

UN PEACEKEEPING TODAY: LEGAL CHALLENGES AND UNCERTAINTIES

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I INTRODUCTION

I would first like to thank the Asia Pacific Centre for Military Law ('Asia Pacific Centre') for inviting me to this event today as 2017 Sir Ninian Stephen Visiting Scholar. Sir Ninian is a highly respected personality within the United Nations for his service in various capacities, including as judge of the International Criminal Tribunal for the former Yugoslavia and the head of the Expert Group on Cambodia. I had the pleasure of meeting and observing Sir Ninian at close range during my time in The Hague, and I am truly grateful for the opportunity to give this lecture in honour of Sir Ninian.

I have had close contacts over the years with Professor Bruce Oswald, the Director of the Asia Pacific Centre, and highly appreciated the insights he has offered on issues concerning international humanitarian law and other subjects. I also admire the important research and teaching done by the Asia Pacific Centre in the area of international humanitarian law, and I appreciate the collaboration we have had with the Asia Pacific Centre.

I also wish to take this opportunity to convey immense appreciation and gratitude for Australia's strong commitment to the UN's peace efforts in the past 70 years. In 1947, Australians were part of the very first group of UN military observers, which were then deployed to Indonesia. Australia was one of the pioneers of peacekeeping operations. Australia has since been involved in numerous peacekeeping operations around the globe, notably in Cyprus, Cambodia, East Timor, Iraq, the Middle East, Papua New Guinea, Rwanda, Somalia and South Sudan. According to the Australian War Memorial, 16 Australian nationals lost their lives during peacekeeping operations.

I would like to discuss three legal issues that arise in connection with contemporary peacekeeping, namely the humanitarian law implications of robust peacekeeping operations, some issues relating to international responsibility and how the UN is tackling the issue of sexual exploitation and abuse by peacekeepers.

However, before I do so, I would like to briefly discuss the evolution of UN peacekeeping to date and particularly, how these operations have evolved from a traditional to a more contemporary and, arguably, a more robust and multidimensional model.

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II FROM THE TRADITIONAL TO TODAY'S MORE ROBUST AND MULTIDIMENSIONAL MODEL OF UN PEACEKEEPING

It is well known that peacekeeping operations are not expressly mentioned in the *Charter of the United Nations* ('*Charter*') as a tool for the maintenance of international peace and security, but rather they arose from the practice of the Organization and in particular its principal organs. UN peacekeeping emerged out of necessity, allowing the Organization to overcome challenges that would otherwise have complicated the substantial accomplishments of the Organization in this area.

As many of you will be aware, the *Charter* had in fact envisaged a Standby UN Force ('UN Force'), contributed by the member states to serve at the call of the UN Security Council ('Council'), and under the Council's operational control, through a Military Staff Committee comprised of the Joint Chiefs of Staff of the concerned countries. This UN Force, which did not see the light of day, was envisaged mostly as an enforcement tool at the disposal of the Council, when deciding to use force under Chapter VII of the *Charter*, to maintain international peace and security.

It was one of the chief innovations of the Organization's principal organs, and also thanks to the vision of its Secretaries General, starting with Dag Hammarskjöld, that the concept and modalities of UN Peacekeeping emerged, and evolved, from the first *unarmed* military observer mission to the first *armed* peacekeeping operations (with a limited mandate to use force); all the way to the more recent, multidimensional peacekeeping operations (with a broader range of tasks and expanding mandates to use force).

While the terminology, 'peacekeeping operations', is an innovation that may be credited to the UN, the sending of neutral military observers and impartial troops with the consent of host countries, to consolidate ceasefires or to assist parties in settling their conflict is not a total innovation under international law.

The Geneva-based League of Nations, created after the First World War, dispatched military advisers and a number of military commissions to help broker peace agreements and end international disputes between its member states. In a few cases, most notably that of the Saar Basin territory, between 1920 and 1935, and that of the river Port of Leticia in Colombia at the border with Peru, between 1933 and 1934, the League of Nations established Commissions to administer a territory and it dispatched international forces contributed by its member states to maintain order in these territories.¹

Yet, in the early years of the UN, the concept of peacekeeping had a significantly different meaning compared to that today. For the purposes of this presentation, we can define traditional peacekeeping as the consensual intervention of international military observers, to broker or facilitate ceasefire arrangements, with a view to creating the space required for a mediated, longer term peace.

This was the case of the earlier UN peacekeeping missions, which were unarmed. The UN Truce Supervision Organization, headquartered in Jerusalem and created in May 1948, and the Military Observer Group created in January

¹ On the forays of the League of Nations into peacekeeping, see Alan James, 'The Peacekeeping Role of the League of Nations' (1999) 6 *International Peacekeeping* 154.

1948 to investigate and mediate the dispute between India and Pakistan ('UNMOGIP'), are examples of this early type of peacekeeping, with a mandate generally limited to reporting on the implementation of a ceasefire (or the lack thereof), and to seeking a mediated solution to conflict, without means to use force to restore the status quo ante.

The first UN Emergency Force in the Sinai ('UNEF I'), created in 1956 exceptionally by the General Assembly, was the first UN peacekeeping mission which included an armed contingent in addition to military observers. In this model, the mission may be tasked by the UN principal organ (usually the Council), not only to monitor the implementation of a ceasefire, but also to secure, as needed, the cessation of hostilities, including by serving as a buffer between the parties. UNEF I thus served as a buffer between Egyptian and Israeli forces after their withdrawal, in addition to providing impartial supervision of the ceasefire.

The exclusive UN chain of command and control was clearly established in the Regulations issued by Secretary-General Hammarskjöld for UNEF I, which confirmed the full command authority and operational responsibility of the UNEF I Force Commander; while the Secretary-General retained authority for all administrative, executive and financial matters and for the negotiation and conclusions of agreements with governments. The Secretary-General also channelled all instructions from the UN principal organs to the Force Commander and the chain of command designated by him. The Secretary-General thus retained a critical role in all aspects of the operation's activities.²

The traditional model of peacekeeping was premised on three cardinal principles: (i) consent of the parties; (ii) impartiality; and (iii) non-use of force except in self-defence. The third principle (non-use of force except in self-defence) has since been extended to encompass the use of force 'in defence of the mandate'. For UNEF I and other UN peacekeeping operations entrusted with the responsibility to act as a buffer between withdrawing armed forces, this implied the possible use of force, however strictly to the extent necessary for the securing of the buffer zone.

Starting with the UN Mission in Sierra Leone ('UNAMSIL'), which was established in 1999, the Security Council began routinely introducing language in its resolutions expressly authorising peacekeeping missions to use force to protect civilians, the so called 'POC mandates' (for Protection of Civilians).

This was not an entirely novel approach. Already in 1960, an Operational Directive issued for the UN Operation in the Congo ('ONUC'), provided that: 'Where feasible, every protection will be afforded to unarmed groups who may be subjected by any armed party to acts of violence likely to lead to loss of life.'³

² Secretary-General Hammarskjöld, *Regulations for the United Nations Emergency Force*, UN Doc ST/SGB/UNEF/I (20 February 1957) <<http://www.un.org/depts/dhl/dag/docs/stsgbunef1e.pdf>>, archived at <<https://perma.cc/YQ56-YCLR>>.

³ Haidi Willmot and Scott Sheeran, 'The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices' (2013) 95 *International Review of the Red Cross* 517, quoting UN Secretariat, *Code Cable OPS 277 to ONUC*, Operations Directive No. 8 (untitled), February 1961. The main parts of the *Code Cable OPS 277 to ONUC* are reproduced in Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford University Press, 2002) 414.

The Operational Directive concluded: 'In such cases, UN troops will interpose themselves, using armed force if necessary, to prevent such loss of life.'⁴ Other missions had also included some authority to protect civilians.

The standard introduction of more robust POC mandates by the Security Council, from 1999 onwards, reflects the increasingly internal nature of the conflicts in which civilians have become the main victims. The increase in the number of internal conflicts has also prompted a broader, more proactive range of activities entrusted to UN peacekeepers in such contexts, including the protection of areas declared safe and support to the effective delivery of humanitarian assistance. The robust POC mandates of contemporary UN peacekeeping also represent an attempt to build upon the difficult experiences of UN Assistance Mission for Rwanda and UN Protection Force in Bosnia Herzegovina, in the mid-1990s.

Whether the robust POC mandates have been accompanied by an increased capacity to effectively protect civilians at risk is a matter of debate. Among the factors that will affect delivery on such mandates, are the available resources, the mobility of the UN troops and the extent of their deployment over large swaths of territory. Also among the relevant factors is the provision by contributing countries of well-equipped soldiers ready and willing to confront spoilers, including armed groups and even authorities, who are threatening civilians.⁵

A different, more passive concept of protection of civilians, by providing safe haven to them within or near UN camps, may become a norm in particularly hostile and complex situations. The example of South Sudan comes to mind, where the UN Mission in South Sudan has been providing safe haven to thousands of civilians, for years now, in so called 'protection of civilian sites'. It must be noted that in some cases these camps have also been attacked by armed groups in circumstances in which the UN was not able to respond effectively.

UN peacekeeping operations are also increasingly deployed in contexts where there is no peace to be kept, and thus they are increasingly targeted and drawn into conflict. The situation in Mali or in the Central African Republic comes to mind, and the armed groups (and terrorist elements in Mali) who have no interest in engaging in a peace process or in helping create conditions for peace and development.

By virtue of their mandate, which includes, in Mali and the Central African Republic, supporting the State in reasserting its authority over a part (and sometimes most) of the national territory, the impartial posture of these Missions vis-a-vis non-state actors may also come to be questioned and complicate mandate implementation.

Not surprisingly, the increasingly robust mandate of UN peacekeeping missions and their frequent involvement in the midst of hostilities in recent years have generated debates on the application of international humanitarian law to UN peacekeeping operations. I now turn to this issue.

4 Ibid.

⁵ On Protection of Civilians mandates in UN peacekeeping operations, see Willmot and Sheeran, above n 3; Katarina Mansson, 'Use of Force and Civilian Protection' (2005) 12 *International Peacekeeping* 503.

III APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO UN PEACEKEEPING OPERATIONS

The question whether international humanitarian law — the law that regulates the conduct of armed forces and armed groups in times of armed conflict and which I will refer to as IHL for the rest of this lecture — applies to UN peacekeeping operations in the first place was debated for many years. This issue arose due to the fact that there was no specific provision in IHL instruments that regulated the conduct of UN peacekeeping operations, and the UN itself is not a party to any of the core instruments, such as the *Geneva Conventions*.

However, the general question of whether IHL is applicable to UN peacekeeping operations could now be considered as a settled matter. In 1999, the Secretary-General issued a bulletin on the observance by UN forces of IHL,⁶ which contains most customary rules of IHL.

This is a clear indication that the UN has recognised that UN peacekeeping operations shall be conducted in a manner consistent with IHL.

However, there are a number of outstanding issues concerning how, in specific instances, IHL applies to UN peacekeeping operations. These issues have surfaced, or resurfaced, in recent years following the establishment of peacekeeping operations with robust mandates.

A *UN Peacekeeping Operations as a Party to a Conflict*

One of those issues is whether there are circumstances in which a UN peacekeeping operation itself could be considered as a party to an armed conflict.

This question should be approached with caution, as the circumstances in which a peacekeeping mission becomes involved in armed clashes vary, and in many instances, the question whether a mission has become a party to an armed conflict may not arise.

It is first noted that, while peacekeeping operations may be deployed to conflict situations, in many cases, peacekeeping operations themselves have not been involved in military operations at all. In these cases, the question of whether a mission could become a party to an armed conflict would not arise.

However, particularly since the 1990s, peacekeeping operations have often been attacked and have been compelled to react by force, particularly against armed groups, either in the exercise of their right of self-defence or pursuant to a Security Council authorisation to take all necessary measures.

Such attacks have often occurred as part of, for example, carjacking, robbery and office break-in, which normally would not constitute elements to determine a situation as an armed conflict.

In other instances, however, organised military operations have been carried out against peacekeeping operations, often killing or injuring peacekeepers. In response, peacekeeping operations have occasionally used force to defend themselves and repel the attack.

However, even when peacekeeping operations have been attacked repeatedly, they did not use force or only occasionally used force in response to the attacks. In such cases, the situation did not develop into regular armed clashes between

⁶ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, UN Doc ST/SGB/1999/13 (12 August 1999).

peacekeeping operations and non-state armed groups. In these instances too, the question whether peacekeeping missions have become parties to armed conflicts may not arise, as it was questionable whether armed conflicts existed in the first place.

Support to government forces by a UN peacekeeping operation has also raised questions as to whether the mission has been drawn into an existing conflict, and has become a party to it. For example, the peacekeeping operation in Mali, the UN Multidimensional Integrated Stabilization Mission in Mali ('MINUSMA'), has, in the past, shared intelligence and conducted joint patrol with the French forces deployed pursuant to a Security Council mandate. In this regard, it has been argued that certain support provided by a UN peacekeeping mission to state's armed forces, such as the provision of intelligence for use in ongoing military operations, could make the mission a party to an armed conflict.⁷

However, there are also reservations to this approach. In particular, it is not clear whether support to government forces alone, without direct armed clashes with armed groups, would make a peacekeeping mission a party to an armed conflict.

In exceptional cases, however, UN peacekeeping operations have become directly involved in regular armed clashes with organised armed groups, such as in Somalia and the Democratic Republic of the Congo ('DRC'). It is in these rare instances that the question of whether a peacekeeping mission has become a party to an armed conflict has particularly arisen.

These questions were raised particularly in relation to the UN Organization Stabilization Mission in the Democratic Republic of the Congo ('MONUSCO'), when it was authorised by the Security Council to carry out targeted offensive operations, through the Intervention Brigade, to neutralise armed groups.⁸ Pursuant to this mandate, MONUSCO, in fact, carried out combat operations against an armed group, the 23 March Movement ('M23'), between August 2013 and November 2013, often in support of the military operations carried out by the DRC armed forces.

In this instance, it was argued that MONUSCO as a whole had become a party to an armed conflict. However, some members of the Security Council sought to draw a distinction between the Intervention Brigade and other military units of MONUSCO.

The issue is of particular concern to a number of member states contributing troops to peacekeeping missions, as there may be serious legal consequences. In particular, the argument that military personnel of a mission could lose the protection from attacks and become lawful targets when a mission becomes a party to an armed conflict has raised particular concerns. It could also endanger civilian personnel in peacekeeping missions, as well as anyone seeking protection in such missions.

I now turn to this issue.

⁷ International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Report, 32nd International Conference of the Red Cross and Red Crescent, 8–10 December 2016) 22–3.

⁸ SC Res 2098, UN SCOR, UN Doc S/RES/2098, 6943rd mtg (28 March 2013) para 12(b). See also the latest resolution extending the mandate: SC Res 2348, UN SCOR, UN Doc S/RES/2348, 7910th mtg (31 March 2017) para 24(i)(d).

B *Protection and Loss of Protection for Peacekeepers*

It is widely accepted that personnel of peacekeeping operations are generally treated as civilians and protected as such under IHL in times of armed conflict.⁹ Therefore, peacekeeping personnel are protected from attacks, and parties to the conflict are required not to direct attacks against those personnel. But there is, in the *Rome Statute of the International Criminal Court* and elsewhere, an exception for cases in which peacekeepers would lose the protections of civilians.

As UN peacekeeping operations become increasingly involved in hostilities, the following argument has been made by some observers, including the International Committee of the Red Cross:

- When a peacekeeping mission engages in military operations, it becomes a party to an armed conflict on the same basis as any armed force; and
- Once it becomes a party to an armed conflict, all military personnel would collectively lose the protection given to civilians under IHL, until the end of the armed conflict.¹⁰

According to some who take this approach, all military personnel of a mission could be targeted lawfully, wherever they are in the host state's territory, and even if they are located far away from the place where hostilities are taking place. Furthermore, all military personnel of the mission could be lawfully targeted, even if they are carrying out activities that have no connection with the hostilities. This approach could also include that all military personnel remain lawful targets until the end of the armed conflict, which could be many years ahead.

On the other hand, some authorities, in particular representatives of states that contribute peacekeepers to UN missions, have taken the view that UN peacekeepers, acting under a lawful mandate of the Security Council, should never be regarded as parties to a conflict or lose the protection that they generally enjoy.

The matter remains unresolved at present, but it has been addressed in a few cases by international courts, particularly by the Special Court for Sierra Leone ('SCSL') and the International Criminal Court ('ICC').

These courts have taken the approach that peacekeeping personnel would lose the protection given to civilians under IHL on an individual basis rather than collectively. In other words, only those individuals who are directly engaged in military operations would become lawful targets, while others who are not would continue to be protected.

These cases also seem to indicate that the personnel concerned would become lawful targets only while they take a direct part in hostilities, and that they would retain such protection outside that timeframe. This is in marked contrast to the approach that personnel would lose the protection on a permanent basis until the end of an armed conflict.

⁹ See, eg, *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998 2187 UNTS 3 (entered into force 1 July 2002) arts 8(2)(b)(iii), 8(2)(e)(iii).

¹⁰ International Committee of the Red Cross, above n 7, 25.

In *Prosecutor v Sesay*,¹¹ the SCSL examined a number of incidents that occurred in 2000, in which the Revolutionary United Front, an armed group in Sierra Leone, ill-treated, captured or attacked a number of military personnel of the UN Mission in Sierra Leone (UNAMSIL).

The Court first stated that personnel of peacekeeping missions are entitled to protection, but will lose that protection if they take a direct part in military operations. The Court also stated, quite clearly, that ‘where peacekeepers become combatants, they can be legitimate targets for the extent of their participation in accordance with international humanitarian law’.¹² While the Court recognised that peacekeeping personnel could become lawful targets in certain circumstances, it did not mention that they would be regarded as lawful targets on a permanent basis.

In this particular instance, the Court found that UNAMSIL personnel were not taking a direct part in hostilities at the relevant time. Therefore, attacks against them were considered as a crime.

The ICC also dealt with the issue in *Prosecutor v Abu Garda*¹³ and *Prosecutor v Banda and Jerbo*,¹⁴ although these cases involved an African Union peacekeeping operation rather than a UN peacekeeping operation. In these cases, the Court dealt with an incident in which armed groups in Darfur directed an attack against a base of the African Union Mission in Sudan (‘AMIS’) in 2007.

In these cases, the ICC took a similar approach to the SCSL and stated that ‘personnel involved in peacekeeping missions enjoy protection from attack unless and for such time as they take a direct part in hostilities or in combat-related activities’.¹⁵

In this particular case, the ICC found that AMIS personnel did not take any direct part in hostilities and that there were substantial grounds to believe that they were entitled to the protection given to civilians under IHL.

It should be noted that such court cases that examined the protected status of peacekeeping personnel have been rare, and further case law on the matter would be welcome.

IV RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS

A *Responsibility of the UN for Acts by its Peacekeeping Missions*

I will now briefly discuss the potential responsibility of the UN for acts of its peacekeeping missions, or acts of forces supported by the UN.

The UN Secretariat has taken a clear position that, as a general matter, when a UN peacekeeping operation is under UN command and control and is engaged in

¹¹ *Prosecutor v Sesay (Trial Judgement)* (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-15-T, 2 March 2009).

¹² *Ibid* 75 [233].

¹³ *Prosecutor v Abu Garda (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-02/09, 8 February 2010).

¹⁴ *Prosecutor v Banda and Jerbo (Corrigendum of the ‘Decision on the Confirmation of Charges’)* (International Criminal Court, Pre-Trial Chamber I, ICC-02/05-03/09, 7 March 2011).

¹⁵ *Ibid* 42 [102].

military operations in an armed conflict, the UN is responsible for violations of IHL committed by members of that mission.¹⁶

However, as UN peacekeeping missions consist of troops contributed by member states, a question has arisen as to whether troop-contributing countries could also be responsible for the acts of their troops serving in UN peacekeeping missions.

This issue has arisen recently in the courts of the Netherlands.¹⁷ These courts examined certain actions carried out by Dutch Battalion while it was serving in the UN peacekeeping mission in the former Yugoslavia in the 1990s. In particular, the courts examined whether the Netherlands was responsible for the deaths of three persons who were asked to leave the Dutch compound in Srebrenica, and who were subsequently killed by the Bosnian Serb forces.

In this particular case, the Supreme Court of the Netherlands ruled that the Netherlands had effective control over the Dutch Battalion and was, therefore, responsible for the deaths of the individuals concerned.

This case illustrates that not all actions by troops serving in a UN peacekeeping operation are attributable to the UN, and that certain specific actions could be attributed to a state. It also illustrates that the question of attribution should be approached on a case by case basis, and that the facts of the specific case should be examined carefully.

B *Responsibility of the UN for Acts by Non-UN Security Forces*

I noted earlier that the Organization may also be called upon to provide support to non-UN, government-led security forces. While UN support may be beneficial on the ground, it may also raise substantial concerns if such non-UN security forces engage in violations of human rights, IHL or in other acts that would be considered ‘internationally wrongful’.

The legal framework governing the responsibility of international organisations is still being developed. The *Draft Articles on the Responsibility of International Organizations* prepared by the International Law Commission provide that an international organisation that ‘aids or assists’ a state or another international organisation in the commission of an internationally wrongful act by the state or the latter organisation is internationally responsible for doing so if: (i) the organisation does so with knowledge of the circumstances of the internationally wrongful act; and (ii) the act would be internationally wrongful if committed by that organisation.¹⁸

The issue of aiding or assisting international wrongful acts arose acutely in 2009, when the then UN Mission in the Democratic Republic of the Congo (‘MONUC’) had to reconcile two mandates from the Security Council, that is: (i)

¹⁶ See, eg, *Report of the Secretary-General on 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, 55th sess, Agenda Items 129 and 140(a), UN Doc A/51/389 (20 September 1996) [16]–[17].

¹⁷ See, eg, *Netherlands v Nuhanović*, Hoge Raad [Supreme Court of the Netherlands], Case No 12/03324, 6 September 2013.

¹⁸ International Law Commission, *Report of the International Law Commission on the Work of its Sixty-Third Session*, UN GAOR, 66th sess, Supp No 10, UN Doc A/66/10 (26 April – 3 June and 4 July – 12 August 2011) ch V(E)(1) (‘ARIO’) art 14.

assisting government-led forces ('FARDC') in their military operations against armed groups in the eastern part of the Democratic Republic of the Congo (eg North Kivu); and (ii) protecting the civilian population.¹⁹ Based on the knowledge that in the course of UN assisted operations, the government-led forces would be likely to commit serious violations of international human rights and humanitarian law against the civilian population, MONUC had to decide whether to continue assisting such forces, as mandated by the Security Council; or decline to do so, on the basis that it was also mandated by the Security Council to protect the civilian population.

In October 2009, the UN Office of Legal Affairs ('OLA') opined that if MONUC had reason to believe that FARDC units were involved in an operation violating international human rights or international humanitarian law, and if MONUC's intercession with the FARDC and with the government of the DRC were unsuccessful, then MONUC 'may not lawfully continue to support that operation, but must cease its participation in it completely'.²⁰

Upon the advice of the Secretary-General, the Security Council adopted this policy conditioning the UN's assistance to Congolese troops on their respect for international human rights and humanitarian law.

The MONUC precedent informed the development and adoption of a new general policy by the Secretary-General in 2013, the 'Human Rights Due Diligence Policy on UN Support to Non-UN Security Forces'.²¹ This policy sets out measures that all UN entities must take in order to ensure that any support that they may provide to non-UN forces is consistent with the purposes and principles as set out in the *Charter* and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law.

Based on the developing legal framework on the responsibility of international organisations, it is still unclear, however, how much support the UN would have to provide to a state or another international organisation and how much knowledge it would have to possess in order for the UN to be found responsible for 'aiding or assisting' that state or the other international organisation in the commission of an internationally wrongful act.

¹⁹ See, eg, SC Res 1856, UN SCOR, 6055th mtg, UN Doc S/RES/1856 (22 December 2008) [2], [3(a)]–[3(e)], [3(g)], [3(k)], [3(l)], [14]. See also SC Res 1906, UN SCOR, 6253rd mtg, UN Doc S/RES/1906 (23 December 2009) [7]–[18] [21]–[23].

²⁰ Note by the UN Legal Counsel, dated 12 October 2009, as reproduced in *ARIO*, UN Doc A/66/10, 105: 'If MONUC has reason to believe that FARDC units involved in an operation are violating one or the other of those bodies of law and if, despite MONUC's intercession with the FARDC and with the Government of the DRC, MONUC has reason to believe that such violations are still being committed, then MONUC may not lawfully continue to support that operation, but must cease its participation in it completely. ... MONUC may not lawfully provide logistic or "service" support to any FARDC operation if it has reason to believe that the FARDC units involved are violating any of those bodies of law. ... This follows directly from the Organization's obligations under customary international law and from the Charter to uphold, promote and encourage respect for human rights, international humanitarian law and refugee law.'

²¹ 'Human Rights Due Diligence Policy on UN Support to Non-UN Security Forces' (Guidance Note, UN, 2013) <<http://southsudanhumanitarianproject.com/wp-content/uploads/sites/21/formidable/2014.07.01.Revised-HRDDP-GN.pdf>>, archived at <<https://perma.cc/U6MT-4Z84>>.

I will now turn to another very difficult challenge at the UN: sexual exploitation and abuse.

V SEXUAL EXPLOITATION AND ABUSE: CHALLENGES AND RECENT DEVELOPMENTS

It is understood that setting up and overseeing a peacekeeping mission is a complex undertaking. Considerable efforts have to be deployed by the UN and its member states to arrange for troops and other personnel to be on the ground. High hopes are placed on these men and women who make personal sacrifices and take important risks to support the UN's peace efforts.

Tragically, some of the individuals that the UN and its member states have entrusted with the critical task of keeping the peace failed to be worthy of our trust. Although these individuals had been deployed to keep the peace, they instead violated the persons and the dignity of beneficiaries of UN assistance by engaging in acts of sexual exploitation and abuse against them.

The uproar generated by incidents of peacekeepers committing sexual violence against those they had been sent to protect has prompted many reforms at the UN in the past 15 years. Despite sustained efforts since 2002, when there was a crisis in the wake of widespread allegations of sexual exploitation and abuse in refugee camps in West Africa, addressing sexual exploitation and abuse remains a persistent and complex challenge at the UN. I will address today three specific questions:

- 1 What are the root causes of sexual exploitation and abuse in the UN context?
- 2 Why is it difficult to prosecute criminal acts of sexual exploitation and abuse?
- 3 What are the most recent actions taken by the Secretary-General to improve the UN's response to sexual exploitation and abuse?

A *What Are the Root Causes of Sexual Exploitation and Abuse in the UN Context?*

At the outset, it might be helpful to explain briefly what the UN means when it refers to 'sexual exploitation or abuse' or 'SEA'.²² 'Sexual abuse' means rape and other forms of sexual assault. 'Sexual exploitation' means the abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, the exchange of money, employment, goods or services for sex, as well as any exchange of assistance that is due to beneficiaries of UN assistance for sexual purposes.

Issues concerning sexual exploitation and abuse are not unique to the UN, but we are forced to realise that the specific context within which the UN is operating appears to make it more likely to happen. Why?

Two main root causes can be identified: UN personnel are generally deployed to (a) fragile states with (b) highly vulnerable populations.

²² The terms 'sexual abuse' and 'sexual exploitation' are defined in *Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, UN Doc ST/SGB/2003/13 (9 October 2003) ss 1, 3. More specifically, the term 'sexual abuse' is defined as 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions'.

The states in which the UN is deployed are generally fragile because their institutions have usually been shattered during several years of armed conflict. As a result, these governmental institutions might not be fully functioning and operational. In addition, interethnic tensions might be detrimentally affecting their work to various degrees. Armed conflicts also have a devastating effect on these states' economies, which are sometimes in shambles and need to be rebuilt.

The populations of these states are also highly vulnerable because many are generally still struggling to survive in a conflict or post-conflict setting, often with little to no education and income, in situations of extreme poverty. Orphaned children and persons with disabilities are even more vulnerable in these precarious circumstances. In some cases, years of conflict and famine have also further increased the vulnerability of local populations by displacing tens of thousands of them, often without adequate protection.

Without education, employment and/or other resources, the local population, including children, may become reliant on outside assistance and feel that they are compelled to do whatever they can to sustain themselves and their family. They, therefore, can become prey to sexual exploitation. Without adequate safety and security systems in place, they are also at an increased risk of becoming victims of sexual abuse.

A number of additional factors may also exacerbate the risk of sexual exploitation and abuse by UN forces, including the duration of the mission, the number of interactions with the local populations, the intensity of the conflict, and the remoteness of the area in which the UN offices or compounds are located. Long term missions in high conflict zones and remote areas are at a greater risk of exposing the local populations to sexual exploitation and abuse.

The 're-hatting' of troops has also been identified as an additional risk factor. 'Re-hatting' is the transfer of uniformed personnel deployed by non-UN missions to a succeeding UN peacekeeping mission. 'Re-hatting' allows for a maximum number of uniformed UN personnel to be deployed in the field very quickly. At the same time, the Secretary-General observed that a number of allegations of sexual abuse involving military contingent personnel received at the beginning of the operations of a mission in which troops had been re-hatted 'may be attributable to the re-hatting of [such] troops[, which] had not benefited from pre-deployment training on the United Nations standards of conduct, including on sexual exploitation and abuse'.²³ The Secretary-General further indicated that the chain of command was '[c]ritically important' to send a 'strong message on expectations in terms of conduct immediately at the time of the re-hatting'.²⁴

Some measures have been taken to mitigate risks of sexual exploitation and abuse, including, for example, screening and vetting of personnel, ensuring that all personnel receive pre-deployment training on sexual exploitation and abuse, providing adequate welfare measures for troops, inspecting bases regularly, strictly enforcing curfews, patrolling after curfew hours, monitoring access to local population, and adopting non-fraternisation policies. Efforts have also been made to increase representation of women among military personnel.

²³ *Special Measures for Protection from Sexual Exploitation and Abuse: Report of the Secretary-General*, UN GAOR, UN Doc A/68/756 (14 February 2014) [24].

²⁴ *Ibid.*

Notwithstanding these measures, we keep receiving allegations of sexual exploitation and abuse.

B *Why is it Difficult to Prosecute Criminal Acts of Sexual Exploitation and Abuse?*

While the UN, its member states and others agree that criminal acts of sexual exploitation and abuse cannot go unpunished, they are difficult to prosecute. Why?

There are several reasons that might explain this. Again, the context within which the UN is operating is one of the main reasons why these allegations are particularly challenging to prosecute.

The allegations first have to be reported to the UN. Not every victim is willing or able to do so, however, for various reasons. Some may fear reprisal and may not be able to find adequate protection, for example, if they live in a camp for displaced persons. Others who are struggling for survival might have become dependent on goods that might have been given to them in exchange for sex, including water, food rations and money. Some may also fear that they would be stigmatised and ostracised from their own communities should the allegations become known locally. Other more vulnerable persons, such as children and persons with disabilities, may not have sufficient support to be able to bring forward their allegations to the UN.

Once the allegations are reported to the UN, the UN can initiate disciplinary proceedings or other administrative processes. However, the UN cannot initiate criminal proceedings, as the UN does not have criminal jurisdiction over military and civilian personnel. Only member states have criminal jurisdiction over such alleged acts.

Depending on the category of personnel involved, the UN either has to rely on contributing States to investigate and prosecute their military personnel; or in the case of civilian personnel, rely on the host state, whose legal system may not be fully functional, or the state of nationality of the accused, to ensure criminal accountability.

In order for criminal proceedings to be initiated in a member state, the UN has to share the allegations reported to it with relevant national authorities. The victims, however, may not agree to the sharing of their personally identifiable information with national authorities. They may lack trust in the capacity of national authorities to entertain their allegations in an appropriate and secure manner. The UN itself may not be in a position to disclose the victims' personally identifiable information if there would be risks to the safety and security of anyone in doing so.

The UN also needs to explain to the victims that by not sharing their personally identifiable information, the capacity of national authorities to achieve accountability is limited. In some circumstances, the UN may offer protection to the victims to alleviate safety and security concerns associated with the sharing of such information with national authorities. The UN may also re approach the victims to seek consent if and when more protection can be afforded to them. But the victims always have the final say on whether to disclose their personally identifiable information to national authorities.

Once the UN refers allegations to relevant member states, the member states themselves may not be able to act on them due to their own jurisdictional limits. For example, some member states currently do not have jurisdiction over criminal acts allegedly perpetrated by their nationals abroad. The UN has yet to receive responses from other member states, in which case the Organization follows up with them. Since 2015, the Secretary-General has also been publicly disclosing the nationality of UN military and police personnel who are alleged to have committed sexual exploitation and abuse, including information pertaining to the status of the underlying cases.²⁵

Troop-contributing countries currently have ‘exclusive’ criminal jurisdiction over their troops, which are, thus, immune from the jurisdiction of host states. This means that host states cannot prosecute crimes allegedly committed by peacekeeping troops, even if such crimes were allegedly committed on their own territory. It has been suggested that the jurisdiction of troop-contributing countries become ‘primary’, rather than ‘exclusive’, which would allow host states to prosecute crimes allegedly committed by peacekeeping troops on their territory when the relevant troop-contributing countries fail to prosecute such alleged crimes. Troop-contributing countries, however, do not appear to be willing at present to agree to change the conditions under which they contribute military contingents to UN peacekeeping operations.

It has also been proposed that a ‘special courts mechanism’ be established, which would be independent from the UN and which would be tasked with prosecuting crimes allegedly committed by any UN military or civilian personnel. Again, it would incumbent upon the member states to agree on the establishment of such mechanism.

C *What are the Most Recent Actions Taken by the Secretary-General to Improve the Organization’s Response to Sexual Exploitation and Abuse?*

In the past decades, the Organization has been continually reassessing and reforming its approach in order to better respond to the challenges I just described. I will focus on three recent actions taken by the new UN Secretary-General: (a) the appointment of the Victims’ Rights Advocate; (b) the conclusion of ‘Voluntary Compacts on Elimination of Sexual Exploitation and Abuse’ between the Secretary-General and member states; and (c) the creation of a Circle of Leadership on the Prevention of and Response to Sexual Exploitation and Abuse in UN Operations (‘Circle of Leadership’), which is composed of heads of state or government.

²⁵ See, eg. *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Report of the Secretary-General*, UN GAOR, 70th sess, Agenda Item 139, UN Doc A/70/729 (16 February 2016) 33–41. See also *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach: Report of the Secretary-General*, UN GAOR, 71st sess, Agenda Items 134, 139 and 149, UN Doc A/71/818 (28 February 2017) 47–56. The latter also includes similar information in respect of allegations involving non-UN forces operating under a Security Council mandate: at 63–4.

1 *Appointment of the Victims' Rights Advocate*

On 23 August 2017, the Secretary-General appointed a 'Victims' Rights Advocate', Jane Connors, an Australian national. The Victims' Rights Advocate is a human rights expert tasked with advocating for victims' rights, serving in the Secretary-General's office and reporting to him. Victims' Rights Advocates have also been appointed in the field. I am confident that the recent appointment of Jane Connors as the Victims' Rights Advocate will galvanise the response to victim assistance, in coordination with the UN system actors and member states, and help achieve accountability.

2 *'Voluntary Compacts on Elimination of Sexual Exploitation and Abuse' between the Secretary-General and Member States*

In his report dated 28 February 2017, the Secretary-General announced his intention of requesting member states to enter voluntarily into a 'compact' with him, which would define specific commitments of both the Organization and the member states in advancing joint efforts to combat sexual exploitation and abuse.²⁶ In particular, he urged member states to include in such compact a commitment to exercise or establish extraterritorial jurisdiction for crimes allegedly committed by their nationals abroad.²⁷ Attention is, thus, given to enhancing the capacity of member states to prosecute criminal acts of sexual exploitation and abuse.

By 29 September 2017, 72 member states, including Australia, had each signed a 'Voluntary Compact on Elimination of Sexual Exploitation and Abuse' ('the Compact') with the Secretary-General, and 19 member states had also formally indicated their intention to sign it in the near future.²⁸ As initially intended, the Compacts set out specific commitments adopted by the Secretary-General and each signatory member state to prevent sexual exploitation and abuse, to hold individuals accountable and to respect the dignity of victims by providing them with meaningful support.²⁹

3 *Circle of Leadership on the Prevention of and Response to Sexual Exploitation and Abuse in UN Operations*

Finally, I am delighted to note that Australian Prime Minister Malcolm Turnbull has recently accepted the Secretary-General's invitation to become a member of his Circle of Leadership, which is currently composed of a total of 57

²⁶ *Special Measures for Protection from Sexual Exploitation and Abuse: A New Approach: Report of the Secretary-General*, UN Doc A/71/818, [19], [55]–[59].

²⁷ Specifically, the Secretary-General urged member states to consider, as an element for inclusion in the Compact, a commitment to 'exercise or establish extraterritorial jurisdiction for crimes committed by civilian personnel when assigned to the United Nations or operating under United Nations authority': *ibid* para 59(b)(xviii).

²⁸ UN Secretary-General, *Note to Correspondents on Voluntary Compact on Preventing and Addressing Sexual Exploitation and Abuse* (29 September 2017) <<https://www.un.org/sg/en/content/sg/note-correspondents/2017-09-29/note-correspondents-voluntary-compact-preventing-and>>, archived at <<https://perma.cc/VAD7-AWY9>>.

²⁹ *Ibid*.

heads of state or government.³⁰ The highly influential members of the Circle of Leadership are expected to use their high office to address the problem of sexual exploitation and abuse, with a view to preventing and responding to such acts.

VI CONCLUSION

Through this lecture, against the overall context of the evolution of UN peacekeeping mandates, I have attempted to sketch out a number of legal challenges which UN peacekeeping is currently facing. There are, of course, other challenges, legal and non-legal, such as more effective protection of civilians by UN peacekeeping missions and their further contribution to preventing armed conflict or finding a lasting political solution to conflicts in countries in which they are deployed.

The UN is committed to addressing these legal issues and, more broadly, to becoming operationally more effective and more fit for purpose. I can assure you that the UN OLA will do its best to contribute to these efforts. In this regard, we also count on Australia's continued engagement with, and commitment to, UN peacekeeping.

³⁰ The full list of the Members of the Circle of Leadership is set out in: UN Secretary-General, *Note to Correspondents: Press Release for the High Level Meeting on the Prevention of Sexual Exploitation and Abuse* (18 September 2017) <<https://www.un.org/sg/en/content/sg/note-correspondents/2017-09-18/note-correspondents-press-release-high-level-meeting>>, archived at <<https://perma.cc/PGG6-W49C>>.