commit crimes

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<sup>134</sup> *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174; Okimoto, above n 44, 205.

against civilians or fail to prevent the commission of crimes against civilians by the third parties of the host states? This serious question will be the subject matter of Chapter 5.

## Chapter 4

### **Failure of the UN Peacekeepers to Protect Civilians in Host States: Case Studies of the Democratic Republic of Congo and South Sudan**

#### **4.1 Introduction**

The failure to protect civilians in the host states has increased with time and has opened the door for the third parties to attack civilians. The most serious massacres committed because of the failure of the UN peacekeeping forces were the genocides in Rwanda and Srebrenica in 1990, which caused the deaths of approximately one million people.<sup>1</sup> This underscored the need to find a solution to the failure of the UN peacekeeping forces in protecting civilians.<sup>2</sup> Not solving this problem has caused the loss of tens of thousands of civilian lives. One of the main reasons that may cause this problem is the ambiguity as to whether the UN peacekeepers have been authorised with all the necessary mandates for the protection of civilians. It is important to understand the reasons the UN peacekeepers do not act to prevent harm to civilians and merely witness crimes when civilians are under attack.

The mandates to protect civilians in most of their operations, and their authorisation to launch offensive operations when it is necessary to prevent violence, appear to be insufficient to secure the protection of civilians. Several reports have shown that the UN peacekeeping forces are unwilling to take action when civilians are under attack.

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<sup>1</sup> United Nations, *Report of the Independent Inquiry into the Actions of the UN During the 1994 Genocide in Rwanda* <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement>> (accessed 07 April 2017).

<sup>2</sup> The statements made by the president of UNSC about protection of civilians in armed conflict; SC Res /1999/6, 3978<sup>th</sup> mtg, UN Doc S/PRST/1999/6 (12 February 1999); see Masako Yonekawa, 'Critical Analysis of Spoilers and Neighbouring States for Peace Implementation: Peacekeepers' Failure to Protect Civilians in Eastern DR Congo' (2014) 26(2) (2014/05/04) *Global Change, Peace & Security* 159.

One of these reports was adopted by the UN General Assembly in 2014, which shows that the UN ‘Peacekeepers are absent from many locations when civilians come under attack, and when they are present, are unable or unwilling to prevent serious physical harm from being inflicted’.<sup>3</sup>

The reason for focusing on the failure of the UN peacekeeping forces during their operations is related to the protection of civilians as a ‘strategic objective’, and the failure to achieve this duty means that the lives of civilians are at risk from the third parties.<sup>4</sup> Therefore, as regards the crimes committed during the UN peacekeeping operations, it must be determined whether the failure to prevent the third parties from committing crimes against civilians of the host states is because of deliberate neglect by the UN peacekeepers or other causes beyond their control. The first case is the crime committed by insurgents against the refugee camp in the DRC in 2014. This case will be used to explain the reason behind inaction to prevent the killing of 33 refugees by insurgents even though the offensive on the camp occurred close to the base of the UN peacekeeping forces.<sup>5</sup> The second case was the crime committed in July 2016 when the UN peacekeepers refused to provide any protection for civilians during the fighting in South Sudan.<sup>6</sup> This case will show how the UN peacekeeping forces deal with the crimes committed against civilians by the national army of the host states.

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<sup>3</sup> *Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations*, UN GAOR, 68<sup>th</sup> sess, Agenda Items 142, UN Doc A/68/787 (7 March 2014) para 80.

<sup>4</sup> *The Situation in Democratic Republic of the Congo*, SC Res 2098, 6943<sup>rd</sup> mtg, UN Doc S/RES/2098 (28 March 2013) para 3.

<sup>5</sup> Martin Kobler, the Head of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), noted that the UN peacekeepers failed to protect the refugee camp and they have not been held accountable for their failure to protect the camp. *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC S/PV.7237, 7237<sup>th</sup> mtg, UN Doc S/PV/7237 (2014).

These two cases have been selected for examination because they cover most, if not all, circumstances of the failure to protect civilians in the host states by the UN peacekeeping forces. The examination of these two cases would also reveal the commission of crimes against civilians by some members of the UN peacekeeping forces, which will be considered more appropriately in Sections 4.2.2.1 and 4.3.2.1.

## **4.2 The UN peacekeeping operation in the DRC**

While several of the UN peacekeeping operations have been launched in the DRC, the operation that will be examined to analyse the failure of the UN peacekeeping forces is their mission that has been renamed the UN Organization Stabilization Mission in the DRC (MONUSCO).<sup>7</sup> The reason for studying this mission is that it was mandated to protect civilians and they had been given priority in MONUSCO's duty, because the UNSC 'authorizes MONUSCO to use all necessary means, within the limits of its capacity and in the areas where its units are deployed'.<sup>8</sup> In addition, the same resolution has been mentioned in paragraph 12 (a) for the necessary mandates for the protection of civilians.<sup>9</sup> However, MONUSCO has failed to protect civilians and has been

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<sup>6</sup> The government soldiers and the opposition groups have 'committed widespread sexual violence against women who left those camps in search of food and attacked international and national aid workers in a hotel and apartment complex'. All these crimes were in the area of UN peacekeeping forces, but they refused to intervene to protect the victims although protection is one of their primary duties. For more information, see Center for Civilians in Conflict, *Under Fire: The July 2016 Violence in Juba and UN Response* (5 October 2016) <<http://civiliansinconflict.org/resources/pub/under-fire-the-july-2016-violence-in-juba-and-un-response>>. (accessed 21 July 2017). See also: Jason Burke, 'UN Peacekeepers Refused to Help as Aid Workers were Raped in South Sudan – Report', *The Guardian* (online) 6 October 2016 <<https://www.theguardian.com/world/2016/oct/06/un-peacekeepers-refused-to-help-south-sudan-rebels-raped-aid-workers-report>> (accessed 21 July 2017).

<sup>7</sup> As of 1 July 2010, the MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in accordance with UN Security Council Resolution 1925. See *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1925, UN SCOR, 6324<sup>th</sup> mtg, UN Doc S/RES/1925 (28 May 2010).

<sup>8</sup> Ibid para 11.

<sup>9</sup> Ibid para 12 (a): 'Ensure the effective protection of civilians, including humanitarian personnel and human rights defenders, under imminent threat of physical violence, in particular violence emanating from any of the parties engaged in the conflict.'

criticised on several occasions for its failures, such as the failure to prevent violations of IHR and IHL, including rapes and other physical violence committed by the third parties in the host states.<sup>10</sup> These crimes were committed even though the UN peacekeeping forces had increased their ability and had to protect civilians on priority. Therefore, examining the reason behind the strengthening of the forces and permitting them to use force should reduce the suffering of civilians. This is because understanding the idea that led to the decision of making the UN peacekeeping forces robust will clarify the duty of the UN peacekeepers and intensify the protection of civilians.

The analyses of MONUC will clearly show the reasons that made the UNSC adopt the decision to make the UN peacekeeping forces more robust. In addition, the analyses will clarify the reasons for the repetitive failure of the UN peacekeeping forces to protect civilians, and for the inability of MONUC to prevent crimes on many occasions. Although the MONUC in Kisangani involved approximately 1,000 UN peacekeepers and tens of ‘military observers’ who had enough information regarding the violence, they did nothing to prevent the massacre.<sup>11</sup> The reason for this lack of reaction was that the UN peacekeeping forces were unwilling to risk their personnel, although they stated it was because the UN peacekeeping forces could not act unless they were authorised under Chapter VII to ‘engage in combat’,<sup>12</sup> which made their duty and the purpose of

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<sup>10</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC Res 512, UN Doc S/2010/512 (8 October 2010) paras 8, 11, 13 and 36.

<sup>11</sup> *The Situation in the Democratic Republic of the Congo*, SC Res 1417, 4554<sup>th</sup> mtg, UN Doc S/RES/1417 (14 June 2002); see Joshua Marks, ‘The Pitfalls of Action and Inaction: Civilian Protection in MONUC’s Peacekeeping Operations’ (2007) 16(3) (2007/09/01) *African Security Review* 67, 71.

<sup>12</sup> Marks, above n 11. See also Victoria K Holt, Glyn Taylor and Max Kelly, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges* (UN, 2009) 251.



their mission ambiguous. Another example of the failure by the UN peacekeeping forces to discharge their duties was in May 2004 when the Uruguayan battalion did not resist the attack on an airport, which was under its protection ‘and gave control of the civilian tarmac to Nkunda’.<sup>13</sup>

Many factors in the DRC led to the failure by the UN peacekeeping forces to protect civilians. One was the long border between the DRC and its neighbours, which extends for up to 2,500 km, and influenced the capacity of the UN peacekeeping forces to prevent ‘an arms embargo or prevent militias, such as the Lord’s Resistance Army, from slipping across the border to relative security’.<sup>14</sup> Other reasons were the collapse of the security situation and the instability in the political environment in the DRC, which were ignored in the mandates of the UN peacekeeping forces and reflected even in their equipment and made them have less ability than the armed groups in the DRC. These factors made the UN peacekeepers incapable of fighting the armed groups. To prevent the failure of the UN peacekeeping forces and to secure the protection of civilians in general, working on ‘security sector reform’ must be a priority.<sup>15</sup> All these factors led the UNSC in 2010 to adopt another decision to make the UN peacekeeping forces robust with new mandates to strengthen their ability to use force for the protection of civilians.

In March 2013, the UNSC concluded their decision to include an:

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<sup>13</sup> Holt, Taylor and Kelly, above n 12.

<sup>14</sup> Ray Murphy, ‘UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians’ (2016) 21(2) *Journal of Conflict and Security Law* 209, 224.

<sup>15</sup> Alan Doss, *Great Expectation: UN Peacekeeping, Civilian Protection, and the Use of Force* (Geneva Centre for Security Policy, 2011) 21.

Intervention Brigade consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under the direct command of MONUSCO Force Commander.<sup>16</sup>

The purpose of these forces was to reduce the threat of insurgents ‘to state authority and civilian security’. Therefore, the above question was very important for analysing the reasons that made the UNSC take these decisions to make the UN peacekeeping force robust. The UN peacekeepers must now have the ability and responsibility for preventing crimes against civilians that may be committed by the third parties in the host states. However, this mission failed to protect civilians from insurgents on several occasions. To discuss this failure, the duties of MONUSCO are examined next.

#### **4.2.1 Mandates of MONUSCO**

Following the repetitive failures of the UN peacekeeping forces in the DRC, the UNSC adopted Resolution 2098 on 28 March 2013 that extended the UN peacekeeping operation until 31 March 2014. The extension of the UN peacekeeping operation was not limited to only the duration, but also included enhancing their ability to face potential threats against civilians. MONUSCO included the ‘Intervention Brigade’ to stop the conflict and bring stability to the DRC. The responsibility of MONUSCO according to the mandate authorised by the UNSC was ‘neutralizing armed groups and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC’.<sup>17</sup>

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<sup>16</sup> *The Situation in Democratic Republic of the Congo*, SC Res 2098, 6943<sup>rd</sup> mtg, UN Doc S/RES/2098 (28 March 2013) para 9.

<sup>17</sup> Ibid.

The UNSC on 28 March 2014 by its Resolution 2147 decided to extend the mandate of MONUSCO to 31 March 2015.<sup>18</sup> This mission included ‘19,815 military personnel, 760 military observers and staff officers, 391 police personnel and 1,050 formed police units’.<sup>19</sup> This decision was made because of the crimes committed by the third parties against civilians, for example, the rapes, other forms of sexual violence and killing committed by these forces showed the urgent need for civilians to be protected.<sup>20</sup> Therefore, the main concerns of the UNSC were to provide better protection to civilians through neutralising insurgent groups by authorising MONUSCO to use their forces to prevent insurgents from moving freely in the DRC. However, this resolution did not stop those crimes committed against civilians, even with the continual push by the UNSC to extend the missions many times.

On 30 March 2016, the UNSC extended the mandate of the UN peacekeeping forces for another year because of the humanitarian crises.<sup>21</sup> On 31st March 2017, the UNSC decided to retain MONUSCO until 31 March 2018; however, the personnel number was decreased to ‘16,215 military personnel, 660 military observers and staff officers, 391 police personnel, and 1,050 personnel of formed police units’.<sup>22</sup> Finally, on 27 March 2018, the UNSC decided to extend MONUSCO until 31 March 2019 with the mandate of MONUSCO in the DRC including the same mandates mentioned before with the

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> *The Situation in Democratic Republic of the Congo*, SC Res 2098, 6943<sup>rd</sup> mtg, UN Doc S/RES/2098 (28 March 2013). See also *Conflict-Related Sexual Violence*, SC Res 181, UN Doc S/2014/181 (13 March 2014) paras 27–31.

<sup>21</sup> *Democratic Republic of the Congo*, SC Res 2277, 7659<sup>th</sup> mtg, UN Doc S/RES/2277 (30 March 2016).

<sup>22</sup> *The Situation Concerning the Democratic Republic of the Congo*, SC Res 2348, 7910<sup>th</sup> mtg, UN Doc S/RES/2348 (31 March 2017).

‘Intervention Brigade’.<sup>23</sup> The strengthening of MONUSCO and extending its mandate over and over again without offering any real protection to civilians raises two important questions. If the strength of MONUSCO has no effect so far, is there another strategy that can help provide protection for civilians? The second question is: How do the insurgent groups recruit new fighters to join their criminal activity? The answers to these questions are very important for exploring the real reasons for the suffering of civilians, such as whether the mandate of MONUSCO is still insufficient for defeating insurgent groups or whether they are unwilling to protect them. If the mandate is still insufficient, the international community is not taking the necessary actions to defeat insurgents and prevent them from committing crimes against civilians, which indicates that the danger of the situation could increase over time.

However, when the failure of the UN peacekeepers is a result of the unwillingness of MONUSCO to discharge their main duty, which is the protection of civilians, they will be responsible for the crimes and this will show the importance of accountability for the failure. Therefore, it is very important to examine the reasons behind the failure of MONUSCO to protect civilians. In addition, it is important to understand how the insurgent groups recruit fighters. In this case, the availability of a strong government has a significant effect on this problem, but because the UN peacekeeping forces are mostly deployed in non-stable countries lacking strong governments, the UN peacekeeping forces will have the responsibility to treat this problem. In this scenario, the UN peacekeeping forces must not only strengthen their military equipment, but also should have sufficient experience even in technology to stop the insurgent groups

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<sup>23</sup> SC Res 2409, 8216<sup>th</sup> mtg, UN Doc S/RES/2409 (27 March 2018) para 29.

reaching any new people. This is because, in recent years, the insurgent groups have started to use social media to recruit new fighters.

#### **4.2.2 Consequences of omission by the UN peacekeeping forces to protect civilians**

Even though the protection of civilians has been the central priority in the mandates of the UN peacekeeping forces since 2008, they have omitted to discharge this duty in numerous cases. One of the evaluations by the UN across eight missions has found ‘a persistent pattern of the UN peacekeeping operations not intervening with force when civilians are under attack’.<sup>24</sup> Therefore, they do not value their obligations and civilians’ lives, regardless of whether they are witnessing serious violations of human rights or in a safe environment. Subsequently, making the UN peacekeeping forces in the DRC robust and providing them necessary equipment to protect civilians and prevent crimes committed against civilians is highly important; otherwise, the failures of the forces will not cease. One of the main peacekeeping operations that failed on several occasions is MONUSCO. Its failures caused human rights violations, including the killing of civilians and the rape of women and children. Because of these failures, the UNSC has mentioned that the mission ‘is no longer able to implement critical parts of its priority mandated tasks related to protecting civilians, addressing the presence of the insurgent groups and supporting the elections’.<sup>25</sup>

The repetitive failures of the UN peacekeeping forces to protect civilians caused the emergence of insurgent groups in the UN peacekeeping area and increased their crimes

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<sup>24</sup> Denis M Tull, ‘The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo’ (2018) 25(2) (2018/03/15) *International Peacekeeping* 167, 170.

<sup>25</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC Res 656, UN Doc S/2011/656 (24 October 2011) para 77.

against civilians, such as the 23 March Movement (M23) in the DRC,<sup>26</sup> which cost civilians their lives and dignity. These failures in the protection of civilians raise an important question: Why are the UN peacekeeping forces unable to protect civilians? Some studies have argued that the UN peacekeeping forces were a vaguely robust concept, and not 'robust enough'.<sup>27</sup> Another study showed that the UN peacekeeping forces failed to manage internal problems to reduce violations against civilians.<sup>28</sup> In addition, there are 'institutional gaps' and no clear definition for the protection of civilians, which makes the distinguishing of civilians a challenging job for the UN peacekeepers.<sup>29</sup> Therefore, the crimes committed by the UN peacekeepers and the insurgent groups need to be examined to discover the real reason that civilians are always the losers in any armed conflict.

#### **4.2.2.1 Crimes committed by the UN peacekeepers against civilians**

Throughout the operations of the UN peacekeeping forces in the DRC, numerous misconducts have been committed by the UN peacekeepers. Although the UN peacekeepers have been involved in different types of misconduct during their operations, the main misconduct that they have committed during their operations is SEA. Mentioning these crimes committed by the UN peacekeepers does not mean that

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<sup>26</sup> John Karlsrud, 'The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali' (2015) 36(1) (2015/01/02) *Third World Quarterly* 40, 44.

<sup>27</sup> Thierry Tardy, 'A Critique of Robust Peacekeeping in Contemporary Peace Operations' (2011) 18(2) *International Peacekeeping* 152, 152; see Denis M Tull, 'Peacekeeping in the Democratic Republic of Congo: Waging Peace and Fighting War' (2009) 16(2) (2009/04/01) *International Peacekeeping* 215, 215.

<sup>28</sup> Séverine Autesserre, *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding* (Cambridge University Press, 2010) 9.

<sup>29</sup> Janine Natalya Clark, 'UN Peacekeeping in the Democratic Republic of Congo: Reflections on MONUSCO and its Contradictory Mandate' (2011) 15(3–4) *Journal of International Peacekeeping* 363, 263; see Benjamin de Carvalho and Jon Harald Sande Lie, 'Chronicle of a Frustration Foretold? The Implementation of a Broad Protection Agenda in the United Nations' (2011) 15(3–4) *Journal of International Peacekeeping* 341.

they have not protected civilians at all; rather, it serves to highlight the gaps that make some of them not perform their duty strictly for the safety of civilians and ignore the rules of UN peacekeeping forces. Those serving in the MONUC and MONUSCO forces have worked and sacrificed much under very difficult circumstances since these were established to protect civilians from several crimes committed by armed groups, such as the crimes of rape and killing.

However, some of the UN peacekeepers have committed misconducts against civilians instead of protecting them and exploited the fact that there is no one to hold them accountable for their misconducts. Therefore, in this chapter the crimes committed against civilians, whether by MONUC or MONUSCO, will be stated in brief to show the suffering of civilians. The main reason to analyse the MONUC and the subsequent operation (MONUSCO) is because during these missions, the highest rates of SEA were committed by the UN peacekeepers across all the UN peacekeeping operations.<sup>30</sup> The crimes were committed because the UN peacekeeping forces neglected to perform their duty.

During the MONUC operation, personnel committed many crimes by exploiting the position and the needs of the people, especially women.<sup>31</sup> These crimes were committed in many of the UN peacekeeping operations, but these significantly increased in the

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<sup>30</sup> Bonnie Kovatch, 'Sexual Exploitation and Abuse in UN Peacekeeping Missions: A Case Study of MONUC and MONUSCO' (2016) 7(2) (2016/04/02) *Journal of the Middle East and Africa* 157, 158.

<sup>31</sup> Sara Meger, 'Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo' (2010) 28(2) (2010/04/01) *Journal of Contemporary African Studies* 119, 126; *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 65<sup>th</sup> sess, Agenda Item 134, UN Doc A/65/742 (18 February 2011) para 9.

DRC and were committed by MONUC personnel.<sup>32</sup> The nature of the exploitation was mostly by having sexual relationships or raping women, namely, hundreds of thousands of women and girls in the DRC during the 10-year term, because there was no protection for them from the violation of their fundamental human rights.<sup>33</sup> The consequence of these criminal misconducts in 2004 made several independent resources, such as newspaper articles, state that the UN peacekeepers in the DRC had committed several types of crimes against women, including rape, torture and transactional sexual relationships. The rape of women and sexual relationships caused an increase in the number of single Congolese women having babies, who were later called ‘peacekeeper babies’, and the pornographic videotaping of the Congolese women and children.<sup>34</sup> These crimes have not been stopped, but are still being committed even after the UN forces mandated MONUSCO in 2010 to protect civilians and authorised them to take all necessary actions to achieve this duty in the DRC.

MONUSCO has been mandated to protect civilians, which means logically that they will not commit any crimes against civilians; however, they are still involved in many

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<sup>32</sup> *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 64<sup>th</sup> sess, Agenda Item 137 and 146, UN Doc A/64/669 (18 February 2010) para 9; *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 63<sup>rd</sup> sess, Agenda Item 123 and 132, UN Doc A/63/720 (17 February 2009) para 9.

<sup>33</sup> Mary Kimani, ‘Congolese Women Confront Legacy of Rape: War and Sexual Violence Leave Survivors in Desperate Need’ (2007) 20(4) *Africa Renewal* 4.

<sup>34</sup> Natalie Gilliard, ‘Peacekeepers or Perpetrators? An Analysis of Sexual Exploitation and Abuse (SEA) by UN Personnel in the Democratic Republic of Congo’ (2012) 3 *Mapping Politics*, 27; Susan A Notar, ‘Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo’ (2006) 14 *American UJ Gender Society Policy and Law* 413, 414. See, for example: M Lacey, ‘In Congo War, Even Peacekeepers Add to Horror’, *New York Times* (online) 18 December 2004, <[http://www.nytimes.com/2004/12/18/international/africa/18congo.html?\\_r=1&](http://www.nytimes.com/2004/12/18/international/africa/18congo.html?_r=1&)> (accessed 27 September 2018); K Holt, ‘DR Congo’s Shameful Sex Secret’, *BBC News* (online), 3 June 2004 <<http://news.bbc.co.uk/2/hi/africa/3769469.stm>> (accessed 27 September 2018); *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 62<sup>nd</sup> sess, Agenda Item 133 and 140, UN Doc A/62/890 (25 June 2008) Annex IV.



direct crimes against civilians, which could increase the probability of the continuation of harm towards civilians; further, the UN peacekeepers may not go to protect them when they should. For example, 16 allegations of SEA were received from MONUSCO in 2015.<sup>35</sup> In addition, on 1 April 2016, MONUSCO announced that allegations of SEA were received that had been committed ‘by members of the Tanzanian contingent of the Mission’s Force Intervention Brigade in Mavivi village, near Beni in the Eastern DRC’.<sup>36</sup>

These crimes and harm against civilians have not stopped because the UNSC neglected a critical issue, which is the accountability for the crimes committed by the UN peacekeepers. The question here is are the UNSC resolutions considering all circumstances that may protect civilians? If the UNSC considered all the dangers to civilians, why are they experiencing the commission of crimes by the UN peacekeepers themselves? This study has found that the UNSC neglected several sides during the adoption of the resolutions related to the UN peacekeeping operation in the DRC. For example, if we examine UNSC Resolution 2098 from 2013, this shows the high concern for the humanitarian situation that continues to severely affect the civilian population in the DRC, which included ‘high levels of violence and abuses and violations of international law’ committed against civilians.

In addition, the same resolution called for bringing to justice and prosecuting all those responsible for violations of IHL or abuses of human rights. However, it did not include

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<sup>35</sup> *Special Measures for Protection from Sexual Exploitation and Sexual Abuse, Report of the UN Secretary-General*, UN GAOR, 70<sup>th</sup> sess, Agenda Item 139, UN Doc A/70/729 (16 February 2016) para 8 (a).

<sup>36</sup> *DR Congo: Investigation into Misconduct Opened* <<https://monusco.unmissions.org/en/dr-congo-investigation-misconduct-opened>>(accessed 08 November 2018); and *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 66<sup>th</sup> sess, Agenda Item 139, UN Doc A/66/699 (17 February 2012) para 19.

the criterion to bring the alleged criminals to justice and did not mention how to deal with the crimes committed by the UN peacekeepers or their failure to achieve their duties. Therefore, this shows that the UNSC resolution was at best half-hearted, not seriously interested in protecting civilians and reducing their suffering. This lacklustre protection regime of the UNSC appears to be one of the reasons the crimes are still being committed by the UN peacekeepers, more often than not, with impunity even today.

#### **4.2.2.2 Crimes committed by insurgents against civilians**

MONUSCO was the first massive UN peacekeeping operation launched by the UNSC in 2015, which included 24,912 personnel, most of them military and police.<sup>37</sup> However, the violence and insecurity have never stopped in the DRC, and things became worse in some situations especially when it appears that MONUSCO has failed to protect civilians from numerous attacks by the insurgent groups in the DRC. This failure to protect civilians reflects on security and the social situation. The security situation has worsened, and the lands controlled by the insurgent groups and the suffering and the victims on the side of civilians have increased.<sup>38</sup> One situation that caused discontent among the main actors was the non-implementation of a peace deal between the Congolese government and M23 in 2009, which caused huge parts of North Kivu to be occupied by M23 and led to them running their own government.<sup>39</sup> The ability of M23 to occupy the area was the result of a long cooperation between M23 and

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<sup>37</sup> MONUSCO at a Glance < [https://monusco.unmissions.org/sites/default/files/2015-04-16\\_global\\_factsheet-eng\\_.pdf](https://monusco.unmissions.org/sites/default/files/2015-04-16_global_factsheet-eng_.pdf) > (accessed 08 November 2018).

<sup>38</sup> Masako Yonekawa, 'Critical Analysis of Spoilers and Neighbouring States for Peace Implementation: Peacekeepers' Failure to Protect Civilians in Eastern DR Congo' (2014) 26(2) (2014/05/04) *Global Change, Peace & Security*, 165.

<sup>39</sup> Tull, above n 24, 173.

Rwanda, who supported them with weapons and logistics that caused 3,000–4,000 new combatants to be enrolled in M23.

In November 2012, the inability of the government of the DRC to control insurgent groups and its unwillingness to make concessions contributed to the success and strengthening of M23, which attacked and occupied Goma, the capital of North Kivu. In addition, MONUSCO had failed to halt and stop M23, even though it was engaged against the rebellion.<sup>40</sup> The consequence of these problems was the emergence of insurgent groups in the DRC in a powerful position, such as M23 and the Democratic Forces for the Liberation of Rwanda (FDLR). These and other insurgent groups committed numerous crimes against civilians, which will be presented to understand whether MONUSCO attempted to prevent them or not.

The condemnation was clear for all insurgent groups in the 2013 UNSC resolution that mandated the UN peacekeeping forces to prevent crimes, and yet, the UN forces failed to stop much violence against civilians that was committed by these groups.<sup>41</sup> The deployment of MONUSCO, especially the Intervention Brigade since 2013 in North Kivu, did not alter anything since they had failed to prevent attacks against civilians. Their watching the crimes committed against civilians without attempting to halt the insurgent groups caused a significant increase in these civilian attacks.

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<sup>40</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC Res 96, UN Doc S/2013/96 (15 February 2013) para 37.

<sup>41</sup> *The Situation in Democratic Republic of the Congo*, SC Res 2098, 6943<sup>rd</sup> mtg, UN Doc S/RES/2098 (28 March 2013) para 8.

In the Beni area from October 2014 to June 2015, up to 450 people were killed by unidentified insurgent groups according to UN reports.<sup>42</sup> On 30 April 2015, in the north of the former Katanga province 30 civilians were killed by Luba (an ethnic armed group). This attack included not only the killing of the 30 civilians but also the burning down of the camp.<sup>43</sup> In Ituri, another insurgent group was responsible for serious human rights violations, ‘particularly rape and pillage’. In the Rutshuru territory, North Kivu province, in 2016 the HRW mentioned in its report that civilians were still being kidnapped by the insurgent groups for ransom.<sup>44</sup> The reaction by the Congolese army to stop the large number of the insurgent groups who were still active in the eastern area of the DRC was to launch a military operation against the FDLR in February 2015.<sup>45</sup> This was because the FDLR had committed a serious violation of IHL in the east area of the DRC over the previous decade. This operation was supported by the UN peacekeeping forces in the DRC, especially in the planning stage; however, they later withdrew from the operation because they appointed two commanders who were responsible for any human rights violations.

The complicated situation in the DRC and no real solutions to stop the crimes against civilians was clearly shown in the 2018 UNSC report, which stated that in a one-year period from January to December 2017, MONUSCO verified 804 cases of sexual

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<sup>42</sup> ‘DR Congo Launches Offensive against FDLR Rebels’ *Al Jazeera* (online) 26 February 2015 < <https://www.aljazeera.com/news/2015/02/dr-congo-offensive-fdlr-rebels-150226021624157.html> > (accessed 10 October 2018).

<sup>43</sup> Human Rights Watch report, *Democratic Republic of Congo* < <https://www.hrw.org/world-report/2016/country-chapters/democratic-republic-congo#c778c9> > (accessed 10 October 2018).

<sup>44</sup> Ibid.

<sup>45</sup> ‘DR Congo Launches Offensive against FDLR Rebels’, above n 42.

violence that affected 507 women, 265 girls, 30 men and 2 boys.<sup>46</sup> This was a significant increase in the cases of sexual violence compared with the previous year. In addition, ‘5,783 cases of sexual violence in conflict-affected provinces’ were reported by the UN Population Fund during the same period; therefore, the number of cases increased to double that of the number of cases committed in 2016. A total of 72 per cent of these cases were committed by the insurgent groups.<sup>47</sup>

To date, there is no solution for ending the failure by the UN peacekeeping forces, although many voices have been raised to try to solve this problem. In the Kasai region, between June 2016 and June 2017, there were approximately 2.8 million people suffering from food shortages, an increase of 600 per cent since the previous decade. The most serious problem is that the health and education of ‘over 1.5 million children in the Kasai region’ are still unsecured and they also prone to diseases.<sup>48</sup> The increased suffering of civilians is clearly revealed by the UN peacekeeping forces not being able to discharge their duty to protect them and improve their environment, thus making them easy targets for recruitment into the insurgent groups. Instead of defeating the armed groups and preventing them from being active, a new environment and new fighters are available for their sustainability.

Thus far, this section has examined the crimes committed between 2012 and 2017 to show the suffering of civilians because of armed groups in the DRC. However, only

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<sup>46</sup> United Nations Secretary General, *Report of the Secretary-General on Conflict-Related Sexual Violence* S/2018/250 (16 April 2018) <<https://www.un.org/sexualviolenceinconflict/wp-content/uploads/reports/sg-reports/SG-REPORT-2017-CRSV-SPREAD.pdf>> (accessed 15 October 2018).

<sup>47</sup> *Report of the UN Secretary-General on Conflict-Related Sexual Violence*, SC Res 250, UN Doc S/2018/250 (23 March 2018) para 37.

<sup>48</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC Res 824, UN Doc S/2017/824 (2 October 2017) para 35.

one crime will be examined in depth as a case study to show why the UN peacekeeping forces have failed in protecting civilians and whether their failures can be conceded as a crime. The crime discussed in greater detail in the next section was committed in 2014 and caused the killing of many civilians without intervention or reaction from MONUSCO to defend them. This crime and the reason why it is chosen will be explained in the next section.

#### **4.2.3 The massacre of civilians in the DRC in 2014**

MONUSCO was based 9 km away from the massacre site and was aware of the attack; however, they did not intervene to stop the attack and protect civilians. This attack caused the killing of 33 civilians east of the DRC's South Kivu province on 6 June 2014.<sup>49</sup> The attack against these civilians was committed by the Barundi and Banyamulenge armed group in South Kivu, where a large number of civilians were gathered in an outdoor church.<sup>50</sup> This insurgent group attacked 200 civilians at this location with gunfire and grenade shrapnel. During the attack, men, women, children and people with disabilities were killed. In addition, this barbaric attack was not limited only to people, but also targeted 'a health centre and several houses, shot people at point-blank range, and then burned them to death'.<sup>51</sup>

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<sup>49</sup> Martin Kobler, the Head of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), noted that the UN peacekeepers failed to protect the refugee camp and they have not been held accountable for their failure to protect the camp. *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC S/PV.7237, 7237<sup>th</sup> mtg, UN Doc S/PV.7237 (2014); Scott Sheeran and Stephanie Case, *The Intervention Brigade: Legal Issues for the UN in the Democratic Republic of the Congo* (International Peace Institute New York, 2014) 18; see Human Rights Watch, *DR Congo: Army, UN Failed to Stop Massacre* <<https://www.hrw.org/news/2014/07/02/dr-congo-army-un-failed-stop-massacre>> (accessed 10 October 2018).

<sup>50</sup> *Report of the United Nations High Commissioner for Human Rights*, GA Res 30/32, UN GAOR, 30<sup>th</sup> sess, Agenda Item 2 and 10, UN Doc A/HRC/30/32 (27 July 2015) para 59.

<sup>51</sup> Ibid.

This attack was a clear violation of many articles of the Geneva Conventions. For example, Article 18 of Geneva Convention IV was violated because the insurgent group attacked a health centre even though this article clearly states that ‘the civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack, but shall at all times be respected and protected by the parties to the conflict’.<sup>52</sup> The damage caused to civilians during the attack included death, torture and inhuman treatment, which was a violation of Article 147 of the Geneva Convention IV because these crimes were committed against persons and property protected by IHL.<sup>53</sup> During this attack, civilians received no protection; therefore, the insurgent group were able to take enough time to easily complete their crime without any resistance. IHL obliges all conflict parties to prevent any violation of human rights being committed against civilians during the time of conflict even by the third parties;<sup>54</sup> therefore, MONUSCO are responsible for their failure to prevent these crimes.

Additionally, MONUSCO are responsible according to their mandate listed in the UNSC Resolution 2147 in March 2014, which placed an obligation on MONUSCO to protect civilians as mentioned in the mandates.<sup>55</sup> Notably, MONUSCO had been

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<sup>52</sup> *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, open for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 18.

<sup>53</sup> *Ibid* art 147.

<sup>54</sup> Siobhán Wills, *Protecting Civilians: The Obligations of Peacekeepers* (Oxford University Press, 2009) 101.

<sup>55</sup> *Democratic Republic of the Congo*, SC Res 2147, 7150<sup>th</sup> mtg, UN Doc S/RES/2147 (28 March 2014) para 4 (a) (i): ‘Ensure, within its area of operations, effective protection of civilians under threat of physical violence, including through active patrolling, paying particular attention to civilians gathered in displaced and refugee camps, humanitarian personnel and human rights defenders, in the context of violence emerging from any of the parties engaged in the conflict, and mitigate the risk to civilians before, during and after any military operation.’

informed of the preparation by the insurgent group to launch an attack against civilians; however, they ignored the warning of this impending massacre. Ignoring this warning is evidence that they deliberately neglected their duty. Therefore, the question here is why did neither MONUSCO nor the army respond to this attack in a bid to protect civilians?

The national army of any state must be responsible for the protection of its own country's civilians since it represents the power of the state;<sup>56</sup> this is their main obligation and the reason for adopting an army for any state.<sup>57</sup> This obligation remains the same even where there are other official forces in the state, irrespective of whether these forces are foreign or local. However, the army in the DRC did not discharge this duty when the Barundi and Banyamulenge insurgent group attacked civilians in South Kivu despite the warning received before the massacre.<sup>58</sup> According to the HRW report, before the attack on 6 June 2014, an insurgent group belonging to Bafuliro called Mai 'killed a Banyamulenge cattle herder near Mutarule and stole his cattle'.<sup>59</sup> The leader of the Barundi reported this crime to Captain Enabombi Changa from the 10052 army battalion. Soldiers were sent to investigate; however, they returned to their base without reaching their destination because of the fighting and the fire between Bafuliro Mai and Banyamulenge and Barundi youth.

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<sup>56</sup> Sompong Sucharitkul, 'State Responsibility and International Liability under International Law' (1995) 18 *Loyola of Los Angeles International and Comparative Law Journal* 821, 823.

<sup>57</sup> *The Protection of Civilians in Armed Conflicts: Well-Trodden Paths and New Ways Forward* <<https://aiv-advice.nl/8wr/publications/advisory-reports/the-protection-of-civilians-in-armed-conflicts-well-trodden-paths-and-new-ways-forward#advice-summary>> (accessed 11 July 2019).

<sup>58</sup> Human Right Watch, *DR Congo: Army, UN Failed to Stop Massacre*, above n 49.

<sup>59</sup> *Ibid.*



The failure to protect civilians occurred when the commander of the 10052 interim battalion Colonel Venance Kayumba Nyenyeri, who is from the Banyamulenge community, had been informed of the fighting but decided to pull his troops back to their base. He defended his decision by saying ‘the army’s intervention could result in civilian casualties’.<sup>60</sup> The report by the HRW presented several testimonies from witnesses who were soldiers in the 10052 battalion. These testimonies showed that ‘Enabombi again alerted Colonel Nyenyeri, as well as the deputy battalion commander, that attackers were burning houses and killing people’.<sup>61</sup> In addition, Enabombi informed MONUSCO and alerted them to the attack. However, no one intervened to prevent violations against civilians. Therefore, what was the duty of MONUSCO in this case and why did they not intervene to protect these civilians?

MONUSCO only conducted investigations after the crimes were committed, although they were stationed near the place of the attack with the Congolese army and did nothing to stop insurgents from committing the massacre.<sup>62</sup> The inaction by MONUSCO that showed a lack of obligation as regards their duties was clearly evident when one of the UN peacekeepers, who was a major in MONUSCO, told a UN civilian worker that ‘after seeing so many deaths in Kashmir, the DRC was a holiday’.<sup>63</sup> His statement was a frustrated reaction from the UN peacekeeping forces because they were supposed to prevent any violation against civilians, not just watch them suffer.

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

The protection of civilians from the insurgent groups has been mentioned in the mandates of MONUSCO, which were adopted in paragraph 11 of UNSC Resolution 2098 on 28 March 2013 that decided that MONUSCO was mandated to determine the development of the circumstances on the ground and in cooperation with the government of the DRC to achieve their main duty.<sup>64</sup> Under this paragraph, they also have responsibilities to reduce the threat from any armed groups, ‘including through the operations by the Intervention Brigade, violence against civilians, including sexual and gender-based violence and violence against children to a level that can be effectively managed by the Congolese justice and security institutions’.<sup>65</sup> These mandates have been confirmed in paragraph 12 of the same resolution that mentioned that MONUSCO were authorised to take all necessary measures ‘through its regular forces and its Intervention Brigade as appropriate’ to protect civilians and reduce the threat of armed groups. The protection of civilians includes preventing any physical violence or threat, even those which may be committed against refugee camps, and participating with the DRC to ensure the protection of civilians from abuses and violations of human rights and violations of IHL.

From the mandates identified in UNSC Resolution 2098 and the subsequent resolutions that mandated MONUSCO, which have been discussed above, they had a responsibility to prevent the attack on 6 June 2014 by the Barundi and Banyamulenge insurgent groups in South Kivu against 200 gathered civilians. In addition, MONUSCO had enough information regarding how the attack would be dangerous to civilians, which was

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<sup>64</sup> *The Situation in Democratic Republic of the Congo*, SC Res 2098, 6943<sup>rd</sup> mtg, UN Doc S/RES/2098 (28 March 2013) para 11.

<sup>65</sup> Ibid.

proven when Major Shaban<sup>66</sup> told HRW that he had informed the battalion commander of the attack. The commander responded that he would ‘sort it out.’<sup>67</sup> He also said: ‘We were very confident that if [gun] fire is going on, [the Congolese army] would be able to handle it.’<sup>68</sup> However, it is clear that MONUSCO deliberately neglected its duty to protect these civilians, even though this was the main mandate for the mission authorised by the UNSC. This problem raises a new question here: If this was their responsibility according to the mandates, why take the risk and be confident that the Congolese army would protect civilians? In this case, the gap that appeared in the UNSC resolutions, especially for the resolution related to the mandates of the UN peacekeeping forces, is that the resolutions do not adopt any criteria to push the UN peacekeepers to achieve their duties, and there is no accountability for any deliberate neglect to perform their mandated duty.

Therefore, leaving the UN peacekeeping forces to work depending on their mood, willingness and desire is a real problem that directly affects civilians of the host states. Therefore, the jurisdiction of the DRC and the home states of the UN peacekeeping forces over this failure in duty must be identified. The reason for examining the jurisdiction of the DRC is because the crimes were in its territory and for returning the UN peacekeepers to their home states, the jurisdiction in those states must be shown as well as all gaps covered that might lead to impunity or help them go unpunished.

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<sup>66</sup> The Pakistani commander of MONUSCO peacekeepers’ base in Sange, 9 km from Mutarule, was replaced by a new commander on 22 June 2014.

<sup>67</sup> Human Right Watch, *DR Congo: Army, UN Failed to Stop Massacre*, above n 49.

<sup>68</sup> Ibid.

### 4.3 The UN peacekeeping operation in South Sudan

In 2011, after two decades of conflict in Sudan between the government and the Sudan People's Liberation Movement (SPLM), South Sudan gained independence. This independence was based on UNSC Resolution 1996 in 2011.<sup>69</sup> In the same resolution, the UNSC decided that the situation in South Sudan was still a threat to international peace and security and it must remain under Chapter VII of *the Charter of the United Nations*. Paragraph 1 of this resolution called for the establishment of the United Nations Mission in the Republic of South Sudan (UNMISS). The responsibility of this mission was based on UNSC Resolution 1996 in 2011 and included strong human rights protection and authorisation for the protection of civilians by UNMISS that was deployed with 7,000 military personnel and 900 civilian police personnel.<sup>70</sup> Although UNMISS was responsible for protecting civilians, it failed to do that by avoiding the use of force.<sup>71</sup> This failure to protect civilians from violence started in 2013, which was two years after the country gained its independence, and is still occurring today.<sup>72</sup>

The problem here is that the crimes and violations against civilians in South Sudan were committed not only by the insurgent groups, but also by the national army, which placed UNMISS in a confused situation. This is because the UN peacekeeping forces must be responsible for protecting civilians from any violence during their missions, yet the

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<sup>69</sup> *Reports of the UN Secretary-General on the Sudan*, SC Res 1996, 6576<sup>th</sup> mtg, UN Doc S/RES/1996 (8 July 2011).

<sup>70</sup> Ibid para 3 (a), (b) and (c); see also Haidi Willmot et al, *Protection of Civilians* (Oxford University Press, 2016) 362.

<sup>71</sup> *Evaluation of the Implementation and Results of Protection of Civilians' Mandates in United Nations Peacekeeping Operations, Report of the Office of Internal Oversight Services (OIOS)*, GA A/68/787, UN GAOR, 68<sup>th</sup> sess, Agenda Item 142, UN Doc A/68/787 (7 March 2014) paras 15 and 19.

<sup>72</sup> Ray Murphy, 'The United Nations Mission in South Sudan and the Protection of Civilians' (2017) 22(3) *Journal of Conflict and Security Law* 367, 370.

question here is what is the responsibility of the UN peacekeeping forces if they fail to prevent the crimes committed by the national army of the host states? The crimes committed against civilians in South Sudan by the national army were complicated because as asserted by a UN investigation, ‘the highest levels of government and military’ were responsible for the violence in South Sudan.<sup>73</sup> For example, 80 to 100 soldiers attacked Juba’s Hotel Terrain compound in July 2016, where the staff of international organisations lived, killed a journalist and raped several foreign aid workers and other staff in four hours.<sup>74</sup> In addition, numerous reports show the failure of UNMISS to prevent sexual violations against civilians.<sup>75</sup>

Urgent solutions are required for this failure by the UN peacekeepers, who did nothing and merely witnessed these crimes committed by all conflicting sides against civilians. The previous case in the DRC showed the neglect of the UN peacekeeping forces to discharge their duty when they failed to prevent crimes committed by the insurgent groups. This case study of South Sudan provides evidence that the UN peacekeeping forces cannot achieve their duty and proves that the only reason for this is the non-accountability for the deliberate neglect of their duties even when the crimes are by the

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<sup>73</sup> *Exclusive: South Sudan Buys Weapons as Economy Collapses UN Panel* <<https://in.reuters.com/article/southsudan-security-un-exclusive/exclusive-south-sudan-buys-weapons-as-economy-collapses-u-n-panel-idINKCN11E2P8>> (accessed 28 November 2018); *South Sudan’s Fighting Directed at Highest Levels: UN Report* <<https://www.apnews.com/653b1366885f4a5ea9cd733329602098>> (accessed 26 December 2018).

<sup>74</sup> Executive summary of the independent special investigation into the violence in Juba in 2016 and the response by the United Nations Mission in South Sudan, SC S/2016/924, UN Doc S/PV./924 (1 November 2016).

<sup>75</sup> United Nations Secretary General, *Report of the UN Secretary-General on Conflict-Related Sexual Violence* s/2017/249 (15 April 2017) <<http://www.un.org/en/events/elimination-of-sexual-violence-in-conflict/pdf/1494280398.pdf>> p 28 (accessed 28 November 2018); *Witnesses Say South Sudan Soldiers Raped Dozens Near UN* <<https://www.voanews.com/a/witnesses-say-south-sudan-soldiers-raped-dozens-near-un-camp/3436720.html>> (accessed 28 November 2018).

national army of the host states. Therefore, the duty and mandate of UNMISS must be discussed as well as the crimes committed against civilians during their mission.

#### **4.3.1 The mandate of UNMISS**

Post the independence of South Sudan, the crimes against civilians did not stop, despite the establishment of UNMISS. The continuation of the crimes made the UNSC take the mandate of UNMISS seriously to consider regular protection for civilians. In December 2013, the UNSC adopted Resolution 2132.<sup>76</sup> In this resolution, the UNSC clearly showed that civilians were still under threat and summarised the responsibilities of the UN peacekeeping forces to protect civilians from all conflict parties. In addition, the same resolution criticised the violence targeted at civilians across the country, which caused ‘deaths and casualties and tens of thousands of internally displaced persons.’<sup>77</sup> The UNSC also decided that all parties in South Sudan were responsible for providing full support to UNMISS to achieve its mandate, especially the protection of civilians and to confirm zero tolerance with ‘the efforts to undermine UNMISS’ ability to implement its mandate and attacks on United Nations personnel’. Here, the main responsibility for UNMISS was to prevent any violation against civilians in the entire country; however, the situation on the ground was different from ‘what was agreed’.<sup>78</sup>

In 2014, because of the security and political situation, the Secretary-General of the UN adopted another report that recommends a new suggestion to rearrange priorities and to focus on five priorities.<sup>79</sup> These priorities include protecting civilians under imminent

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<sup>76</sup> *Sudan and South Sudan*, SC Res 2132, 7091<sup>st</sup> mtg, UN Doc S/RES/2132 (24 December 2013).

<sup>77</sup> Ibid.

<sup>78</sup> Murphy, above n 72, 274.

<sup>79</sup> *Report of the UN Secretary-General on South Sudan*, UN Doc S/2014/158 (6 March 2014) 68.

threat of violence within its capacity, helping in creating a secure environment to deliver humanitarian assistance and increasing the protection of human rights. Additionally, the report included supporting the national dialogue and the Intergovernmental Authority on Development (IGAD) monitoring and verification mechanism, and political dialogue. Because of the situation in South Sudan required significant improvement, especially for the protection of civilians, the UNSC agreed to adopt all the recommendations suggested by the Secretary-General according to UNSC Resolution 2155.<sup>80</sup> This resolution criticised and condemned all the attacks against the UN personnel and provided strong mandates to UNMISS for the purpose of the protection of civilians from any threat of physical violence. This resolution has been criticised because of its focus on the protection of civilians, which was left to the capacity of the UN peacekeeping forces, and thus the violence against civilians was expected and the UN peacekeepers had in advance an excuse for non-responsibility if they deliberately neglected the protection of civilians. This has been mentioned by several law scholars when they have stated that the UNSC put civilians in South Sudan at risk of violence.<sup>81</sup>

Because of the collapse of the security situation in South Sudan, the mandates adopted by the UNSC in 2014 became unacceptable and weak, which led to repetitive attacks against civilians and the UN peacekeeping forces. One of the situations that caused an increase in the instability in South Sudan was the double-standard dealing by SPLM–Juba, which participated in the government as a political party and were also involved as part of the conflict. Therefore, the UN peacekeeping forces required a significant

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<sup>80</sup> *Reports of the UN Secretary-General on the Sudan and South Sudan*, SC Res 2155, 7182<sup>nd</sup> mtg, UN Doc S/RES/2155(27 May 2014).

<sup>81</sup> Alex J Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press, 1st ed, 2016) 869; see Murphy, above n 72, 275.

increase in their ability to deal with the violations against civilians or themselves that may be committed by the government, opposition forces and other groups.

Numerous crimes against civilians or the UN peacekeeping forces have been committed by the government, opposition forces and other groups, such as their attacks on the UN and particularly the IGAD personnel and facilities, including the December 2012 downing of a UN helicopter by the SPLM.<sup>82</sup> Additionally, there was violence that caused severe internal displacement and serious risk of physical harm to civilians. For these reasons, the mandate was extended until 31 July 2016, and the force levels of UNMISS increased to 13,000 troops and 2,001 police personnel.<sup>83</sup> The main priority duties mentioned in UNSC Resolution 2252 were related to protecting civilians who were under threat of physical violence, irrespective of the source of such violence.<sup>84</sup> In addition, the same resolution stated other mandates for UNMISS, such as monitoring and investigating human rights, creating the conditions conducive to the delivery of humanitarian assistance and supporting the implementation of the agreement between the conflict parties in South Sudan. These mandates are considered among the strongest authorisations given to the UN peacekeeping forces in regard to the protection of civilians; however, civilians have still been attacked several times during the UNMISS operation. The next section will discuss the attacks against civilians, those who committed them and the position the UNMISS adopted in response since they were responsible for the protection of civilians according to their mandates and Chapter VII of the *Charter of the United Nations*.

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<sup>82</sup> *Reports of the UN Secretary-General on the Sudan and South Sudan*, SC Res 2252, 7581<sup>st</sup> mtg, UN Doc S/RES/2252(15 December 2015).

<sup>83</sup> Ibid paras 4 and 7.

<sup>84</sup> Ibid para 8.



#### **4.3.2 Failure of UNMISS to discharge their duty**

The main priority for the UNMISS is the protection of civilians as stated in all UNSC resolutions that maintained the mandates of the UN peacekeeping forces in South Sudan. In addition, they have been authorised as the UN peacekeeping forces to use ‘deadly force’ to protect civilians facing physical violence or under attack from any conflict parties in the host state. These mandates were adopted by the UNSC to protect civilians and are considered a common element in all mandates of the UN peacekeeping operations.<sup>85</sup> However, they have failed on many occasions to achieve this priority during their mission in South Sudan, and their non-intervention when civilians were under attack caused severe violation against civilians by the national army in South Sudan. While the UN peacekeeping forces were responsible for protecting the lives and dignity of civilians, they neglected this duty many times. This shows that they do not place any value on their obligations or on civilians’ lives whether they be under serious violations of human rights or in a safe environment. Therefore, civilians have become the victims of neglect by the UN peacekeeping forces. The question here is why do they not care about civilians’ protection and leave them to face violations by other conflict parties in South Sudan or by the UN peacekeepers themselves?

There is no accountability for the UN peacekeeping forces in cases where they commit direct violence against civilians or when they take no action to prevent crimes by other groups. This non-accountability became a significant reason for the repetitive crimes against civilians. These crimes will be discussed in two parts, including the crimes committed by the UN peacekeepers and those committed by the South Sudanese army against civilians. The analyses of the crimes committed during the mission will prove

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<sup>85</sup> *Evaluation of the Implementation and Results of Protection of Civilians Mandates in United Nations Peacekeeping Operations*, UN GAOR, 68<sup>th</sup> sess, Agenda Items 142, UN Doc A/68/787 (7 March 2014) para 15.

the argument of this section and the reason there will be no solution to these problems without adopting an accountability system for crimes committed by the UN peacekeepers.

#### **4.3.2.1 Crimes committed by the UN peacekeepers against civilians**

The UN peacekeeping forces have committed several types of crimes against civilians during their missions. One is sexual exploitation; however, their committing of this crime here is considered significant compared with other peacekeeping operations because it was not common during UNMISS. On 8 February 2018, an allegation was raised against police personnel from the Ghanaian Formed Police Unit, which stated that they had exploited their position and engaged in sexual activity with women living at the UN-protected civilian site in Wau.<sup>86</sup>

The response of UNMISS leaders and the Special Representative of the Secretary-General, David Shearer, to these allegations on 22 February 2018 was to strip the police unit of their duty and to fully withdraw them from their base to Juba. This was the strongest reaction that could be made during that time by the Special Representative of the Secretary-General and raised questions regarding his authority over the UN peacekeepers in general regarding whether he could refer them for accountability or just strip them of their position and send them back to their home states. The answer to this question will be analysed deeply in an independent chapter. There are no clear criteria as to how the UN peacekeepers, when they commit such crimes, will be referred for prosecution and it is a high priority for the protection of civilians despite their mostly good work in protecting civilians. The importance of the accountability criteria is

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<sup>86</sup> *UNMISS Acts on Allegations of Sexual Exploitation against Formed Police Unit* <<https://unmiss.unmissions.org/unmiss-acts-allegations-sexual-exploitation-against-formed-police-unit>> (accessed 20 December 2018).

evident here because ‘Ghanaian peacekeepers and police serving with UNMISS have made an excellent contribution to the protection of civilians and building of durable peace in South Sudan’.<sup>87</sup> However, the behaviour of some police personnel caused ‘staining that record of service as well as the Mission’s reputation’.<sup>88</sup>

The crimes committed to date show that the UN peacekeepers are confident that no one will hold them accountable and they will go unpunished owing to the absence of legal powers. It is irrelevant whether these crimes have been committed once or several times since it is the responsibility of the UN peacekeepers to protect the citizens in all circumstances, and they have breached their duty by committing crimes against civilians rather than defending them. The problem facing civilians during UNMISS was not only the crimes committed by the UN peacekeepers, but also the crimes committed by the South Sudanese army and other groups because of the failure of the UN peacekeeping forces to defend civilians.

#### **4.3.2.2 Crimes committed by the South Sudanese army against civilians**

In 2014, the UNSC adopted a resolution for UNMISS to focus on the following four main priorities: protection of civilians, monitoring and investigating human rights, creating enabling conditions for the delivery of humanitarian assistance and supporting the implementation of the cessation of hostilities agreement.<sup>89</sup> Currently, more than 220,000 civilians divided into six different locations around the country are under the direct protection of UNMISS, and as Mr David Shearer<sup>90</sup> expressed, ‘I have no doubt

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> *Reports of the UN Secretary-General on the Sudan and South Sudan*, SC Res 2155, 7182<sup>nd</sup> mtg, UN Doc S/RES/2155(27 May 2014).

<sup>90</sup> The Special Representative of the UN Secretary-General for South Sudan and Head of the United Nations Mission in South Sudan.

that thousands of civilians would not be alive today if it were not for UNMISS'.<sup>91</sup> Mentioning the protection of civilians during this meeting was logically accepted because UN peacekeeping forces did their best for this duty. Improvements were made to protect civilians by developing a number of strategies to respond to any violations. One of the most important changes was the managing of civilians who sought protection at the UN bases. Despite this change occurring gradually, it was a significant improvement in their policy in South Sudan.<sup>92</sup> This was reflected by the behaviour of UNMISS when they 'opened the gates' for civilians who fled after the outbreak of violence in December 2013. UNMISS immediately began to provide shelter for thousands of civilians who were unable to return to their homes.<sup>93</sup> This excellent and robust position from UNMISS was highly appreciated by the international community because they had dealt with those civilians in ways that were responsive to protecting their lives and dignity.

However, the above positive action did not mean that they have had no failures or have committed to achieve their duty or were willing and able to fully protect civilians under all conflict circumstances. This section will provide some examples of the crimes committed by the third parties in South Sudan, such as the crimes committed by the army of the government or other armed groups. Providing these examples is significant

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<sup>91</sup> *Reports of the UN Secretary-General on the Sudan and South Sudan*, UN SCOR 72<sup>nd</sup> sess, 7930<sup>th</sup> mtg, UN Doc S/PV.7930 (25 April 2017).

<sup>92</sup> Alex J Bellamy and Charles T Hunt, 'Twenty-first Century UN Peace Operations: Protection, Force and the Changing Security Environment' (2015) 91(6) *International Affairs* 1277, 1291.

<sup>93</sup> United Nations Mission in South Sudan, 'Protection of Civilians' (PoC) Sites <[https://unmiss.unmissions.org/sites/default/files/170403\\_poc\\_update\\_-\\_159.pdf](https://unmiss.unmissions.org/sites/default/files/170403_poc_update_-_159.pdf)> (accessed 20 December 2018).

for determining the real reasons that the UN peacekeeping forces have failed to protect civilians on some occasions.

While more than 14,000 peacekeepers from 60 different countries work with UNMISS to prevent violence against civilians and provide a secure environment for them across the country,<sup>94</sup> the third parties in South Sudan are still active and committing crimes.<sup>95</sup> The reasons that have caused aggravation of the general environment for the security situation are the availability of former fighters, weapons and the criminality that is prevalent, which has placed UNMISS in a predicament.<sup>96</sup> The situation in South Sudan developed from a political struggle for power into an ethnic conflict between the majority Dinka and other tribes that led to civil war in December 2013, which began within the Presidential Guard and second largest ethnic groups, the Dinka and the Nuer.<sup>97</sup> Consequently, the situation caused the prominence of the main actors who later became responsible for those crimes, such as the pro-Machar Sudan People's Liberation Army in Opposition (SPLAIO) and the Government's Sudan People's Liberation Army (SPLA).<sup>98</sup> The crimes here signify the failure of the Government of the Republic of South Sudan and the opposition forces to protect civilians from violence.<sup>99</sup> Their crimes

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<sup>94</sup> United Nations Mission in South Sudan, *About UNMISS* <<https://unmiss.unmissions.org/about-unmiss>> (accessed 20 December 2018).

<sup>95</sup> United Nations Mission in South Sudan, 'Protection of Civilians', above n 93.

<sup>96</sup> Murphy, above n 72, 376.

<sup>97</sup> Aleksy Ylönen, 'Peace or Stability? A Critical Appraisal of External Interventions in South Sudan' (2014) 9(3) (2014/09/02) *Journal of Peacebuilding & Development* 102, 102.

<sup>98</sup> United Nations Mission in South Sudan, *Violations and Abuses against Civilians in Gbudue and Tambura States (Western Equatoria)* <<https://unmiss.unmissions.org/sites/default/files/reportwesternequatoria17oct2018.pdf>> paras 1 and 50 (accessed 21 December 2018).

<sup>99</sup> *Conflict in South Sudan: A Human Rights Report* (8 May 2014) <[https://unmiss.unmissions.org/sites/default/files/unmiss\\_conflict\\_in\\_south\\_sudan\\_-\\_a\\_human\\_rights\\_report.pdf](https://unmiss.unmissions.org/sites/default/files/unmiss_conflict_in_south_sudan_-_a_human_rights_report.pdf)> (accessed 25 December 2018).

and failure are found to be violations of IHR and IHL, which are divided into sexual violence, looting, unlawful killings, enforced disappearance, arbitrary arrests and detentions and ill-treatment of civilians.<sup>100</sup>

This section presents a range of crimes that have been committed against civilians in different years to show how their suffering has not necessarily improved or reduced as a result of the UN peacekeeping operations. For example, in December 2013, widespread killings were launched against Nuer men by members of the South Sudanese armed forces in Juba, resulting in the deaths of between 200 and 300 men; in addition, the HRW documented the killing of civilians of Dinka ethnicity by SPLAIO.<sup>101</sup> Although the crime here was supposed to have been considered by the UNSC to resolve the roots of this problem, they left civilians to face their destiny with other groups who have a long history of the violation of human rights. Neglecting this important problem during UNMISS caused further crimes to occur by the same armed groups, that is SPLAIO and SPLA.

Three years later, in February 2016, the same scenario occurred again with a massacre committed in the South Sudanese city of Malakal when a group of armed men wearing SPLA uniforms attacked the camp through a perimeter fence.<sup>102</sup> The non-response by UNMISS to this attack caused the killing of 30 people and wounding of 123 others. This case raises a crucial question: Why did the UN peacekeepers not respond to this

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<sup>100</sup> United Nations Mission in South Sudan, *Violations and Abuses against Civilians in Gbudue and Tambura States (Western Equatoria)*, above n 98.

<sup>101</sup> Human Rights Watch, *South Sudan: Ethnic Targeting, Widespread Killings* <<https://www.hrw.org/news/2014/01/16/south-sudan-ethnic-targeting-widespread-killings>> (accessed 25 December 2018).

<sup>102</sup> *UN Peacekeepers Accept Responsibility for Massacre at Malakal* <<https://www.voanews.com/a/un-peacekeepers-accept-responsibility-for-massacre-in-malakal/3390321.html>> (accessed 25 December 2018).

attack to prevent the crimes against civilians since this is one of their duties? The default answer to this question could be that they could not respond, or it was just deliberate neglect for the protection of civilians. Answering this question will provide a solution to the dilemma of the protection of civilians during the UN peacekeeping operations.

In July 2016, approximately 100 men wearing soldiers' uniforms attacked international staff in their place of residence, which was the Hotel Terrain compound. Those soldiers killed an ethnic Nuer journalist and committed sexual violence against at least five foreign aid workers and other staff during a limited period.<sup>103</sup> There was no response by the UN peacekeepers even though they were close to where this crime was committed. Again in 2016, UNMISS failed to protect civilians from violence that broke out in and around its premises in the capital, Juba.<sup>104</sup> According to the same resource, the 'serious shortcomings' in the response of UNMISS to the violence committed around Juba in July 2016 caused the deaths of at least 73 people, including more than 20 displaced persons in 'the Mission's civilian protection sites'. Another example of crimes was on 20 May 2018, when SPLA committed violence during their operation to liberate Nagero from SPLAIO elements. During the operation, eyewitnesses stated that the method of warfare used by SPLA targeted military and civilian objects without distinction, as ground troops shot civilians and destroyed their property.<sup>105</sup>

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<sup>103</sup> *Exclusive: South Sudan Buys Weapons as Economy Collapses UN Panel*, above n 73; *South Sudan's Fighting Directed at Highest Levels: UN Report*, above n 73.

<sup>104</sup> *South Sudan: UN Peacekeeping Chief sets up Task Force after Probe into Mission's Performance* <<https://news.un.org/en/story/2016/11/544502-south-sudan-un-peacekeeping-chief-sets-task-force-after-probe-missions>> (accessed 25 December 2018); see *SPLA Committed Widespread Violations during and after July Fighting in South Sudan – Zeid* <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20339&LangID=E>> (accessed 25 December 2018).

<sup>105</sup> United Nations Mission in South Sudan, *Violations and Abuses against Civilians in Gbudue and Tambura States (Western Equatoria)*, above n 98.

The commission of the above crimes presented strong evidence that the UN peacekeeping system needed urgent reforms. The repetitive commission of these crimes against civilians went unpunished. Neither the UNSC nor the international community took any steps to improve the UN peacekeeping forces by implementing an accountability system for their failure and/or increasing their ability to be able to prevent insurgent groups in the host states from committing crimes against civilians. According to the nature of the crimes stated above, the UN peacekeeping forces need improvements in accountability and robustness, which should both run in the same direction. There was no response by UNMISS when 100 men killed an ethnic Nuer journalist and committed sexual violence against at least five foreign aid workers even though they were near the UNMISS base. This case shows deliberate neglect by UNMISS because they must prove that they had tried to achieve their duty in all circumstances, even though the reason for non-intervention might be that they were unable to intervene to prevent these crimes.

The committing of these crimes may be excused at the beginning of the mission because they might not have had enough experience with the nature of the host states; however, their continuing failure until date after more than seven years without any improvement is not acceptable. If there is no real intervention by the international community and UNSC to fix these problems, civilians will continue to be victims of the failure of the UN peacekeeping forces and will receive limited benefits from the presence of the UN peacekeeping forces in the host states in the future. The non-improvement not only affects the protection of civilians, but it could be dangerous for the UN forces as well. For example, according to David Shearer, a Nepalese UN peacekeeper working under UNMISS, who was travelling near the town of Yei, in Central Equatoria, was shot by SPLA. In addition, an SPLA soldier had begun shooting near four vehicles belonging



to UNMISS, even though these vehicles included two water tankers. Moreover, ‘the soldier then shot directly at one of the vehicles, hitting the Nepalese peacekeeper in the leg, and ran off into a crowd. The troops were unable to return fire as they did not want to risk injuring civilians.’<sup>106</sup>

Crimes against the UN peacekeepers are prohibited according to international criminal law;<sup>107</sup> however, the commission of such crimes requires rethinking to explore the link and the effect on the protection of civilians of the host states. Such crimes and other failures have been mentioned by the chief of UNMISS because the UN peacekeepers were attacked even though they were near the UNMISS base in Yei. This included a declaration that showed one of the real troubles of the UN working in South Sudan as he argued ‘this situation is evidence of a lack of command and control of armed forces which has resulted in unruly elements who continue to commit human rights abuses in the area.’<sup>108</sup> Therefore, the question here is if they cannot protect their personnel from harm and lack the leadership of armed forces, how will they protect civilians? The crime here shows the inability of UNMISS to protect civilians even though this is a high priority duty for the entire UN peacekeeping mission. Finally, the UN peacekeeping system that still has significant confusion must be clarified, such as whether their failure

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<sup>106</sup> United Nations, ‘South Sudanese Government Must Bring Soldiers Under Control, Urges UN Mission Chief, as the UN Peacekeeper is Shot and Injured’, *UN News* (online), 15 September 2018 <<https://news.un.org/en/story/2018/09/1019462>> (accessed 26 December 2018).

<sup>107</sup> M Pacholska, ‘(Il)legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals’ (2015) 13(1) *Journal of International Criminal Justice* 43, 46.

<sup>108</sup> United Nations Mission in South Sudan, ‘UNMISS Condemns Attack on Peacekeeping Convoy in South Sudan’ (Press Release 15 September 2018) <[https://reliefweb.int/sites/reliefweb.int/files/resources/Press%20Release\\_UNMISS%20deploras%20attack%20on%20peacekeeping%20convoy%20in%20South%20Sudan%20.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Press%20Release_UNMISS%20deploras%20attack%20on%20peacekeeping%20convoy%20in%20South%20Sudan%20.pdf)> (accessed 27 December 2018).

in duty could constitute a crime and if it is a crime how those responsible for this crime can be prosecuted. These points will be discussed in next sections.

#### **4.4 Impunity of the UN peacekeepers from the jurisdictions of the DRC and South Sudan**

While there is the possibility that the UN peacekeepers are responsible for any act or omission that has caused harm to civilians or has breached any law, the jurisdiction over them still remains unclear as regards whether they can be prosecuted in the host states, international courts or their home states. Understanding the jurisdiction of the host states over their crimes is important for several factors; one of these factors is that for crimes committed in the territory of the host states, the victims are mostly citizens of this state and they should be protected by the government in the host state or the UN peacekeeping forces. In this chapter, two cases have been discussed thus far, which are the crimes during MONUSCO and UNMISS. Examining these two cases is a practical study for the main argument of the entire study, which is to explore the position of the UN peacekeeping forces and whether their failure in duty can be considered a crime of omission and can they be prosecuted.

The position of the host states regarding the crimes in general, such as the crimes by act or omission committed in their territory, is significant for stabilising all sectors of the state. The UN peacekeepers are under the jurisdiction of the host states and thus are treated with a suitable punishment for their act or omission, which is very important to put an end to impunity. This approach can be adopted even though the UN peacekeepers have immunity in the host states that shields them from the jurisdiction of these states,<sup>109</sup>

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<sup>109</sup> Gabrielle Simm, 'International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers' (2011) 16(3) *Journal of Conflict and Security Law* 473, 297.

such as via the possibility of waiving these privileges by the Special Representative of the Secretary-General of the UN.<sup>110</sup> Unless he adopts this method for retaining justice, the highest reaction will be having them stripped from their position and returned to their home states, which means there is no guarantee that they will be prosecuted.<sup>111</sup> This is the usual method adopted when the host states have stable governments and judicial systems. However, the question here is whether there was no prosecution of the personnel of MONUSCO and UNMISS who committed crimes or failed to prevent the crimes because of this immunity or for another reason.

The prosecution of the UN peacekeepers in the host states such as the DRC and South Sudan is very complicated or even impossible in some circumstances even though there is the possibility to waive their immunity. This is because the central element to prosecute any crime should be that the state has a reliable judicial system to secure justice for the accused and the victims. With the situation of the UN peacekeepers in the DRC and South Sudan, there will be no change concerning whether their immunity has been waived because under all circumstances these states were unable to prosecute them; therefore, there was no reason for intervention by the Secretary-General to waive their immunity. During MONUSCO, the DRC was considered a failed state and this situation affected the entire government, including the judicial system that was unable to prosecute the UN peacekeepers.

The situation in South Sudan was different because this state was new, and its judicial system still had limited capability of prosecuting the crimes in its territory; therefore, it

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<sup>110</sup> C Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law' (2008) 19(5) *European Journal of International Law* 1015,1031.

<sup>111</sup> The immunity of UN peacekeeping forces and how it can be waived will be analysed in Chapter 6 of this thesis.

was unable to prosecute the UN peacekeepers. Therefore, the analysis of prosecuting the UN peacekeepers for their crimes is essential for understanding the way in which they can be prosecuted when the host states have no judicial system. Prior to such prosecution, it is important to determine whether the failure in duty can be treated as a crime of omission under international criminal law.<sup>112</sup> The next section will focus on the challenges that prevented the DRC and South Sudan from prosecuting the UN peacekeepers even in the cases where immunity had been waived.

#### **4.4.1 Causes of lack of accountability among UN peacekeepers in DRC and South Sudan**

The failures of UN peacekeepers in the DRC and South Sudan—as indicated by the cases discussed in this chapter and in general could derive from their lack of ability or deliberate neglect. However, there remains no definite answer regarding why these peacekeepers have failed and which challenges and circumstances have prevented the DRC and South Sudan from holding accountable the personnel of MONUSCO and UNMISS for their misconduct, regardless of their immunity. The reasons for the peacekeepers' failure and the DRC's and South Sudan's inability to hold them accountable differ in both cases; however, regardless, the outcomes of this discussion aim to determine a novel outcome that will reduce the gaps that enable UN peacekeepers and other individuals engaged in criminal activity to go unpunished. Moreover, this discussion aims to suggest a strategy for accountability. However, first, the reasons that prevent accountability in both cases must be analysed.

The situation in the DRC is complicated because there is no stable judicial system to prosecute criminals; therefore, in situations in which the UN Secretary-General does

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<sup>112</sup> Whether the failure in duty can be considered a crime by omission is discussed in Chapter 5 of this study, and the way to prosecute them is shown in Chapter 6.

not waive peacekeepers' immunity, there has been no reason to improve this accountability. The challenge here relates to a failure by the state that created the judicial system, yet did not take steps to prosecute misconduct committed in its territory.<sup>113</sup> In the crimes committed by the UN peacekeepers or the third parties in the DRC, as discussed above, the main victims were civilians, and the crimes committed against them are considered either direct crimes by the UN peacekeepers or crimes that occurred while under the responsibility of the UN peacekeeping forces. In this case, the UN Secretary-General did not consider waiving the immunity of those responsible for committing the crimes or those who failed to prevent the crimes under the jurisdiction of the DRC. However, regardless, the failure of the judicial system in the DRC ensured that the waiving of immunity held no value.

Thus, stability in the host state is one of the main factors that helps end impunity. For example, when the UN peacekeepers committed unlawful acts against civilians in East Timor, the Secretary-General waived the immunity of these peacekeepers and declared that the Jordanian peacekeepers could be prosecuted under East Timorese law<sup>114</sup> because the judicial system was stable at that time. For states that have not yet established lawful systems, especially judicial systems, and remain unable to prosecute anyone—such as the situation during UNMISS in South Sudan the effect is the same as the impunity that exists in the DRC.<sup>115</sup>

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<sup>113</sup> Marco Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010) 15(2) *Journal of Conflict and Security Law* 347, 365.

<sup>114</sup> Simm, above n 109, 502. See also *The Situation in East Timor*, SC Res 1272, 4057<sup>th</sup> mtg, UN Doc S/RES/1272(25 October 1999).

<sup>115</sup> *Accountability for Sexual Violence Committed by Armed Men in South Sudan*, p 11 <<https://reliefweb.int/sites/reliefweb.int/files/resources/Legal-Action-Worldwide-Report-on-Accountability-for-Sexual-Violence-Committed-by-Armed-Men-in-South-Sudan.pdf>> (accessed 03 January 2019).

The situation in South Sudan was the same as that in the DRC, aside from a few key points. Their judicial system had the same inability to prosecute the UNMISS personnel; however, the reasons for this failure differed, given that South Sudan was a new state that was still struggling to establish the required sectors for a state. Even a couple of years after establishing the state, the formal justice system in South Sudan still had limited ability because of financial struggles and a lack of staff qualified to deliver justice.<sup>116</sup> The situation in the DRC differed because it was not a new state and had a complete system; however, it failed because of continuing armed conflict. Moreover, after the outbreak of war in 2013, the justice system collapsed, which placed the entire state in crisis and caused an inability to prosecute and the lack of a transparent judicial system.<sup>117</sup> These circumstances created the same situation as that in the DRC, as neither location could prosecute UN personnel for their crimes. This indicates the ways in which these UN peacekeepers were beyond accountability.<sup>118</sup>

Challenges arose from the failed system in the DRC and the lack of system in South Sudan, which prevented the host states from prosecuting the UN peacekeepers. Both cases reveal the serious finding that the waiving of immunity by the Secretary-General is not always a solution to end impunity because, when the host states are unable to prosecute, the waiving of immunity has no value. This conclusion is the same outcome

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<sup>116</sup> *Final Report of the African Union Commission of Inquiry on South Sudan*, p 290  
<<http://www.peaceau.org/uploads/auaiss.final.report.pdf>> (accessed 04 January 2019).

<sup>117</sup> Katharina Diehl, Ruben Madol Arol and Simone Malz, 'South Sudan: Linking the Chiefs' Judicial Authority and the Statutory Court System' in *Non-State Justice Institutions and the Law* (Springer, 2015) 55, 56.

<sup>118</sup> 'UN to Send Peacekeepers Home over South Sudan Inaction', *Aljazeera* (online)  
<<https://www.aljazeera.com/news/2016/06/%20send-peacekeepers-home-south-sudan-inaction-160623060004340.html>> (accessed 06 January 2019).

as that presented by the group of legal experts,<sup>119</sup> whose report stated that ‘where there is a dysfunctional legal system in the host State’, it may not be in the best interest to waive immunity. Therefore, if the main actors—such as the UNSC, international community and the home states seriously wish to end impunity, the factors discussed in these two cases must be considered to establish a new system outside the host states and the home states, and to prosecute individuals in independent courts. This finding must be taken seriously to enhance the protection of civilians during UN peacekeeping operations; otherwise, civilians will continue being negatively affected.

#### **4.4.2 Losers and consequences of failures of UN peacekeeping forces**

The consequences of the failures of UN peacekeeping forces are always reflected in civilians, who must be protected during conflict. Civilians are most strongly affected by conflict.<sup>120</sup> Examples of this situation include the crimes that occurred in the DRC and South Sudan, and the way civilians suffered from the crimes committed by the third parties, without intervention by the UN peacekeeping forces, even though they could have prevented most of these crimes. In most cases, the UN peacekeepers did not take steps to uphold their duty or try to stop the crimes from occurring. This does not mean that the UN peacekeepers can prevent crimes in all circumstances, given that some of the third parties have more powerful military equipment than do the UN peacekeepers. The inability of the UN peacekeeping forces and the instability situations in the host states showed that civilians are the main losers, and it is a challenge for the UN peacekeeping forces to prevent crimes in some cases. The UNSC needs to rethink the

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<sup>119</sup> *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*, UN GAOR, 66<sup>th</sup> sess, Agenda Item 32, UN Doc A/60/980 (16 August 2006) 22.

<sup>120</sup> *Security Council Condemns ‘In the Strongest Terms’ All Acts of Sexual Abuse, Exploitation by UN Peacekeeping Personnel* <<https://www.un.org/press/en/2005/sc8400.doc.htm>> (accessed 06 January 2019).

real reason behind the challenge of protection of civilians because the UN peacekeepers' failures appear to derive from deliberate neglect or an inability to act. Therefore, the question here is how these factors can be addressed to protect civilians or to achieve the duty of the UN peacekeeping forces.

The first challenge facing the UN peacekeeping operations as a system and the duty of UN peacekeepers is the crimes committed against civilians by the third parties or the deliberate neglect of their protection. The consequence of this problem is impunity, which means that UN peacekeepers can easily go unpunished, as there are no criteria to prosecute them or criminalise their misconduct. The reason for this dilemma is that the UN peacekeepers have immunity that prevents the host states from holding them accountable, unless the UN Secretary-General waives this immunity to allow the host states to hold them responsible for misconduct.<sup>121</sup> Another available punishment for crimes is to strip peacekeepers of their position and send them back to their home state; however, they will likely not be prosecuted in their home state because many countries cannot prosecute misconduct by the UN peacekeepers, unless the crimes are a dual criminality in the host state and the home state. The law of the home state can be extended to cover crimes committed by UN peacekeepers in the host state.

In addition, many host states have adopted 'dual criminality as a prerequisite for rendering extradition and mutual legal assistance in criminal matters'.<sup>122</sup> Thus, UN peacekeeping forces require an independent judicial system in the event that their misconduct is not criminalised in both countries, or the host state cannot prosecute them

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<sup>121</sup> Elizabeth F Defeis, 'UN Peacekeepers and Sexual Abuse and Exploitation: An End to Impunity' (2008) 7 *Washington University Global Studies Law Review* 185, 192.

<sup>122</sup> *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*, UN GAOR, 66<sup>th</sup> sess, Agenda Item 32, UN Doc A/60/980 (16 August 2006) 23.



because of an inadequate judicial system. In addition, failure in duty must be considered by the UNSC to place a clear criminalisation if the failure to protect civilians is caused by deliberate neglect because the number of these crimes against civilians is increasing, without any real attempt by the UNSC to resolve this problem.

Another challenge for the UN peacekeeping forces in the host states is insurgent groups or other third parties targeting civilians during the UN peacekeeping operations. In numerous operations, this problem has caused a high increase in civilians being sexually assaulted or killed by the third parties, without prevention by the UN peacekeepers because the UN peacekeepers did not have the ability to prevent them. For example, the situation in South Sudan was a nightmare for UNMISS, as they were in a trouble position and were faced with major threats to civilians. This case involved hostilities between two fighting forces who used helicopters, artillery and gunfire in an attack against the UN bases in Juba and neighbouring areas that housed internally displaced people.<sup>123</sup> If no action is taken by the UNSC and international community to close the gaps in the legal system of the UN peacekeeping forces that always cause impunity for who committed crimes or failed to prevent crimes against civilians and ensure the UN peacekeeping forces are stronger than the third parties in the host states, failure to protect civilians will continue and UN peacekeeping forces will be rendered useless.

#### **4.5 Inability of UN peacekeepers to protect civilians: reasons, consequences and remedies**

The two discussed UN peacekeeping operations in the Congo and South Sudan have revealed that the failure of the UN peacekeeping forces to protect civilians from the

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<sup>123</sup> *UNDER FIRE: The July 2016 Violence in Juba and UN Response*, p 5  
<<https://civiliansinconflict.org/wp-content/uploads/2017/09/civic-juba-violence-report-october-2016.pdf>> (accessed 06 January 2019).

attacks of the third parties may largely be attributable to deliberate neglect. However, in some instances, the failure of the UN peacekeeping forces to protect civilians was not a result of deliberate neglect, but because of inability and inappropriate equipment and weaponry to resist the well-armed third parties from committing crimes against civilians. According to the UN, the main contributing states to the UN peacekeeping forces are developing countries, such as Ethiopia (7,519 personnel), Bangladesh (6,614 personnel) and Rwanda (6,545 personnel), with the personnel having limited training and lack of arms.<sup>124</sup> These UN peacekeepers as they are from developing countries with limited ability were incapable of mounting effective resistance against attacks by the third parties armed with contemporary weapons. The limited resources and budgetary constraints experienced by these developing countries mean they struggle to invest funds into the training and provision of equipment for personnel that they send to join the UN peacekeeping operations.

To ensure fair assessment of the UN peacekeepers, it is important to judge their inability or incapacity to protect civilians in a different manner to their failures attributable to deliberate neglect. The ICTY discussed whether responsibility for failure can be held when it is impossible to achieve the mandated duty. In the *Zejnir Delalic* case, the ICTY stated that:

It must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the

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<sup>124</sup> *Troop and Police Contributors* <<https://peacekeeping.un.org/en/troop-and-police-contributors>> (accessed 10 May 2019).

Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility.<sup>125</sup>

If the situation of the UN peacekeeping forces is compared with that of the ICTY case, in addition to their mandate, the UN peacekeepers must be held responsible for their failure to prevent the third parties from committing crimes against civilians if they have the ability to prevent crimes. There appears to be a causal link between ability to protect civilians and responsibility for failure, and the lack of the former may result in the absence of the latter.

Strengthening and improving the abilities of the UN peacekeeping forces is a significant part of the responsibility to protect civilians and face the challenge of the third parties. Once the UN peacekeepers have the ability to protect civilians, they can be held responsible if they fail to take all measures to prevent the crimes of the third parties. Through being well equipped, the UN peacekeeping forces may even incur increased responsibility for failing to protect civilians and their obligations under IHL may increase when they are actively engaged in conflict.<sup>126</sup> In this instance, the UN peacekeeping forces will 'repress grave breaches, and take measures necessary to

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<sup>125</sup> *Prosecutor v. Zejnil Delalic et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [395]; *Prosecutor v Tihomir Blaskic (Appeals Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY-IT-95-14-A, 29 July 2004) para 417.

<sup>126</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (6 August 1999).

suppress all other breaches' that may be committed by the third parties, according to Article 86 of the *Additional Protocol I*.<sup>127</sup>

The strength required by the UN peacekeeping forces to prevent the third parties from committing crimes against civilians could be in contrast to their main establishment purpose, as they are non-combatant forces. However, the development of contemporary weapons and the third parties' ability to obtain such arms has made it urgent for the UN to deploy robust UN forces to protect themselves and civilians.<sup>128</sup> The robustness of the UN peacekeeping forces is fundamental to their ability to protect civilians. Nonetheless, there are numerous cases in which they have failed to protect civilians by deliberately ignoring their duty or have exploited their position to commit crimes against civilians themselves, such as the criminal conduct in the Congo and South Sudan.<sup>129</sup>

The inability of the UN peacekeeping forces can have far-reaching consequences that extend beyond the protection of civilians. In numerous instances, peacekeepers have even failed in self-defence from the attacks of the third parties, thereby undermining international peace. The UN has highlighted this problem with statistics indicating that at least 200 UN peacekeepers were killed in the last five years (from 2014 to 2019) by the third parties.<sup>130</sup> The inability of the UN peacekeeping forces is an important issue

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<sup>127</sup> *Additional Protocol I* art 86(1): 'The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so'.

<sup>128</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (6 August 1999) art 1.2.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Strengthening Peacekeeping Uniformed Capabilities, Performance and Protection* <[https://www.youtube.com/watch?v=FOx8Q\\_PhOok&t=144s](https://www.youtube.com/watch?v=FOx8Q_PhOok&t=144s)> (accessed 21 April 2019).

that warrants solutions, given that the limited ability to face the third parties is a serious problem for both the UN peacekeepers and civilians. This problem must be addressed urgently because the involvement of the UN peacekeeping forces in conflict has been changed to be the forces that can fight even terrorism, such as the UN Stabilisation Mission in Mali (MINUSMA), which was deployed in 2013 to take ‘direct action’ against terrorist groups.<sup>131</sup> In addition, the incapacity of the UN peacekeeping forces has affected their ability to protect civilians in the host states.

The challenge of the UN peacekeeping forces to prevent crimes by the third parties was discussed at the UNSC meeting in 2018. This meeting underscored the gaps in the UN peacekeeping forces and the urgent need to ensure they have the ability to discharge their duties. One issue is lack of fast mobility, which affects several types of support in the host states, such as medical support, and impairs the UN peacekeeping forces from preventing the third parties from committing crimes against civilians.<sup>132</sup> Any imposition of legal responsibility here ‘would be contrary to the legal maxim that nobody is bound to do the impossible’.<sup>133</sup> At the same meeting of the UNSC, challenges of personnel to prevent the third parties were discussed as a critical problem for the UN peacekeeping operations. The UN peacekeeping forces have shortages in women, experienced leaders and skilled technicians, as well as shortages in ‘logistics and air assets, and specialized

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<sup>131</sup> John Karlsrud, 'UN Peace Operations, Terrorism, and Violent Extremism' in *United Nations Peace Operations in a Changing Global Order* (Springer, 2019) 153.

<sup>132</sup> *United Nations Peacekeeping Operations Collective Action to Improve the UN Peacekeeping Operations*, UN SCOR, 73<sup>rd</sup> sess, 8218<sup>th</sup> mtg, UN Doc S/PV.8218 (28 March 2018).

<sup>133</sup> Michael Duttweiler, ‘Liability for Omission in International Criminal Law’ (2006) 6(1) *International Criminal Law Review* 1, 6.

equipment, including intelligence capabilities'.<sup>134</sup> However, the main sectors that need improvement at this stage are mainly related to ability in the battlefield. These sectors in the UN peacekeeping forces that need improvement are their rapid reaction, mobility and increases women peacekeepers in the forces.<sup>135</sup>

#### **4.5.1 Rapid reaction force**

Deploying the UN peacekeeping forces in the host states without the ability for rapid reaction presents a serious risk for the UN peacekeepers and civilians, which means abandoning responsibility by the UN and its member states.<sup>136</sup> This was highlighted after the massacre in Bosnia, which indicated the need to establish a rapid reaction force to protect civilians. After this massacre, the UN peacekeeping forces were authorised by UNSC Resolution 836 to take necessary measures to protect safe areas from the third parties, including through using force.<sup>137</sup> According to Article 24 of the *UN Charter*, the international community must take all measures to prevent violations against civilians.<sup>138</sup> However, the UNSC failed to achieve this critical duty in Bosnia, and, in the following years, this problem has become more challenging whether they can maintain peace and security in the host states. The incapability of the UN peacekeeping

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<sup>134</sup> *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1925, UN SCOR, 6324<sup>th</sup> mtg, UN Doc S/RES/1925 (28 May 2010) para 12 (a).

<sup>135</sup> *Strengthening Peacekeeping Uniformed Capabilities, Performance and Protection* <[https://www.youtube.com/watch?v=FOx8Q\\_PhOok&t=144s](https://www.youtube.com/watch?v=FOx8Q_PhOok&t=144s)> (accessed 21 April 2019).

<sup>136</sup> Article 43(1) of the UN Charter: 'All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security'.

<sup>137</sup> SC Res 836, UN SCOR, 3228<sup>th</sup> mtg, UN Doc S/RES/836 (4 June 1993) para 9.

<sup>138</sup> Article 24(1) of the UN Charter: 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.

forces to prevent the third parties' attacks has led to the deaths of civilians in several operations. Subsequently, the bid to enhance the robustness of the UN peacekeeping forces has included developing rapid reaction forces with artillery, and then gradually including other types of equipment, such as 'light-armoured units or to armed helicopters more often than to artillery'.<sup>139</sup> This is strong evidence that the third parties' crimes cannot be prevented without significant improvement in the strength of the UN peacekeeping forces.

The importance of this strength can be seen in many cases, such as MONUC, where the UNSC stated implicitly that the UN peacekeeping forces cannot always protect civilians because of their limited capability, compared with the third parties in the Congo. This was stated in UNSC Resolution 1291 as 'MONUC may take the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities'.<sup>140</sup>

Therefore, it is clear that the UN peacekeeping forces may be incapable of preventing all crimes against civilians because of their limited abilities. This means the UN must increase the UN peacekeepers' ability so they can react to attacks against civilians and defend their mandate.

The lack of ability has caused the UN peacekeeping forces to fail to protect civilians on several occasions. In 2008, when the Mai attacked Kiwanja, the priority of MONUC

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<sup>139</sup> Patrice Sartre, *Making UN Peacekeeping More Robust: Protecting the Mission, Persuading the Actors* (International Peace Institute, 2011) 30.

<sup>140</sup> *Mandate for MONUC (UN Organization Mission in the Democratic Republic of the Congo)*, SC Res 1291, UN SCOR, 4104<sup>th</sup> mtg, UN Doc S/RES/1291 (24 February 2000) para 8.

was not to protect the local population of Kiwanja or civilians. Their priority was rescuing abducted foreign journalists, humanitarian workers and a team of military observers. The reason for neglecting civilians during that time, as stated after the attack, was the insufficient number of the UN peacekeepers.<sup>141</sup> In addition, the need to improve rapid reaction in the UN peacekeeping forces was evident when Indian troops were deployed with four Russian Bronevaya Maschina Piekhota (BMP) fighting vehicles (which were the most effective vehicles in the deployed forces in the area), yet did not help prevent the attack.<sup>142</sup> When the group of insurgents—the ‘National Congress for the Defence of the People’—attacked Kiwanja, two of the fighting vehicles were already in Kalengera and could not return to their base to help respond to the attack. Although there were two BMP fighting vehicles, these vehicles were not used to protect civilians because they were sent to help rescue other personnel from the UN mission.<sup>143</sup>

MONUC is an example indicating the need for robust the UN peacekeepers to protect civilians. Therefore, in response to the continuing failure of the UN peacekeeping forces in the Congo, in 2010, the UNSC decided to increase MONUC’s ability to provide protection for civilians. In 2010, MONUC was renamed the UN Organization Stabilization Mission in the DRC (MONUSCO),<sup>144</sup> which was given an intervention

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<sup>141</sup> *Killings in Kiwanja: The UN’s Inability to Protect Civilians*  
<<https://www.hrw.org/sites/default/files/reports/drc1208web.pdf>> (accessed 19 April 2019).

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> As of 1 July 2010, the MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in accordance with UN Security Council Resolution 1925. See *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1925, UN SCOR, 6324<sup>th</sup> mtg, UN Doc S/RES/1925 (28 May 2010).



brigade force in March 2013 that is considered the first UN combat force.<sup>145</sup> This mission includes all necessary forces to achieve their duty. Despite these authorisations to help the UN peacekeepers protect civilians and despite providing the equipment required to prevent the third parties from committing crimes, the UN peacekeeping forces still require further improvements to increase their military ability and training. Thus, the UN should undertake a comprehensive study to determine the challenges in each host state before each operation to minimise the abilities of the third parties and help UN peacekeepers achieve their mandated duties.

#### **4.5.2 Mobility**

As mentioned in the previous section, the strength of equipment and robustness of the UN peacekeeping forces are important for the UN to succeed in peacekeeping operations. However, strong military equipment without the capacity for mobility is not a solution to the challenges of the UN peacekeeping forces,<sup>146</sup> who require ‘mobility across large areas of operations, and [the ability to] respond robustly to threats when they arise’.<sup>147</sup> The main means of mobility for UN peacekeeping forces are air and land mobility, which are important because of the different and complex geographic terrains in the host states.

Land mobility must be sufficiently flexible to allow UN peacekeeping forces to move quickly to respond to threats to their mandate to achieve their mission. This flexible

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<sup>145</sup> *The Situation in Democratic Republic of the Congo*, SC Res 2098, 6943<sup>rd</sup> mtg, UN Doc S/RES/2098 (28 March 2013) para 9.

<sup>146</sup> Sartre, above n 139, 18.

<sup>147</sup> *Statement by Under-Secretary-General Hervé Ladsous to the Special Committee on Peacekeeping Operations* (20 February 2015) <[https://peacekeeping.un.org/sites/default/files/150219\\_ladsous\\_c34speech\\_draftousgfinal.pdf](https://peacekeeping.un.org/sites/default/files/150219_ladsous_c34speech_draftousgfinal.pdf)> (accessed 21 April 2019).

land mobility requires special vehicles suitable for all terrains in the host states. While the UN peacekeepers have been provided with 4×4 vehicles to use in their patrols, these vehicles cannot be used during armed conflict, as they do not have ‘ballistic protection’.<sup>148</sup> To increase the land mobility of the UN peacekeeping forces, they must be provided with vehicles that can move them to the conflict area with high speed and protection. Focusing on this problem is important because land mobility has been the main reason for the UN peacekeeping forces’ failure to protect civilians on several occasions in the Congo alone. One of these occasions occurred when the BMP military vehicles for the Indian troops could not return to their base to protect civilians in Kiwanja. The lack of mobility meant the UN peacekeeping forces were unable to prevent insurgents from committing crimes. However, the challenge of mobility cannot be resolved solely by flexible land mobility because, in some operations, UN peacekeepers cannot even use military vehicles—for example, when crossing rivers, flooded areas, mountains or hills. For this travel, they require air mobility to discharge their duties.

Air mobility has become the main branch for any military forces. The UN peacekeeping forces have indicated that they require this capacity in their missions to pass land barriers in the host states, especially when military vehicles cannot be used. In this case, the only way to discharge their duty is through air mobility. For example, including helicopters in their forces will give them flexibility to move around the host states. The importance of air mobility has been highlighted in numerous the UN peacekeeping operations, such as in the Congo. During the UN peacekeeping operations in the Congo, the UN personnel suffered from mobility difficulties when deployed on a long border

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<sup>148</sup> Victoria K Holt, Glyn Taylor and Max Kelly, *Protecting civilians in the context of UN peacekeeping operations: successes, setbacks and remaining challenges* (UN, 2010) 202.

(of approximately 2,500 kilometres) between the Congo and its neighbours.<sup>149</sup> This huge area was under the protection of the UN peacekeeping forces, yet they had limited capacity to prevent weapon smuggling or insurgents moving across the border. This inability resulted in an increase in crimes committed against civilians. In this case, violence could not be prevented despite improvements in the strength of the UN peacekeeping operation in the Congo in 2010,<sup>150</sup> and also it is difficult to stop the insurgents' activity to bring the state security under control.<sup>151</sup> Enhancing the security situation of the host states is not easy with challenges in mobility, especially with a lack of helicopters.

Resolving the mobility problems of UN peacekeeping forces is essential to protect civilians and achieve the peacekeepers' mandated duty. It will also help close the legal gaps in the UN peacekeeping system, as it will then be easier to determine whether a failure in the UN peacekeepers' duty was a result of deliberate neglect or inability. UN peacekeepers will understand that any inaction to protect civilians, within their capability, may be treated as a violation of their assigned and assumed duty, as long as they have the ability and mandate to protect civilians.

#### **4.5.3 Increasing female peacekeepers**

The requirement for female peacekeepers in the UN peacekeeping operations has been highlighted because of the increased problems of SEA by some UN peacekeepers in the host states. Unabated SEA in the host states led the UN in 2005 to undertake

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<sup>149</sup> Ray Murphy, 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians' (2016) 21(2) *Journal of Conflict and Security Law* 209, 224.

<sup>150</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, SC Res 512, UN Doc S/2010/512 (8 October 2010) para 33.

<sup>151</sup> Alan Doss, *Great Expectation: UN Peacekeeping, Civilian Protection, and the Use of Force* (Geneva Centre for Security Policy, 2011) 22.

investigations and establish rules to halt this misconduct,<sup>152</sup> given that the UN has no ability to hold UN peacekeepers accountable for their misconduct.<sup>153</sup> Therefore, only the home states can prosecute the UN peacekeepers, and there is no guarantee that the home states will be willing to prosecute. Although all states have criminal laws that can be applied to citizens who commit crimes outside their country, there are some states that are unwilling to prosecute their nationals if they are involved in committing crimes during UN operations.<sup>154</sup> Therefore, to minimise the suffering of women in the host states and close this gap in the UN peacekeeping operations, a suitable and practical solution may be to increase female personnel in the UN peacekeeping forces and perform duties related to women in the host states.

#### **4.6 Conclusion**

This chapter has investigated problems associated with the failures of UN peacekeeping forces and the factors that led to the suffering of civilians during MONUSCO in the DRC and UNMISS in South Sudan. In these two cases, several problems were examined to determine the extent of UN peacekeeping forces' ability to prevent crimes committed by the third parties against civilians, and the factors that led to peacekeepers' failure to protect civilians. The investigations in these cases indicated that the third parties committed numerous crimes against civilians without intervention by UN peacekeepers. The reasons for the failure to stop crimes against civilians included the

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<sup>152</sup> *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, UN GAOR, UN Doc A/59/661 (2005); *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN GAOR, 59<sup>th</sup> sess, Agenda Items 114 and 123, UN Doc A/59/782 (15 April 2005).

<sup>153</sup> *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) ('*General Convention*') art 1.

<sup>154</sup> UNGA Legal Committee, '*Jurisdictional Gaps*' Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions, UN Doc GA/L/3342 (10 October 2008).

deliberate neglect of UN peacekeepers and the inability of the UN peacekeepers to prevent the third parties from committing crimes in South Sudan. In addition, a central problem is that there is no body to hold UN peacekeepers accountable when they deliberately neglect their duty.

In the DRC during MONUSCO, the operation failed to protect civilians through deliberate neglect because, although they were provided with mandates to protect civilians,<sup>155</sup> they did not take the necessary measures to prevent crimes against civilians.<sup>156</sup> Civilians in the DRC were in a non-secured environment and, although the UN peacekeepers were based close to the crime areas during the time that most crimes were committed, the peacekeepers did not act. This provides strong evidence that the UN peacekeepers did not care about the life of civilians, and they experienced no accountability or punishment when they neglected their duty in this case.

The investigation in the case of South Sudan exposed a failure in the duty of UNMISS to protect civilians residing in the site prepared for the displaced people. While the protection of civilians was a priority mandated by the UNSC to the UN peacekeeping forces, they neglected this duty and left civilians without protection.<sup>157</sup> UNMISS should be responsible for these crimes, even though the third parties committed them because

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<sup>155</sup> *Democratic Republic of the Congo*, SC Res 2147, 7150<sup>th</sup> mtg, UN Doc S/RES/2147 (28 March 2014).

<sup>156</sup> *DR Congo: Investigation into Misconduct Opened* <<https://monusco.unmissions.org/en/dr-congo-investigation-misconduct-opened>> (accessed 08 November 2018); *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 66<sup>th</sup> sess, Agenda Item 139, UN Doc A/66/699 (17 February 2012) para 19; 'DR Congo Launches Offensive Against FDLR Rebels', *Al Jazeera* (online) <<https://www.aljazeera.com/news/2015/02/dr-congo-offensive-fdlr-rebels-150226021624157.html>> (accessed 10 October 2018).

<sup>157</sup> *MSF Internal Review of the February 2016 Attack on the Malakal Protection of Civilians Site and the Post-event Situation* <[https://reliefweb.int/sites/reliefweb.int/files/resources/malakal\\_report\\_210616\\_pc.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/malakal_report_210616_pc.pdf)> (accessed 21 December 2018).

they have been authorised to use ‘deadly force’ to protect civilians and had ability to prevent crimes. However, many crimes during UNMISS indicated that the UN peacekeepers were unable to prevent crimes even against the UN peacekeepers themselves, such as the attack that caused the crash of a helicopter belonging to the UN by IGAD.<sup>158</sup> In addition, South Sudan is a new state that still has no adequate judicial system to prosecute those against whom crimes are committed in the territory of the state; therefore, the personnel of UNMISS could not be prosecuted in South Sudan even if their immunity was waived.

Finally, although the failure of the UN peacekeeping forces caused the same effect as any other crime on civilians and increased civilian suffering, it remains unclear whether this misconduct can be considered a crime of omission, and how peacekeepers should be prosecuted, or whether, when the UN peacekeepers fail to protect civilians from insurgent groups, they do so with no responsibility. In addition, UN peacekeeping forces require urgent improvement in their ability to face serious challenges by the third parties in the host states. If the UN peacekeepers continue being unable to perform their duty effectively, there seems to be limited benefit to deploying them in the long term. Whose interest do these deployments serve? Moreover, the cases discussed in this chapter indicate that waiving the immunity of the UN peacekeepers by the UN Secretary-General has no value in most operations, as the host state can be a failed state with no judicial system. Moreover, sending UN peacekeepers back to their home states may not be a realistic way to prosecute them because many states prosecute only when the UN peacekeepers’ misconduct amounts to dual criminality (whereby the crime committed in the host state is also a prosecutable criminal act under the national

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<sup>158</sup> *Reports of the UN Secretary-General on the Sudan and South Sudan*, SC Res 2252, 7581<sup>st</sup> mtg, UN Doc S/RES/2252 (15 December 2015).

criminal law of the home state). Thus, UN peacekeeping forces still require an independent legal accountability regime and judicial system that can prosecute the UN peacekeepers when they commit misconduct or criminal acts.

## **Chapter 5**

### **Failure to Protect Civilians as a Crime under International Criminal Law**

#### **5.1 Introduction**

The responsibility for proving failure to protect civilians as a crime under criminal law is complicated. This responsibility emanates from the fact that the failure to protect civilians can occur when the defenders (the UN peacekeepers) have not acted or have deliberately neglected their duty. Law jurists and scholars are attempting to analyse this phenomenon to explore whether such failure can constitute a crime under international criminal law. Law scholars argue that, for failure in duty to be considered a crime of omission, all elements of these crimes must be available otherwise, there is no criminalisation for simply doing nothing. It is important to explore the crime of omission and under what circumstances the defenders (the UN peacekeepers) may be held responsible for such a crime. Further, it is important to consider whether the elements of this crime of omission are the same as those of the criminal offence of neglect in international criminal law.

As a result of the increasing failures of the UN peacekeepers, an important question is whether these failures are considered a crime of omission, and answering this question is essential to clarify the UN peacekeepers' criminal responsibility. Thus, this chapter will analyse the effect of failure to protect civilians in the host states. The responsibility for the UN peacekeepers' conduct, based on criminal laws, must be placed on the offender who commits the crime; however, for the UN peacekeepers, in most cases, their failures have resulted from deliberate neglect, which has caused more danger to civilians. Thus, this chapter seeks to clarify how the neglect of duty differs from a crime



of omission because the UN peacekeepers' responsibility is different for several reasons. For example, the UN peacekeepers who neglect their duty should not be responsible for the entire result of this neglect; however, the crime of omission means that responsibility should be held for the complete failure to prevent the crimes of the third parties.

This chapter discusses the position of the existing international criminal law to indicate how this law deals with the crime of omission. Understanding the criminalisation of the crime of omission is significant because it is unclear whether UN peacekeeping forces can be held criminally accountable for their failure to protect civilians. In addition, the position of the ICC to prosecute UN peacekeepers who are citizens of ICC non-state parties will be examined in case their failure is considered a crime. Moreover, the position of the national law will be examined to discuss how the host states can criminalise the UN peacekeepers' failure in duty.

## **5.2 Concept of crime in criminal law**

To define the behaviours that must be included in this research, the concept of crime must be identified. Criminology has experienced numerous problems, such as the legal ambiguities of the phenomena of the crime by omission, which differentiate human suffering caused by the acts of others from human suffering caused by the failure of those who have a duty to act.<sup>1</sup> Law scholars have defined crime as a behaviour from the human against others and who committed this violation must be responsible for their actions.<sup>2</sup> However, this definition was too narrow, as it did not cover all the crimes that

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<sup>1</sup> Donald R Cressey, 'Criminological Research and the Definition of Crimes' (1951) 56(6) *American Journal of Sociology* 546.

<sup>2</sup> Ronald C Kramer, 'Defining the Concept of Crime: A Humanistic Perspective' (1985) 12 *Journal of Society & Social Welfare* 469, 470.

can affect people.<sup>3</sup> To resolve this problem, scholars debated for a long time to find a suitable definition. Blackstone established two definitions for crime. The first definition stated that a 'crime or misdemeanour is an act committed, or omitted, in violation of public law, either forbidding or commanding it'.<sup>4</sup> The second definition determined crime as a 'violation of the public rights and duties, due to the whole community, considered as a community'.<sup>5</sup>

However, the above definitions or concepts of crime are considered insufficient as a formal definition for crimes because they do not cover all crimes that can be committed against a community. Thus, further scholars have sought to define crime, such as the definition based on the statement by Iryna Marchuk,<sup>6</sup> which defines crime as 'a socially harmful act or omission that breaches the values protected by a state'.<sup>7</sup> This definition raises the question of whether the omission of duty is considered the same as an act of crime.

Although the above definitions differ and not all are considered sufficient to be adopted as the legal definition of crime, they have a commonality between them because they all mention crime as being socially harmful and a violation of the rules. In addition, crime means any harm that could arise from an act or omission. Thus, this study must analyse whether failure in duty is a crime of omission because, if a crime of omission

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<sup>3</sup> Ibid.

<sup>4</sup> William Sir Blackstone, S Hein William and Company, *Commentaries on the Laws of England* (WS Hein, 1992) 5. See also Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5(1) *Social & Legal Studies* 57, 62.

<sup>5</sup> Ibid.

<sup>6</sup> Iryna Marchuk, Head of PhD School and Research Education at University of Copenhagen.

<sup>7</sup> Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law* (Springer, 2014) 69.

is unclear and has no legal definition, then there is no responsibility established for criminals, as the criminal could argue that he or she did not act in a manner that holds them liable for the harms inflicted on the victims.

Based on the above discussion, the crimes committed by UN peacekeepers can be divided into two types: the crime of act and crime of omission. Most crimes that have been committed in UN operation areas include crimes of sexual exploitation or violent acts against civilians by the UN peacekeepers.<sup>8</sup> These crimes are considered crimes of act because the actions of the UN peacekeepers caused the crimes. The second type of crime committed by the third parties is the crime of omission, which is perpetrated when UN peacekeepers deliberately fail to achieve their duties and cause suffering to civilians. This crime differs from the crime of act because a crime act may not be committed by the UN peacekeepers; rather, the crime derives from neglect of their duties. The following section briefly discusses crimes of act. However, the crimes of omission committed by the UN peacekeepers and why peacekeepers go unpunished for such crimes will be the main focus of this section. The UN administers some form of punishment to the UN peacekeepers who commit crimes in the host state, but these punishments do not meet the basic requirements of justice for the crimes. For example, when a UN peacekeeper commits a crime against civilians, the only punishment may face is being stripped of his position and sent back to the home state. However, the UN peacekeepers can face no punishment if a crime has been committed because of deliberate neglect.

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<sup>8</sup> Felicity Lewis, 'Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress' (2014) 23(3) *Southern California Interdisciplinary Law Journal* 595, 596.

### 5.2.1 Acts that constitute crimes in general

There are several important views for jurisprudence relating to the meaning of the crime of act and how to identify this crime. The main view of this crime in common law is from John Austin, who stated that any ‘voluntary movement of my body, or a movement which follows a violation, is an act’.<sup>9</sup> Holmes confirmed this view when he stated that a person who has committed an act is responsible for this action if it is followed by damage or harm.<sup>10</sup> This type of crime depends on physical movement, such as when someone is killed by a weapon—for example, when a person uses his or her finger to pull a gun trigger, and the result of this movement is the death of someone else.<sup>11</sup> Crime by acts are still considered the main crime committed widely, and are the result of a mental decision reflected in body movements that lead a person to commit a crime. For this reason, William Wilson argued that most criminal laws focus on the act itself, rather than the action of crimes to explain the harm of act in crimes.<sup>12</sup>

The above points outline why all legal systems have established punishments for crimes committed by human acts, and how these legal systems explain the harm caused only by human acts although harms can derive from doing nothing.<sup>13</sup> Explaining the crime of act is important in this section because numerous act crimes have been committed by the UN peacekeeping forces, and some of these crimes are serious criminal acts,

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<sup>9</sup> Michael S Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford University Press, 2010) 78.

<sup>10</sup> Oliver Wendell Holmes, Jr, *The Common Law* (The Belknap Press of Harvard University Press, 2009) 73.

<sup>11</sup> Moore, above n 9.

<sup>12</sup> William Wilson, *Central Issues in Criminal Theory* (Hart, 2002) 79.

<sup>13</sup> FM Kamm, 'Action, Omission, and the Stringency of Duties' (1994) 142(5) *University of Pennsylvania Law Review* 1493, 1494.

including war crimes. In addition, explaining a crime of act will provide a view of the crime and indicate how it differs from the crime of omission. The next section will focus on the crime of omission to determine the liability of UN peacekeepers if others commit crimes against civilians during the UN operations.

### **5.2.2 Omissions that constitute a crime**

The main problem discussed in this study is crime caused by a deliberate failure in duties, which is expressed by jurists as the crime of omission.<sup>14</sup> In this crime, it is clear that the harm caused is the direct result of the offender's failure in his or her duty. The law's definition and jurisprudence views must be identified to determine the exact meaning of this crime. Joel Feinberg argued that harm can arise from the failure to prevent crimes committed by the third parties.<sup>15</sup> Thus, crimes are not just crimes of action, but also crimes of omission. Unlike crimes of action, crimes of omission can be committed by a failure to do what the law requires, such as a neglecting one's duties.<sup>16</sup>

The above view led this study to clarify what a crime of omission means, and how it can be committed in numerous instances. The previous sections have defined a crime as any illegal act that may be committed by humans and that causes tort or damage to the protected interests (such as personal or property interests) of another person.<sup>17</sup> However, a crime of omission is different because it results from the neglect of duties when crimes are committed, without any action to prevent harm. Gerhard Werle<sup>18</sup>

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<sup>14</sup> Jacobo Dopico Gómez-Aller, 'Criminal Omissions: A European Perspective' (2008) 11(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 419, 420.

<sup>15</sup> Patricia Smith, 'Legal Liability and Criminal Omissions' (2001) 5(1) *Buffalo Criminal Law Review* 69.

<sup>16</sup> Terrence F Williams, 'Neglect of Duty and Breach of Trust' (2010) 13(4) *Journal of Money Laundering Control* 336, 343.

<sup>17</sup> Wilson, above n 12, 77.

<sup>18</sup> Professor of German and International Criminal Law at Humboldt University in Berlin.

defended this as follows: ‘the criminal conduct consists in the very fact that the perpetrator failed to act’.<sup>19</sup> It is difficult to classify these situations as crimes because different law jurisprudences have differing views. Bentham argued that ‘many omissions are preceded by “act of will” just as are positive acts’.<sup>20</sup> He recognised and explained that omissions are preceded by acts, and these are positive acts committed by the perpetrator.

However, Austin argued that there are two problems with Bentham’s argument and his ‘extensive signification’ to the word ‘act’.<sup>21</sup> The first problem is that Bentham ‘makes mental acting sufficient for acting in the legal sense of the word’, and the mental act cannot be excluded from legal liability.<sup>22</sup> Austin rejected Bentham’s opinion and stated that people must be responsible for their physical actions, not for ‘what they think’.<sup>23</sup> The second problem is that, even if the legal plausibility and identification are conceded, it is insufficient to justify Bentham’s opinion.<sup>24</sup> Austin stated that numerous omissions cannot be punished as acts; for example, neglect is not considered a crime of omission because the brain in this situation has not any decision to omit the action.<sup>25</sup>

According to the above points, crimes may be committed not just by action, but also by omitting to perform required duties. However, to criminalise a person who has not

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<sup>19</sup> Gerhard Werle, *Principles of International Criminal Law* (TMC Asser Press, 2005) 170.

<sup>20</sup> Moore, above n 9, 23.

<sup>21</sup> Ibid 78.

<sup>22</sup> Ibid 23.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 27.

<sup>25</sup> Ibid 24.

prevented a crime, the person must have had legal duty to prevent the crime.<sup>26</sup> An example is a police officer who does not act to protect a person in danger. For example, a police officer may watch a perpetrator harm a person and leave the victim to die, even though it is the officer's duty to protect that person. In this case, the crime of omission arises from failing to act, as the police officer does not prevent a crime committed by others.<sup>27</sup> Therefore, the police officer is considered criminally liable because he or she did not stop or prevent a crime from being committed, despite his or her duty and ability to protect the victim.

### **5.2.3 Perspective of jurisprudence on difference between crimes**

The differences between committing a crime by an act and by an omission are considered very complicated and are not always possible to distinguish because criminal conduct is sometimes difficult to determine. For example, when UN peacekeepers fail to prevent attacks against civilians in a mission area, it is difficult to determine whether this is a failure in duty or whether they wanted civilians to be killed by the third parties. The use of force in UN peacekeeping operations must only occur in the case of self-defence, based on the principles of UN peacekeeping operations.<sup>28</sup> To avoid difficulties and determine whether an act or omission can cause harm, this section examines three cases to explain situations related to the elements of crimes of omission. For these cases, this study will explain whether the harm resulted from an act or omission.

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<sup>26</sup> Michael Duttwiler, 'Liability for Omission in International Criminal Law' (2006) 6(1) *International Criminal Law Review* 1, 5.

<sup>27</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press, 2013) 180.

<sup>28</sup> *What is Peacekeeping?* <<http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml>> (accessed 29 August 2018).

The case with a crime of omission is different from a crime of act, and the question here is whether UN peacekeepers are responsible for a crime if they do not act. According to Geoffrey Mead,<sup>29</sup> responsibility can be raised with anyone who has a duty and fails to adhere to it. He explained his view with the below examples,<sup>30</sup> which explain how the crime is committed to explain whether crimes of the UN peacekeepers can be considered crimes of omission. In addition, it explains the process of the crime of omission to clarify this crime in relation to UN peacekeepers' crimes.

The first example involves offender (D) pushing victim (V) into a swimming pool and allowing the victim to die. This could be the same as UN peacekeepers of the African Union Mission in Somalia who committed numerous crimes against civilians, including crimes against detainees who were held in metal boxes (which were used as prisons) in hot areas, even though they knew the person in the box would die.<sup>31</sup>

The second example involves a swimming trainer (D) pushing someone who wants to learn to swim (V) into a swimming pool, knowing that this person cannot swim. The trainer promise he will rescue the victim if they start to drown, but the trainer fails to do so, and the victim dies. Similarly, UN peacekeepers can place refugee camps or civilians in danger if they believe their forces are able to handle attacks against civilians by insurgent groups yet fail to protect civilians when the attacks occur. The UN peacekeepers would be responsible for this as a crime of omission because the negative outcomes would be a direct result of their failure to protect civilians.

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<sup>29</sup> Geoffrey Mead, 'Contracting into Crime: A Theory of Criminal Omissions' (1991) 11(2) *Oxford Journal of Legal Studies* 147, 152.

<sup>30</sup> Ibid.

<sup>31</sup> Lewis, above n 8, 595, 604.



The third example is related to the UN peacekeepers' crime by omission in which the UN established an operation in a host state to protect civilians from insurgent groups. The duty of the UN peacekeepers was to protect civilians; however, when the insurgent groups attacked them, the UN peacekeepers did not prevent these groups. Therefore, the UN peacekeepers were responsible for doing nothing to prevent crimes against civilians although they had a duty to rescue civilians when they were in a dangerous situation.

The above three cases assume that the UN peacekeepers could rescue civilians, yet they failed to do their duty. Therefore, it must be identified whether these were crimes of omission or action, so the UN peacekeepers can be held criminally accountable. The first case is clearly considered a crime of act because D pushed V into the water, even though he knew V could not swim, and the UN peacekeepers placed a young man in a metal box in the sun even though they knew he would die. The most complicated case is the second case because it is unclear whether the death resulted from an act or omission. In this case, the victim died because D pushed the victim into the water and did not rescue the victim. The third case is clearly a crime of omission because the harm resulted from the UN peacekeepers' failure to rescue civilians.

In MacCormick's opinion,<sup>32</sup> the above cases—especially the second and third—are considered crimes of omission.<sup>33</sup> He asserts that D should have taken action or made a plan to protect the victim. MacCormick stated that, in the second case, one act occurred (D promising to rescue V) and one omission occurred (D did not perform this action to

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<sup>32</sup> MacCormick was a lecturer in jurisprudence at the School of Law of Edinburgh University. Neil Walker, 'Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason' (2011) 24(4) *Ratio Juris* 369, 370.

<sup>33</sup> Mead, above n 29.

rescue V). Mead argued that, if D had not promised to rescue V, V would not have gone swimming and thus would not be in danger.<sup>34</sup> In most UN peacekeepers' crimes, civilians depended on them for protection. If there had been no UN peacekeepers in their area, they would have moved to a safer location; however, the UN peacekeeping forces' commitment to protect civilians meant that they stayed in the UN peacekeeping area.

The most common crimes committed by the UN peacekeepers are sexual crimes and exploitation of their position over civilians in the host states. These crimes are obviously crimes of action. However, complications arise when insurgent groups commit such crimes against civilians in conflict areas. These instances raise a special question in relation to the responsibility of UN peacekeepers to protect civilians from crimes, and whether the crimes committed by the third parties in conflict areas can be identified as crimes of omission by the UN peacekeeping forces. Examining this issue is very important to determine the crimes of the UN peacekeeping forces. To consider a situation as a crime of omission, the UN peacekeepers must have the ability to prevent the crimes. Based on the above points, crimes against civilians who should be protected by the UN peacekeeping forces can be considered crimes of omission because the UN peacekeepers failed to prevent criminal activity even though they could discharge their duty,<sup>35</sup> and the UNSC had authorised them to use force to protect civilians in the host states.<sup>36</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> *The Situation in Sierra Leone*, SC Res 1260, 4035<sup>th</sup> mtg, UN Doc S/RES/1260 (20 August 1999).

<sup>36</sup> *Protection of Civilians Mandate* <<https://peacekeeping.un.org/en/protection-of-civilians-mandate>> (accessed 6 August 2019).

If the UN peacekeepers are to be held responsible for all crimes committed by the third parties against civilians in their operations area, they must be provided with highly developed equipment by the international community, so they are able to prevent insurgent groups from attacking civilians in the host states. In addition, the law must be reformed to hold peacekeepers' responsible for failure in their duty or failure to protect civilians, and this liability should be either individual or collective, depending on the failure circumstances. If UN peacekeepers have no ability to choose or determine when to use force, the international community cannot prosecute them for crimes of omission, which causes a gap in jurisdiction in the law related to the UN peacekeepers' work. Therefore, the next sections focus on the following three main points: (1) the elements of crimes of omission, (2) how to avoid the jurisdiction gap and (3) how the problem of crimes of omission can be solved by upgrading the weapons and equipment of the UN peacekeepers.

### **5.3 Elements of crimes of omission related to UN peacekeepers**

The main crime that remains without a solution in relation to UN peacekeeping forces is the crime of omission—or the situation in which the UN peacekeepers fail to prevent crimes being committed by the third parties against civilians in the host states. As a result of the ambiguity in this crime, the elements will be discussed below to explain and indicate how a failure to act can be considered a crime of omission.

#### **5.3.1 Accused must have a duty under the law**

Offenders are responsible for their crimes when they commit them; however, with a crime of omission, the case is different because it is not only the offenders who are responsible for their crimes—the responsibility also lies with people who have a duty to prevent these crimes and fail to achieve their duty. Therefore, for a crime to be considered a crime of omission, even if a person did not commit the crime, the person

must have had a duty to prevent the crime.<sup>37</sup> The duty held by the person is considered the most important element because, if there is no duty according to criminal law, the offender cannot be prosecuted for the crimes of others.<sup>38</sup>

The UN peacekeepers deployed in the host states have a duty to protect civilians. Therefore, this raises the question of whether the UN peacekeepers have a duty to protect civilians in the mission area according to the law. According to UNSC Resolution 1674, paragraphs 10 and 13,<sup>39</sup> the UN peacekeepers have the duty to prevent misconduct against civilians. This duty is confirmed for the UN peacekeepers in paragraph 17. Therefore, the UN peacekeepers are responsible for all crimes committed against civilians in the operations area because they have the legal duty to protect civilians from any threat. However, the UN peacekeepers must meet the other elements such as have ability and failed to achieve their duties to be fully responsible, which will be discussed in detail below—especially the ‘ability to act’ element, which is considered an important element for the responsibility.

### **5.3.2 Accused must have the ability to act**

Responsibility for a crime of omission is related to the ability to act. Upholders of the law must be able to prevent criminals from threats to be responsible for crimes of omission. The ability to act is based on two factors—legal ability and the ability of the equipment used by UN peacekeeping forces to face the third parties who attack their operations area. Legal ability is important to give UN peacekeepers the authority to use

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<sup>37</sup> Duttwiler, above n 26, 1, 5.

<sup>38</sup> Michael T Cahill, 'Attempt by Omission' (2009) 94(4) *Iowa Law Review* 1207, 1213.

<sup>39</sup> *Protection of Civilians in Armed Conflict*, SC Res 1674, 5430<sup>th</sup> mtg, UN Doc S/RES/1674 (28 April 2006).

force against the third parties because, according to the mandate of the UN peacekeeping forces, they cannot use force without authorisation from the UNSC.<sup>40</sup> Moreover, sophisticated equipment and weapons will offer the UN peacekeepers greater ability to stop an attack against the host state. If the UN peacekeepers have no ability to act, they cannot be held responsible for crimes against civilians committed by others. Thus, they must have legal ability and upgraded weapons.

However, if the UN peacekeepers could have prevented an attack against the operations area, yet did not, they are responsible for their failure as a crime of omission. An example of this occurred in the DRC when the UN peacekeeping forces did nothing to prevent the insurgent from killing 33 refugees.<sup>41</sup> In this case, the UN peacekeeping forces had the ability to prevent the crimes yet did not act to protect the refugees. Thus, the UN peacekeepers were responsible for the crime of omission.<sup>42</sup>

### **5.3.3 Accused fails to prevent criminal conduct**

The responsibility in criminal law must be for an offence committed by an act or omission. However, in the case of criminals who fail to act under special conditions, the offenders can be responsible for their failure to reduce the effect of the crimes, while not actually causing the crime itself.<sup>43</sup> This element was confirmed in the decision of the Appeals Chamber of ICTR for the prosecution of Jean-Bosco Barayagwiza, who

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<sup>40</sup> United Nations, *United Nations Peacekeeping Operations: Principles and Guidelines*, p8 <[https://peacekeeping.un.org/sites/default/files/capstone\\_eng\\_0.pdf](https://peacekeeping.un.org/sites/default/files/capstone_eng_0.pdf)> (accessed 6 August 2019).

<sup>41</sup> *Report of the UN Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo*, 7237<sup>th</sup> mtg, UN Doc S/PV/7237 (2014).

<sup>42</sup> The case of the DRC has been discussed and analysed in chapter 4.

<sup>43</sup> Marcelo Ferrante, 'Causation in Criminal Responsibility' (2008) 11(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 470, 472.

was held responsible for genocide and serious violations of IHL committed in Rwanda against civilians. The decision stated that Barayagwiza:

(1) knew or had reasons to know ... that crimes were about to be committed or had been committed by his subordinates; [and] (2) failed to take necessary and reasonable measures to prevent such criminal acts or to punish their perpetration.<sup>44</sup>

For this reason, the Appeals Chamber found Barayagwiza guilty of genocide according to Article 6(3) of the *ICTR Statute*.<sup>45</sup> This is a clear example of criminalising the failure to prevent criminal conduct, which exists in international criminal law. When civilians who should be protected by the UN peacekeepers are in danger and subject to murder by the third parties, and the UN peacekeepers fail to prevent attacks, even though they have the ability to reduce the number of victims by preventing these third parties, the UN peacekeepers are responsible for a crime of omission. The UN peacekeepers must be responsible for their failure in duties when they fail to decrease the action of crimes against civilians.

#### **5.3.4 Failure to act results in crimes committed**

The crime of omission defined in the above sections is considered the opposite to the crime of act because the latter crime involves performing some act, while the former crime refers to failure to perform a required act.<sup>46</sup> This section analyses the failure to act, the way this failure results in crimes being committed, and the way this failure

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<sup>44</sup> *Prosecutor v Jean-Bosco Barayagwiza et al (Judgement)* (International Criminal Tribunal for Rwanda, The Appeals Chamber, Case No ICTR-99-52-A, 28 November 2007) [362–4].

<sup>45</sup> In addition, '[T]he Appeals chamber finds that Appellant Nahimana has not shown that the Trial Chamber erred in concluding that he failed to take necessary and reasonable measures to prevent or punish direct and public incitement to murder Tutsi in 1994 by RTLM staff'. See *ibid* 856.

<sup>46</sup> Jonathan M Burchell and John Milton, *Principles of Criminal Law* (Juta, 2005) 186.

appears as an element in crimes of omission. Crimes of omission mean that a required act must be performed within an appropriate time to avoid crimes or misconduct. An example is the Srebrenica massacre, in which the UN peacekeepers had a duty to protect civilians in their operations area, and the third parties attacked and killed a large number of civilians.<sup>47</sup> In this case, the UN peacekeeping forces are liable for the crime of omission because they failed to prevent the crime, even though they had the ability to do so and were able to use force to prevent the third parties from committing the crime.<sup>48</sup> In this case, the failure of the UN peacekeeping forces caused the crimes to be committed and civilians to be killed.

Regarding the punishment of those who fail to do their duty and cause crimes to be committed, several criminal law scholars argue that punishment of the failure to act to avoid harm should be the same as the punishment of offenders who committed those crimes.<sup>49</sup> However, criminal sanctions for the failure to act are only applicable when offenders have the legal duty to act<sup>50</sup> because they hold liability ‘for conduct that is not criminal under the Penal Code’.<sup>51</sup> The above discussion explains the failure to prevent a crime in which circumstances can be considered a crime of omission, and the elements

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<sup>47</sup> Cedric Ryngaert, ‘Srebrenica Continued. Dutch District Court Holds the Netherlands Liable for Cooperating with Bosnian Serbs’ (2014) 61(3) *Netherlands International Law Review* 365.

<sup>48</sup> Human Rights Watch, *The Fall of Srebrenica and the Failure of UN Peacekeeping Bosnia and Herzegovina* <<https://www.hrw.org/sites/default/files/reports/bosnia1095web.pdf>> (accessed 29 August 2018).

<sup>49</sup> John Kleinig, ‘Criminal Liability for Failures to Act’ (1986) 49(3) *Law and Contemporary Problems* 161.

<sup>50</sup> *Ibid* 161.

<sup>51</sup> Jesús-María Silva Sánchez, ‘Criminal Omissions: Some Relevant Distinctions’ (2008) 11(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 452, 456.

of crimes of omission, given that, if there is no failure to act, it cannot be considered a crime of omission.

In international law, the accused are responsible according to Article 7(1) of the *ICTY Statute*, regardless of whether the accused committed the criminal act or failed to perform some act to prevent crimes in violation of IHL. In addition, this liability is confirmed in Article 14(1) of *Geneva Convention III* and Article 27 of *Geneva Convention IV*. These articles state that ‘while these obligations are technically incumbent on the states party to the conventions, they have resulted in the recognition of a general principle of criminal liability for omissions’. Therefore, based on international law, the offenders are responsible for the omission of crimes if they fail to act, resulting in crime being committed.<sup>52</sup> For this reason, the question here is what liability the UN peacekeeping forces have for crimes committed by the third parties during their operations if the peacekeepers fail to prevent the crimes.

#### **5.4 Position of English common law on crime of omission**

This section focuses on common law to analyse the position of the crime of omission because it is considered a customary international law,<sup>53</sup> yet international law has limited mention and argument regarding this crime. This section will analyse the English legal system and the opinion of law scholars on the crime of omission.<sup>54</sup> The

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<sup>52</sup> Lars C Berster, 'Duty to Act' and 'Commission by Omission' in International Criminal Law' (2010) 10(5) *International Criminal Law Review* 619, 622.

<sup>53</sup> Patrick Capps, 'The Court as Gatekeeper: Customary International Law in English Courts' (2007) 70(3) *The Modern Law Review* 458, 458.

<sup>54</sup> The other reason that this study focuses on English common law is that ‘English Common Law is now the most widespread legal system in the world with 30% of the world’s population living under English Common Law systems’. See *English Common Law is the Most Widespread Legal System in the World* <<https://www.sweetandmaxwell.co.uk/about-us/press-releases/061108.pdf>> (accessed 25 July 2018). The UK is a permanent member of the Security Council and plays a central role in drafting resolutions for UN peacekeeping operations to protect civilians, women and security in host states. In addition, the UK has a large share in the UN peacekeeping equipment and expertise employed in UN peacekeeping



English legal system depends on common law, and this law criminalises all crimes committed by an act or omission.<sup>55</sup> However, English criminal law does not include crimes that may be committed by omission, even though they are considered part of common law. The law faces difficulties in most cases, especially with cases that cause harm by failure in duty or someone failing to perform a duty. In this case, the difficulties will not be with the crimes of act, because the punishment will be clear and based on criminal law. For example, with murder, the murderer is responsible for the crime and there is no confusion regarding responsibility because the offence is based on s 1 of the *Homicide Act 1957* in the United Kingdom. The crime in this case results from an action committed by the defendant.

For example, a crime was presented before the Crown Court in the United Kingdom (UK) on 12 December 2014, in which Colin Ash-Smith was convicted as a murderer because of his premeditated killing of Claire Tiltman on 13 January 1993 by stabbing her nine times.<sup>56</sup> The court argued that there was no doubt that the murderer committed this crime because of a ‘feeling of power’. When Tiltman died, Ash-Smith was prosecuted as her murderer because her death resulted from his act. However, in situations in which someone attempts to commit a crime yet does not cause any harm—such as when someone attempts to kill another person by shooting yet does not hurt them—the position of English law is relevant to understand how the crime should be prosecuted. The English law has focused on such crimes in numerous cases, such as the

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operations, and has a long history of impartial intervention. See also *UN Peacekeeping—In Detail* <<http://www.una.org.uk/content/un-peacekeeping-detail>> (accessed 25 July 2018).

<sup>55</sup> Duttwiler, above n 26, 30.

<sup>56</sup> In the Inner London Crown Court, Transcript of Proceedings, *The Queen v Colin Ash-Smith* <<https://www.judiciary.gov.uk/wp-content/uploads/2014/12/ash-smith-sentencing-remarks.pdf>> (accessed 25 July 2018).

case of Philip Spence, in which the Crown Court prosecuted Spence for attempting to kill three women from the United Arab Emirates, who were visiting the UK when Spence attacked them with a hammer on 6 April 2014.<sup>57</sup> In this case, although the attack did not cause harm to these women, Spence was prosecuted for the crime because he attempted to kill them and committed a preventable act. Therefore, the law administers liability when a person commits a forbidden act.

The above cases outline that crimes of act can be prosecuted even if they do not result in harm to others, and there is no confusion about who is the defendant because the sentence depends on the defendant's act. This is because the cases proved the crimes of act which is a body movement with brain dissection must be criminalised even the crimes being stopped before causing the harm. The above discussion has examined crimes of act and how the law prevents acts that are considered crimes. It has also outlined that English criminal law focuses on this type of crime. However, it is also important to consider other types of crime, such as crimes of omission, and how these are covered by English law. These other types of crime arise when the defendant has failed to perform his or her duty. In this case, it must be determined whether this person holds any responsibility. The main problem here is the English law does not mention the appropriate punishment for this crime, even though failure to act is more dangerous than neglect, which the English law does punish. To explain why English law focuses on neglect and not on crimes of omission, this study must identify what neglect means.

The punishment of neglect becomes prominent when the English parliament addresses different types of homicide, such as homicide committed by simple negligence and

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<sup>57</sup> In the Crown Court at Southwark, Transcript of Proceedings, *Regina v Philip Spence Thomas Efremi* <<https://www.judiciary.gov.uk/wp-content/uploads/2014/11/R-v-Philip-Spence-Thomas-Efremi-and-James-Moss.pdf>> (accessed 25 July 2018).

crimes that result from neglect of duties. An example of a homicide that is simple negligence is when a defendant drives a car on the highway in a dangerous and careless manner and causes an accident that results in injury or death to others. In this case, the driver is responsible for careless and dangerous driving, with punishment of up to two years imprisonment and an unlimited fine, according to s 2 of the *Road Traffic Act 1988*.<sup>58</sup> Section 3 of the same Act states that the punishment for driving carelessly in a public area will only be a fine—for example, if someone drives faster than the speed limit. An example of a law that mentions neglect is the ‘domestic violence’ section of the *Crime and Victims Act 2004*. For example, a domestic violence case could include a family member causing the death of a person by failing to prevent mistreatment, as mentioned in Article 5 of *Crime and Victims Act 2004*.<sup>59</sup> The law outlines that, when someone neglects his or her duty, this person can be prosecuted for a crime, even though the crime is a result of neglect. This raises the question of why the English criminal law does not mention crimes of omission.

English law does not impose responsibility for crimes of omission because, as argued by Ashworth, imposing liability for a crime of omission is considered interfering in people’s privacy.<sup>60</sup> Liability can be applied, yet only for exceptional cases. This is because the UK law attempts to cover all crimes in its law; however, the UK legislator still fails to cover all crimes that cause harm to others, especially crimes of omission.

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<sup>58</sup> JR Spencer and Marie-Aimée Brajeux, ‘Criminal Liability for Negligence—A Lesson from Across the Channel’ (2010) 59(1) *International and Comparative Law Quarterly* 1, 3.

<sup>59</sup> *Ibid* 2.

<sup>60</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 2003) 47.

There is no statute that mentions this crime, even though it is known in common law.<sup>61</sup>

However, it can be prosecuted for exceptional cases, as mentioned above.<sup>62</sup>

Exceptional cases have been adopted by English courts because there is no legal obligation.<sup>63</sup> The cases mentioned above adopted the crime of omission when it relates to duty.<sup>64</sup> Although English criminal law has only punished positive crimes in most cases, several jurisprudences have highlighted that crimes of omission can be prosecuted by UK courts, and several cases have dealt with such crimes.

Andrew Ashworth has a special opinion on crimes of omission, stating that crimes of omission should be raised when defendants have a duty to prevent harm.<sup>65</sup> Duty refers to a required act from a person, such as a police officer, who has a duty to protect society in his or her workplace, and is responsible for failing to perform the duty to prevent harm to the people he or she has a duty to protect. Thus, courts in the UK prosecute those who fail in their duty and consider this failure a crime of omission because they omit to act when required. Therefore, crimes of omission have been seen in English court cases, such as the case in the UK Appeal Court that dealt with the liability of the crime of omission. The case dealt with a police officer who watched the death of Dytham outside a nightclub in St Helens, England. Although Dytham's death was caused by someone who beat and kicked him, the police officer did nothing to help the

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<sup>61</sup> Duttwiler, above n 26, 30.

<sup>62</sup> AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (Hart, 2000) 63.

<sup>63</sup> Ibid 61.

<sup>64</sup> Ashworth, above n 60.

<sup>65</sup> Ibid.

victim.<sup>66</sup> For this reason, the court charged the officer with the offence of misconduct because he had a duty to care for all those in society. In addition, the court outlined that police officers have liability when others place themselves in harm.<sup>67</sup> This case proved that a crime of omission can be committed if someone fails in their duty. The police officer was charged for failure to do his job, even though the English criminal law has no provision for the criminalisation of this crime.

The second point in this discussion is considered the relationship between the defendant and the victims as a duty to prevent the crime, which means if the defendant failed to prevent harm to the victims, they would be liable for this failure. This relationship appears as that of the defendant under a general legal duty, similar to the relationship between parents and children<sup>68</sup>—that is, parents have the responsibility to feed their children when they are hungry, and liability is raised if the parents fail to feed them and allow them to die. Therefore, to create the responsibility for crimes of omission, the defendant must have the duty and ability to prevent harm from crimes or other actions. The case of *Stone and Dobinson* in 1977 proves that the crime of omission can be raised when the defendant has a relationship with the victim.<sup>69</sup> In this case, the victim was the defendant's sister, and the court used this relationship to prosecute the defendant for the crime.

The third important point that can create liability for the crime of omission in English criminal law is the contract between the defendant and victim. In this case, the contract

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<sup>66</sup> *R v Dytham* (1979) QB 722.

<sup>67</sup> *Ibid.*

<sup>68</sup> Simester and Sullivan, above n 62, 63.

<sup>69</sup> *R v Stone and Dobinson* (1977) QB 354.

is based on the duty between defendant and victim to prevent any harm.<sup>70</sup> An example of this is the case of *Pittwood* in 1902,<sup>71</sup> when a railway company employed someone as a gatekeeper to maintain the level crossing. One day, the defendant went to lunch and forgot to close the gate. Consequently, a hay cart crossed the railway line and was struck by a train, causing the death of one man and seriously injuring another. The defendant was convicted of manslaughter because of his failure to perform his contractual duty by leaving the gate open and not closing the gate when a train approached. The convicted in this case was prosecuted for the crime because he was under contract with the railway to perform this job yet failed in his duty.

Thus, English criminal law can prosecute crimes of omission, even though there is no mention of these crimes in the law, because the cases presented by the English courts mentioned all the elements of crimes of omission. These cases provided punishments for people who failed to prevent harm. However, although the above cases cover the elements of crimes of omission, English law must still include punishment for such crimes. If the law is not reformed to include punishments for these crimes, the impunity of criminals will increase because they can argue that there is no law criminalising their offence. There is no just criminalisation in English law for defendants who failed to perform their duty.

However, what is the responsibility of people who do not have a duty, relevant or contract yet fail to help others to prevent harm? Do they have no responsibility? Although these people have caused harm to others, they are not liable if a crime has resulted in a non-act. Moore argued that the reason the English law does not mention

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<sup>70</sup> Simester and Sullivan, above n 62.

<sup>71</sup> *R v Pittwood* (1902) TLR 37.

crimes of omission is because people are considered to have committed a greater wrong if they have killed than if they have failed to rescue others from harm.<sup>72</sup> Thus, the law fails to protect people from dangerous crimes caused by failure to act, and the defendants receive no punishment even if the outcome of failing to act is the same as a crime committed by a deliberate act. James Rachels argued that the result of positive and negative crimes should be the same in numerous cases, such as the case presented to him regarding the responsibility of an uncle who let his nephew drown in the bath to inherit his fortune.<sup>73</sup> In this case, the uncle did nothing to rescue his young nephew, even though he could have saved him. The negative act taken by the uncle resulted in harm, and the uncle was committed for criminal purposes. The positive crime presented by Rachels in the same case involved the uncle holding his nephew's head under water in the bath to kill him to obtain his fortune.<sup>74</sup> This was considered a positive act and the result was the same as the above negative act; therefore, criminalisation of crimes depends on the result of an act or omission. The above instances have outlined how English law has criminalised crimes of omission, even though they are not listed in the legislation, which creates liability for people who have a responsibility when they do not help others or save them from a harmful situation.

Finally, the English legal system provides sufficient information regarding the suffering of people if a crime of omission goes without accountability. This is reflected among civilians in the host states of the UN peacekeeping forces. If the law related to the UN peacekeeping operations does not include omission as a crime, civilians will suffer from

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<sup>72</sup> Moore, above n 9, 58.

<sup>73</sup> James Rachels, 'Active and Passive Euthanasia' (1975) 292(2) *The New England Journal of Medicine* 78, 79.

<sup>74</sup> Ibid.

the failures of the UN peacekeepers. Therefore, crimes of omission should be criminalised by international law to help people avoid harm caused by omission. This will be discussed in the next section to indicate whether international criminal law criminalises failure in duty or omission.

### **5.5 Perspective of failure in international criminal law**

The increasing number of crimes committed by the third parties against civilians during the UN peacekeeping operations has caused the UN to struggle with a lack of accountability criteria that can be adopted to criminalise the failure of the UN peacekeeping forces. Accordingly, this section focuses on how the existing international law provides international tribunals with the authority to apply the principles of law in cases. This analysis of the perspective of failure in duty will investigate the ICTY,<sup>75</sup> ICTR<sup>76</sup> and ICC.<sup>77</sup> To clarify that failure of the UN peacekeeping forces is a crime, this section will discuss how the international criminal tribunals solved the problems that arose from failure in duty, and how the offenders who committed these crimes were prosecuted.

#### **5.5.1 The ICTY**

The ICTY was established by UN Resolution No. 827 in 1993.<sup>78</sup> The purpose of its establishment was to solve problems regarding violations of IHL committed by the third

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<sup>75</sup> SC Res 25704, UN Doc S/25704 (3 May 1993) para 58; *ICT Yugoslavia*, SC Res 827, UN SCOR, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993) art 28.

<sup>76</sup> *Establishment of an International Tribunal and Adoption of the Statute of the Tribunal*, SC Res 955, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994).

<sup>77</sup> *How the Court Works* <<https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess>> (accessed 13 August 2018).

<sup>78</sup> S/RES/827, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993).



parties in Yugoslavia.<sup>79</sup> According to Article 1 of the *ICTY Statute*, this tribunal has the jurisdiction to prosecute any person who commits any of the crimes mentioned in the *ICTY Statute*, especially in Articles 2, 3, 4 and 5. Thus, the required ‘duty mandated by criminal law’ could be conceived as a liability of omission and a breach of the duties considered a crime by omission, according to Article 7(1) of the *ICTY Statute*:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

Therefore, the ICTY Appeals Chamber stressed that the laws and customs of war were the source of duties to prevent the conflict parties from committing crimes against civilians or enabling others to commit crimes against them.<sup>80</sup> This point confirmed that all the parties involved in conflict were responsible for failure in duty as a crime of omission, according to the LOAC. In addition, given that the ICTY has the responsibility to apply the international law principle, the conflict parties were responsible for crimes against civilians, even when committed by others.

The ICTY has prosecuted all parties that have caused harm to civilians, both for parties who committed the crime and parties who failed to protect civilians from harm. The ICTY has prosecuted several cases involving crime of omission or failure in duty. An example is the case of Sljivancanin, who was prosecuted in 2009 by the ICTY. The ICTY Appeals Chamber considered that a ‘breach of ... duty gives rise to his individual

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<sup>79</sup> Colin Warbrick, ‘Co-operation with the International Criminal Tribunal for Yugoslavia’ (1996) 45(4) *The International and Comparative Law Quarterly* 947.

<sup>80</sup> *The International Criminal Tribunal for the Former Yugoslavia and the Kosovo Conflict* <<https://www.icrc.org/en/doc/resources/documents/article/other/57jqd2.htm>> (accessed 8 July 2019).

criminal responsibility'.<sup>81</sup> Sljivancanin failed to protect prisoners and this failure was considered a violation of the law of war.<sup>82</sup> In this case, the failure was prosecuted because it resulted in harm to prisoners who had to be protected, and Sljivancanin had a duty to protect them. Thus, Sljivancanin was found to be responsible for the crime of the third parties by the ICTY Trial Chamber, even though he did not physically commit the crime.<sup>83</sup> The harm caused by the offender was due to his responsibility for violation by having aided and abetted the murder of 194 individuals without taking any action to protect them from the criminals.<sup>84</sup> In this case, the Appeals Chamber considered Sljivancanin responsible for the crime of omission, and his case provides proof that people who fail in their duty will be held responsible for the results of this failure.

Another failure in duty was prosecuted according to Article 7(1) of the *ICTY Statute* when Blaskic was charged for omission under Article 7(3) of the *ICTY Statute*.<sup>85</sup> Although Blaskic was a high-ranking officer and exempt from charge under Article 7(3) of the *ICTY Statute*, he was charged for using civilians as human shields, according to the evidence of witnesses.<sup>86</sup> The Appeals Chamber argued that the prosecution of Blaskic was based on his failure to protect civilians who were killed during the conflict,

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<sup>81</sup> *Prosecutor v MRKSIC et al (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-95-13/1 -A, 5 May 2009).

<sup>82</sup> *Prosecutor v Mile Mrksic Veselin Sljivancanin* (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-95-13/1-R.1, 8 December 2010) para 32.

<sup>83</sup> *Prosecutor v MRKSIC et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-95-13/1 -T, 5 May 2009) para 407.

<sup>84</sup> *Ibid* para 4.

<sup>85</sup> Duttwiler, above n 26, 52.

<sup>86</sup> *Prosecutor v Zejnil Delalic et al (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-A, 20 February 2001) para 342; *Prosecutor v Radoslav Brdanin (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-36-T, 9 December 2003) para 18. In addition, see Duttwiler, above n 26, 52.

even though he had the ability and responsibility to protect them. These two cases explain how failure in duty can be prosecuted as a crime of omission.

In a similar case, the ICTY prosecuted Zlatko Aleksovski for his failure to take necessary action to protect civilians in Bosnia. On the basis of individual criminal responsibility, Aleksovski was found ‘guilty of ordering and/or aiding and abetting the physical and psychological maltreatment of Muslim prisoners’, according to Article 3 of the *ICTY Statute*. Although the accused had attained sufficient information about committing the crimes against civilians by the third parties, he did not take any action to prevent the crimes from being committed. In addition, ‘the Trial Chamber also found the accused guilty of superior criminal responsibility’, according to Article 7(3) of the *ICTY Statute*.<sup>87</sup>

If we compare the rules of ICTY regarding liability with UN peacekeepers, the LOAC could apply to the UN peacekeepers’ crimes and they should be held responsible for any omission to act to prevent crimes in the host states. However, their situation is considered more complicated because their legal systems are different to other forces because of their immunity, and the laws surrounding the UN peacekeeping forces only mention crimes of act even though crimes of omission may be more dangerous for civilians.

### **5.5.2 The ICTR**

The establishment of the ICTR to prosecute those responsible for crimes of genocide and other serious violations of IHL in Rwanda was adopted by the UNSC’s Resolution

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<sup>87</sup> *Prosecutor v Zlatko Aleksovski (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No ICTY- IT-95-14/1-T, 24 March 2000) para 177.

No. 955 in 1994.<sup>88</sup> The ICTR held jurisdiction over crimes committed in the territory of Rwanda, because its jurisdiction extended to cover both crimes of act and crimes of omission. Its period was limited from 1 January 1994 to 31 December 1994, and the ICTR should have adopted the *ICTR Statute*.<sup>89</sup> Therefore, the ICTR applied the principles of international law to prosecute offenders, and it adopted the sources of individual duties.<sup>90</sup> The crime of omission was one of the crimes that could be prosecuted according to liability for the prevention of crimes, as discussed in Article 6(1) of the *ICTR Statute*:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

The above article was adopted by ICTR during numerous cases that found the accused to be guilty for failing to take the necessary action to prevent crimes against civilians.<sup>91</sup> An example of these cases is the judgement of Jean Mpambara. The crimes in this case were crimes of omission because Mpambara failed in his duty to prevent these crimes being committed.<sup>92</sup> Evidence was heard during his trial and, according to witness testimonies, the accused failed to provide the required protection for civilians.<sup>93</sup>

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<sup>88</sup> *Establishment of an International Tribunal and Adoption of the Statute of the Tribunal*, SC Res 955, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (8 November 1994).

<sup>89</sup> Ibid.

<sup>90</sup> Berster, above n 52.

<sup>91</sup> *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) [30]; *Prosecutor v Simon Bikindi (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-72, 2 December 2008) [41].

<sup>92</sup> *Prosecutor v Jean Mpambara (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-01-65-T, 11 September 2006) 1(7).

<sup>93</sup> Ibid para 21.

Therefore, liability for crimes of omission has been adopted by international law, and all crimes relating to the crime of omission must be prosecuted by international law. However, the situation with the UN peacekeepers is different because the legal system that organises the prosecution of the UN peacekeeping forces has no mention of crimes of omission; it merely prosecutes crimes of act. An example is the zero-tolerance policy for sexual exploitation shows how the UN peacekeepers have been prosecuted for just the crimes of act.<sup>94</sup>

In addition, responsibility for crimes of omission has been confirmed by international law, especially in Article 6(3) of the *ICTR Statute*, which discusses responsibility for crimes of omission, and punishment is established for offenders who have duties and the ability to prevent crimes. The Appeals Chamber considers the ability to act as an element to be satisfied for responsibility of the crime of omission.<sup>95</sup> In cases when offenders have no ability to act, they have no liability to be criminalised for the crime of omission. Therefore, the situation with the UN peacekeepers should be the same as with the above cases, and the ‘ability to act’ element is necessary and important to maintain justice. The UN peacekeeping forces have a duty to prevent crimes that may be committed by others in the host states, according to the purposes of their operations.

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<sup>94</sup> See Kofi A Annan, *The UN Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003) 1; Machiko Kanetake, ‘Whose Zero Tolerance Counts? Reassessing a Zero Tolerance Policy against Sexual Exploitation and Abuse by UN Peacekeepers’ (2010) 17(2) *International Peacekeeping* 200, 200.

<sup>95</sup> *Prosecutor v MRKSIC et al (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-95-13/1 -A, 5 May 2009) [82].

### 5.5.3 The ICC

The establishment of the ICC was adopted by the *Rome Statute* on 17 July 1998 and entered into force on 1 July 2002.<sup>96</sup> The general principles of the law, according to Article 21(1) (c) of the *Rome Statute*, have been adopted by the ICC from national laws of member states for their application.<sup>97</sup> These laws and rules must be consistent with the *ICC Statute* and international law. Therefore, according to the general principles of law, the ICC must adopt deliberate failure as a crime by omission. The jurisdiction of the ICC on deliberate failure in duty or crime of omission is identified in Article 28 of the *Rome Statute*, which states that the prosecution of crimes of omission by the ICC differs to that by the ICTY or ICTR. According to Article 7 of the *ICTY Statute* and Article 6 of the *ICTR Statute*, the responsibility of commission crimes is raised and punished according to the result of the failure; however, the ICC punishes this crime as a responsibility for the failure in duty.

One of the cases prosecuted by the ICC was for failure in duty, when Bembo Combo<sup>98</sup> failed to take the necessary action to prevent crimes committed by his subordinates during a 2002 to 2003 CAR operation, and failed to prosecute them for their crimes by submitting them to the competent authorities.<sup>99</sup> In this case, his responsibility was for crimes against humanity because of his failure to repress the commission of crimes.

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<sup>96</sup> *How the Court Works*, above n 78; *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/241/85/PDF/N9824185.pdf?OpenElement>> (accessed 07 April 2017); see Keiichiro Okimoto, 'Violations of International Humanitarian Law by United Nations Forces and Their Legal Consequences' (2003) 6 *Yearbook of International Humanitarian Law* 199, 230.

<sup>97</sup> Berster, above n 52.

<sup>98</sup> *Prosecutor v Jean-Pierre Bemba Gombo (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016) para 196.

<sup>99</sup> *Ibid.*

Therefore, personnel who have the duty to protect civilians and fail to discharge this duty will be held responsible for the results of this failure.

The ICC has jurisdiction over failure in duty; however, the crimes prosecuted by the ICC must meet the elements of crimes mentioned in Article 5 of the *Rome Statute*. After identifying the dealings of the ICC and other institutions regarding failure in duty, the path is paved to discuss the jurisdiction of the ICC over the UN peacekeeping forces for international crimes, given that the ICC is a permanent international court. The reason for expanding the ICC's jurisdiction to the UN peacekeeping forces is that these forces' misconducts largely 'affect the international peace and security'.<sup>100</sup> However, a difficult legal question remains regarding whether the UN peacekeeping forces are subject to prosecution before the ICC. The next section will focus on this jurisdiction to explore the position of the ICC over the UN peacekeeping forces.

### **5.5 Jurisdiction of the ICC over UN peacekeeping forces**

The crimes and deliberate failures of the UN peacekeeping forces emphasise the need to prosecute these forces before an international court, especially given that some of their crimes are considered international crimes. In 2017, 138 allegations of SEA were reported by women and children as being committed by the UN peacekeeping forces, even though they were in charge of protecting civilians in the host states.<sup>101</sup> An example of deliberate failure is the massacre committed after the decision was made by the Belgian UN contingent to leave the 'Don Bosco school, where 2,000 Rwandans were

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<sup>100</sup> Melanie O'Brien, 'Protectors on Trial? Prosecuting Peacekeepers for War Crimes and Crimes against Humanity in the International Criminal Court' (2012) 40(3) *International Journal of Law, Crime and Justice* 223, 226.

<sup>101</sup> *Special Measures for Protection from Sexual Exploitation and Abuse*, UN GAOR, 72<sup>nd</sup> sess, Supp No 54, UN Doc A/72/751 (15 February 2018) para 61.

under the protection of UNAMIR’, even though there was no guarantee that another contingent would replace their position.<sup>102</sup>

Given the increasing and ongoing crimes and no clear jurisdiction to prosecute who commit misconduct, make the jurisdiction of the ICC over the UN peacekeepers necessary to put an end for their impunity. The ICC does have a certain jurisdiction over the UN peacekeepers, who are not completely exempt from the jurisdiction of the ICC, particularly since the drafters of the *Rome Statute* removed immunity for ‘persons who have carried out acts ordered by the UNSC or in accordance with a mandate issued by it’.<sup>103</sup> As aforementioned, the crimes committed by the UN peacekeeping forces related to the *Rome Statute* include SEA and the deliberate failure (crime of omission) in their duty, which cause civilians of the host states suffer. This section discusses how the UN peacekeepers can be prosecuted by the ICC.

### 5.5.1 Jurisdiction of the ICC

The ICC has jurisdiction over ‘the most serious crimes of concern to the international community’, which are genocide, crimes against humanity, war crimes and crimes of aggression.<sup>104</sup> The ICC is restricted only to those crimes and cannot prosecute other crimes. However, these crimes are not always prosecuted by the ICC—the ICC is involved only if the national court is unable or unwilling to prosecute those who have committed the crimes.<sup>105</sup> In addition, the ICC has jurisdiction to prosecute individuals;

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<sup>102</sup> *Parliamentary Commission of Inquiry Regarding the Events in Rwanda* <<http://www.senate.be/english/rwanda.html>> (accessed 02 August 2018).

<sup>103</sup> Shayna Ann Giles, ‘Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict through Their Own Misconduct’ (2017) 33 *American University International Law Review* 147, 180.

<sup>104</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 5(1).

<sup>105</sup> Article 17 of the *Rome Statute*.



therefore, it is different to the ICJ, which has jurisdiction over states.<sup>106</sup> Although the original goal of the ICC was to end impunity and punish criminals, it lacks jurisdiction over ‘international organisations, states and people’.<sup>107</sup> This is because Article 12 of the *Rome Statute* states that the ICC can only exercise its jurisdiction when a crime has been committed in a state that is party to the *Rome Statute*, regardless of the nationality of the perpetrators.

In cases where crimes have been committed in a state that is not party to the *Rome Statute*, the perpetrators must be a citizen of a state party to the statute to be subject to prosecution before the ICC.<sup>108</sup> If the crimes have been committed by a citizen of a non-state party and are outside the states ratified by the *Rome Statute*, they cannot be subject to prosecution before the ICC, unless the UNSC refers them to the prosecutor of the ICC.<sup>109</sup> Therefore, prosecution of the UN peacekeeping forces by the ICC and these forces’ misconduct in the host states require further discussion.

Examining the history of the UN peacekeeping forces indicates that they have been involved in different types of crimes against civilians in their host states. These crimes can be the result of direct action by the UN peacekeepers or deliberate failure. An example of these crimes is as follows. In 2001, the UN High Commissioner for Refugees and Save the Children released its report regarding SEA, which caused the

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<sup>106</sup> MR Islam, *International Law: Current Concepts and Future Directions* (LexisNexis Butterworths, 2013) 532.

<sup>107</sup> Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34(5) (2013/06/01) *Third World Quarterly* 800.

<sup>108</sup> Article 12 of the *Rome Statute*.

<sup>109</sup> Article 12 of the *Rome Statute*; see Islam, above n 106, 534.

UN to launch its first broad investigation into this issue.<sup>110</sup> The report highlighted sexual exploitation and violence in refugee camps across Guinea, Liberia and Sierra Leone.<sup>111</sup> In addition, the report claimed widespread SEA committed by UN staff, security forces, personnel of international and national non-government organisations, and government officials.<sup>112</sup> The SEA committed by different groups of criminals indicates that the UN peacekeeping forces had failed numerous times to protect civilians, even though this protection was one of their duties.

Another crime was committed by the UN peacekeeping forces during MONUC, which was sent to monitor the Congo peace process and protect civilians. The protection of civilians during this operation was very important because, during the previous five years of unrest, ‘tens of thousands of women and girls in the eastern part of the country ... suffered crimes of sexual violence’.<sup>113</sup> However, a HRW report documented that MONUC failed in its duty to protect civilians, including victims of sexual violence, with the UN peacekeepers committing sexual crimes against women of the host state. As such, ‘some MONUC peacekeepers and civilian staff have discredited the operation

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<sup>110</sup> *Investigation into West Africa*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 122, UN Doc A/57/465 (11 October 2002).

<sup>111</sup> Muna Ndulo, ‘The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions’ (2009) 27 *Berkeley Journal of International Law* 127, 140.

<sup>112</sup> United Nations High Commissioner for Refugees, *Sexual Violence & Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October–30 November 2001* (February 2002) <<http://www.unhcr.org/en-au/partners/partners/3c7cf89a4/note-implementing-operational-partners-unhcr-save-children-uk-sexual-violence.html?query=UNHCR%20and%20Save%20the%20Children%20UK>> (accessed 06 August 2018).

<sup>113</sup> Human Rights Watch, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War* <<https://www.hrw.org/sites/default/files/reports/drc0305.pdf>> (accessed 06 August 2018).

and the U.N'.<sup>114</sup> In this case, the UN peacekeepers committed direct crimes against civilians.

The ongoing misconduct by the UN peacekeeping forces against civilians in the host states indicates the great need for accountability by an international court that would remain impartial, given that most of the home states are unwilling to prosecute those who are guilty. Increasing the jurisdiction of the ICC is very important so that the ICC can prosecute criminals as individuals, given that most crimes committed by the UN peacekeepers are individual crimes. Simultaneously, the jurisdiction of the home states would be preserved, as the ICC only has jurisdiction when the home state is unable or unwilling to prosecute.<sup>115</sup> In addition, SEA could fall under the jurisdiction of the ICC, as this encompasses crimes against humanity, war crimes and genocide.<sup>116</sup> However, not all the UN peacekeepers are from state parties of the ICC; thus, the below section discusses jurisdiction over non-state parties and ways to refer criminals.

#### **5.5.1.1 ICC jurisdiction over UN peacekeepers from state parties of the *Rome Statute***

The ICC has clear jurisdiction over citizens of state parties who commit one of the crimes stated in Article 5 of the *Rome Statute*; however, if these crimes are committed by the UN peacekeepers who are from state parties, the situation still requires further clarification. According to Articles 12 and 13 of the *Rome Statute*, the crimes must be committed in the territory of a state party to the ICC, committed by a citizen of a state

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<sup>114</sup> Ibid.

<sup>115</sup> Alison Duxbury and Matthew Groves, *Military Justice in the Modern Age* (Cambridge University Press, 2016) 393.

<sup>116</sup> Mark Ellis, 'Breaking the Silence: Rape as an International Crime' (2006) 38 *Case W. Res. J. International Law* 225, 229.

party, or committed in a state that accepts the jurisdiction of the ICC.<sup>117</sup> Thus, the UN peacekeepers can only be prosecuted by the ICC if one of the conditions outlined in Articles 12 and 13 of the *Rome Statute* is approved in the station of the crimes committed during the UN peacekeeping operations.

However, while numerous crimes have been committed by the UN peacekeepers who were from member states of the *Rome Statute*, the ICC did not prosecute them, and they were prosecuted in their home states. An example is the crime committed by Canadian forces, even though Canada is a state party to the ICC.<sup>118</sup> The crime was committed when the UN peacekeepers from Canada killed a 16-year-old Somali teenager in the 1990s<sup>119</sup>; however, the ICC has not yet prosecuted these UN peacekeepers, even though this crime falls under war crimes, according to Article 8 of the *Rome Statute*. The factor preventing the ICC from prosecuting this case is very important to indicate whether the ICC can prosecute any individual who has committed a crime before they entered into force or before the activation of the ICC jurisdiction. According to Article 11 of the *Rome Statute*, the ICC has jurisdiction over the crimes mentioned in Article 5 if these crimes were committed on or after 1 July 2002, as this is the date that the *Rome Statute* entered into force.<sup>120</sup> The UNSC confirmed the temporal jurisdiction of the ICC when referring the matter of Darfur to the prosecutor, as mentioned the international crimes that were committed on 1 July 2002 or after were under the jurisdiction of the ICC.

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<sup>117</sup> *How the Court Works*, above n 77.

<sup>118</sup> *The State Parties of the ICC* <[https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/western%20european%20and%20other%20states/Pages/canada.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/western%20european%20and%20other%20states/Pages/canada.aspx)> (accessed 13 August 2018).

<sup>119</sup> Giles, above n 103, 169.

<sup>120</sup> *The Referring of the Situation in the Darfur Region of Sudan to the International Criminal Court (ICC)*, SC RES 1593, 5158<sup>th</sup> mtg, UN Doc S/RES/1593 (31 March 2005).

Therefore, the crimes committed by the UN peacekeeping forces from ICC state parties are not under the jurisdiction of the ICC if the crimes were committed before the ICC entered into force.

#### **5.5.1.2 ICC jurisdiction over UN peacekeepers from non-state parties of the *Rome Statute***

The previous section discussed the ICC jurisdiction and the way it can be applicable to the crimes mentioned in Article 5 of the *Rome Statute*. However, these crimes must occur in the territory of ICC state parties, regardless of the nationality of the criminals;<sup>121</sup> must be committed by a citizen of the state parties; or must be referred by the UNSC to the ICC prosecutor.<sup>122</sup> In circumstances where the home state of the UN peacekeeping forces is a non-state party to the *Rome Statute*, the crime is committed in the territory of non-state parties and the criminals have not been referred by the UNSC; the home states may decide not to prosecute the crimes committed by their citizens or give them amnesty.<sup>123</sup> Therefore, the ICC has very limited jurisdiction over crimes committed by the UN peacekeeping personnel from non-state parties to the *Rome Statute*.

A jurisdiction gap that can occur with the UN peacekeeping operations in case none of the preconditions of the jurisdiction will be available, which may cause impunity for the UN peacekeepers, as not all states are willing or able to prosecute their citizens if their crimes were committed while they were under the umbrella of the UN. An example

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<sup>121</sup> Islam, above n 106, 533.

<sup>122</sup> Articles 12 and 13 of the *Rome Statute*; see also Yaël Ronen, 'ICC Jurisdiction over Acts Committed in the Gaza Strip Article 12(3) of the ICC Statute and Non-state Entities' (2010) 8(1) *Journal of International Criminal Justice* 3, 7.

<sup>123</sup> Neha Jain, 'A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court' (2005) 16(2) *European Journal of International Law* 239, 249.

of the deficit of the ICC to prosecute crimes that fall under Article 5 of the *Rome Statute* arose from the lack of availability of any of the preconditions mentioned above. The ICC attributed its inability to prosecute crimes committed in the Gaza Strip because of the non-availability of ‘the preconditions for ICC jurisdiction’, given that the crimes were not committed in the territory of state parties of ICC, not committed by citizens of ICC state parties, and not referred by the UNSC to the ICC.<sup>124</sup>

Prosecuting the criminals of non-state parties has always raised concern among the judges of the ICC, who argue that investigation of crimes committed by non-state parties will never come before the ICC.<sup>125</sup> Therefore, this concern must be viewed as a priority at the beginning of any new investigation. For example, the prosecutor of the ICC attempted to appeal the rejection of the ICC to investigate crimes committed against civilians by insurgent groups, government security forces and US forces during the conflict in Afghanistan.<sup>126</sup> However, his appeal was rejected as unrealistic because of the lack of cooperation of the conflict parties involved. This was confirmed when the US administration revoked the entry visa of the ICC prosecutor, who wished to begin an investigation of the US forces involved in direct crimes against civilians in Afghanistan.<sup>127</sup>

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<sup>124</sup> ‘Palestinians Press for War Crimes Inquiry on Gaza’, *The New York Times* (online), <[https://www.nytimes.com/2009/02/11/world/middleeast/11hague.html?\\_r%C2%BC1](https://www.nytimes.com/2009/02/11/world/middleeast/11hague.html?_r%C2%BC1)> (accessed 17 August 2018); Ronen, above n 122.

<sup>125</sup> ‘ICC Prosecutor Presses for Afghanistan War Crimes Investigation’, *Aljazeera* (online) <<https://www.aljazeera.com/news/2019/06/icc-prosecutor-presses-afghanistan-war-crimes-investigation-190607174852274.html>> (accessed 21 June 2019).

<sup>126</sup> *Preliminary Examination Afghanistan* <<https://www.icc-cpi.int/afghanistan>> (accessed 21 June 2019).

<sup>127</sup> *Ibid.*

Despite the difficulties associated with alleged criminals from non-state parties, there may still be ways to prosecute the UN peacekeepers for their crimes before the ICC. Prosecuting the UN peacekeepers before the ICC is necessary and can keep the host states in line because the ICC is ‘complementary to national criminal jurisdictions’, according to the preamble and Article 17 of the *Rome Statute*. In addition, this would reduce the chance of impunity by prosecuting the UN peacekeepers when their home states show unwillingness or inability to prosecute their citizens for crimes in the host states. In this case, the national jurisdiction of the home states of the UN peacekeeping forces will be respected to ensure the UN peacekeepers are punished for their crimes. Thus, the UN peacekeepers who are non-state parties to the ICC may believe they have the right to commit crimes with impunity, despite the ability of the UNSC to refer them to the ICC. UNSC referral of the UN peacekeepers to the ICC will be discussed in the next section.

### **5.5.2 UNSC referral of UN peacekeepers to the ICC**

The UNSC has been given the right by the *Rome Statute* to refer cases to the ICC to prosecute crimes and defer investigations. This is an important issue and the UNSC’s ability to refer crimes committed by the UN peacekeepers still requires more explanation, although the jurisdiction of the ICC has been discussed above. The only apparent approach to prosecute the UN peacekeepers who are citizens of non-state parties to the ICC and commit crimes in non-state parties is through referral of their crimes to the ICC by the UNSC. According to Article 13 of the *Rome Statute*, the ICC may exercise jurisdiction in ‘a situation in which one or more of such crimes appears to

have been committed [and] is referred to the Prosecutor by the UNSC acting under Chapter VII of *the Charter of the United Nations*'.<sup>128</sup>

The UNSC can refer a case to be prosecuted under the jurisdiction of the ICC, similar to what occurred in the cases of Darfur and Libya, as these states are non-state parties to the ICC.<sup>129</sup> These cases are the same as the situation with the UN peacekeepers, and the UNSC can refer them to the ICC if their home states are non-state parties and the crimes were committed in non-state parties. However, the referral right of the UNSC does not fill the jurisdiction gap, which can defer or exclude criminals from being prosecuted before the ICC.

The citizens of non-state parties can be prosecuted before the ICC if the UNSC refers them; however, a legal gap remains because the UNSC has the right to exclude people who have violated Article 5 of the *Rome Statute* from the jurisdiction of the ICC. The US has considered the main states drive anti-ICC policy by taking several actions. The first action was through the UNSC by making resolutions that give the UN peacekeepers immunity from being prosecuted before the ICC for any crimes they commit. The resolutions adopted in 2002 and 2003—Resolutions 1422, 1487 and 1497—exclude the UN peacekeepers from the jurisdiction of the ICC.<sup>130</sup> The second problem that may contribute to consolidating the legal gap with citizens of non-state parties being prosecuted before the ICC is bilateral agreements with the state parties according to

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<sup>128</sup> Article 13(b) of the *Rome Statute*.

<sup>129</sup> *How the Court Works*, above n 77; *The Referring of the Situation in the Darfur Region of Sudan to the International Criminal Court (ICC)*, SC Res 1593, 5158<sup>th</sup> mtg, UN Doc S/RES/1593 (31 March 2005); *Peace and Security in Africa (Libya)*, SC Res 1970, 6491<sup>st</sup> mtg, UN Doc S/RES/1970 (26 February 2011).

<sup>130</sup> *United Nations Peacekeeping*, SC Res 1422, 4572<sup>nd</sup> mtg, UN Doc S/RES/1422 (12 July 2002); *The UN Peacekeeping and ICC*, SC Res 1487, 4772<sup>nd</sup> mtg, UN Doc S/RES/1487 (12 June 2003); *The Situation in Liberia*, SC Res 1497, 4803<sup>rd</sup> mtg, UN Doc S/RES/1497 (1 August 2003).



Article 98 of the *Rome Statute*. These agreements are a weak point in the prosecution of people who have committed crimes because the states that signed this agreement are unable to refer any offenders to the ICC. Finally, a significant problem hindering the referral of offenders from non-states parties to the ICC is the UNSC depending geopolitics to refer them.

The first case referred to the ICC by the UNSC involved the situation in Darfur in 2005.<sup>131</sup> The UNSC referred this situation under Chapter VII because Secretary-General Kofi Annan reported that the Sudanese government had neglected their obligations to stop ‘attacks against civilians and ensure their protection’.<sup>132</sup> The UNSC decided to refer the situation in Darfur to the prosecutor of the ICC from 1 July 2002. This case did not take long to refer, with less than three years passing from the recommendation of the Secretary-General to the referral. The same scenario occurred with the situation in Libya. At the beginning of February 2011, civilians in Libya began protesting Muammar Gaddafi’s regime, which led Gaddafi to dispatch the national army to stop them, and thousands of civilians were killed. The UNSC decided to refer this case to the ICC on 26 February 2011.<sup>133</sup> The turning point in this case was the quick decision to refer the situation in Libya since 15 February 2011 to the prosecutor of the ICC and this decision was taken on 26 February 2011, which means that the UNSC finalised the decision in 11 days.<sup>134</sup> Therefore, both cases had quick referral by the UNSC to protect civilians. However, the situation with other states is different and the UNSC has

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<sup>131</sup> *The Situation in Darfur*, SC Res 1593, 5158<sup>th</sup> mtg, UN Doc S/RES/1593 (31 March 2005).

<sup>132</sup> Jennifer Falligant, ‘The Prosecution of Sudanese President Al Bashir: Why a Security Council Deferral Would Harm the Legitimacy of the International Criminal Court’ (2009) 27 *Wisconsin International Law Journal* 727,728.

<sup>133</sup> *The Situation in Libya*, SC Res 1970, 6491<sup>st</sup> mtg, UN Doc S/RES/1970 (26 February 2011).

<sup>134</sup> *Ibid.*

displayed double standards, given that many cases have not been referred to the ICC, even though the crimes against civilians were more serious. For example, in Syria, the geopolitical interests of the permanent members of the UNSC undermined repeated attempts to refer the case to the ICC. In 2014, the Russian–Chinese voted against the decision to refer the situation in Syria to the ICC, even though the crimes committed against civilians in this state were more serious than the situation was in Libya.<sup>135</sup>

The same scenario occurred with Myanmar and Palestine. In Myanmar, genocide has been committed, yet the strong relationship with Russia prevented the UNSC from referring the case to the ICC. In Palestine, the reason is that the US protects and prevents any referral from the UNSC to the ICC against Israel.<sup>136</sup> The situations here indicate how the five permanent members of the UNSC ignore the legal position of crimes that can be prosecuted by the ICC, and shield criminals from accountability. This is a problem in the international justice system, and the referrals are binding on the permanent members because they play politics with the suffering of civilians, as they refer only the cases that they wish to refer to the ICC. Any veto from permanent members means the failure of the resolution.

One of the consequences of Article 98 is with the US administration where 99 bilateral agreements with foreign governments to exclude the US citizens from the jurisdiction

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<sup>135</sup> Just in the first two years, the victims were ‘over 100,000 people in Syria, including over 10,000 children, as reported by the United Nations the UN Secretary-General and the Special Representative of the UN Secretary-General for Children and Armed Conflict’. See *The Situation in Syria*, SC Res 2139, 7116<sup>th</sup> mtg, UN Doc S/RES/2139 (22 February 2014); *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution* <<https://www.un.org/press/en/2014/sc11407.doc.htm>> (accessed 27 June 2019).

<sup>136</sup> Nathan Hogan, ‘Five Sides of Justice: The Dangerous and Disproportionate Influence of the Permanent Five Members of the UN Security Council on the International Criminal Court’ (2018) 32(1) *Brigham Young University Prelaw Review* 227, 228.

of the ICC.<sup>137</sup> At the same time, the US adopted the *American Service-Members' Protection Act* to prevent cooperation with the ICC and ensure that no Americans could be held by the ICC, 'and prohibits military assistance to certain ICC States Parties who refuse to enter into Article 98 agreements'.<sup>138</sup> For these reasons:

these agreements go beyond the scope of Article 98 of the Rome Statute, which intended to address conflicts with existing international agreements and was not intended to place any one country's citizens, military or employees above the reach of international law.<sup>139</sup>

The inability of the ICC to prosecute the citizens of non-state parties could be catastrophic for the protection of civilians in the host states of the UN peacekeeping forces, given that no one can prosecute these forces when they commit crimes against civilians, as there is a lack of jurisdiction in the host states and the home states. Therefore, to reduce the number of crimes committed during the UN peacekeeping operations and improve the protection of civilians, the ICC should have jurisdiction over the UN peacekeepers, even in cases where their home states are non-state parties. This approach would be complimentary to the jurisdiction of the home states.

## 5.6 Conclusion

This chapter has indicated that international criminal law and domestic law criminalise the crime of omission. In international criminal law, the crime of omission criminalised clearly by the statutes and courts/tribunals of the ICC, ICTY and ICTR. For the ICC,

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<sup>137</sup> David Scheffer, 'Article 98(2) of the Rome Statute: America's Original Intent' (2005) 3(2) *Journal of International Criminal Justice* 333, 335.

<sup>138</sup> Megan A Fairlie, 'The United States and the International Criminal Court post-Bush: A Beautiful Courtship but an Unlikely Marriage' (2011) 29 *Berkeley J. Int'l L.* 528, 538.

<sup>139</sup> *US Bilateral Immunity Agreements or So-called 'Article 98' Agreements* <[http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs\\_QA\\_current.pdf](http://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf)> (accessed 28 August 2018).

this chapter has explained how failure in duty can constitute a crime and that people who fail in their duty can be prosecuted for this failure and the results of this failure. This is particularly highlighted in Article 28 of the *Rome Statute*, as it was the main reason to prosecute Gombo for his crimes against humanity because he was considered to have neglected his duty to prevent these crimes, even though the people who committed the original crime were soldiers from the forces of the Movement for the Liberation of Congo. The reason Gombo was found responsible was because he failed in his duties as a leader of this force to direct the force and prevent crimes being committed against civilians.<sup>140</sup>

The ICTY also prosecuted Sljivancanin because he failed to protect prisoners, and his failure was considered a violation of the law of war because he was in charge of protecting those prisoners.<sup>141</sup> The ICTR examined failure in duty as a crime and found that people who failed in their duty must be responsible for the results of this failure. Moreover, Mpambara was prosecuted according to Article 6 of the *ICTR Statute* because of his inability to prevent crimes in Rwanda.<sup>142</sup> Overall, these judicial precedents suggest that the crime of omission exists in international law and that people who commit this crime can be prosecuted.

This chapter has considered the domestic law of the home states of the UN peacekeeping forces to explore the crime of omission, even though its primary purpose is how the international law can criminalise the crime of omission. This chapter

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<sup>140</sup> *Prosecutor v Jean-Pierre Bemba Gombo (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016) para 196.

<sup>141</sup> *Prosecutor v MRKSIC et al (Appeal Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeal Chamber, Case No IT-95-13/1 -A, 5 May 2009) [82].

<sup>142</sup> *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) [30].

presented UK domestic law an example of common law and to verify how English law deals with this crime. Although English law does not mention the crime of omission, failure in duty has been mentioned and criminalised. For instance, if a police officer fails in his or her duty to prevent the perpetration of crimes in public, this failure to protect civilians can be considered a crime. The information discussed above explains the crimes that can be perpetrated by the UN peacekeepers in the host states, and how international law or domestic law uses different expressions to describe this crime yet does prosecute those who commit the crime of omission. The failure of the UN peacekeepers in most cases is considered a crime of omission, yet there is no mention of punishments for this crime in the legal system of the UN peacekeeping forces.

## **Chapter 6**

### **Prosecuting UN Peacekeepers Who Have Immunity: Current Problems and Future Prospects**

#### **6.1 Introduction**

The UN was established in 1945 by the international community to protect international peace and security from threatening behaviour. Examples are the special measures taken by the UN Secretary-General to protect civilians in the host states from SEA and to prevent and address instances of SEA and other misconduct that may be committed by the UN peacekeepers or the third parties.<sup>1</sup>

Under Articles 41 and 46 of the UN Charter, it is possible to use force in international relations when it is necessary to maintain world peace and security. These articles authorise the UN to launch peacekeeping operations when they are necessary for international peace or to assist member states in unstable situations. There is no special army belonging to the UN that can be used for the UN peacekeeping operations.<sup>2</sup> The forces used in the UN peacekeeping operations are from the national armies of its members, in accordance with Article 43 of the UN Charter. The UN peacekeepers involved are drawn from the three main components of the military, the police and civilians.<sup>3</sup> They all are considered part of the operation to maintain peace in the host states.

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<sup>1</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003).

<sup>2</sup> Olivera Simic, *Regulation of Sexual Conduct in UN Peacekeeping Operations* (Springer, 2012) 26.

<sup>3</sup> Ibid.

Although the police and military are the UN peacekeepers and are referred to as experts during the mission, different special rules are applicable to each of them. There are some rules specific to military contingents when they commit a crime or unlawful act, as they will be subject to their home states' criminal jurisdiction.<sup>4</sup> However, there are different rules for civilian personnel who commit an unlawful act, as they are subject to investigation by the UN Secretary-General, who decides with the host state government whether the UN peacekeepers need to be criminally prosecuted.<sup>5</sup>

The immunity of the UN prevents the national courts of the host state from applying their jurisdiction over the UN peacekeepers when any unlawful acts are committed during their operations. In these cases, they should be under the jurisdiction of their home state. However, in some cases, the host state has been able to hold jurisdiction over the UN peacekeepers when the UN waived the UN peacekeepers' immunity, as occurred with the Jordanian peacekeepers in East Timor.<sup>6</sup> Thus, immunity can be dropped when the UN peacekeepers commit crimes against civilians.

If the host state and the home state have no jurisdiction over the crimes committed by UN peacekeepers, they can go unpunished. For example, under New Zealand law, the country has no jurisdiction over the UN personnel if they commit crimes overseas, and international law has no jurisdiction over them either. For this reason, the chance of impunity increases. This study argues that the UN peacekeepers should be prosecuted before an international court when they commit crimes during the UN peacekeeping

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<sup>4</sup> *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Model Status of Forces Agreement for Peacekeeping Operations*, UN Doc A/45/594 (Model SOFA) (9 October 1990) art 47(b).

<sup>5</sup> Ibid.

<sup>6</sup> C Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law' (2008) 19(5) *European Journal of International Law* 1015, 1031.

missions yet should retain their immunity from the host states. This will help maintain a balance between: (1) the need to have the UN peacekeepers in conflict areas and to administer justice to victims, and (2) ensuring the UN peacekeepers have immunity to serve their mission mandate effectively yet can be prosecuted for their impunity should be no defence if they commit crimes in the host states.

## **6.2 Immunity**

Immunity refers to the process or act of making an exception to applying the law of the host state to the people or organisations in that territory, according to the home state's immunity agreements or international laws. In effect, the host state leaves the prosecution to the offender's home state or international law. Moreover, if the laws of the home state indicate that the law will be applied to military forces when they commit crimes overseas, it does not mean these forces will be under their home state jurisdiction.<sup>7</sup> This is because numerous countries have no jurisdiction over any of their citizens if crimes are committed outside the state's territory, thereby depriving the state of the ability to exercise its authority over another state. However, the situation with respect to the UN peacekeeping forces is more nuanced because these forces work under UN authorisation, immunity prevents the host state from prosecuting them, and the peacekeepers' home state holds jurisdiction over them.<sup>8</sup>

However, on several occasions, the UN peacekeepers have been prosecuted under the host state's law when the UN waived the UN peacekeepers' immunity. This scenario

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<sup>7</sup> Joop Voetelink, 'Status of Forces and Criminal Jurisdiction' (2013) 60(2) *Netherlands International Law Review* 231, 240.

<sup>8</sup> Ibid 238.



was illustrated in the case of Jordanian peacekeepers who raped a girl in East Timor.<sup>9</sup> When the UN peacekeepers are involved in a state mission, they are often under the jurisdiction of the host state. If they commit a serious crime, only the UN Secretary-General can waive their immunity.<sup>10</sup>

The immunity of the UN is provided to the UN peacekeeping forces by the *1946 Convention*. According to Sections 18 and 22 of this convention, this immunity should be applied to two categories of personnel, namely ‘officials’ and ‘experts on mission’,<sup>11</sup> who are working with the UN. Officials are people or staff members who have a responsibility delegated by the UN Secretary-General.<sup>12</sup> Moreover, diplomatic privileges are granted by the *General Convention* and *1994 Convention on the Safety of the UN and Associated Personnel* (1994 Convention)<sup>13</sup> and its Optional Protocol.<sup>14</sup> The 1994 Convention prevents any action against UN members, the UN peacekeepers and anyone working under the authorisation of the UN Secretary-General, according to Article 1. The personnel stated in Article 1 are under the host state’s responsibility to protect them from any threat or attack, according to Article 7 of the 1994 Convention.

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<sup>9</sup> Frederick Rawski, ‘To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations’ (2002) 18(1) *Connecticut Journal of International Law* 102, 120.

<sup>10</sup> Voetelink, above n 7.

<sup>11</sup> See also Anthony J Miller, ‘Privileges and Immunities of United Nations Officials’ (2008) 4(2) *International Organizations Law Review* 169.

<sup>12</sup> *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) (‘*General Convention*’) art 5.

<sup>13</sup> *Convention on the Safety of United Nations and Associated Personnel*, GA Res 49/59, UN GAOR, 84<sup>th</sup> plen mtg, UN Doc A/RES/49/59 (9 December 1994).

<sup>14</sup> *Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel*, GA Res 60/42, UN GAOR, 60<sup>th</sup> sess, 8<sup>th</sup> plen mtg, Agenda Items 83, UN Doc A/RES/60/42 (6 January 2006).

However, the host state cannot prosecute the UN peacekeepers if they commit any misconduct or crime, without the permission of the UN Secretary-General.

Finally, the members of the UN peacekeeping forces are granted immunity from the national criminal jurisdiction of the host states under specific treaties. They are granted immunity via two types of treaties.<sup>15</sup> The most important of these treaties is the SOFA, which is between the host state and the foreign nation stationing military forces in that country.<sup>16</sup>

### **6.2.1 The SOFA**

Although the *1946 Convention* does not explicitly cover military personnel, the SOFA provides a level of immunity to such forces.<sup>17</sup> The SOFA has been widely adopted as an agreement to protect foreign forces by waiving the national jurisdiction of the host state and keeping the foreign forces under their home state's jurisdiction. The SOFA is considered the first step to impunity because not all states have jurisdiction to prosecute their citizens when crimes are committed outside their territory, especially when the crimes are committed under the umbrella of the UN. Further, criminal jurisdiction over the UN peacekeeping forces members was concluded by the UN as a legal framework for UN crises.<sup>18</sup> In 1990, the jurisdiction of the UN peacekeeping forces was included in the model of the SOFA, placing the UN peacekeepers under the exclusive jurisdiction of their home states, who are themselves members of the UN contingents operating in

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<sup>15</sup> Gabrielle Simm, 'International Law as a Regulatory Framework for Sexual Crimes Committed by Peacekeepers' (2011) 16(3) *Journal of Conflict and Security Law* 473, 500.

<sup>16</sup> Ibid 501.

<sup>17</sup> Rawski, above n 9, 108.

<sup>18</sup> Voetelink, above n 7, 237.

the host states.<sup>19</sup> For this reason, the SOFA clearly indicates the relationship between foreign forces and the host states by waiving part or the entire criminal jurisdiction of the host state in its territory to give immunity to visitor forces. This can be seen in the case of the Afghan territory, which has been governed by two international agreements that are referred to as the SOFA.<sup>20</sup>

In terms of the current and past situation in Afghanistan, the SOFA is a diplomatic agreement between the US and Afghanistan regarding the US interim authority on the status of the US military forces and civilian personnel within Afghanistan's boundaries.<sup>21</sup> The second SOFA represents the letter exchanges between NATO and Afghanistan since 2004. These exchanges helped review and solidify the agreements of international security forces.<sup>22</sup> Moreover, a similar situation occurred in Iraq. Iraqi criminal law has jurisdiction over its territory according to Articles 6 and 7 of this law:

Article 6—The provisions of this Code are enforceable in respect of offences committed in Iraq. An offence is considered to have been committed in Iraq if a criminal act is committed there or if the consequence of that act is realised or is intended to be realised there. In all circumstances, the law applies to all parties to the offence of which all or part occurs in Iraq even though any of those parties are abroad at the time and regardless of whether he is a principal or accessory to the offence.

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<sup>19</sup> Ibid.

<sup>20</sup> *The US–Afghan Bilateral Security Agreement*, opened for signature 6 April 2002 (signed and entered into force 13 April 2002).

<sup>21</sup> Voetelink, above n 7, 332.

<sup>22</sup> Ibid 234.

Article 7 Iraq's regional jurisdiction includes the territory of the Republic of Iraq and all areas under its control including its coastal waters and airspace as well as any foreign territory occupied by the Iraqi army in so far as any offence affects the security or interests of the army. Iraqi ships and aircraft are subject to the territorial jurisdiction of the Republic of Iraq wherever they may be.

The Iraqi government gave the US soldiers immunity from criminal jurisdiction under the SOFA, signed with the US government, on 17 November 2008. In addition, the Iraqi government waived part of its jurisdiction over the US forces, yet retained criminal jurisdiction if soldiers commit grave premeditated felonies.<sup>23</sup> In addition, the US forces had been given a class of cases over which they could waive the territorial jurisdiction.<sup>24</sup> A foreign independent state can waive territorial jurisdiction when the state allows foreign forces to pass through its land to other states. During this time, jurisdiction over these forces will be held by their home state.<sup>25</sup>

### **6.2.2 Effect of agreements on prosecution of UN peacekeepers**

As previously discussed, the UN peacekeepers' immunity from accountability is adopted through agreements between the UN peacekeepers' home states and the UN, or between the home states and state parties (if the host state is a party to the ICC). Although the US voted against the ICC in 1998,<sup>26</sup> US peacekeepers are not immune to

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<sup>23</sup> *Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq*, signed 17 November 2008, ILM (entered into force 1 January 2009). See also Chris Jenks, 'A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement' (2010) 11(2) *San Diego International Law Journal* 411,414.

<sup>24</sup> Voetelink, above n 7, 234.

<sup>25</sup> Ibid.

<sup>26</sup> Ilias Bantekas, *International Criminal Law* (Hart Pub, 2010) 424.

ICC jurisdiction in all circumstances, as the ICC may extend its jurisdiction over non-party states, according to Article 12 of the *Rome Statute*.<sup>27</sup> Thus, when US forces commit a crime that could be under the jurisdiction of the ICC while serving abroad, such crimes can now be prosecuted by the ICC. For this reason, the US government requested immunity for its soldiers from the UN to continue to participate in the UN peacekeeping operations. The request led the UNSC to adopt Resolution 1422 on 1 July 2002. This resolution stopped the initiation of investigations or prosecutions of the UN peacekeepers from non-party states. Immunity can then be renewed under the same conditions after a 12-month period, beginning each year on 1 July.<sup>28</sup> The concession given by Resolution 1422 to the US peacekeepers and others is considered a 'jurisdictional gap'. Accordingly, many analysts and experts warn that this will a gap in the jurisdiction of the ICC over the territory of the state parties.

### **6.2.3 Types of immunity**

The UN peacekeepers are considered part of the UN when they work under the command and control of the UN.<sup>29</sup> These UN peacekeepers are working to achieve the aims of the UN and to support people to bring stability to their country. For this reason, any attack against these forces is an attack against the aims of the UN. Article 104 of the UN Charter discusses the legal capacity of an international organisation to exercise its functions in its member states, which of course covers the UN peacekeepers. Further, Article 105 of the UN Charter provides immunity to international organisations to

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<sup>27</sup> Scott E Zipprich, 'The International Criminal Court: Time to Adjust U.S. Foreign Policy' (2010) 54(4) *Orbis* 644, 651.

<sup>28</sup> C Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)' (2003) 14(1) *European Journal of International Law* 85, 85.

<sup>29</sup> Rawski, above n 9, 110.

exercise their functions in the territory of the member states. The categories of immunity under international law are divided into four types: diplomatic immunity, absolute immunity, functional immunity and organisational immunity.<sup>30</sup>

#### **6.2.3.1 Diplomatic immunity**

In its most basic form, diplomatic immunity is defined as a shield from the legal jurisdiction of the host state, given to members of diplomatic missions in foreign states or UN members. It removes the risk of prosecution if international personnel commit a crime.<sup>31</sup> In the modern era, this concept has evolved from the way it was defined in the *Vienna Convention on Diplomatic Relations* in 1961. Article V, s 19, of the *Immunities Convention*<sup>32</sup> and Article 29 of the *Vienna Convention* grant diplomats absolute immunity by excluding criminal activities unrelated to the representative official work and specify that the host state should respect diplomatic agents. According to both conventions, this immunity protects military members of the UN peacekeeping forces from the jurisdiction of the host state. Moreover, diplomatic immunity is considered one of the most important types of immunity provided to state members and is one of the oldest parts of international law.<sup>33</sup> Diplomatic agents have criminal immunity and civil immunity according to Article 31 of the *Vienna Convention*, except if the case is related to immovable property in the territory of the host state or to other exceptions stated in Article 31 of the *Vienna Convention*.

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<sup>30</sup> Ibid 111.

<sup>31</sup> *Vienna Convention on Diplomatic Relations*, opened for signature 14 April 1961 (signed and entered into force 24 April 1964)

<sup>32</sup> *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) ('*General Convention*'); see Rawski, above n 9, 110.

<sup>33</sup> Ibid.

According to the above view, the UN peacekeeping forces have criminal immunity from the host state because they are involved in UN missions. According to the *Vienna Convention* articles, the purpose of criminal jurisdiction is to permit military members to complete their work, protected by the law from the host state jurisdiction. However, the UN peacekeepers can exploit immunity to protect themselves from being accountable to the law of the host state if they commit crimes against civilians of the host state.

#### **6.2.3.2 Absolute immunity**

Absolute immunity is granted to some state officials, such as senior state officials, especially heads of state, heads of government and foreign ministers.<sup>34</sup> Such immunity allows these officials to perform functions related to their job without harassment. Further, this immunity confirms responsibility in conducting relations between states.<sup>35</sup> In addition, immunity from the jurisdiction of a host state during operations arises from customary international law—unlike functional immunity, which is granted to all acting state agents.<sup>36</sup> According to Articles 29 and 31 of the *Vienna Convention*, the receiving states should protect and prevent any attack against diplomatic agents. However, the *1946 Convention* and *Vienna Convention* omitted the protection of civilians from crimes that may be committed by the UN peacekeepers during their missions.

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<sup>34</sup> Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *The American Journal of International Law* 407, 410.

<sup>35</sup> *Ibid* 409.

<sup>36</sup> Antonio Cassese, *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011) 88.

### 6.2.3.3 Functional immunity

Functional immunity provides UN members with limited immunity from criminal accountability in the host state and is used to shield official activities from foreign tribunals.<sup>37</sup> The *General Convention* provides UN members with functional immunity from criminal jurisdiction in the host state only during their period of operations. The purposes of this immunity are to protect the UN members in tasks ‘necessary for the independent exercise of their functions’ (stated in Article 105 of the *General Convention*), ‘in their official capacity’ (s 18 of the *Immunities Convention*) and in the ‘course of the performance of their mission’ (s 22 of the *Immunities Convention*).<sup>38</sup> The above points are considered appropriate for the UN as long as UN personnel are only able to maintain the independent exercise of their functions. They should have no chance to exploit their position to commit crimes against civilians of the host state. Functional immunity should remain under the control of the UN to maintain justice when the UN peacekeepers commit an unlawful act and to avoid criminal impunity.

### 6.2.3.4 Organisational immunity

According to the current and existing legal definitions of organisational immunity, an international organisation is granted organisational immunity to achieve the common goals of its members.<sup>39</sup> However, there are several exceptions to this jurisdiction, such as the immunity given to the personnel of international organisations or members of diplomatic missions. The immunity from criminal jurisdiction is granted in the host state to allow completion the work of the personnel of international organisations, such

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<sup>37</sup> Ibid 77.

<sup>38</sup> *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) (‘*General Convention*’); see Rawski, above n 9, 111.

<sup>39</sup> Antoinette A Farrugia, ‘International Organizations Immunity is Absolutely not Restrictive’ (1989) 15(2) *Brooklyn Journal of International Law* 497, 502.



as the immunity given to UN personnel and properties. Therefore, this immunity means a justification to the personnel of organisations to commit crimes or unlawful acts without accountability under the host state, given that the crimes committed by the UN peacekeepers during their missions will be referred to their home states for prosecution.

#### **6.2.4 Effect of immunity on prosecution of UN peacekeepers**

The UN peacekeepers are deployed in numerous states to restore peace and security in those states and/or to protect civilians, such as deployments to the DRC, East Timor, Kosovo and Somalia. This study focuses on the crimes of military peacekeepers in the host states because, of the 102,910 personnel involved as the UN peacekeepers, 75,033 of them are military UN peacekeepers<sup>40</sup> and most of the crimes committed by the UN peacekeepers are committed by military personnel. The host states have no jurisdiction over these UN peacekeepers because they are referred to their home states if they commit unlawful acts, based on a special military law.<sup>41</sup> This study will further clarify how the UN Secretary-General or his representatives in the host states have authority to prosecute these crimes and/or waive the UN peacekeepers' privileges and immunities during the UN peacekeeping operations.

The UN peacekeepers have been given privileges and immunities by the international community because they are UN personnel. The *1946 Convention*, which was adopted on 13 February 1946, is considered a reflection of international customary law. Therefore, most of the UN peacekeepers who have committed unlawful acts have been prosecuted under the laws of their home states. The main reason these UN peacekeepers

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<sup>40</sup> *The UN Peacekeeping* <<https://peacekeeping.un.org/en/about-us>> (accessed 20 January 2019).

<sup>41</sup> *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Model Status of Forces Agreement for Peacekeeping Operations*, UN Doc A/45/594 (Model SOFA) (9 October 1990) art 47(b).

are referred to their home states for prosecution is because they have been granted immunity during their work with the UN missions, which prevents prosecution under the host state's laws.<sup>42</sup>

Although the UN peacekeeping forces are considered part of the UN and are covered by immunity resulting from the *1946 Convention*,<sup>43</sup> they are usually granted immunity under the SOFA.<sup>44</sup> These agreements, on most occasions, are organised between the host states and the states that are sending forces for the UN peacekeeping operations. The purpose of the SOFA is to avoid the criminal jurisdiction of the host state, as each country prefers its soldiers to be prosecuted under its own law, and subsequently to prosecute the UN peacekeepers under the law of their home state.<sup>45</sup> The prosecution of the UN peacekeepers in their home state, according to the SOFA, is considered a reassuring message to the host state. However, in most instances, the home states do not prosecute offenders who have committed unlawful acts in the host states.

For example, the assurance of the SOFA between the governments of Mongolia and the US guaranteed that US personnel had immunity from Mongolian law if they committed any breach of its law. However, although jurisdiction over the crimes lay with US courts, according to Article 10 of the *1946 Convention*, the government of Mongolia had the right to request the US government waive the jurisdiction if a crime was not

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<sup>42</sup> The *Vienna Convention on Diplomatic Relations*, opened for signature 14 April 1961 (signed and entered into force 24 April 1964) s 22. See also Rawski, above n 9, 108.

<sup>43</sup> Rawski, above n 9, 108.

<sup>44</sup> Ibid 108.

<sup>45</sup> Marten Zwanenburg, 'UN Peace Operations between Independence and Accountability' (2008) 5(1) *International Organizations Law Review* 23, 47, 27.

committed during official duties.<sup>46</sup> This example explains how impunity derives from the SOFA and how there is no law that can apply in several instances to bring justice to the victims in the host states.

The above discussion has outlined the complex issues related to prosecuting the UN peacekeepers if their home state has no jurisdiction over them. However, there is a legal way to prosecute them—through the authority of the UN Secretary-General, according to s 20 of the *1946 Convention*, if the Secretary-General waives the immunity of the offending the UN peacekeepers to give the host state the right to prosecute them. However, this raises questions about how to prosecute the UN peacekeepers if the Secretary-General does not waive this immunity.<sup>47</sup> Thus, this study considers how to prosecute the UN peacekeepers if the UN Secretary-General does not waive immunity and prosecution in the home state fails. The suitable solution to prosecute the UN peacekeepers so far is establishing a hybrid court in the host state to prosecute those who have committed crimes or unlawful acts. The judges would be from the host state, from the UN peacekeepers' home states and from the department of the UN peacekeeping operations. The discussion here will focus on the authorisation of the UN Secretary-General to waive the immunity of the offending the UN peacekeepers.

### **6.3 Jurisdiction over crimes committed by UN peacekeepers, and UN Secretary-General's authority to waive immunity**

The prosecution of members of international organisations<sup>48</sup> was different before the adoption of the UN Charter. In the past, if the members of an organisation committed a

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<sup>46</sup> *The Agreement on Military Exchanges and Visits between the Government of the United States of America and the Government of Mongolia*, signed 26 June 1996.

<sup>47</sup> See the next section of this study for more information regarding the UN Secretary-General's authority to waive the immunity of peacekeepers.

<sup>48</sup> Members of the UN and non-government organisations.

crime in the host state, and the act was not related to their official work, their punishment would occur under the applicable law of the host state.<sup>49</sup> However, at present, the UN peacekeepers have immunity from the jurisdiction of the host states. This immunity means that the host state waives all or part of their criminal jurisdiction over their territory for the UN personnel. This can cause a problem with criminal prosecutions and may act as a barrier to prevent the discipline and prosecution of the UN peacekeepers when they commit unlawful acts in the host state.

The privileges and immunity given to the UN personnel in the host states raise the question of how to prosecute the UN personnel if they commit unlawful acts<sup>50</sup> during the UN peacekeeping operations. Although this study acknowledges that the UN peacekeepers and all UN personnel have immunity,<sup>51</sup> there is another legal way to exert control over them—the UN Secretary-General has the authority to waive the UN peacekeepers' immunity.<sup>52</sup> The discussions below explain the UN peacekeepers' immunity and the circumstances in which it can be waived by the UN Secretary-General.

Article 105 of the UN Charter is clearly intended for immunity for official acts only:

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<sup>49</sup> Miller, above n 11, 90.

<sup>50</sup> The unlawful acts that can be committed by the UN peacekeepers in the mission area, such as sexual exploitation, crimes against civilians and other unlawful acts. For more information, see *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, UN GAOR, UN Doc A/59/661 (2005).

<sup>51</sup> *The Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) ('*General Convention*') s 22.

<sup>52</sup> *Ibid* s 20.

1. 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.
2. 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.
3. The UN General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

Article 105 of the UN Charter grants immunity to the members of international organisations; however, the purpose of this immunity must be considered. The purpose is to establish the fundamental principle that members of international organisations should enjoy immunity in the territory of member states for the purposes stated in paragraph 2—the independent exercise of their functions without harassment from the host state.<sup>53</sup> Therefore, immunity means a special exception for the UN peacekeepers from the exercise of criminal jurisdiction if they commit unlawful acts in the host state's territory.<sup>54</sup> However, Sweetser<sup>55</sup> held a different opinion and construed Article 105 such that the UN peacekeepers are immune from prosecution even if their acts fall outside

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<sup>53</sup> See also Miller, above n 11, 16.

<sup>54</sup> For more information and explanation, see Section 6.2 of this chapter, discussing immunity and types of immunities.

<sup>55</sup> Catherine E Sweetser, lecturer at the School of Law, University of California.

their official functions. This opinion is very important to this study because it is apparent that domestic courts are unable to prosecute the UN peacekeepers without waiving immunity in all cases. For this reason, while the immunity is necessary for the independent exercise of the UN peacekeepers' functions during the period of the mission, the immunity structure in international law creates jurisdictional gaps in the accountability and liability of the UN peacekeepers, which can lead UN personnel to impunity.<sup>56</sup>

Moreover, as noted above, the UN peacekeepers are protected by international conventions, such as the *1946 Convention*.<sup>57</sup> Section 22 of the *1946 Convention* provides them with immunity from personal arrest or detention, in addition to immunity from legal processes. These points confirm that the host state has no jurisdiction over any criminal acts, whether they are part of the UN peacekeepers' official function or not, if immunity is not waived. Thus, the prosecution of UN peacekeepers in the host states depends on the waiving of immunity. Therefore, the above points led this study to explore the jurisdiction of the host state over the crimes committed by the UN peacekeepers, and the legal steps taken to waive immunity and avoid the UN peacekeepers exploiting their freedom from prosecution.

### **6.3.1 Jurisdiction of host state over crimes committed by UN peacekeepers**

Under the structure of immunity defined above, the UN peacekeeping forces are granted immunity during their deployment under the UN umbrella, which protects them from

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<sup>56</sup> *Privileges and Immunities of the Staff of the Secretariat of the United Nations* <<https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/27/IMG/NR003327.pdf?OpenElement>> (accessed 6 August 2019); see also Miller, above n 11, 90.

<sup>57</sup> The *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) ('*General Convention*').

the criminal jurisdiction of the host states.<sup>58</sup> In this case, the UN peacekeepers may feel that the legal controls of the host state might serve as a means of restricting their ability to perform the UN mission. For this reason, the UN peacekeepers have been granted immunity to keep them and their mission independent from the jurisdictional process of the host states, given that independent states usually exercise their jurisdiction over their territory.

The UN and its organs have immunity to shield them from the jurisdiction of foreign states and protect them from harassment from the host states.<sup>59</sup> However, the immunity of the UN peacekeepers prevents the jurisdiction of the host state from prosecuting the UN peacekeepers who commit crimes or unlawful acts during their engagement in the UN peacekeeping missions, even though international law enables them to be prosecuted. This limits their accountability.

However, the UN peacekeepers can be prosecuted under the law of the host state if the UN Secretary-General waives their immunity, in accordance with s 20 of the *1946 Convention*. This depends on the UN Secretary-General's opinion. Although the UN Secretary-General can waive immunity to allow the UN peacekeepers to be prosecuted before the host state's courts, the situation is complicated because the UN Secretary-General is independent, and no one monitors his or her ultimate authority. The UN Secretary-General's inaction or arbitrary action may lead the UN peacekeepers to have impunity from criminal jurisdiction, especially when their home states have no jurisdiction over them if they commit a crime abroad. In view of the above discussion,

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<sup>58</sup> Rosa Freedman, 'UN Immunity or Impunity? A Human Rights Based Challenge' (2014) 25(1) *European Journal of International Law* 239, 244.

<sup>59</sup> Simm, above n 15, 297.

it is necessary to discuss and identify the legal steps involved in waiving the UN peacekeepers' immunity when they commit unlawful acts.

### **6.3.2 International measures for UN peacekeepers if UN Secretary-General does not waive immunity**

The peacekeeping missions launched by the UN should be controlled by the international community and measures should be applied to avoid impunity if the UN Secretary-General does not waive immunity<sup>60</sup> when there is misconduct or unlawful action. the UN peacekeepers have committed numerous crimes during their missions, even though the UN Secretary-General has the option of using a waive of immunity to stop the prosecution of the UN peacekeepers' misconduct against civilians in the area of the host states. For these reasons, the UNSC decided to implement a 'zero-tolerance' policy with the UN to prevent the UN peacekeepers from committing misconduct, such as SEA.<sup>61</sup>

Further, Kofi Annan released the UN Secretary-General's bulletin on the topic of observing IHL by the UN peacekeeping forces.<sup>62</sup> The bulletin outlined the policy that the UN peacekeeping forces must respect concerning the fundamental principles and rules of IHL, even if there is no SOFA with the host state. Section 5 of the UN Secretary-General's bulletin in 1999 requires that UN forces make a clear distinction at all times between civilians and combatants, and between civilian objects and military objectives.<sup>63</sup> Military operations should be against combatants and must avoid attacks

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<sup>60</sup> When the UN Secretary-General does not use his right according to s 20 of the *1946 Convention*.

<sup>61</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003).

<sup>62</sup> Ibid.

<sup>63</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (6 August 1999) section 5.



against civilians or civilian objects, in accordance with Section 5. The problem identified in this study is that, if no strong measures are taken by the international community to avoid impunity, there will be no way to punish the UN peacekeepers if they commit crimes and the UN Secretary-General does not waive immunity. If no action is taken by the international community to address this situation, opportunities for impunity will continue unabated in the future.

### **6.3.3 UN Secretary-General's authority to waive immunity**

According to Section 20 of the *1946 Convention*, the UN Secretary-General has the right to waive the UN peacekeepers' immunity when any official or expert on a mission commits crimes or misconduct:

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, UNSC shall have the right to waive immunity.

This legislation in Section 20 of the *1946 Convention* means that no one except the Secretary-General can waive immunity or privilege. Most researchers and the group of legal experts appointed by the UN Secretary-General to prepare and submit a comprehensive report to the UN General Assembly during its 60th session as the group of legal experts have argued to avoid impunity.<sup>64</sup> This is to ensure that no UN staff or

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<sup>64</sup> *Support Account for the UN Peacekeeping Operations*, GA Res 60/268, UN GAOR, 60<sup>th</sup> sess, Agenda Item 136, UN Doc A/RES/60/268 (15 August 2006) para 1.

experts on missions are effectively exempt from the consequences of criminal acts committed at their duty station.<sup>65</sup> Other commentators have argued that immunity is not relevant in the context of sexual abuse by individual UN peacekeepers because the abuse falls outside the UN peacekeepers' official duties.<sup>66</sup>

Although the previous points indicate that, in some instances, the UN peacekeepers' crimes fall outside their official functions, the national criminal authority must request that the UN Secretary-General waive their immunity. Therefore, several of the points above confirm that only the UN Secretary-General can waive immunity. However, Prince Zeid Al-Hussein<sup>67</sup> recommended different rules to prosecute the UN peacekeepers by allowing the host state to at least hold criminal jurisdiction over SEA committed by officials and experts on missions that constitute a crime under local law.<sup>68</sup> The recommendation that resulted from the report of the legal experts was surprising, as they suggested that the host state should have jurisdiction over the crimes of the UN peacekeepers. They also assumed that, if the host state is unable to exercise jurisdiction, even with the UN's assistance—as often occurs in post-conflict areas where a UN peacekeeping operation is being undertaken—the case will be referred to other states. Therefore, this point led this study to examine whether there is any role for the host state to prosecute the UN peacekeepers if the UN Secretary-General waives immunity.<sup>69</sup>

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<sup>65</sup> *Report of the Special Committee on Peacekeeping Operations and its Working Group*, UN GAOR, UN Doc A/59/19/Rev.1 (31 January-25 February 2005).

<sup>66</sup> Catherine E Sweetser, 'Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel' (2008) 83(5) *New York University Law Review* 1643, 1653.

<sup>67</sup> Permanent representative of Jordan at the UN.

<sup>68</sup> *Zeid Report*, UN Doc A/59/710, paras 89, 93.

<sup>69</sup> *Ibid* paras 89, 93.

### 6.3.3.1 Position of UN Secretary-General in East Timor

The people of East Timor voted for independence on 30 August 1999, and, according to the UNSC Resolution 1272, the UN peacekeeping forces were deployed in the area.<sup>70</sup> The forces were from 41 states, one of them being Jordan.<sup>71</sup> Although the purpose of the UN peacekeepers was to bring stability to East Timor and help its people work towards autonomy,<sup>72</sup> the UN peacekeepers caused problems for the local people.

The UN peacekeepers in East Timor committed numerous crimes against the East Timorese people, especially against women. Crimes committed by the Pakistani peacekeepers in 2001 involved sexual exploitation and acts considered ‘inappropriate behaviour’ against local women. For this reason, they were referred to their home state. Further, some Jordanian peacekeepers were arrested on 21 August 2001 for raping an East Timorese woman who was working at a Dili hotel.<sup>73</sup> This crime led the Special Representative of the Secretary-General to declare that the UN peacekeepers would not have the protection of immunity from the legal jurisdiction of East Timor. Thus, the Special Representative of the Secretary-General used his right, according to s 20 of the *1946 Convention*, to waive the immunity of the UN peacekeepers who had committed this crime. However, the UN-convened Board of Inquiry declared that the crimes committed by the Jordanian peacekeepers were outside their official work; therefore, it

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<sup>70</sup> *The Situation in East Timor*, SC Res 1272, UN SCOR, 4057<sup>th</sup> mtg, UN Doc S/RES/1272 (25 October 1999).

<sup>71</sup> *Contributors of Military Personnel the United Nations*  
<<https://peacekeeping.un.org/en/mission/past/etimor/UntaetF.htm>> (accessed 6 February 2019).

<sup>72</sup> *The Situation in East Timor*, SC Res 1272, UN SCOR, 4057<sup>th</sup> mtg, UN Doc S/RES/1272 (25 October 1999).

<sup>73</sup> *Jordanian Civilian Police Indicted on Rape Charges* (24 August 2001)  
<<https://reliefweb.int/report/timor-leste/untaet-daily-briefing-24-aug-2001>> (accessed 30 January 2019); see also Rawski, above n 9, 120.

was not necessary to waive their immunity and they were prosecuted before the courts of East Timor. Another case involved a UN member killing a 72-year-old woman in a hit-and-run car accident. In this case, the UN Secretary-General refused to waive immunity because the accident occurred during official work.<sup>74</sup>

The above points demonstrate that the prosecution of the UN peacekeepers depends on whether the UN Secretary-General wishes to prosecute them in the host state. There are some inconsistencies in the UN Secretary-General's decisions regarding the UN peacekeepers' crimes in different countries, which raises questions about why the decisions of the UN Secretary-General are inconsistent when waiving immunity in different mission countries. The reaction of the UN Secretary-General in the instances mentioned above indicates that allowing the UN Secretary-General to waive immunity based on his or her opinion does not stop or prevent unlawful acts being committed by the UN peacekeepers because there are no specific criteria regarding waiving immunity. When crimes in the DRC were committed by the UN peacekeepers, the Special Representative of the Secretary-General was sent to prepare a special report about the crimes committed to avoid the perpetrators' impunity. The question here is: what was the nature of the crimes committed by the UN peacekeepers in the DRC and what were the recommendations made by Prince Zeid to solve the problems regarding prosecuting the UN peacekeepers?

#### **6.3.3.2 Position of UN Secretary-General in relation to DRC**

The explanation of the crimes committed by the UN peacekeepers is significant because most of the perpetrators of these crimes have still not been punished.<sup>75</sup> This issue led

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<sup>74</sup> Rawski, above n 9, 120.

<sup>75</sup> Human Rights Watch, *MONUC: A Case for Peacekeeping Reform—Testimony of Anneke Van Woudenberg before the U.S. House Committee on International Relations, Subcommittee on Africa*,

this study to highlight and focus on the cases in the DRC to explain the UN Secretary-General's role in preventing the crimes that committed by the UN peacekeepers. Civilians in the DRC have suffered from sexual crimes committed by the UN peacekeepers against women, yet there remains ambiguity regarding accountability and there has been no action from the UN Secretary-General to stop these crimes by waiving immunity or prosecuting the perpetrators. For these reasons, this study focuses on the cases in the DRC by explaining why the UN mission was established there, the purpose of the mission, the crimes committed by the UN peacekeepers during that mission, and the position of the UN Secretary-General concerning this case.

Subsequent to the 1994 genocide and the establishment of a new government in Rwanda, 1.2 million Rwandese people escaped to the DRC,<sup>76</sup> including individuals who perpetrated the genocide. They fled to the eastern regions of the DRC—an area inhabited by Tutsis and other ethnic groups. Consequently, in 1996, a rebellion was started against the army of President Mobutu Sese Sekoby Laurent Desire Kabila.<sup>77</sup> The rebels successfully took the capital city of Kinshasa in 1997 and renamed the country the DRC.<sup>78</sup> They started their rebellion against the Kabila government in 1998, in the Kivu regions, and took control of a large area of the country. Several countries—such as Angola, Chad, Namibia and Zimbabwe—tried to send military support to President

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*Global Human Rights and International Operations* (1 March 2005)  
<<https://www.hrw.org/news/2005/02/28/monuc-case-peacekeeping-reform>> (accessed 30 January 2019).

<sup>76</sup> *MONUC in DRC* <<https://peacekeeping.un.org/mission/past/monuc/background.shtml>> (accessed 11 July 2019).

<sup>77</sup> *Ibid.*

<sup>78</sup> Susan A Notar, 'Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo' (2006) 14 *American UJ Gender Soc. Pol'y & L.* 413, 414.

Kabila; however, the rebels in the eastern regions prevented this. The UNSC established MONUC with Resolution 1279 on 30 November 1999<sup>79</sup> to observe the ceasefire and disengagement of forces, and to maintain contact with all conflicting parties in the ceasefire agreement, in addition to authorising the UN peacekeeping forces to enter the DRC.

The duties of peacekeepers in the DRC were to help and protect civilians, according to the UNSC resolution,<sup>80</sup> and to support 'human rights, humanitarian affairs, public information, child protection, political affairs, medical support, and administrative support'.<sup>81</sup> However, the UN peacekeepers allegedly committed numerous crimes and unlawful acts against the Congolese, especially women and girls. These allegations were investigated by the General Assembly.<sup>82</sup> To understand the position of the UN Secretary-General in relation to these acts in the DRC, this study will outline the crimes that the UN peacekeepers committed in the DRC. In addition, the HRW launched another investigation to establish whether the UN peacekeepers committed sexual crimes during their mission in the DRC. The investigation was undertaken by interviewing girls under 13 years and other girls between 12 and 15 years.<sup>83</sup> Both groups

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<sup>79</sup> *The Situation Concerning the Democratic Republic of the Congo*, SC Res 1279, UN SCOR, 4076<sup>th</sup> mtg, UN Doc S/RES/1279 (30 November 1999).

<sup>80</sup> *Mandate for MONUC (UN Organization Mission in the Democratic Republic of the Congo)*, SC Res 1291, UN SCOR, 4104<sup>th</sup> mtg, UN Doc S/RES/1291 (24 February 2000).

<sup>81</sup> Ibid.

<sup>82</sup> *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, UN GAOR, UN Doc A/59/661 (2005).

<sup>83</sup> Human Rights Watch, above n 75.

confirmed that they had engaged in sexual relations with UN peacekeepers to obtain food, money or protection. The girls referred to these acts as ‘survival sex’.<sup>84</sup>

In addition, the UN General Assembly performed another investigation in Bunia between May and September 2004.<sup>85</sup> MONUC received 72 allegations of SEA against Congolese women—68 allegations against military personnel and four against civilians working with the MONUC. Bhalla’s report explained that the Nepalese peacekeepers had used food and money to pay young girls to have sex with them.<sup>86</sup> The UN General Assembly investigation of the UN peacekeepers’ crimes in the DRC stated that these crimes were some of the gravest crimes committed by UN peacekeepers against the Congolese. They included sex with 12-year-old girls, which sometimes occurred within the mission’s administrative building. The UN peacekeepers exploited their positions with these girls by giving them small gifts or two eggs from their rations, and demanding sex as payment.<sup>87</sup>

According to the UN General Assembly,<sup>88</sup> the victims also included women over the age of 18. However, the investigation indicated that most of the victims were between 12 and 16 years of age. Therefore, given that most victims were below 18 years of age,

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<sup>84</sup> Ibid.

<sup>85</sup> *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, UN GAOR, UN Doc A/59/661 (2005).

<sup>86</sup> Nita Bhalla, *UN Must Review Policy on Peacekeepers who Abuse Amnesty* (16 March 2012) <<http://www.trust.org/item/?map=un-must-review-policy-on-peacekeepers-who-abuse-amnesty>> (accessed 28 August 2018).

<sup>87</sup> Owen Bowcott, ‘Report Reveals Shame of UN Peacekeepers Sexual Abuse by Soldiers “Must be Punished”’, *The Guardian* (online), 25 March 2005 <<http://www.theguardian.com/world/2005/mar/25/unitednations>> (accessed 30 August 2018).

<sup>88</sup> *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, UN GAOR, UN Doc A/59/661 (2005).

the acts cannot be considered prostitution, and the UN peacekeepers' acts were considered rape and violence against children.<sup>89</sup> The crimes mentioned in these reports are examples of exploitative behaviour, since SEA is prohibited under Rule 4 of the Code of Personal Conduct for Blue Helmets and the MONUC Code of Conduct.<sup>90</sup> This section will now discuss how to prosecute the UN peacekeepers who committed crimes in the DRC.

Concerning the prosecution of the UN peacekeepers, the legal position of the DRC as a host state must be discussed, regarding how individuals with immunity can be prosecuted. For example, when six Moroccans and French peacekeepers were involved in the sexual exploitation of Congolese women, the judicial system in the DRC could not prosecute them because of their immunity in the host state.<sup>91</sup> The prosecution in these cases needed to occur in their home states. However, although they have been referred to their home states for prosecution, there has been no progress regarding these prosecutions so far. If the home states have no jurisdiction over the UN peacekeeper crimes, as in this instance, no one can prosecute them.

This chapter aims to address these prosecution problems and focuses on the UN peacekeepers' immunity and how the UN Secretary-General can waive this immunity, given that waiving immunity allows the host states to prosecute those who commit 'serious misconduct' during the UN operations. The question of how to waive immunity remains unaddressed. For the incidents in the DRC, in accordance with s 20 of the 1946

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<sup>89</sup> See Article 170 of the *Congolese Penal Code*.

<sup>90</sup> *Investigation by the Office of Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo*, above n 88, 6.

<sup>91</sup> Human Rights Watch, above n 75.



*Convention*, the UN Secretary-General should have waived the UN peacekeepers' immunity, yet he did not. The case in the DRC outlines the questionable role of the UN Secretary-General in waiving the UN peacekeepers' immunity and it is important to understand the position he has taken in other cases, such as those in East Timor and Somalia. The above facts of the DRC raise the question of why the UN Secretary-General did not waive the UN peacekeepers' immunity.<sup>92</sup>

The UN Secretary-General decides whether the UN peacekeepers' immunity will be waived, and each case is individually reviewed.<sup>93</sup> The UN Secretary-General appointed Zeid in July 2004 to investigate the issues of the case in the DRC and to suggest a framework to solve the problems related to prosecuting the crimes committed by the UN peacekeepers against the Congolese.<sup>94</sup> He asked Zeid to begin his investigation in October 2004 and to determine the crimes of SEA that were committed by the UN peacekeepers.<sup>95</sup> Zeid undertook the investigation with Congolese women to determine whether the UN peacekeepers had committed sexual abuse, and proposed recommendations to the UN Secretary-General in relation to prosecuting the UN peacekeepers for their crimes against civilians.

When Zeid arrived in the DRC, he held consultations with representatives of the Congolese government, local women's organisations and the alleged victims.<sup>96</sup> These

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<sup>92</sup> For more information regarding this question, see Section 6.4.3 of this document: 'Legal Challenges to International Jurisdiction over UN Peacekeeping Forces'.

<sup>93</sup> Anthony J Miller, 'United Nations Experts on Mission and Their Privileges and Immunities' (2007) 4(1) *International Organizations Law Review* 11, 47.

<sup>94</sup> Gabrielle Simm, *Sex in Peace Operations* (Cambridge University Press, 2013) 153.

<sup>95</sup> Anna Shotton, 'A Strategy to Address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel' (2006) 39(1) *Cornell International Law Journal* 97, 101.

<sup>96</sup> *Ibid.*

consultations confirmed that the crimes mentioned above, in accordance with the reports of HRW and the UN General Assembly, were exploitation of Congolese civilians. He also met the young victims who were sexually abused and exploited by the UN peacekeepers in exchange for money or food.<sup>97</sup> Some of those girls stated that they were raped and then the attack was portrayed as prostitution. Some of the victims became pregnant from the rape. The above crimes outline the suffering experienced by the Congolese and highlight the deep problems that can exist between the host states and the UN peacekeepers if criminals remain unpunished.

When Zeid reported to the UN Secretary-General after his investigations in the DRC, he expressed his views regarding the abuse and exploitation that had been committed by the UN peacekeepers against the Congolese. His report included suggestions that needed to be taken up by the Secretary-General and the personnel in charge of the UN peacekeeping operations. This chapter considers Zeid's report regarding the crimes of the UN peacekeepers via a comprehensive analysis of SEA.

Zeid presented four recommendations to prevent these crimes from being repeated in the future. For the current rules on the standards of conduct, he recommended that the 'zero-tolerance' rule be applied to the military because the UN Secretary-General's bulletin in 2003 only applied to civilians.<sup>98</sup> He recommended that the UN General Assembly extend its rule to be applicable to anyone from the UN whether civilians, uniformed personnel appointed or contracted by the UN, or any other UN peacekeeping personnel appointed by the UN Secretary-General<sup>99</sup> if they commit crimes against

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<sup>97</sup> *Zeid Report*, UN Doc A/59/710.

<sup>98</sup> Kofi A Annan, *The UN Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003).

<sup>99</sup> Simm, above n 94, 154.

people in the host states.<sup>100</sup> His recommendation included using appropriate language in contracts or letters of engagement to avoid any misunderstanding that could appear if the contract was written in another language. This recommendation sought to ensure that all UN personnel from different countries and with different languages understand instructions properly.

The second recommendation from the investigation was that those who committed crimes against the Congolese and violated the UN standards should be punished.<sup>101</sup> This recommendation included advice on establishing a permanent professional investigators' committee (Permanent Committee) that included military lawyers from the home states. This recommendation aimed to address the complaints of the home states regarding the current investigative mechanisms of the Department of Peacekeeping Operations, or claims that the investigation committee's evidence gathered by mission boards of inquiry and investigations was inadequate under their national law for use in subsequent judicial or court-martial proceedings.<sup>102</sup> The purpose of the Permanent Committee was to begin investigations of the sexual crimes committed by the UN peacekeepers in the DRC. The intention of the Permanent Committee's establishment was to stop the home states from claiming that the evidence against them was not neutral.

In addition, Zeid recommended organising the UN implementing system, and managerial and command responsibility by adding female peacekeepers to its members. The increase of female peacekeepers would provide opportunities to help victims,

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<sup>100</sup> *Zeid Report*, UN Doc A/59/710.

<sup>101</sup> *Ibid* para 28.

<sup>102</sup> *Ibid* 28.

especially women, who have suffered from sexual exploitation.<sup>103</sup> This recommendation also included a request to change the legal agreements between the UN and the home states that provide soldiers,<sup>104</sup> and to ensure that soldiers will be punished if they commit any unlawful acts, regardless of their immunity.

The fourth recommendation addressed individual disciplinary, financial and criminal accountability. The UN peacekeepers who committed crimes against the UN Secretary-General's bulletin in 2003 should be subject to disciplinary action, and individual accountability should be enacted for those who commit sexual exploitation. This assurance included the right to financial assistance for any children conceived in these relationships. This sexual exploitation should be considered by the UN General Assembly as 'serious misconduct' under staff regulations, and the memorandum of understanding prepared between the UN and the home states should include adherence to the national law of the host states.<sup>105</sup> In addition, Zeid confirmed that the accountability of the UN peacekeepers for serious crimes is complicated because of the different rules and types of the UN peacekeepers. This led the UN to prepare a draft convention on criminal accountability to prosecute UN experts and officials who commit serious crimes during their mission.

Although Zeid's report sought to solve the problems that occurred during the UN peacekeeping operations in the DRC, crimes still continue unabated and the Congolese people are still suffering from exploitation.<sup>106</sup> This was confirmed by neutral

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<sup>103</sup> Simm, above n 94, 154.

<sup>104</sup> Shotton, above n 95, 106.

<sup>105</sup> *Zeid Report*, UN Doc A/59/710, 91–3.

<sup>106</sup> Simm, above n 94, 157.

investigations, when the UN peacekeepers from different countries committed sexual abuse against the locals.<sup>107</sup> This sexual abuse resulted in 10 girls becoming pregnant, which underscores why this issue has such profound legal and international importance.

### **6.3.3.3 Difference between position of UN Secretary-General in DRC and East Timor**

As aforementioned, the prosecution of the UN peacekeepers in the host state depends on the UN Secretary-General's decision to waive the immunity of the UN peacekeepers. Although the right is given to him, for the situation in the DRC, he did not undertake his responsibility and retained the criminals' immunity to be prosecuted in the host states.<sup>108</sup> The UN has no power to prosecute its personnel, rather than sending them back to their home state to face justice.<sup>109</sup> Although the actions of the UN Secretary-General should be strong in all cases to uphold justice, there have been many weaknesses in his position with different cases, including East Timor, the DRC and Somalia. The above points raise the question of why the UN Secretary-General waived the UN peacekeepers' immunity in East Timor, yet did not do the same in the DRC, South Sudan and Somalia, despite the crimes being very similar.

When the UN peacekeepers committed unlawful acts against civilians, East Timor had a stable judicial system. Moreover, the role of the UN peacekeepers during that time was to help East Timor gain its autonomy. For this reason, the UN Secretary-General

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<sup>107</sup> Kate Brannen, July 24, 2018, The Unchanging Reality of the UN Sex Abuse Scandal <<https://www.justsecurity.org/59682/unchanging-reality-sex-abuse-scandal/>> (accessed 6 February 2019).

<sup>108</sup> The *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 and 90 UNTS 327 (entered into force 17 September 1946) ('*General Convention*') s 20. For more information, see Marten Zwanenburg, 'UN Peace Operations Between Independence and Accountability' (2008) 5(1) *International Organizations Law Review* 23,47.

<sup>109</sup> Andrew Ladley, 'Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations' (2005) 1(1) *Politics and Ethics Review* 81, 82.

waived the immunity of the UN peacekeepers, and declared that the Jordanian peacekeepers could be prosecuted under East Timorese law.<sup>110</sup> In addition, he considered that the UN peacekeepers' acts were unofficial and unnecessary for the mission. However, the question remains as to why the Secretary-General's view of the DRC case differed to his position in East Timor, even though the crimes committed in the DRC were more serious than those committed in East Timor. Odello<sup>111</sup> outlined the reason for this difference. He stated that, when a crime is committed by the UN peacekeepers and the host state cannot prosecute them, it is because the state is unstable during that time and is unable to perform prosecution. The situation in the DRC was complicated. There was no stable judicial system to prosecute the criminals, even if the UN Secretary-General waived the UN peacekeepers' immunity. If he waived the immunity, the prosecution had to proceed according to the law of the host state, and the DRC would have been unable to proceed because of the lack of a functionally effective judiciary.

These points confirm that the host states have no jurisdiction over criminal acts even if they occur outside the official function of the UN peacekeeping organisation. Even if immunity is waived by the UN Secretary-General, the host states cannot prosecute the UN peacekeepers. When the UN peacekeepers committed crimes in East Timor, the UN Secretary-General waived their immunity to be prosecuted before East Timorese courts.

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<sup>110</sup> *The Situation in East Timor*, SC Res 1272, UN SCOR, 4057<sup>th</sup> mtg, UN Doc S/RES/1272 (25 October 1999).

<sup>111</sup> Marco Odello, 'Tackling Criminal Acts in Peacekeeping Operations: The Accountability of Peacekeepers' (2010) 15(2) *Journal of Conflict and Security Law* 347, 365.

However, he did not do the same with the DRC because, at that time, there was no judicial system in the DRC suitable to prosecute the UN peacekeepers.<sup>112</sup>

#### **6.3.4 Jurisdiction to prosecute UN peacekeepers**

Normal jurisdiction for each state over its territory means applying its own laws to any person who commits unlawful acts in its territory. However, the situation with the UN peacekeepers is different because, when the UN peacekeepers commit crimes, the prosecution depends on the UN Secretary-General waiving their immunity to allow prosecution under the host state or sending them back to their home state for prosecution. The UN Secretary-General has the right and duty to waive immunity, without prejudice to the UN, in any case where he believes immunity may prevent appropriate justice.<sup>113</sup>

However, as aforementioned, the UN Secretary-General does not always waive immunity to prosecute the UN peacekeepers under the host state law and sends them back to their home state for prosecution because the home states believe their soldiers will receive an unfair process if they are prosecuted in the host countries. For example, 100 Sri Lankan peacekeepers were sent back to their home state from Haiti, as a punishment for sexual crimes against civilians.<sup>114</sup> In addition, in East Timor, when a UN staff member killed a 72-year-old woman in a hit-and-run car accident, the UN

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<sup>112</sup> Simm, above n 15.

<sup>113</sup> Paul C Szasz and Thordis Ingadottir, 'The UN and the ICC: The Immunity of the UN and Its Officials: In Memoriam: Paul C Szasz 1929-2002' (2001) 14(4) *Leiden Journal of International Law* 867,873.

<sup>114</sup> Felicity Lewis, 'Human Rights Abuses in U.N. Peacekeeping: Providing Redress and Punishment while Continuing Peacekeeping Missions for Humanitarian Progress' (2014) 23(3) *Southern California Interdisciplinary Law Journal* 595, 602.

Secretary-General refused to waive immunity because the accident occurred during the staff member's official work.<sup>115</sup>

The above cases confirm that the prosecution of the UN peacekeepers will occur in their home state; however, who has the right to prosecute if the home state has no jurisdiction over these unlawful acts? Referring the UN peacekeepers to their home states for prosecution creates a jurisdiction gap because not all the home states' laws include accountability for committing crimes abroad.<sup>116</sup> Therefore, the UN peacekeepers should be prosecuted according to international law to maintain international justice and prevent them from committing crimes.

In some cases, when the UN Secretary-General waives the immunity of the UN peacekeepers, the host states have the right to prosecute according to their own law. However, the UN peacekeepers can be deployed in states without a functioning government, such as Somalia, Haiti and the Balkans.<sup>117</sup> This problem with the host states can lead the UN peacekeepers to impunity if the home state has no jurisdiction over crimes, and international law has no jurisdiction over the UN peacekeepers' crimes because they work with the UN. For these reasons, if no action is taken by the international community to change the prosecution rules and extend the international jurisdiction to cover crimes by the UN peacekeepers, crimes and impunity may continue to increase.

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<sup>115</sup> Rawski, above n 9, 120. See also Ladley, above n 109, 81. For more information, see Section 2.3.3.1 of this study.

<sup>116</sup> The UNGA Legal Committee, *'Jurisdictional Gaps' Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions*, UN Doc GA/L/3342 (10 October 2008).

<sup>117</sup> Ladley, above n 109, 81, 86.



### 6.3.5 Gap in jurisdiction of home state over UN peacekeepers

The prosecution of the UN peacekeepers who have committed unlawful acts in the host state depends on their home state because the host state cannot prosecute the UN peacekeepers because they have immunity and the UN Secretary-General generally prevents the host states from mounting a criminal prosecution. On 16 March 1993, during a Canadian mission in Somalia, UN soldiers killed a Somali teenager.<sup>118</sup> The host state could not prosecute the soldiers for that crime instead, the prosecution occurred before the Canadian courts. In a second incident, a US soldier, Ronghi, was found guilty in a US court of the rape and murder of a 11-year-old girl in Kosovo.<sup>119</sup> The offender was prosecuted under US law because the host state had no jurisdiction over UN personnel.

In addition, when the UN peacekeepers commit unlawful acts during their official mission, immunity cannot be waived unless authorised under s 20 of the *1946 Convention* by the UN Secretary-General. If the Secretary-General does not waive immunity, the jurisdiction over this unlawful act transfers to the home state. For example, this occurred in East Timor, when a UN staff member killed a 72-year-old woman in a hit-and-run car accident.<sup>120</sup> In these cases, the immunity of the UN peacekeepers causes harm to their victims because the victims wish to see that the person who committed the crime is prosecuted, and feel they should be compensated

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<sup>118</sup> Sandra Whitworth, 'Militarized Masculinities and the Politics of Peacekeeping: The Canadian Case' (2005) *Critical Security Studies in World Politics*, Boulder, CO, Lynne Rienner Publishers 89.

<sup>119</sup> *United States, Appellee, v. Frank J. RONGHI*, Staff Sergeant, U.S. Army, Appellant, 60 M.J. 83 <<https://cite.case.law/mj/60/83/>> (accessed 7 December 2019).

<sup>120</sup> Rawski, above n 9, 120.

by the person who caused them harm. The UN should avoid the miscarriages of justice that can occur from sending criminals back to their home states for prosecution.

In contrast to the above examples, the case of US peacekeeper, Sergeant Frank J Ronghi, was different. In 2000, Ronghi raped and killed an 11-year old girl called Merita Shabiu in Kosovo.<sup>121</sup> The UN Secretary-General did not waive the soldier's immunity or seek to prosecute him under the host state jurisdiction or international law, even though his action was considered a serious crime<sup>122</sup> and a grave breach of Article 147 of *Geneva Convention IV*, given that the acts were considered wilful killing and torture. To protect international justice and the human rights of civilians during the UN peacekeeping operations, immunity of the UN peacekeepers should be waived when they commit crimes against civilians of the host states, and they should be prosecuted according to the host state's courts or international courts to achieve justice. In the Kosovo case, the US soldier was referred to a military court in Germany in 2000, and the court sentenced the offender to life imprisonment; however, the victim's family has not received any compensation.<sup>123</sup>

In view of the above, the waiving of immunity is considered the best legal step to prosecute the UN peacekeepers in the host states and prevent them from impunity, which may occur when they commit unlawful acts because their immunity prevents the host state or international judicial system from prosecuting them. When the UN peacekeepers commit a crime during their UN mission, the UN only strips them of their

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<sup>121</sup> 'The Forgotten Story of Rape and Murder in Kosovo, American-Style', *The Independent* (online) <<https://www.independent.co.uk/news/world/europe/the-forgotten-story-of-rape-and-murder-in-kosovo-american-style-622977.html>> (accessed 11 July 2019).

<sup>122</sup> Rawski, above n 9, 119.

<sup>123</sup> 'The Forgotten Story of Rape and Murder in Kosovo', above n 121.

weapons and sends them back to their home state for prosecution under their home state's law. The prosecution of the UN peacekeepers under their home state's law may create a jurisdiction gap because not all states have jurisdiction over unlawful acts if committed out of their territory, such as New Zealand.<sup>124</sup> Meanwhile, several states have jurisdiction over limited crimes if their citizens commit them abroad, such as Ireland. These issues raise questions of how to prosecute peacekeepers if the UN Secretary-General does not waive immunity and the home state does not have criminal jurisdiction over crimes committed outside its territory by the UN peacekeepers. This will be discussed in the next section.

The prohibition on the violations of IHR in armed conflicts has been clearly declared in many international conventions and instruments. One of the central conventions is ECHR in Armed Conflicts. No derogation of human rights in this convention is permissible even in emergency or armed conflict.<sup>125</sup> Article 15 of ECHR has confirmed the restriction and non-derogable of human rights during the time of war. These rights include the right to life according to Article 2, the prevention of torture under Article 3, and the prevention of slavery and forced labour under Article 4. In addition, most of the contributing states of the UN peacekeeping forces are parties to the Convention Against Torture (CAT).<sup>126</sup> CAT has prohibited 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person' for intimidation or

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<sup>124</sup> UNGA Legal Committee, 'Jurisdictional Gaps' Among Elements Impeding Efforts on Accountability of Personnel on United Nations Missions' (GA/L/3342, 10 October 2008).

<sup>125</sup> Heintze, Hans-Joachim, *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism* / edited by Hans-Joachim Heintze, Andrej Zwitter (Berlin, Heidelberg: Springer Berlin Heidelberg : Imprint: Springer, 2011) 88.

<sup>126</sup> The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, open for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT').

discrimination or any other purpose.<sup>127</sup> These regional and international conventions show that IHR are linked to all human lives with a universal value, not just in the time of peace but also during the time of war. However, the continuing IHR violations during the UN peacekeeping operations shows that IHR obligations are ‘nonsense upon stilts’.<sup>128</sup> Although IHR are applicable extra-territorial of the state parties in case their citizens violate human rights,<sup>129</sup> the home states of the UN peacekeepers seldom go with the prosecution option to halt the violation of IHR in the host states.<sup>130</sup> Therefore, most of IHR violations against civilians go with impunity and civilians are usually unable to seek any redress.<sup>131</sup> Leaving the prosecution of the UN peacekeepers to their home state has caused them to commit numerous crimes and increased their impunity. Consequently, the impunity of the UN peacekeepers has increased because international law has no jurisdiction over them; and not all home states have extra-territorial jurisdiction over their citizens if they commit crimes while working with the UN. Therefore, immunity causes a jurisdiction gap in international prosecution by leaving the UN peacekeepers’ cases to be considered under national law.

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<sup>127</sup> Ibid, art 1.

<sup>128</sup> Conor Foley, 'The Human Rights Obligations of un Peacekeepers' (2016) 8(4) *Global Responsibility to Protect* 431, 435.

<sup>129</sup> The European Court of Human Rights in the *AI-Skeini* case, when six Iraqis were killed by British forces in 2003, the Court decision was that 'in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's jurisdiction' *AI-Skeini and Others v. UK*, Appl. No. 55721/07, Judgment (Grand Chamber) 7 July 2011.

<sup>130</sup> In *Bankovic v. Belgium and 16 Other Contracting States* the European Court of Human Rights ruled inadmissible a claim brought by relatives of five employees of a Serbian television centre who were killed by a NATO bomb during the Kosovo crisis; for more information see *Bankovic v. Belgium and 16 Other Contracting States*, Appl. No. 52207/99, (Grand Chamber), Decision on Admissibility, 19 December 2001; Haiti peacekeeper abuse and why it's so hard to prosecute international peacekeepers <<https://www.undispatch.com/haiti-peacekeeper-abuse-and-why-its-so-hard-to-prosecute-international-peacekeepers/>> (accessed 20 December 2019). And also see Felicity Lewis, 'Human rights abuses in UN peacekeeping: providing redress and punishment while continuing peacekeeping missions for humanitarian progress' (2014) 23 *S. Cal. Interdisc. LJ* 595, 597.

<sup>131</sup> Lewis, Ibid.

#### **6.4 Approach to prosecute UN peacekeeping forces under international law**

The previous section emphasised the authority of the UN Secretary-General to waive immunity and determine when and how immunity should be waived. This section focuses on the prosecution components and explains under which jurisdiction and forum the UN peacekeepers should be appropriately prosecuted. Although the UN peacekeeping forces were founded to protect civilians in armed conflicts and help the states in humanitarian crises, their members have committed numerous crimes against civilians. Moreover, this section will explain which common crimes have been committed by the UN peacekeeping forces. In addition, it will explain why the UN peacekeepers are still committing these crimes in their missions, especially sex-related crimes against women.

In 1999, the HRW criticised the acts of sexual exploitation and child prostitution that were committed by humanitarian organisation members in refugee camps.<sup>132</sup> Asmita Naik<sup>133</sup> met some of the victims in the refugee camps and discovered that several of the crimes committed by the UN peacekeepers were with children. One of those cases was with a child named Ma:

When Ma asked me to go to the stream to wash plates, a UN peacekeeper asked me to take my clothes off so that he could take a picture. When I asked him to give me money, he told me, no money for children, only biscuit.<sup>134</sup>

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<sup>132</sup> Asmita Naik, 'Protecting Children from the Protectors: Lessons from West Africa' (2002) (15) *Forced Migration Review* 16.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

Thus, the UN peacekeepers exploited their position to commit sexual crimes, even against children. All these crimes were confirmed by Zeid in his report<sup>135</sup> of 24 March 2005. The UN peacekeepers exploit their immunity<sup>136</sup> to attain impunity from the host state's jurisdiction, even though the immunity was only granted to protect the independence of the UN missions from the host state harassment, not to act as a barrier to justice.

The immunity of these forces has caused several legal problems, such as with the criminal jurisdiction of the host state over the UN peacekeepers and the legal relationship with them. This created the main problem in prosecuting the UN peacekeepers, as the host state has no criminal jurisdiction over the UN peacekeepers unless the UN Secretary-General waives their immunity, and the international judicial system has no jurisdiction thus far. According to the previous section and the above points, the prosecution of the UN peacekeepers should occur in their home state. However, this raises the question of how the UN peacekeepers should be prosecuted if they commit unlawful acts in the mission country and the crimes gravely breach the *Geneva Conventions* and the *Rome Statute*, yet their home state has no jurisdiction over crimes committed beyond its territory. Therefore, this study examines the principle of international jurisdiction, including its capacity to prosecute the UN peacekeepers and its legal challenges.

#### **6.4.1 Prosecuting in special international criminal tribunals/courts**

Special tribunals/courts may be established within the ambit of Chapter VII of the UN Charter pursuant to a UNSC resolution, as occurred in the case of the East Timor Special

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<sup>135</sup> *Zeid Report*, UN Doc A/59/710, paras 89, 93.

<sup>136</sup> According to s 20 of the *1946 Convention*.

Panels, ICTY, ICTR, Sierra Leone Special Court and Cambodian Extraordinary Chamber. The UNSC attempted and is still attempting to legislate the rules required to hold accountable people who commit international crimes because criminals' impunity for serious international crimes is still a primary concern of the international community. For this reason, this section identifies the purpose of those tribunals/courts and whether it is possible to prosecute the UN peacekeepers from different states if they have committed serious crimes.

The purpose of the tribunals/courts is to prosecute those who have committed serious violations of IHL and grave breaches of the *Geneva Conventions*, according to Articles 1 and 2 of the *ICTY Statute*. According to Zeid's report, this tribunal was established by the UN according to Chapter VII of the UN Charter for urgent issues, as explained in Zeid's report, such as prosecuting criminals who have committed grave crimes. For example, the ICTY was established by the UN in 1993<sup>137</sup> to prosecute war crimes committed in Yugoslavia. In addition, the ICTR was established by the UNSC on 22 February 1995<sup>138</sup> to prosecute those who committed crimes, such as genocide, crimes against humanity and violations of Common Article 3 of the *Geneva Conventions*. The above tribunals were important because they provided protection to civilians by prosecuting people who committed serious crimes in Rwanda and Yugoslavia. The above points indicate that it is possible for the UN to prosecute people who commit serious crimes by establishing special tribunals to enable that prosecution.

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<sup>137</sup> *ICT Yugoslavia*, SC Res 827, UN SCOR, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (25 May 1993).

<sup>138</sup> *The Decision to Designate Arusha as the Seat of the International Tribunal for Rwanda*, SC Res 977, UN SCOR, 3502<sup>nd</sup> mtg, UN Doc S/RES/977 (22 February 1995).

However, the situation with the UN peacekeepers is different, even when they have committed serious crimes. For example, the crimes committed by the UN peacekeepers were confirmed by Zeid when he explained that numerous crimes were committed by the UN peacekeepers against civilians in the host states, and most of these crimes were international crimes, such as sex crimes against women and children under 18 years of age.<sup>139</sup> Therefore, to explain why the UN cannot establish a special tribunal or court to prosecute the UN peacekeepers? To answer this question, we must determine which states the UN peacekeepers come from and under which jurisdiction they can be prosecuted when working on a UN mission.

According to Zeid, the UN peacekeeping personnel come from different countries; for this reason, they work under different rules and military laws because, when deployed under the UN umbrella, they operate under the laws of their home state. Consequently, the UN cannot prosecute them, even if their home state has no jurisdiction over their crimes, and even though Article 3 of the *Hague Convention IV* in 1907<sup>140</sup> states that ‘A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’. However, for the UN peacekeepers who commit crimes outside their home state, they must be prosecuted in their home state. In addition, one question remains: what is the ICC jurisdiction over the UN peacekeepers? The next section will focus on this question and the rule of the ICC.

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<sup>139</sup> *Zeid Report*, UN Doc A/59/710, para 9.

<sup>140</sup> Fourth Hague Convention in 1907.



#### **6.4.2 Prosecution according to the *ICC Statute***

To discuss how to prosecute the UN peacekeepers, this section explains the most common types of crime committed by the UN peacekeepers and whether these crimes fall under the jurisdiction of the ICC. According to Zeid's report, sexual crimes against women in the host states<sup>141</sup> and grave breaches mentioned in Article 147 of the *Geneva Convention IV* are the most common crimes committed by the UN peacekeepers:

Involving of the UN peacekeepers in any of the following acts is a breach to Article 147 of the *Geneva Convention IV*, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.<sup>142</sup>

The above points confirm that the crimes committed by the UN peacekeepers violated the *Geneva Conventions* because the most common crimes were crimes against civilians of the host states, especially women and girls.<sup>143</sup>

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<sup>141</sup> *Zeid Report*, UN Doc A/59/710, para 9.

<sup>142</sup> See Article 147 of the *Fourth Geneva Convention*.

<sup>143</sup> *Zeid Report*, para 9.

In addition, the *Rome Statute*<sup>144</sup> determines grave breaches founded in Article 147 of the *Geneva Convention IV* as war crimes, according to Articles 8(1) and (2) (a), especially if the crimes are committed as part of a systematic plan. In this case, the prosecutor of the ICC has the jurisdiction to prosecute the UN peacekeepers if they have committed any of the above crimes, as these fall under the definition of war crimes. However, criminals to be prosecuted under the ICC should be referred by the UNSC, and must be from state parties to the ICC, according to Article 14 of the *Rome Statute*. Also, the criminalisation can be through the prosecutor as the investigation can be started based on the commission of crimes under the jurisdiction of the ICC. This prosecutorial initiative may be undertaken according to Articles 13(c) and 15 of the *Rome Statute* as an ‘automatic trigger mechanism’, even if the UNSC or the states parties have not referred the crimes.<sup>145</sup> Therefore, given that the above information confirms that the UN peacekeepers have committed crimes that violated the *Geneva Conventions* and *Rome Statute*, this study sought to examine whether the ICC has jurisdiction over the UN peacekeepers’ crimes.

#### **6.4.3 Legal challenges to host and home states jurisdictions over UN peacekeeping forces**

When the UN peacekeepers commit criminal misconduct, the prosecution can occur under one of three jurisdictions the host state; the home state, or international jurisdiction. The host state jurisdiction depends on the UN Secretary-General’s decision to waive (or not waive) the UN peacekeepers’ immunity. If he does not waive the immunity, the UN peacekeepers who committed the crimes are referred to their home state for prosecution. Thus, if the UN peacekeepers are not prosecuted in the host state,

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<sup>144</sup> The *Rome Statute*.

<sup>145</sup> M Rafiqul Islam, *International Law: Current Concepts and Future Directions* (LexisNexis Butterworths, 2013) 534.

they may be prosecuted before their home state's courts. However, this is not a solution for the impunity because not all the home states have legislation or jurisdiction over criminal acts committed by their personnel while they work under the UN authority. Besides, the ability of the home states to conduct an impartial 'investigation, access to victims and witnesses, translation issues, and the storing and preservation of evidence' make the prosecution more complicated.<sup>146</sup> Some home states may not have a credible judiciary capable of conducting trials of their own nationals serving as UN peacekeepers committing crimes in a foreign jurisdiction. Also, some home states may be willing to try their own nationals serving as the UN peacekeepers committing crimes for the sake of only holding such trials without rendering proper justice and appropriate punishment. Therefore, the jurisdiction over the UN peacekeepers still remains a significant challenge, which means when the UN peacekeepers commit any misconducts which can go without prosecution due to the lack of jurisdiction in both states (the host and home states) and international law. This leads us to rely on international jurisdiction for which options are discussed below.

#### **6.4.4 Hybrid tribunals/courts**

The previous discussion outlined the challenges that faced the prosecution of the UN peacekeepers before the ICC and international crimes tribunals/courts. However, another alternative way to prosecute the UN peacekeepers may be by establishing a special hybrid tribunal or court exclusively to prosecute the UN peacekeepers for committing crimes in the host state. This type of tribunal/court raises questions about who the judge in this court should be, and where the judge should come from. A hybrid

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<sup>146</sup> Kathleen Jennings, Sep 18, 2017, *The Immunity Dilemma: Peacekeepers' Crimes and the UN's Response* <<https://www.e-ir.info/2017/09/18/the-immunity-dilemma-peacekeepers-crimes-and-the-uns-response/>> (accessed 10 August 2019).

court could involve judges from the host state, the home state and international locations. These courts must be supported by the host state authorities to be established. Therefore, the rule of law and capacity-building efforts require interaction between the home states, the UN personnel and their counterparts in the criminal justice sector of the host state.<sup>147</sup>

The purpose of establishing a special hybrid tribunal/court is to prosecute the UN peacekeepers who commit crimes in the host states, such as SEA, and the home state cannot prosecute them, as mentioned in the Zeid Report. In addition, hybrid courts are required to deal with incidents of SEA and other crimes by the UN peacekeepers when their home states fail to exercise jurisdiction. The failure of the home states has led groups of legal experts to suggest establishing courts in the host state's legal system.<sup>148</sup> The purpose of such a hybrid tribunal/court is to avoid decreasing the UN peacekeeper's participation in the UN missions because, if the home states feel that their peacekeepers are without immunity and can be prosecuted, they may decide against sending peacekeepers to future missions.

Zeid recommended to the UN the establishment of a special hybrid tribunal/court to maintain justice for all victims by prosecuting the UN peacekeepers for their crimes. If the sending states prove unwilling or unable to prosecute offenders,<sup>149</sup> then the host state can request the establishment of a hybrid tribunal/court or ask the court to

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<sup>147</sup> Róisín Sarah Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving beyond the Current 'Status Quo' and Responsibility under International Law* (Martinus Nijhoff Publishers, 2014) 245.

<sup>148</sup> Ibid; *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*, UN GAOR, 66<sup>th</sup> sess, Agenda Item 32, UN Doc A/60/980 (16 August 2006) 33.

<sup>149</sup> Burke, above n 147, 245.

prosecute if it has already been established. This tribunal/court will exercise justice through involving judges from all involved countries, as well as international judges. Zeid's report further suggests that the tribunal/court must operate in the host state because this is where the witnesses and evidence is located. Thus, 'holding criminal trials in the host State will avoid the cost, delays and inconvenience of witnesses having to travel overseas or of evidence having to be transmitted abroad'.<sup>150</sup> Therefore, the jurisdiction between the home state, the host state and court can be apportioned by hybrid justice, which will demonstrate that the UN peacekeepers are not immune from the law.

## **6.5 Conclusions**

Based on the analysis in this chapter, it is apparent that the way in which jurisdiction has previously been defined is insufficient to counter the unique challenges and difficulties created by international involvement and strategic force agreements. Until the past few decades, many nations have relied on jurisdictional precedent that evolved over many hundreds of years. For example, in several European nations, the history of jurisprudence can be traced back to ancient Rome. However, the needs and endemic changes created by the twenty-first century indicate the need for jurisdictional re-evaluation of the means by which nations engage with and alter existing treaty and jurisprudence as a way to fulfil international obligations.

The changes exhibited over the past decades have been largely contingent on issues pertaining to prosecuting accused criminals based on international law and/or domestic law, concerning the nation in which they committed the crime and the nation from which they came. The clear problem in the situations discussed in the analysis is that

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<sup>150</sup> *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*, UN GAOR, 66<sup>th</sup> sess, Agenda Item 32, UN Doc A/60/980 (16 August 2006) 27 b.

existing jurisdictional standards to which such individuals are beholden leave a great deal to be desired. This chapter contests the position that a clear and resolute interpretation of the fact that the existing law is sufficient to punish and curtail potential illegalities by the UN peacekeepers or those that are working at the behest of an international organisation within a foreign country. Instead, this chapter argues that the jurisdictional power and level to which prosecution for crime occurs as it relates to international organisations and their scope of activities remains inherently lacking.

Although potentially beneficial, the degree and extent to which international cooperation has occurred thus far does not indicate that there will be a significant level of agreement at a global scale anytime soon. One of the reasons that caused there is no specific international jurisprudence is the cultural and historical differences that exist in the ways that nations punish crimes. However, an even more important issue is that the majority of the cases discussed in this chapter occurred in relatively undeveloped regions with clear and distinct political agendas for non-intervention. As such, many actors in these states have used the lack of jurisdictional precedent as a means to draw further attention to international disputes and seek to halt the means by which the UN peacekeepers can operate within their territories. This, of course, does not indicate that all operations within these states have been above board and that no laws have been infringed or broken by the UN peacekeepers. However, it does indicate that there is a distinctly political slant in the way these cases have not been understood. This is likely one of the main reasons that a level of jurisdictional universality has not yet been applied or agreed upon by states. Similarly, fear of losing a level of control and sovereignty to an international body has further discouraged developed states from pursuing this goal as a primary objective in the international community.

With such an understanding, it is the expectation of this analysis that further regulation and application of international law in the domestic context for aid workers and troops stationed on international missions will need to be thoroughly evaluated and agreed upon if the situation is to improve in the near future. Obvious impediments to this goal include the overall level of jurisdictional overreach, potential sovereignty claims, and the degree and extent to which international cooperation can exist in terms of ratifying a body or rubric/framework that might be drafted in the future. Sadly, the existing level of international cooperation existing around other issues of even greater importance illustrates that there is unlikely to be a definitive level of agreement for this type of measure in the near future. Instead, this research expects that the current situation, as untenable as it may be, is likely to proliferate until an incident of international importance or scope will engage stakeholders and force the issue onto the international jurisdictional stage.

## **Chapter 7**

### **Conclusion and Recommendations**

#### **7.1 Overview of thesis**

The aim of this thesis has been to contribute to strengthening the existing protection regime of civilians or at least improve their protection against crimes committed by local insurgents, members of national armies and the UN peacekeepers during the UN peacekeeping operations in the conflict zones of the host states. A precondition to achieve effective UN peacekeeping operations is to establish an accountability regime for negligent failure and/or inaction by the UN peacekeepers, given the increase in crimes against civilians perpetrated by the third parties (local insurgents and members of national armies) without any serious intervention by the UN peacekeeping forces to stop these crimes, even if this is one of their primary duties. The beginning of this thesis explained the responsibilities of UN peacekeepers to protect civilian populations and the mechanisms that make the UN peacekeepers accountable for their actions, particularly when they fail to protect civilians.

Civilians have experienced serious suffering caused by third-party crimes in the host states, such as the cases discussed in Chapter 4 in the DRC and South Sudan. In these cases, large numbers of civilians were killed or attacked by the third parties. The committing of these atrocious crimes led this research to: (1) determine whether the UN peacekeepers can be held responsible for their failure as a crime of omission, (2) determine the reason behind the third parties targeting civilians in the host states, (3) identify the reasons that the UN peacekeeping forces have not stopped the third parties from attacking civilians and (4) explore how the UN peacekeepers can be held responsible for inaction in these situations.



### **7.1.1 Legal system's ambiguities and insufficient protection for civilians**

Chapter 2 explored the legal system surrounding the UN peacekeeping forces, based on the role and mandates of the UN peacekeepers in the host states. The purpose of examining the role and mandates of the UN peacekeepers was to clarify the system surrounding the UN peacekeeping forces and their responsibilities in terms of their protection of civilians. Therefore, the protection of civilians was discussed in the time range extending before and after the Brahimi Report to clarify the development of their responsibility to protect civilians. One of the main problems facing the UN peacekeeping forces is that civilians still face serious crimes without real solutions, even though the UN and international community have aimed, since the end of the Cold War, to prevent crimes by the third parties through robust the UN peacekeepers.

The principal problems found in the discussion are that sufficient action was not taken by the UN to enable a clear strategy to end crimes against civilians in the situations before and after adoption of the Brahimi Report, that the report did not improve the protection of civilians, and that protecting civilians remains a challenge for the UN peacekeeping operations.<sup>1</sup> This report mentioned a limitation on the use of force, as use of force was only authorised when the UN peacekeeping forces needed it to defend themselves.<sup>2</sup> In this case, allowing the UN peacekeepers unlimited freedom to use force

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<sup>1</sup> H Willmot and S Sheeran, 'The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices' (2013) 95(891) *International Review of the Red Cross* 530.

<sup>2</sup> *Report of the Panel on United Nations Peace Operations*, UN Doc A/55/305-S/2000/809 ('*Brahimi Report*') para 48.

to prevent attacks against civilians may confirm that civilians are the main losers during these conflicts. However, the use of force to protect civilians after adoption of the Brahimi Report did not change the situation with civilians, as crimes are still being committed.<sup>3</sup> Hence, the protection of civilians cannot be approached by the authorisation to use force only without give priority for the legal responsibility of those who deliberately neglect their duty.

Examination of the accountability mechanisms for the prosecution of the UN peacekeepers has found that they can easily go unpunished when they commit crimes. Chapter 2 identified a gap in the legal system of the UN peacekeeping forces that ensures they have no responsibility for failure in their duty or misconduct against civilians. The UN peacekeepers cannot be held legally liable if the failure to protect civilians is not criminalised by law and there is no legal system to criminalise this failure in the host states.

### **7.1.2 UN peacekeeping forces' responsibility for protecting civilians under IHL**

Chapter 3 discussed the protection of civilians according to IHL. This chapter discussed the responsibility of the UN peacekeepers according to IHL to explore whether they are responsible for preventing crimes against civilians that are committed by the third parties. The findings here indicate that the protection of civilians appears clearly in IHL, especially the *Geneva Conventions* and their *Additional Protocols*, which are applicable to the UN peacekeeping forces, together with other conventions of IHL. Thus, the UN peacekeeping forces are responsible for violations against civilians of the host states. This responsibility is based on Article 1 of the *Geneva Conventions* and Article 1 of *Additional Protocol I*, as these conventions and protocols are applicable 'in all

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<sup>3</sup> *Mandate for MONUC (UN Organization Mission in the Democratic Republic of the Congo)*, SC Res 1291, UN SCOR, 4104<sup>th</sup> mtg, UN Doc S/RES/1291 (24 February 2000) paras 7–8.

circumstances’, and mean that forces are bound by IHL, even when they are under the command of the UN.

Therefore, if the UN peacekeepers neglect the prevention of misconduct against civilians by the third parties, they should be criminally responsible for violation of IHL. However, IHL disregards an essential issue in the protection of civilians—the issue of how to compel the UN peacekeepers to discharge their duty, because what has been listed in IHL and considered a responsibility for the UN peacekeepers is insufficient for protection of civilians in the host states. In particular, there is no clear explanation regarding the prosecution of the UN peacekeeping forces if they commit crimes against civilians or fail to prevent crimes.

### **7.1.3 UN peacekeepers’ neglect of responsibility to prevent crimes by third parties**

Chapter 4 explored the UN peacekeepers’ deliberate failure to protect civilians through examining practical cases—MONUSCO in the DRC and UNMISS in South Sudan, in which third parties attacked civilians repeatedly, without any reaction by the UN peacekeepers to stop the attacks. These two cases revealed multiple reasons that crimes by the third parties continue being committed against civilians, which are exacerbated by the UN peacekeepers’ inability to stop them, and the fact that the UN peacekeepers may deliberately neglect their duty and leave civilians without protection. Additionally, there is no system to prosecute the UN peacekeepers, even in cases where their immunity has been waived by the UN Secretary-General, because the host state does not always have a judicial system to hold them accountable.

In the DRC, MONUSCO failed to secure civilians from being a target for the third parties, and the in-depth investigation in Chapter 4 found that the reason for this was deliberate neglect of the duties of the UN peacekeepers in numerous instances. During

the time of the attacks, the UN peacekeepers had the mandates and equipment to protect civilians,<sup>4</sup> yet did not take the necessary measures to stop the crimes against civilians.<sup>5</sup>

During UNMISS in South Sudan, the failure of the UN peacekeepers led to the third parties attacking civilians while they were residing in the site that had been prepared for displaced people. In this case, the UN peacekeepers did not protect civilians, and neglected their priority duty mandated by the UNSC. Thus, UNMISS should be responsible for these crimes, even though the third parties committed them.<sup>6</sup> Many crimes highlight the inability of the UN peacekeepers to stop criminals attacking civilians, and, on several occasions, the UN peacekeepers were even unable to protect themselves, such as when a helicopter belonging to the UN was shot down by the IGAD.<sup>7</sup> In addition, the investigation in this case found strong factors that prevent the host states from prosecuting the UN peacekeepers, such as the immunity granted to the UN peacekeepers, which exists as a barrier to holding them accountable for their crimes, and the host state being eligible to undertake the prosecution process. South Sudan could not prosecute the UN peacekeepers because it was a new state and its judicial system was inadequate to prosecute those who committed crimes in its territory.

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<sup>4</sup> *Democratic Republic of the Congo*, SC Res 2147, 7150<sup>th</sup> mtg, UN Doc S/RES/2147 (28 March 2014).

<sup>5</sup> *DR Congo: Investigation into Misconduct Opened* <<https://monusco.unmissions.org/en/dr-congo-investigation-misconduct-opened>> (accessed 08 November 2018); *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the UN Secretary-General*, UN GAOR, 66<sup>th</sup> sess, Agenda Item 139, UN Doc A/66/699 (17 February 2012) para 19; see 'DR Congo Launches Offensive Against FDLR Rebels', *Al Jazeera* (online) <<https://www.aljazeera.com/news/2015/02/dr-congo-offensive-fdlr-rebels-150226021624157.html>> (accessed 10 October 2018).

<sup>6</sup> *MSF Internal Review of the February 2016 Attack on the Malakal Protection of Civilians Site and the Post-event Situation* <[https://reliefweb.int/sites/reliefweb.int/files/resources/malakal\\_report\\_210616\\_pc.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/malakal_report_210616_pc.pdf)> (accessed 21 December 2018).

<sup>7</sup> *Reports of the UN Secretary-General on the Sudan and South Sudan*, SC Res 2252, 7581<sup>st</sup> mtg, UN Doc S/RES/2252 (15 December 2015).

In both cases, it is clear that the UN peacekeepers failed to discharge their duty, which is mainly to prevent crimes against civilians by the third parties. Therefore, they should be prosecuted for their failure that ideated in the discussion because the attacks were within the ability of the UN peacekeepers to prevent. However, no serious steps have been taken thus far to end this deliberate neglect, and the UN peacekeepers still attain impunity. Therefore, although the failure of the UN peacekeeping forces has caused serious harm to civilians and increased their suffering, which is a violation of LOAC,<sup>8</sup> it remains unclear whether it can be considered a crime of omission. The international community must end this failure and develop a clear strategy to criminalise the UN peacekeepers for their neglect in protecting civilians.

#### **7.1.4 Failure to discharge duties a crime in both international and domestic law**

The analysis in Chapter 5 found that failure in duty may be criminalised as a crime of omission, according to international criminal law and domestic law. The important part of the legal system in international law has generally prosecuted failure to protect civilians, such as with the ICC, ICTY and ICTR. The ICC clearly states that whoever fails in their duty will be responsible for the result of this failure, based on Article 28 of the *Rome Statute*. For example, Gombo was prosecuted for crimes against humanity because of his neglect in preventing certain crimes, even though perpetrators of the crimes were from the Movement for the Liberation of Congo soldiers.<sup>9</sup> Gombo failed to direct those under his command to prevent crimes being committed against civilians. Sljivancanin was also prosecuted by the ICTY because he failed to protect prisoners,

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<sup>8</sup> *Protected Persons* <<https://www.icrc.org/en/document/law-armed-conflict-essentials#part4>> (accessed 17 January 2019).

<sup>9</sup> *Prosecutor v Jean-Pierre Bemba Gombo (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08, 21 March 2016).

and his failure was considered a violation of the law of war, given that he was in charge of protecting these prisoners.<sup>10</sup> The ICTR had no different scenario to other international courts when they designated individuals who failed in their duty as responsible for the entire results of that failure. For this reason, Jean Mpambara was prosecuted according to Article 6 of the ICTR because he failed to prevent crimes in Rwanda.<sup>11</sup> Therefore, there is no doubt that the crime of omission exists in international law and that individuals who commit this crime incur criminal responsibility and are subject to prosecution.

Moreover, failure in duty has been stated as a crime of omission on numerous occasions in domestic law. For example, English law has treated failure as a crime, even though it is not mentioned exactly for the crime of omission.<sup>12</sup> The contents of Chapter 5 indicate the types of crimes perpetrated by the UN peacekeepers in the host states, and the ways in which the law—either international or domestic law, using different expressions—describes these acts as crimes, and prosecutes those who commit the crime of omission. Failures by the UN peacekeepers in most cases are considered crimes of omission. However, there is no mention of the punishments for such crimes in the legal system of the UN peacekeeping forces.

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<sup>10</sup> *Prosecutor v Mile Mrksic Veselin Sljivancanlin* (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-95-13/1-R.1, 8 December 2010) para 32.

<sup>11</sup> *Prosecutor v Jean Mpambara (Judgement)* (International Criminal Tribunal for Rwanda, Case No ICTR-01-65-T, 11 September 2006) para 21.

<sup>12</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 2003) 47.

### **7.1.5 Insufficient jurisdiction to counter challenges in prosecuting UN peacekeeping forces**

The analysis in Chapter 6 indicated that jurisdiction over the UN peacekeepers is insufficient to counter the unique challenges and difficulties created by international involvement and strategic force agreements, despite the fact that states have adopted jurisdictional precedent that has evolved over many years. Generally, the law presented over the long history of prosecuting criminals and developing strategies to prevent crimes based on international law and domestic law is that people who commit misconduct must take responsibility and be prosecuted. However, currently, there is impunity when the UN peacekeepers commit crimes from international and domestic jurisdictions, such as the situation with the UN peacekeepers, who have immunity from being prosecuted by the host states, international courts and their home states.

The obvious drawback to the situations defined and elaborated in this document is that there are no criteria to waive immunity, even though the UN Secretary-General has the authority to waive immunity. Therefore, a practical reform of the jurisdiction over the UN peacekeepers could help prevent civilians being affected by the crimes committed by the UN peacekeepers or resulting from the UN peacekeepers' failure to discharge their duty to protect civilians, such as from crimes committed by the third parties. The existing law lacks jurisdictional power and does not specify the level at which prosecution for crimes should occur, as it relates to international organisations and their scope of activities.

There is an even more critical issue—that the majority of deployments of the UN peacekeeping forces discussed in this research occurred in relatively undeveloped regions with clear and distinct political agendas for non-intervention. The gap in the jurisdiction has caused to exploit the unstable situation in the host states by many actors

and leave civilians suffering. This does not indicate that all operations in these nations have been legitimate and that no laws have been infringed or broken by the UN peacekeepers. However, it does indicate that the waiving of immunity to enable prosecution of the UN peacekeepers might have no effect because of the political situation or collapse of the system in the host states. This means that the UN peacekeepers can easily attain impunity when committing crimes in the host states, and civilians will be in danger because of the jurisdictional gap that allows the UN peacekeepers to go unpunished if they do not act to prevent crimes against civilians.

## **7.2 Recommendations**

The entire system of the UN peacekeeping suffers from multiple gaps in legal jurisdiction, the ways the UN peacekeepers can be prosecuted, and the UN peacekeepers' ability to achieve their duties. To provide suitable protection to civilians and accomplish the UN mission objectives, the gaps in the system of legal regulation must be addressed. The main two issues are as follows: (1) UN personnel can engage in SEA and other crimes without responsibility; and (2) UN personnel cannot always prevent attacks from the third parties because they are working in the host states without the proper abilities and facilities to face the challenges of the third parties. Therefore, the argument here is that, if the UN peacekeeping forces wish to protect civilians in the host state, support must be provided to these forces to succeed and avoid failure to prevent violence. This may be accomplished by two steps: (1) strengthen the forces' ability on the battlefield to halt the third parties from committing crimes against civilians and (2) improve the regulatory system of the UN peacekeeping forces to end the abuses and exploitation of civilians by some of the UN peacekeepers through holding them accountable and bringing them to justice.



### **7.2.1 Prevent crimes by reforming UN peacekeeping forces' system**

The prevention of the crimes against civilians is a priority concern, warranting a reform of the jurisdiction system of the UN peacekeeping forces. The reform of the system should undergo three steps: (1) establish an independent judicial system to prosecute the UN peacekeepers to hold them accountable, (2) criminalise deliberate failure in duty as a crime of omission that entails criminal responsibility and (3) reform the process and conditions of waiving the immunity system so that it does not enable impunity for the UN peacekeepers.

#### **7.2.1.1 Establish independent judicial system to prosecute UN peacekeepers**

The main recommendation of this thesis, based on the data presented in the analyses, is to end impunity and protect civilians through establishing an independent judicial system. This will be a suitable way to avoid the challenges faced by prosecuting the UN peacekeepers before the ICC and special international criminal tribunal/court, as examined in Chapter 6. Adopting such an independent judicial system is not easy to accomplish; however, it can be achieved through establishing a hybrid court and involving judges from the host state, the home state and internationally.

The establishment of a special court would help prosecute the UN peacekeepers who have committed crimes or omitted to prevent the crimes of the third parties in the host states, in situations where the home states are unable to prosecute, as stated in the Zeid Report. In addition, it is necessary to handle incidents by the UN peacekeepers when their home states fail to exercise jurisdiction. If this step is taken, civilians will be protected in an impartial manner and be able to live in a safer environment, given that, if a UN peacekeeper commits a crime or violates the law, this court will maintain justice and prosecute the guilty. Moreover, using a hybrid court will avoid decreasing the participation of the UN peacekeepers in UN missions.

#### **7.2.1.2 Criminalise deliberate failure in duty as a crime of omission**

Considering failure in duty as a crime of omission (when it meets the specified criteria) will improve the protection of civilians and close the gap of impunity for the UN peacekeepers. The non-accountability of the UN peacekeepers is harmful and crimes of the third parties against civilians of the host states have been increased. The UNSC has changed the mandate of the UN peacekeepers by including the protection of civilians as a duty for them, yet without mention of the consequences for not achieving this duty or how the UN peacekeepers will be held accountable, even though their failure in most cases is considered a crime of omission. Crimes of omission and their punishments must be discussed in the legal system of the UN peacekeeping forces.

#### **7.2.1.3 Reform the ‘waive of immunity’ system**

The immunity of the UN peacekeepers and its waiving must be reformed as a system because it is the strongest gap in the UN peacekeeping operations that has allowed personnel to remain unpunished when they commit crimes. The only power the UN holds in punishment is to strip the perpetrators of their position and send them back to their home states. In this case, there is no guarantee that the perpetrators will be prosecuted in their home states because some states do not criminalise activity committed outside their territory. The crime or misconduct committed under the umbrella of the UN is not dual criminality. Therefore, the UN peacekeepers from these states can go unpunished, irrespective of what crime they have committed, as there is no one to prosecute them.

Merely waiving immunity as a solution to these problems is insufficient, as it can only be waived by the UN Secretary-General, and there are no criteria that can be adopted to waive the immunity; thus, it has no value in most operations. The circumstances in

which the UN Secretary-General can waive immunity must be examined in depth to establish a suitable solution for prosecuting the UN peacekeepers when they have committed misconduct.

### **7.2.2 Prevent crimes and improve ability of UN peacekeeping forces to face challenges by third parties in host states**

The failure of the UN peacekeepers to protect civilians in the host states may not be the sole responsibility of the UN peacekeepers but may also be the responsibility of the UNSC and international community, who do not provide sufficient equipment or training to enable the UN peacekeepers to achieve their duty. This inability and limited equipment have caused the failure of the UN peacekeepers to even protect themselves, such as during UNMISS in South Sudan. With such an understanding, this analysis expects that the UN peacekeepers stationed in international operations need evaluation in terms of their ability to prevent crimes against civilians. The evaluation should include training the UN peacekeepers, given that their training still requires improvement, as the UN peacekeepers originate from many countries, especially developing countries, and their criteria for training and ability to react in urgent situations differ. The UN and the home states must view this as a priority if they wish to prevent the third parties from committing crimes against civilians, who are in dire need of protection during armed conflicts and humanitarian crises.

## **7.3 Conclusion**

The critical examinations based on the research question posed in this thesis have indicated that the crimes committed by the UN peacekeepers can be divided into two types: crimes of act and crimes of omission. While this research discussed crimes committed directly by the UN peacekeepers, the central focus has been on crimes of omission, which are the result of failure of duty. This thesis has found that the inaction

of the UN peacekeepers to prevent crimes by the third parties in the host states can be a criminal offence. This is according to the existing provisions of international law that attach criminal liability to the actions or omissions of the UN peacekeepers, as it has been determined that failure in duty can frequently constitute an international crime of a serious nature under international criminal law.

However, the deliberate failure or crime of omission committed by the UN peacekeepers still has no explicit criminalisation, and the contemporary provisions of international law remain inadequate to hold the UN peacekeepers accountable for their action or inaction, given their immunity. Therefore, this is a gap in the legal system because there are no specific criteria to waive immunity. In addition, the cases of South Sudan and DRC that presented in this thesis indicate how the legal system surrounding the UN peacekeeping forces remains unclear regarding the accountability of the UN peacekeepers. There are several gaps in the legal system surrounding the UN peacekeeping forces—such as the gap in criminalisation of criminal conducts by commission or omission and the gap in prosecution—that must be reformed to reduce the number of crimes and improve the protection of civilians.

The present state of immunity of the UN peacekeepers is a pressing problem that warrants a searching reappraisal of the way that the UN peacekeeping operations are conducted and regulated during a time when even the sovereign immunity of heads of state and the government is no defence against international crimes committed against their own civilian citizens. The trials of former heads of state such as Augusto Pinochet of Chile, Slobodan Milosevic of the former Yugoslavia, Charles Taylor of Liberia, Laurent Gbagbo of Ivory Coast, Hissène Habré of Chad, Muammar Gaddafi of Libya, and the recently removed president of Sudan, Omar al-Bashir are some of the contemporary examples of deep inroad into the so-called inviolability of sovereign

immunity. These heads of state and governments have been accused of and held criminally responsible for committing atrocious crimes, despite their sovereign immunity one of the fundamental pillars of the international system of state sovereignty. Their prosecution is a perfect step to reform their immunity, which indicates that they are no longer immune from criminal responsibility. The legal position should be the same for the UN immunity for its peacekeepers who commit heinous crimes against civilians they are supposed to protect in the conflict zones of the host states. The UN cannot allow the impunity of these perpetrators to prevail over justice to the innocent civilian victims of their crimes, under the protective garb of immunity, which cannot be a safe haven for criminals.

Sustaining the status quo of the UN peacekeepers' immunity from prosecution for committing crimes amounts to sustaining a double standard by defending the indefensible. Inaction by the UNSC and the international community in embarking on reform would render the deployment of the UN peacekeepers an unnecessary waste of resources and an external interference in the host states, with no substantial benefit to the vulnerable civilians and the host states. Without implementing the reforms recommended in this thesis, the UN peacekeepers can continue to commit international crimes, remain immune from prosecution and enjoy impunity, while justice for the victims of their crimes remains as elusive as ever.

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