

THE LEGAL STATUS OF PERSONNEL IN MULTINATIONAL PEACE OPERATIONS

WITH SPECIAL REGARD TO SEXUAL EXPLOITATION AND ABUSE COMMITTED DURING PEACE MISSIONS

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Over the last 60 years we have witnessed a massive expansion in the number, scope and mandate of peacekeeping missions worldwide. This also meant that the manpower required for such operations have also increased exponentially. With such a large personnel it is inevitable that the peacekeepers involved will commit criminal acts, some even as grievous as sexual abuse and exploitation (SEA). These cases may not be as isolated incidents as one thinks,¹ leading to scandals when leaked to the international media and forcing the UN to try to come up with solutions. However, part of what makes it difficult to tackle the issue is, *inter alia*, that the legal status of the different categories of personnel vary greatly. While members of military contingents are protected by the jurisdictional immunity of the troop-contributing country, others, such as UN staff, volunteers, military observers and police are governed by separate legal regimes, each supporting their own distinctive set of regulations. This article aims at uncovering the intricacies of the various legal solutions and attempts to synchronize them within the framework of international law.

The Issue of Responsibility and the Categories of Peacekeeping Personnel

It is the very basic principle of every legal system that the conduct of a wrongful act leads to the responsibility of the one who committed it. Responsibility in international law is constituted no differently according to the *International Law Commission's Responsibility of States for Internationally Wrongful Acts*.² To apply this principle in the context of peacekeeping operations the general perception would be the following: if a peacekeeper commits a criminal act then s/he should be held responsible. However, as peacekeeping operations are governed by international law, there are other factors to

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¹ The origins of sexual exploitation and abuse can be traced as far as the UN mission to the Congo in the 1960's, but has since proved to be an enduring stain on the blue helmet with scandals surfacing in Somalia and the Balkans in the 1990's, West Africa and Cambodia in 2000's as well as Haiti, DRC and CAR in recent times to cite the most infamous examples.

² UN Doc. A/RES/56/83 Art. 1.



consider, namely the responsibility of the international organization³ and the state which sends its citizens to the mission – also called the troop-contributing country (TCC). The rationale why these other actors complicate matters is based on both legal grounds and on common sense.

The United Nations is the organization which calls for the mission in the first place. One of its main organs, the Security Council creates the mandate, which serves as a legal basis for the mission to operate upon, while also transferring its capacity to use force in an international environment. Furthermore the mission is created to further the goals of the organization⁴ and it operates under the aegis of the UN.⁵

When it comes to the responsibility of the TCCs, it goes along the following line of logic: the peacekeeper as an individual is part of the military of the TCC, therefore considered to be under the supervision of the executive branch of power. The legal basis lies in the International Law Commission's Responsibility of States for Internationally Wrongful Acts. In its Article 4, paragraph 1, the Articles state the responsibility of the country regardless the character of its organ.⁶ Of course, the question of attribution is not as simple and the jurisprudence of international law remains uncertain at best of which so-called attribution tests to follow.⁷ According to the practice of various international tribunals, the responsibility of the state can be established if the state maintains some sort of control over the group of military personnel in question.⁸

The most logical solution would be to call the peacekeepers themselves to account. After all, they are the ones who commit the criminal acts. However before we accept this seemingly appealing reasoning, we have to answer the question of who are the peacekeepers? The general perception is that peacekeepers are a homogenous group of soldiers, the blue helmets, who maintain law and order, and oversee ceasefires during missions. In reality it is a diverse group of many different categories of personnel. We can distinguish at least 8 categories, which are the following: military, military observers, police, experts, employees of specialized agencies, UN Staff, volunteers and the members of private military and security companies. Due to the constraints of this article the author will only distinguish between military and non-military personnel as the two main legal regimes can be differentiated along those lines.

³ In our case this will always be the United Nations.

⁴ Charter of the United Nations. 1945. Art. 1. para. 1.

⁵ The emblematic blue helmets serve also serve as a sign for the parties to the conflict, notifying them of the presence of international forces, who are and have to remain neutral to the conflict.

⁶ UN Doc. A/RES/56/83. Art. 4. para 1.

⁷ Boon, Kristen: Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines. *Melbourne Journal of International Law*, Vol. 15, No. 2, 2014, p. 7-8.

⁸ Burke, Róisín Sarah: Sexual Exploitation and Abuse by UN Military Contingents – Moving Beyond the Current Status Quo and Responsibility Under International Law. Brill – Nijhoff, Leiden, 2014, p. 266.

The Process

Before the analysis of the process, it must be stated that the vast majority of the people involved in a peacekeeping mission are doing an outstanding job, facing constant danger and adversity while holding themselves to the highest behavioural standards of the organization (UN). There are those however, who do not abide by these standards and abuse their status as peacekeepers in order to commit criminal acts. This chapter aims to briefly discuss what happens in such a situation.

First of all when it seems feasible that a criminal act has occurred, the authorities – at first the UN – receive a form of complaint, called an allegation. An allegation can be considered a unique form of suspicion in written form, which serves as the basis of the inquiry. A major default of the allegation is that it only refers to an incident, therefore as far as official reports go, it can very well happen that an allegation means that several peacekeepers committed sexual exploitation and abuse against several victims.⁹ The allegation is handled by the Conduct and Discipline Officer of the mission who reports the findings to the Office of Internal Oversight Services (OIOS). The OIOS, established in 1994, serves as the UN's internal audit organ, with a mandate to assist the Secretary General in matters regarding oversight, inspections and investigations as well as monitoring the efficiency of various programmes.¹⁰

What happens after the OIOS concludes the investigation depends on the type of personnel involved? For military personnel, all of the collected evidence as well as the materials of the process are handed over to the authorities of the TCC. From this point it is the discretionary decision of the TCC to conclude its own investigation. As the justice system of most TCC's only accept the criminal process conducted by their own authorities, a large number of TCCs have proven to be reluctant in prosecuting their own citizens based on evidence collected by a foreign agency.¹¹ For civilian personnel an internal disciplinary process begins. The final sanction of the process could be the termination of employment. Unfortunately, the UN does not have the adequate means in either if these situations to effectively combat sexual exploitations and abuse. As in the first case concerning military personnel, the UN has no influence over the proceedings after handing over the evidence to the TCCs. When it comes to non-military personnel, there is a large disparity between termination of employment as an ultimate sanction and the type of criminal act committed.

⁹ Notar, Susan A.: Peacekeepers as Perpetrators: Sexual Exploitation and Abuse of Women and Children in the Democratic Republic of the Congo, *Journal of Gender, Social Policy & the Law*, Vol. 14 (2006) No. 2, p. 417.

¹⁰ UN Doc. A/RES/48/218B, 12 August 1994.

¹¹ Durch, William J., England, Madeline E.: *Ending Impunity: New Tools for Criminal Accountability in UN Peace Operations*. Stimson Issue Brief, 2009, p. 10-11.

A Regime of Immunities for Members of Military Contingents

It is clear that in the case of military personnel the UN has no rights or means to act, therefore we must inspect the possibilities of the TCCs in that regard. This segment aims at finding the sources of law which apply and the immunities which protect the personnel involved.

As the members of military contingents remain part of the armed forces of the TCC, it retains jurisdiction over them.¹² This also means that the criminal code of the state can be applied. As every criminal code prohibits sexual exploitation and abuse in some way, we can state that on the internal side, it is forbidden to commit the aforementioned criminal acts. From the side of international law, the Memorandum of Understanding (MoU) must be taken into consideration. The MoU serves as an agreement between the UN and the TCC defining the nature of the cooperation as well as providing some basic guarantees for the sending state regarding its peacekeepers, namely that it retains criminal jurisdiction over them and that neither the UN, nor the host country is entitled to press charges against the members of the TCC's military contingents.¹³ After the scandals of 2002, when the employees of specialized agencies and aid-workers were found taking advantage of the population on a large scale,¹⁴ then *Secretary General Kofi Annan* issued a bulletin calling for zero-tolerance of sexual exploitation and abuse in peacekeeping missions.¹⁵ The bulletin, called '*Special measures for protection from sexual exploitation and abuse*' has since been part of the annex of the revised MoU and as such, takes on the form of a binding source of international law if the UN and the TCCs decide to follow the model agreement.¹⁶ Apart from the bulletin, the 2007 Revised MoU also provides us with the definition of SEA. According to the Memorandum the following acts constitute sexual abuse: actual or threatened physical intrusion of sexual nature, whether by force or under unequal or coercive conditions. The definition of sexual exploitation can be 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.¹⁷ These definitions are broad enough to fit in nearly all violations of sexual nature and to allow the punishable acts to be categorized to fit crimes in every state's criminal code. The Revised MoU also adds the publication '*We are United Nations Peacekeeping Personnel*' to the annexes.¹⁸ The latter has served for some time as a

¹² Leck, Christopher: International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct. *Melbourne Journal of International Law*, Vol. 10 (2009) p. 349.

¹³ UN Doc. A/45/594, Art. 47., para b.).

¹⁴ UN Doc. A/RES/57/306.

¹⁵ UN Doc. ST/SGB/2013/13 Section 3.2.

¹⁶ Burke: *ibid.* 47-48.

¹⁷ UN Doc. A/61/19 Art. 4, Annex F.

¹⁸ UN Doc. A/61/19 Art. 5, Annex H.

pamphlet aiding the training of peacekeeping personnel, ensuring that those involved in peacekeeping abide by the highest ethical standards, fitting their status as peacekeepers.¹⁹ However it has not been binding on the parties before its inclusion in the 2007 Revised MoU.

Evidently, there are multiple sources of law (both national and international) which forbid SEA. Therefore the question arises: why isn't there an easy way to call the perpetrators into account? The answer lies in the multi-faceted system of international law and the underlying political interests. The TCC's, in exchange for the personnel they provide to a peacekeeping operation always ensure that their own criminal jurisdiction applies and that neither the UN, nor the host country has the right to initiate a legal process against its citizens. This leads to a system of immunities, which is supposed to ensure that peacekeepers can comply with the mission's mandate without fear of harassment from the local authorities. The downside is that in case of an allegation against a peacekeeper, the TCC is very reluctant to accept the findings of a UN organ, as the organ can operate differently from the local authorities (police and/or prosecutor).²⁰ This perception of the states is not entirely erroneous, as the OIOS, formed originally as an accounting body, functions in a vastly different manner than any police or prosecutor. Another factor which makes it harder to tackle the issue, is that the UN cannot force a state to commence a criminal proceeding. Whether or not to initiate such a process remains the discretionary decision of the state. Furthermore the UN cannot resort to the method of publicly announcing which countries are not cooperating in cases of SEA, as it could lead to alienating the support of the states in question. There is no clear and simple answer to this dilemma, but one can only make proposals, which would facilitate finding the best solutions. In order to do so we must first analyse the regime of immunities, and the factors which hinder the application of the norms on responsibility.

Two key documents serve as the source of international protection when it comes to members of military contingents committing criminal acts. The first one is the already mentioned Memorandum of Understanding. It not only serves as the source of definitions and prohibition of SEA, but as the very document ensuring the immunity from the proceedings of both the UN and the host state.²¹ To quote the Model MoU:

'Military members and any civilian members subject to national military law of the national contingent provided by the Government are subject to the Government's exclusive jurisdiction in respect of any crimes or offences that might be committed by them while they are assigned to the military component of [United Nations

¹⁹ http://www.un.org/en/peacekeeping/documents/un_in.pdf (downloaded: 05 January 2016).

²⁰ Miller, Anthony J.: Legal Aspects of Stopping Sexual Exploitation and Abuse in UN Peacekeeping Operations. *Cornell International Law Journal*, Vol. 39 (2006) p. 87.

²¹ Clark, Roger S.: Peacekeeping Forces, Jurisdiction and Immunity: A Tribute to George Barton, *Victoria University Wellington Law Review* Vol. 77 (2012) 96-98.

peacekeeping mission]. The Government assures the United Nations that it shall exercise such jurisdiction with respect to such crimes and offences.²²

This is further reinforced by the Status of Forces Agreements (SoFA), which can be considered agreements between the UN and the host state, defining the rights and obligations of peacekeeping personnel in the country. The SoFA mostly serves as a catalogue of immunities, shielding peacekeepers from local proceedings.²³

‘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 country/territory].’²⁴

As both the host state and the UN provides guarantees that members of military contingents would not be charged with criminal offences, it would appear as the TCC can obtain all available guarantees in order to ensure its jurisdiction over its citizen. The opportunities of the UN are very limited. All the Organization can do is to proclaim the person in question *persona non grata* and repatriate him/her. Repatriation serves as a way to ensure that the person would not commit additional criminal offenses during the mission. From the moment of repatriation it is entirely up to the TCC to initiate the criminal proceedings.²⁵ It has been a recurring problem that nothing prohibits the once repatriated personnel to join other UN missions and commit violations there, as the UN has no database of alleged perpetrators.

According to the official statistics of the UN, there has been a constant and promising increase in the number of responses the organization receives from TCCs regarding the criminal proceedings initiated by the state.²⁶ On the one hand, shortly after the UN began monitoring the situation in 2008, the situation was catastrophic. Only in 8% of the cases did the UN get a response of what happened to the alleged perpetrator. Even in that 8% it is not guaranteed that the case reached the phase of the sentence or whether there has been proper and proportionate punishment for the perpetrator. On the other hand, we can witness a dramatic increase in the number of responses from the TCCs. By 2015, 78% of the TCCs have responded to the UN, when inquired about the follow-up of the allegations. We can argue that anything less than 100% is not satisfactory, but the gradual progress is undeniable, and it speaks well of the effort by the organization.

²² UN Doc. A/61/19 quinquies Art. 7. para 1.

²³ Sari, Aurel: *The Status of Armed Forces in Public International Law: Jurisdiction and Immunity*, (21 January 2015) p. 44. (<http://ssrn.com/abstract=2555278>, downloaded: 10 January 2016).

²⁴ UN Doc. A/45/594 Art. 47. para. b).

²⁵ Ferstman, Carla: *Criminalizing Sexual Exploitation and Abuse by Peacekeepers*. United States Institute for Peace Special Issue 335. 2013. p. 4.

²⁶ See Annex I: Statistics - UN follow-up with member states (Sexual Exploitation and Abuse).

The Applicable Law and Immunities Concerning Non-military Personnel

Whereas the scope of possibilities for military personnel is greatly limited, in case of non-military, the UN has more effective methods (if applied correctly and consistently). The United Nations Staff Regulation and Rules serves as a collection of organizational and operational provisions, which although not criminal in nature, explicitly prohibit sexual exploitation and abuse by UN Staff.²⁷ ‘Staff’ in this respect means the following categories: UN Staff, employees of specialized agencies, volunteers and experts. It is unclear as well as debated whether military observers, police and members of private military and security companies fall under the category of staff. The Staff Regulation and Rules also states that UN staff does not fall under the jurisdiction of the host state, as a regime of immunities apply.²⁸ The type of immunity is defined in Article 105 of the UN Charter²⁹ as well as in the 1946 Convention on the Privileges and Immunities of the United Nations.³⁰ The protection can be considered similar to diplomatic immunity, as it protects UN staff from all criminal proceedings, those accused with criminal offences cannot be taken into custody, or seized, etc. However the immunity does not apply when the staff member in question fails to observe the laws or police regulations of the state or in case of non-performance of private obligations.³¹ In practice, the staff member will always argue that in the specific case the immunity applies. Whether or not the existence of the immunity can be verified, can only be decided by the Secretary General who can waive the immunity if he concludes that one of the abovementioned criteria has been met. This would mean that criminal procedure can commence against the alleged perpetrator in the host country. The main problem is that this process takes very long (often 6 months), during which the alleged perpetrator may disappear, or be reassigned to a new mission, leaving no means for the host country to initiate proceedings.

Additional Challenges

In the previous sections some of the most basic challenges have been covered. However, there are those, which are not obvious at first sight, but seriously hinder our understanding as well as the solution of the issue.

First of these problems is the categorization of the personnel involved in a UN peacekeeping mission. When we try to assess the problem at large we have to rely on the statistics provided by the UN. However, it is unclear at best which type of personnel are involved in the statistics. The Unit responsible for publishing the

²⁷ UN Doc. ST/SGB/2014/1 Rule 1.2 section e.).

²⁸ UN Doc. ST/SGB/2014/1 Art. 1. Reg. 1.1 section f.).

²⁹ Charter of the United Nations, 1945, Art. 105.

³⁰ Convention on the Privileges and Immunities of the United Nations, 1946, Art. 18. para. a.).

³¹ UN Doc. ST/SGB/2014/1 Art. 1. Reg. 1.1 section f.).

statistics, the Conduct and Discipline Unit lists military, police, civilian and other as categories,³² the Secretary General lists military and non-military,³³ while various NGOs differentiate otherwise.³⁴ It also remains unclear to which category military observers fall in, and we have no reliable data about criminal acts carried out by members of private military and security companies or employees of specialized agencies.³⁵ The reason why categorization is so problematic, is because if there are types of personnel omitted from the reports, it also means that we have no information about the amount of allegations committed by them. It can be stated that employees of specialized agencies, and of private military and security companies never make it to the reports.³⁶

Secondly, the term allegation lacks transparency. As mentioned above, it is quite possible for an allegation to include several injured parties and a dozen perpetrators, given the nature of these crimes, but there are no statistics of how many people are involved in a given allegation.³⁷ It would serve as a great step for the UN to publish these data in a separate, distinguishable format, so that we could see the number of perpetrators *per annum*.

Another major factor which hinders our clairvoyance is the underreporting of SEA. Crimes of sexual nature are among the most underreported crimes everywhere on the planet and this is especially true in a peacekeeping environment. The fact that there is often no or only weakened central authority to report to or to investigate is only worsened by the seeming impunity of the perpetrators. Taking into consideration the difference in power – as the peacekeepers are considered the ones with authority, weapons, food and money – the widespread illiteracy, the vast distances a victim has to take in an often difficult geographical environment only contribute to the desperate situation of the victims. A further problem is that the victim has no idea about the identity of the perpetrator(s), knowing only a surname and perhaps the perpetrator's country of origin. Also, as peacekeepers are exempt from the jurisdiction of the host country, the victims have to file a complaint at the Conduct and Discipline Unit, which lies at the same camp/establishment as the perpetrator. Returning to the place, where the person fell victim to the SEA only serves as a deterrent for the victims not to press charges.³⁸

³² <https://cdu.unlb.org/Statistics/AllegationsbyCategoryofPersonnelSexualExploitationandAbuse/AllegationsforAllCategoriesofPersonnelPerYearSexualExploitationandAbuse.aspx> (downloaded: 05 January 2016).

³³ UN Doc. A/69/779 Chapter 3, Art. 19.

³⁴ <http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/sexual-exploitation-and-abuse> (downloaded: 05 January 2016).

³⁵ See *ibid*.

³⁶ See Annex II. Sexual Exploitation and Abuse Allegations by Category of Personnel.

³⁷ <http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/sexual-exploitation-and-abuse> (downloaded: 05 January 2016).

³⁸ Csáky, Corinna: No One to Turn To – The Under-reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers. Save the Children Fund, 2008, p. 12-14.

Last but not least, as it was briefly mentioned above, the UN cannot single out a specific country, which fails to respond to allegations regarding its personnel. By doing so, the Organization (namely the UN) risks losing the manpower and the support of the state, which if it happens in case of the main contributors of peacekeeping personnel, can seriously undermine the potential of the UN to establish peacekeeping missions.

Conclusion

This article aimed at highlighting the diverse world of UN peacekeeping personnel, their legal obligations regarding SEA, as well the regime of immunities which protects them. In conclusion it can be argued that both military and non-military contingents have a well-established protection regime. The former is protected by the MoU and the SoFA, granting exclusive jurisdiction to the TCC, while the latter is governed by UN Staff Rules and Regulations, as well as the UN Charter and the 1946 Convention on the Privileges and Immunities of the UN. While both seem like a closed circuit, through a consistent application of its criminal jurisdiction and constant and open communication with the Organization, the TCCs can help remedy the issue. A quick and decisive usage of the waiver can serve as a short-term cure for non-military personnel committing SEA, but it requires the active participation of the Secretary General.

The challenges faced by peacekeeping are numerous and may seem daunting, but there are multiple steps which need to be taken. First of all the reporting and investigating mechanisms need to be strengthened, as this can be the root of solving the problem. Without accurate data, we cannot be certain of the scale of the problem, let alone be able to comprehend it. The OIOS either needs to be reformed to cope with its functions or the competence of investigation in criminal matters delegated to a separate organ. Furthermore it may be feasible to attain considerable improvement without a new international treaty, which could prove to be hard to realize, through the consistent application of existing norms. As it can be seen through the statistics of the UN, if there is a political will from the Organization and the TCCs it is possible improve the situation in a rapid manner.

Last but not least there have been events of great magnitude lately in the international community concerning SEA in peacekeeping operations. The heinous crimes committed in the Central African Republic in 2013-2014 incited the civil sphere to action.³⁹ The campaign, launched in May 2015 and dubbed Code Blue has been instrumental in ushering the issue into spotlight.⁴⁰ As a result, *Secretary General Ban Ki-*

³⁹ <http://www.aljazeera.com/news/2016/01/struck-sex-abuse-allegations-car-160106042447336.html> (downloaded: 05 January 2016).

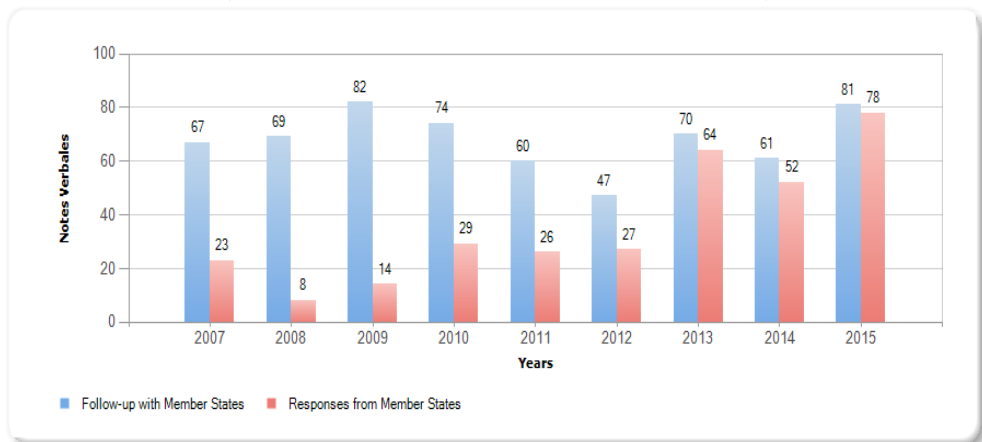
⁴⁰ <http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/video> (downloaded: 05 January 2016).

moon set up an independent investigation panel in June 2015, led by former Canadian Supreme Court Justice *Marie Deschamps*, which has concluded its report on 17 December 2015. The Deschamps Report is the first of its kind to state the responsibility of a head of mission, while also listing measures to avoid further violations.⁴¹ There has been considerable interest from the side of politicians as well, as during the September 2015 Peacekeeping Summit, US President *Barack Obama* named eliminating SEA in peacekeeping missions a top priority, which may signal a shift in the interest of the international community, which is an absolute necessity to implement any possible solutions into practice.⁴²

Whether the recent events signal the first breakthroughs in the matter or remain ripples in the pond of UN peacekeeping, remains to be seen.

ANNEX I

STATISTICS – UN FOLLOW-UP WITH MEMBER STATES (SEXUAL EXPLOITATION AND ABUSE)



Source:

<https://cdu.unlb.org/Statistics/UNFollowupwithMemberStatesSexualExploitationandAbuse.aspx> (downloaded: 05 January 2016)

⁴¹ <http://www.un.org/News/dh/infocus/cenaficrepub/Independent-Review-Report.pdf> (downloaded: 05 January 2016).

⁴² <https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-un-peacekeeping-summit> (downloaded: 05 January 2016).

ANNEX II
SEXUAL EXPLOITATION AND ABUSE ALLEGATIONS BY
CATEGORY OF PERSONNEL

	Military	Non-Military*	UN Agency Staff	Total
Personnel deployed in UN peacekeeping operations	87,538	31,253	No total #s of staff provided	Total cannot be calculated
'Allegations' by category**	24	27	28	79
Percentage of all 'allegations' of sexual exploitation and abuse by category of peacekeeping personnel	31%	34%	35%	100%

Sources: UN DPKO, Peacekeeping Fact Sheets / Conduct and Discipline Unit, Department of Field Support. Statistics

Source: <http://www.codebluecampaign.com/fact-sheets-materials/2015/5/13/sexual-exploitation-and-abuse> (downloaded: 10 January 2016)