Addressing Sexual Exploitation and Abuse

The Case of UN Police – Recommendations

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Abstract

Addressing the issue of sexual crimes committed by Peace Operations personnel has long been on the UN's agenda. The complaint mechanisms have been improved, from *ad hoc* reactions in the 1990s to appointing a Special Coordinator on sexual exploitation and abuse (SEA) issues in 2016. This paper makes recommendations to tackle persisting SEA problems, based on the author's research into over 600 alleged cases and on the UN accountability mechanisms. The personal scope is limited to UN Police personnel. The UN's approach in conflating sexual crimes and misconduct fail to reflect the severity of crimes. The UN is also ineffective in generating information fit for use in criminal proceedings. However, the laws on jurisdiction and immunity do not constitute legal barriers to accountability, if they are applied correctly. Other recommendations are made with regard to the way of investigation, steps in ensuring prosecution, and follow-up procedures with States concerned.

Keywords

sexual exploitation and abuse – sexual crimes – United Nations – peace operations – UN police – accountability – UN system – prosecution – whistleblowers – data management

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I Introduction

It has been a while since the first wave of allegations of sexual crimes against UN Peace Operations personnel was widely reported on the media in the 1990s in Cambodia, former Yugoslavia and Somalia. Numerous allegations of rape, sexual assault and human trafficking were revealed. The two UN transitional administrations established in 1999 attracted more allegations of sexual crimes.¹

The UN has dealt with these allegations on an *ad hoc* basis in the 1990s. Faced with the wave of charges and mounting criticism, the UN commenced work on establishing internal rules and mechanisms. It resorted to expanding its pre-existing complaint mechanism: Board of Inquiry. However, the Board was originally created to deal with dispute resolutions involving traffic accidents, and thus various shortcomings in relation to its capacities subsequently became clear.²

The first time that the UN put an institution-wide effort to eradicate this problem was after the publication of 2002 UN High Commissioner for Refugees (UNHCR) and Save the Children (SVC)'s report.³ This report documented many accounts of aid beneficiaries paying sexual services for little food and money. Some information indicated criminal conduct, and others may have been misconduct not amounting to a crime. It appears that the UN's approach to combat sexual crimes within the framework of sexual exploitation and abuse (SEA)⁴ was its response to the reported events on the ground. SEA includes all

1 On particular allegations of criminal misbehavior committed by UN Peace Operations personnel, see Ai Kihara-Hunt, *Holding UNPOL to Account: Individual Criminal Accountability of United Nations Police Personnel* (Brill, 2017), pp. 69–88.

2 *Ibid.*, pp. 123–128.

3 UNHCR and Save the Children-UK, Note for Implementing and Operational Partners on 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).

4 Sexual exploitation is defined as '[a]ny 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 sexual exploitation of another.' Sexual abuse is defined as 'the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions'. UN, 'Secretary-General's Bulletin 'Special measures for protection from sexual exploitation and sexual abuse' (9 October 2003) UN Doc. ST/SGB/2003/13, para. 1. (Hereinafter 'SGB on SEA').

sexual crimes, misconduct, relationships and favour, based on different power and vulnerability of the victim.⁵

Accordingly, the mid-2000s saw the introduction of a series of internal codes and guidelines. The 2003 Secretary-General's Bulletin on the prevention of sexual exploitation and abuse,⁶ and 'Zeid Report', issued in 2005,⁷ are the two most influential UN-wide documents related to sexual misbehaviour. More specific guidelines pertaining to the UN Police include Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers.⁸ The way that the UN has chosen to respond to the issue has been largely to use and give more tasks to pre-existing mechanisms, and for that matter, to existing personnel. The introduction of these codes has been relatively smooth, and yet their implementation has not been so.⁹

The problem persisted as evidenced by the events surrounding members of non-UN troops involved in sexual crimes against children in the Central African Republic (CAR), and the way that sending States and the UN mechanisms have dealt with the allegations¹⁰ demonstrate that the problems in the accountability machinery remained unresolved. That series of allegations also highlighted the complexity of having different types of Peace Operations personnel.¹¹ Furthermore, this series of events shed light on deficiencies in the UN system in relation to protection of victims, witnesses and whistleblowers, and inconsistent approach within the UN,¹² and created the current wave of more systematic UN efforts.

Consequently, the Organization has been left with little choice but to address these issues swiftly this time, as the issue has become well-known to

5 *Ibid.*, Sections 1 and 3.

6 *Ibid.*

7 UNGA, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations' (24 March 2005) UN Doc. A/59/710. (Hereinafter 'Zeid Report').

8 UN DPKO, 'Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers' (2003) UN Doc. DPKO/CPD/DDCPO/2003/001, DPKO/MD/03/00994. (Hereinafter '2003 Directives').

9 Kihara-Hunt, pp. 123–134.

10 Marie Deschamps *et al.*, 'Taking Action on Sexual Exploitation and Abuse by Peacekeepers – Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic' (Submitted to the Secretary-General, 17 December 2015).

11 It is because the alleged crimes and misconduct involved members of multinational military forces, authorized by the UN but are working outside the UN mission. *Ibid.*

12 Dechamps *et al.*

the world. It is undermining the foundation of legitimacy and existence of the UN.¹³ For the first time, former Secretary-General Ban Ki-Moon accepted resignation of his Special Representative for not handling the issue appropriately.¹⁴ The Security Council adopted the first resolution that acknowledged the need for the UN to remove security forces from States that fail to take accountability issues seriously.¹⁵ He established his Special Coordinator on this issue at the level of Under Secretary-General (USG) in 2016,¹⁶ and his successor Antonio Guterres established his representative to advocate for rights of victims of sexual exploitation and abuse at the Assistant Secretary-General (ASG)'s level in the following year.¹⁷ These two officials hold their offices with senior staff members, to improve the UN-wide response to SEA,¹⁸ and to 'support an integrated, strategic response to victim assistance in coordination with United Nations system actors with responsibility for assisting victims' respectively.¹⁹ The Victim's Advocate has also representatives in major missions.²⁰ Further, a High-Level Task Force on sexual exploitation and abuse was established in January 2017 to develop a 'clear and game-changing strategy'.²¹

13 Kihara-Hunt, pp. 341–342.

14 UN News Center, 'Central African Republic: Ban vows "decisive action" on allegations of sexual abuse by UN peacekeepers' (12 August 2015), available at: <http://www.un.org/apps/news/story.asp?NewsID=51618#.WgvWEFuCz3g>, last accessed 15 November 2017.

15 UNSC Res 2272 (11 March 2016) UN Doc S/Res/2272, op. paras. 1–3.

16 UN, 'Secretary-General Appoints Jane Holl Lute of United States as Special Coordinator on Improving United Nations Response to Sexual Exploitation and Abuse', (8 February 2016), available at: <https://www.un.org/press/en/2016/sgai634.doc.htm>, last accessed 15 November 2017.

17 UN News Center, 'Australian Jane Connors appointed first UN rights advocate for victims of sexual exploitation', (23 August 2017), available at: <https://www.un.org/apps/news/story.asp?NewsID=57401#.WgvZ6VuCz3g>, last accessed 15 November 2017.

18 UNSC Res 2272 (11 March 2016), UN Doc S/Res/2272, preamble.

19 UN, 'Ms. Jane Connors of Australia – Victims' Rights Advocate' 23 August 2017, available at: <https://www.un.org/sg/en/content/sg/personnel-appointments/2017-08-23/ms-jane-connors-australia-victims%E2%80%99rights-advocate>, last accessed 15 January 2018; UNGA Res 818, (28 February 2017), UN Doc A/71/818, para. 13 (a).

20 They are at the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), the United Nations Stabilization Mission in Haiti (MINUSTAH) and the United Nations Mission in South Sudan (UNMISS). UNGA Res 818 (28 February 2017), UN Doc A/71/818/Add. 1. This corresponds with missions where the most number of SEA allegations have been reported. KIHARA-HUNT, pp. 69–114.

21 UN, 'Special Coordinator', available at: <https://www.un.org/preventing-sexual-exploitation-and-abuse/content/un-special-coordinator-0>, last accessed 15 January 2018.

Several new documents have been developed since. In August 2017, military's *aid memoire* compiled related rules and information for commanders of national contingents.²² In relation to the UN Police, a range of administrative reforms of the UN Police has been on-going as part of the introduction of Strategic Guidance Framework.²³ The High-Level Task Force has also produced glossary in order to make the UN approach coherent.²⁴

The author has conducted a research into criminal accountability of UN Police personnel, based on information she collected about more than 600 alleged cases of criminal conduct committed by UN Peace Operations personnel since the 1960s.²⁵ In this 5-year research, all mechanisms, offices and personnel within the UN, which, by UN rules or *de facto*, potentially deal with allegations of criminal conduct, have been examined, in order to analyze how effective the mechanisms are in tackling impunity for those crimes. It was found that the UN's practice in the collection of information that indicates criminal conduct is not sufficiently active.²⁶ Another area where problems persist was found to be who conducts investigation and how.²⁷ The research analyzed whether there are genuine legal, practical and other potential obstacles for willing States to prosecute. In this relation, lack of jurisdiction is often claimed to be a large obstacle for a State contributing personnel to prosecute its nationals. This claim was found to be largely false with regard to the type of crimes committed in

22 UN, 'Commanders' guide on measures to combat Sexual Exploitation and Abuse in United Nations military', August 2017, available at: https://www.un.org/preventing-sexual-exploitation-and-abuse/sites/www.un.org.preventing-sexual-exploitation-and-abuse/files/the_military_aide_memoire_united_nations_measures_against_sexual_exploitation_and_abuse.pdf, last accessed 15 January 2018.

23 Strategic Guidance Framework is the core of the comprehensive review of the operation of the UN Police, following an external review of the UN Police and subsequent Secretary-General's report on the UN Police, both acknowledging the critical needs for reform of the UN Police. UN Police, 'Strategic Guidance Framework for International Police Peacekeeping', available at: <https://police.un.org/en/sgf>, last accessed 15 January 2018. UN, 'External Review of the Functions, Structure and Capacity of the UN Police Division' (31 May 2016); UN, 'Report of the Secretary-General on United Nations Policing' (10 November 2016), UN Doc S/2016/952.

24 UN, 'Glossary on Sexual Exploitation and Abuse – Thematic Glossary of current terminology related to Sexual Exploitation and Abuse (SEA) in the context of the United Nations: Second Edition' (24 July 2017), available at: https://hr.un.org/sites/hr.un.org/files/SEA%20Glossary%20%20%5BSecond%20Edition%20-%202017%5D%20-%20English_o.pdf, last accessed 14 January 2018.

25 For details, see Kihara-Hunt, pp. 65–118.

26 *Ibid.*, pp. 134–155.

27 *Ibid.*, pp. 158–172.

Peace Operations.²⁸ Immunity from legal proceedings is another potential legal barrier. However, the research found that most of criminal acts committed in the context of Peace Operations do not attract immunity. However, the UN's practice was found to be different from theory.²⁹

The following is the author's recommendation based on this research. It brought fundamental problems at various stages of dealing with allegations to light.³⁰ The scope of this paper is, unlike the previous research, limited to allegations of sexual misconduct committed by UN Police personnel. Therefore, certain parts of this paper that are related to specific codes, procedures and arrangements for the UN Police may not apply to other types of UN Peace Operations personnel. However, analysis of policies and codes that apply across various categories of personnel is also of relevance to military and civilian personnel. All will be focused on the result and recommendations due to the limitation of space.

II Getting the Right People

Effective measures to tackle this persistent issue start from selecting and sending the right people. This is because of what came out of the author's research: that the likeliness of committing crimes is related to personal integrity rather than the roles and responsibilities with which they are tasked. If personal integrity of UN employees is linked to possibility of crimes, it is vital that the UN gets the right people in the first place, and properly train them.³¹ This is about prevention. At this stage, the criteria and procedure of selection is the key. Thus it is necessary to first lay out the procedure regarding selection and deployment of UN Police personnel.

The UN Police has two forms. One form is Individual Police Officers (IPOS), and the other one is Formed Police Units (FPUS). Both are nominated and seconded by their contributing countries. For IPOS, the UN has an opportunity to view the candidates' *curriculum vitae* (CVs), while FPUS are given as a unit of 120 to 140 police officers. They come as a unit and work under the national command while serving for UN missions. The UN is given the list of names of selected FPU officers, but not CVs.³²

²⁸ *Ibid.*, pp. 188–229.

²⁹ *Ibid.*, pp. 230–286.

³⁰ *Ibid.*, pp. 119–187.

³¹ *Ibid.*, pp. 69–114.

³² *Ibid.*, pp. 15–64.

The UN has a policy of refusing individuals involved in misconduct in previous missions. Another policy exists on refusing police units and individuals who have been implicated in crimes, violations of international humanitarian law and human rights law in the domestic sphere.³³ The policy and procedures have certainly been improved since the 1990s. Security Council resolution 2272 endorses the Secretary-General's decision to repatriate a particular uniformed unit if credible evidence indicates widespread or systematic SEA committed by that unit, or that the unit fails to respond to allegations.³⁴ The problem, however, is that it is not implemented systematically. On the former policy, the UN has started to check IPOs against the UN data of individuals who committed misconduct in previous missions. On the latter, there are two main tools: self-attestation and checking against units listed in the Special Representative on Sexual Violence in Conflict's reports and other sources. This practice is at best very sketchy.³⁵ The UN should make these policies public. In fact, while the UN's terms of agreement about FPUs are standard and public,³⁶ those for IPOs in the form of bilateral *Notes Verbales*, are not.³⁷ They should be made public, so that the result can be scrutinized against the agreement. The UN must then follow these policies systematically in a transparent manner. The Organization may be concerned that doing so would discourage States to send personnel to UN Peace Operations. Although that concern is legitimate, the stake of losing trust is higher.³⁸

It is necessary for the UN to be more active in ensuring that these standards are met. The UN sends out selection assistance teams to Police Contributing Countries (PCCs) when invited. In regards to IPOs, these teams check whether police candidates nominated by PCCs meet the three minimum criteria of eligibility: language, possession of a driver's license and police experience.

33 UN, 'Standing Operating Procedures: Assessment of Operational Capability of Formed Police Units for Service in United Nations Peacekeeping Operations' UN Doc. Ref. 2012.11., paras. 25b, 51, 52, and Annex D, E; Question number 32 of the Personal History Profile (PHP). The PHP form is available as an annex to the UN DPKO, UN, Guidelines for United Nations Police Officers on Assignment with Peacekeeping Operations (UN Doc DPKO/PD/2006/00135, 29 June 2007); UNPOL, Towards a New UN Police: Revised Procedures for Assessment of Individual Police Officers (2013), p. 5.

34 UNSC Res 2272 (11 March 2016) UN Doc S/Res/2272, op. paras. 1–3.

35 Kihara-Hunt, pp. 42–62.

36 UN, 'Model Memorandum of Understanding between the United Nations and the xxx Contributing Resources to the xxxx' UN Doc. (on file with author). (Hereinafter 'MoU FPU').

37 Kihara-Hunt, pp. 42–62.

38 *Ibid.*, pp. 350–352.

For FPUS, selection assistance teams only check the candidates' identities and their serving police status.³⁹ At this screening stage, information provided by individual candidates and PCCs should be checked, considering that 70 per cent of nominated personnel were found not to meet the three basic criteria for service in 2011.⁴⁰ The challenge of ensuring that selected police personnel have required skills continues.⁴¹ In order to improve this, selection assistance teams need to be strengthened in their capacity.

Prior to deployment, all UN Police officers-to-be are trained in the home State. Training is the PCCs' responsibility. The UN provides modules for PCCs, including a module on SEA for all personnel and a separate SEA module for commanders. This approach is positive, given the circumstances of UN Peace Operations. The issue remains in the implementation.⁴² A considerable number of police personnel arrive without pre-deployment training.⁴³ Therefore, significant need remains for training of UN Police personnel after they arrive in the mission.⁴⁴ What needs to be added is a flat requirement that all personnel must provide a certificate of completion of UN's standard SEA training prior to them joining the mission. Furthermore, training modules are currently heavy on codes and sanctions.⁴⁵ Given that the effectiveness of adult learning lies in

39 *Ibid.*, pp. 52–62.

40 William J Durch *et al.*, *Enhancing United Nations Capacity to Support Post-Conflict Policing and Rule of Law* (Henry L. Stimson Center 2010), p. 46; UN, *UNPOL Magazine* (9 edn., July 2012), p. 22.

41 UN, 'External Review of the Functions, Structure and Capacity of the UN Police Division' (31 May 2016), para. 82.

42 UN DPKO, 'Training Support Services for Member States', available at: http://www.peacekeepingbestpractices.unlb.org/PBPS/Pages/Public/PeaceKeepingTraining.aspx?page=support&menukey=_12_4. See also Anika S. Hansen, *From Congo to Kosovo: Civilian Police in Peace Operations* (Oxford University Press for the International Institute for Strategic Studies 2002), p. 52. In 2009, the UN Police Division developed pre-deployment training curricula that were sent out to member States. Bethan K Greener, 'The Rise of Policing in Peace Operations' (2011) 18 *International Peacekeeping* 183, p. 190.

43 Kihara-Hunt, pp. 61–62.

44 UN, 'External Review of the Functions, Structure and Capacity of the UN Police Division' (31 May 2016), para. 113.

45 To view the content contained in the standardized Core Pre-Deployment Training (CPTM) document, which was developed by the UN in 2009, see <http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/SG%20Report%20A%2065%20644.pdf>. The UN Pre-deployment Training Standard for Police Officers is available at <http://pbpu.unlb.org/PBPS/Library/Training%20Standards%20for%20police%20-%20Experts%20on%20Mission.pdf>, last accessed 15 November 2017. The content of in-theatre training is not accessible to the public. It is tailored to each mission.

active participation, it is recommended that training modules be strengthened in case studies.

III Information

The author's research found that the next stage of dealing with SEA allegations - information collection - is problematic. Currently, the UN receives information when someone complains. The Organization has improved in its public awareness approach and has put various measures to systematize scattered information collection and storage system. For example, the establishment of the Conduct and Discipline Unit (CDU) at the headquarters and Conduct and Discipline Teams (CDTs) in missions in 2005, and the clarification that the Unit is the central databank of allegations, has improved the situation.⁴⁶ The Organization's improved transparency with regard to SEA prevention policies and publication of SEA allegations, in particular in annual Secretary-General's reports,⁴⁷ may further encourage reporting.

However, problems remain. Firstly, regardless of the level of public awareness, the fact that information collection is still reactive is not satisfactory. By limiting itself to receiving complaints, given the nature of under-reporting on sexual misconduct,⁴⁸ the UN is missing out on a large proportion of information available. The UN should proactively seek information, including by verifying threats and rumours of sexual misconduct.

Secondly, information collection is not yet systematic, and further reform is necessary. If one traces how information of sexual and other misconduct is received and reported to which office, and how it was dealt with by whom, there remains significant inconsistencies and confusion. There are contradicting internal guidelines and documents on who is prohibited, who is authorized, and who is obliged to take specific actions.⁴⁹ While the author was engaged in

⁴⁶ Kihara-Hunt, pp. 123–134.

⁴⁷ Since 2004, the Secretary-General reports on the issues of sexual exploitation and abuse, including information on particularized allegations, and since 2016, the report contains the nationality of personnel involved. UN, 'Conduct in Field Missions: Reports of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse', available at: [https://conduct.unmissions.org/reports-secretary-general-special-measures-protection-sexual-exploitation-and-sexual-abuse?date_filter\[value\]&page=1](https://conduct.unmissions.org/reports-secretary-general-special-measures-protection-sexual-exploitation-and-sexual-abuse?date_filter[value]&page=1), last accessed 16 January 2018.

⁴⁸ Kihara-Hunt, pp. 70–71; 141–143.

⁴⁹ The details of various examples of contradictions can be found in Kihara-Hunt, pp. 167–168. In relation to the UN Police, one of the policies that contradict with newer policies is the 2003 Directives, which provided that preliminary investigations shall be conducted

the development of Strategic Guidance Framework, it was confirmed by the participants of a consultation meeting that the UN Police Division and its personnel are aware of existing guidelines contradicting with each other.⁵⁰ Such contradicting guidelines need to be fixed as a matter of urgency. Moreover, the system needs to be tightened to eliminate possibilities of credible allegations being unattended.⁵¹ In order to attend this problem, it is recommended that information flow in terms of allegations of sexual and other misconduct be mapped out and published internally and externally. Where uncertainties become clear, reporting lines should be clarified.

Thirdly, the information is still not in one central place, despite the creation of CDU. Office of the Internal Oversight Services (OIOS), established in 1994 for auditing UN's performance, has an investigation division. This Division is tasked with all SEA investigations. OIOS' data are confidential, and thus CDU does not have access to them. In addition, Police Division at the headquarters has its own database of allegation of misconduct. The three datasets contain overlapping information, but due to confidentiality, it is unknown as to how much of the data are overlapping.⁵² This practice prevents the UN to grasp the whole picture of the problem.⁵³ Considering all circumstances, it is recommended that all data be centrally stored by OIOS, and the other two offices to

by persons appointed by the Head of the Mission. UN DPKO, 'Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers' (2003) UN Doc. DPKO/CPD/DDCPO/2003/001, DPKO/MD/03/00994. Internal *Code Cable*, however, stated that conduct and discipline issues cannot be dealt with by components that were previously responsible. UN, 'Code Cable on the Clarification of Conduct and Discipline Issues' (1 February 2006) UN Doc. (on file with author). Another *Code Cable* mentions that those components are required to cooperate with the Conduct and Discipline Teams. UN, 'Clarification of Roles within Mission Administration with Regard to Conduct and Discipline Issues' (4 June 2007) UN Doc. (on file with author). A separate Directive stated that the Head of Police is authorized to carry out investigations and inquiries, part of that involves establishing an 'internal investigation unit'. UN DPKO, 'Directives for Heads of Police Components in Peacekeeping Operations' (21 November 2006) UN Doc. DPKO/PD/2006/00122.

50 Strategic Guidance Framework meeting, June 2016.

51 *Ibid.*, pp. 134–179.

52 *Ibid.*, pp. 95–96.

53 It is also to be noted that reporting on allegations of SEA incidents is mainly made through the Secretary-General's annual report. Since 2013, this report contains information on particularized allegations. Since 2016, the report also contains information regarding the nationality of the suspect. UN, 'Conduct in Field Missions: Reports of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse', available at: [https://conduct.unmissions.org/reports-secretary-general-special-measures-protection-sexual-exploitation-and-sexual-abuse?date_filter\[value\]&page=1](https://conduct.unmissions.org/reports-secretary-general-special-measures-protection-sexual-exploitation-and-sexual-abuse?date_filter[value]&page=1), last accessed 16 January 2018.

have access to non-confidential parts of the dataset. Lastly, in these reforms, it would be helpful if CDU gains appropriate influence in the UN's policy and decision making. For that purpose, CDU should be upgraded to an appropriate level of authority.

IV Protection of Victims, Witnesses and Whistleblowers

The research identified that one of the reasons that victims, witnesses and UN personnel do not report misconduct is insufficient protection provided to them. When misconduct is of a sexual nature, reporting rates are even lower.⁵⁴ Problems have been identified in this regard, and victims and witnesses' fear of retaliation for reporting has been an obstacle for reporting.⁵⁵ That fear is linked to the actual or perceived lack of confidentiality.⁵⁶ What is needed is not only ensuring confidentiality but a more comprehensive support to victims.⁵⁷ On that front, the creation of the Victims' Rights Advocate for the UN and the deployment of that office's staff in missions, as described above, is a remarkable step forward.⁵⁸ It is hoped that local women's and children's community networks will be systematically involved in victim and witness protection and

54 *Ibid.*, pp. 70–71; 141–143.

55 Corinna Csáky, No One to Turn to – The Under-Reporting of Child Sexual Exploitation and Abuse by Aid Workers and Peacekeepers (Save the Children – UK, 2008), p. 13.

56 In Dadaab, Kenya, research revealed that 15.5 percent of refugees and 43.7 percent of incentive workers expressed a 'fear of lack of confidentiality' in reporting a case of sexual exploitation and abuse. Xefina Consulting, Preventing Sexual Exploitation and Abuse (PSEA) Project: KAPB Survey Results (Report to International Rescue Committee, September 2007), p. 50. Another survey showed that beneficiaries of humanitarian aid worry particularly about the lack of confidentiality, were they to complain. Kirsti Lattu, To Complain or Not to Complain: Still the Question, Consultations with Humanitarian Aid Beneficiaries on Their Perceptions of Efforts to Prevent and Respond to Sexual Exploitation and Abuse (Humanitarian Accountability Partnership, 2007), p. 49.

57 Xefina Consulting, p. 10. About one third of the population consulted in a survey in Haiti thought that the fear of retaliation by perpetrators was deterring child victims from reporting SEA incidents. Csáky, p. 13. UNGA, 'Report of the Office of Internal Oversight Services on its Investigation into Allegations of Sexual Exploitation and Abuse in the Ituri Region (Bunia) in the United Nations Organization Mission in the Democratic Republic of the Congo' (5 April 2007) UN Doc. A/61/841, paras. 13(d), 13(e).

58 UN News Center, 'Australian Jane Connors appointed first UN rights advocate for victims of sexual exploitation'.

support. This is because the data collected in the research indicated that most cases involved women and children as victims.⁵⁹

Another category of persons who require sufficient protection is whistleblowers. Their protection requires taking the environment of the UN and the specific circumstances of UN Peace Operation into account. There are policy and guidelines on whistleblower protection.⁶⁰ It is prohibited to retaliate against anyone who reports misconduct, and the office that is entrusted with protecting them is the Ethics Office.⁶¹ However, this is an area that the UN is particularly weak. In 2004, survey confirmed that UN spersonnel fear retribution for reporting misconduct.⁶² Similar findings were made in various reports,⁶³ and the fear appears to be based on reality. The issue is not only

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- 59 On the author's data, see Kihara-Hunt, pp. 88–91; 104–107. In 2014–2015, SEA allegations were made in the Central African Republic involving boy victims. Deschamps *et al.*
- 60 UN, 'Secretary-General's Bulletin on the Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations', (19 December 2005), UN Doc. ST/SGB/2005/21.
- 61 UN, 'Secretary-General's Bulletin on the Protection against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized Audits or Investigations' (20 January 2017), UN Doc SGB/2017/2.
- 62 UN Wire, 'Survey Finds UN Staff Fear Retribution for Reporting Misconduct' (10 June 2004) http://www.unwire.org/UNWire/20040610/449_24749.asp, last accessed 5 June 2006. This survey concerned all UN personnel.
- 63 UNGA, 'Report of the Office of Internal Oversight Services on the Global Review of Discipline in Field Missions led by the Department of Peacekeeping Operations' (8 March 2006) UN Doc. A/60/713, para. 21. Also see Sarah Martin, *Must Boys be Boys? Ending Sexual Exploitation and Abuse in UN Peacekeeping Missions* (Refugees International, October 2005), p. 6; UNGA, 'A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations' (24 March 2005) UN Doc. A/59/710, para. 13. See also Kathryn Bolkovac, *The Whistleblower: Sex Trafficking, Military Contractors, and One Woman's Fight for Justice* (Palgrave Macmillan 2011); Jamie Wilson and Kevin Maguire, 'American Firm in Bosnia Sex Trade Row Poised to Win MoD Contract' *The Guardian* (London, 29 November 2002) <http://www.theguardian.com/uk/2002/nov/29/military.politics>, last accessed 6 October 2014. A separate case, heard by the UN Dispute Tribunal, upheld the claim lodged by a former senior civilian official at UNMIK that he had been fired following his report of corruption by his supervisors, and that the UN had failed to protect him. This ruling was later overturned in the Appeals Court. Kristen Saloomey, 'Panel Says UN Failed to Protect Whistleblower' *Al Jazeera* (23 June 2012) <http://www.aljazeera.com/video/americas/2012/06/201262322950126228.html>, last accessed 6 October 2014; Julian Borger, 'UN Tribunal Finds Ethics Office Failed to Protect Whistleblower' *The Guardian* (London, 27 June 2012) <http://www.theguardian.com/world/2012/jun/27/un-tribunal-whistleblower-james-wasserstrom>, last accessed 6 October 2014; 'UN Tribunal

possible retaliation and pressure by the perpetrator of misconduct, but also retaliation, pressure and unfavourable treatment by the superior.⁶⁴ This may be particularly serious in uniformed personnel, with the reported tendency of closing ranks. Where uniformed personnel live and work together, protection of a whistleblower is more challenging.⁶⁵

In this regard, it is vital to take firm action against superiors who fail to take action against individuals implicated in misconduct, and who thereby create an atmosphere of condoning transgressions. Separately, it is recommended that stringent action be taken against superiors who fail to take active measures to protect whistleblowers. A series of protection measures are available in the hands of superiors. Assigning duties in a way that implicated personnel and whistleblowers do not have daily contact would be the first one. In addition, the UN has assigned Ethics Office this challenging task of whistleblower protection without providing the Office an appropriate level of authority. The Ethics Office struggles to protect whistleblowers.⁶⁶ The actions taken by the Ethics Office following a series of allegations of SEA cases in the Central

Overtakes Ruling Backing Whistleblower' *The New Zealand Herald* (4 September 2014) http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11320116, last accessed 6 October 2014.

64 UNGA, 'Report of the Office of Internal Oversight Services on the Global Review of Discipline in Field Missions led by the Department of Peacekeeping Operations' (8 March 2006) UN Doc. A/60/713, para. 21; Kathryn Bolkovac, *The Whistleblower: Sex Trafficking, Military Contractors, and One Woman's Fight for Justice* (Palgrave Macmillan 2011); Jamie Wilson and Kevin Maguire, 'American Firm in Bosnia Sex Trade Row Poised to Win MoD Contract' *The Guardian* (London, 29 November 2002) <http://www.theguardian.com/uk/2002/nov/29/military.politics>, last accessed 6 October 2014; Kristen Saloomey, 'Panel Says UN Failed to Protect Whistleblower' *Al Jazeera* (23 June 2012) <http://www.aljazeera.com/video/americas/2012/06/201262322950126228.html>, last accessed 6 October 2014; Julian Borger, 'UN Tribunal Finds Ethics Office Failed to Protect Whistleblower' *The Guardian* (London, 27 June 2012) <http://www.theguardian.com/world/2012/jun/27/un-tribunal-whistleblower-james-wasserstrom>, last accessed 6 October 2014; 'UN Tribunal Overtakes Ruling Backing Whistleblower' *The New Zealand Herald* (4 September 2014) http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11320116, last accessed 6 October 2014.

65 Kihara-Hunt, pp. 150–154.

66 When an independent body reviewed the performance of the OIOS Investigation Division, the OIOS was unable to report how many cases were referred to it by the Ethics Office. If the Ethics Office considers it appropriate, the case may be investigated by the OIOS. However, the OIOS did not have a sufficient number of investigators available to do this. Erling Grimstad, Final Report, Review of the OIOS Investigations Division, United

African Republic in 2014–2015 further questions the independence of the Ethics Office.⁶⁷ The Office needs to be upgraded so that it has sufficient influence in the UN's decision making. The Office also requires sufficient resources to carry out the task.⁶⁸

V Investigation

The author's research also identified issues at the next stage of the chain of actions related to individual accountability. When an allegation of misconduct reaches the investigation stage, how it is investigated, and by whom, determine whether individual accountability is successfully addressed.

The UN's investigation has been largely centered around two systems: Board of Inquiry (BoI) and the Office of the Internal Oversight Services (OIOS). The former emerged from the UN's model in dealing with administrative cases of traffic accidents, and problems were identified in relation to the quality of investigation and burden on managers who are additionally assigned to BoI tasks.⁶⁹ OIOS system was introduced in response to that. However, whilst the quality of investigation has improved, unmanageable amount of tasks and the system's incompatibility with potential criminal proceedings remained. In addition, currently more than half of the investigation from Peace Operations is conducted within the mission, which brings back the issues akin to those of BoI system.⁷⁰ The three largest problems are: (i) the way and the type of evidence collected for the UN's disciplinary purposes does not suit potential criminal proceedings; (ii) the quality of investigation remains problematic; and (iii) resources are insufficient to conduct timely investigation into serious allegations.⁷¹

The UN needs to take a number of steps to address these problems. Most importantly, all information needs to be treated appropriately. This means that allegations that may amount to a crime must be treated carefully, so as not to

Nations, (Submitted to the Under-Secretary-General of Office of Internal Oversight Services, 2007), pp. 35–6.

67 Deschamps *et al.*

68 Kihara-Hunt, pp. 150–154; 343–344.

69 *Ibid.*, pp. 159–162.

70 *Ibid.*, pp. 162–170.

71 *Ibid.*, pp. 119–187.

destroy potential evidence. This in turn requires distinguishing criminal misconduct and wrongdoing that does not amount to a crime. Information that is difficult to categorize should be treated as a crime.⁷² For both criminal and disciplinary purposes, but crucially for the former, evidence collection shall not be done by 'enthusiastic amateurs'.⁷³ Criminal investigation should be conducted by professional criminal investigators from the very beginning. In exceptional cases where the situation on the ground does not allow that, qualified investigators should be the ones collecting evidence. The UN's disciplinary investigation must be conducted with potential national criminal proceedings in mind. This means that utmost effort should be paid to satisfy evidential requirements of the national proceedings of the State of the accused person. There are States that require only authorized personnel such as national police to collect evidence. Some States only admit evidence with a complete chain of custody. These evidential standards vary from State to State. For this reason, it is vital that all FPUS and PCCs that send a large number of police personnel have designated personnel specialized in the investigation of sexual crimes. This designation of personnel should be a formal requirement for those States to send FPUS. As the UN has a set scope for joint investigation between the UN and host State, there should be a firmer cooperation and joint investigation with the PCCs, as the chances of UN police personnel being prosecuted in the host State is declining sharply, given the situations in which UN missions go.⁷⁴

VI Legal Issues

On the potential legal obstacles for holding individuals accountable for criminal conduct, the research found that issues that are often discussed in the context of preventing prosecution do not in fact do so. One important legal point, however, is to change the SEA framework. Currently, SEA includes all sexual

72 *Ibid.*, pp. 120–122.

73 UNGA, 'A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations' (24 March 2005) UN Doc. A/59/710, (hereinafter 'Zeid Report'), para. 32. Prince Zeid, who was appointed as Special Advisor on SEA in Peace Operations, examined the nature and extent of SEA problems, analyzed existing mechanisms for dealing with SEA allegations in Peace Operations, and sought ways to eliminate future incidents.

74 Kihara-Hunt, pp. 158–170; 183–187.

conduct based on the difference of power and position.⁷⁵ While the UN takes the position that actual or attempted abuse of that difference is undesirable, it is problematic that consensual sexual intercourse with an adult and sexual abuse of children is dealt within the same SEA framework.⁷⁶ Serious crimes must be prosecuted. Misconduct must not.⁷⁷ Clearly demarcating the two is necessary for proper accountability of individuals.

Two other clarifications are necessary. One is on criminal jurisdiction. Host State's criminal jurisdiction is uncontested. It is the criminal jurisdiction of the State sending personnel that emerges in discussions on prosecution of crimes committed by Peace Operations personnel. Often the apparent lack of criminal jurisdiction over crimes committed by nationals abroad is considered to be a major barrier for willing States to proceed with prosecution. In terms of UN Police personnel, the author's research proved that over 80 percent of police personnel are within their PCCs' jurisdiction. Criminal jurisdiction is not a major barrier for prosecution.⁷⁸ This needs to be clearly stated by the UN.

The other necessary clarification is on immunity of UN personnel from legal proceedings. With regard to the UN Police, immunity shields prosecution only if the conduct is committed while performing their official functions.⁷⁹ The author's data indicate that vast majority of crimes, and in fact virtually all sexual crimes, have been committed outside their official functions.⁸⁰ Therefore, immunity is not a major barrier for prosecution. This question of whether immunity exists is a separate question from whether immunity should be waived. Where immunity does not exist in the first place, the UN cannot waive it.⁸¹ This needs to be clarified once and for all. The Organization, then, ought to apply the law. Often it has resorted to 'waive or not waive immunity' discussion without assessing whether or not immunity exists in relation to the conduct in question. Even where the UN's intension is to protect its personnel from potential prosecution in a host State, whose judiciary is not functioning or

75 See above Section 1.

76 The former is 'strongly discouraged' and the latter is prohibited. UN, SGB on SEA, para. 3-2 (d).

77 On the obligation to investigate and prosecute under International Human Rights Law, see Kihara-Hunt, pp. 287–340.

78 *Ibid.*, pp. 188–229.

79 UN Police in theory enjoys an additional immunity from arrest and detention, which covers all their conduct, but the UN has been taking an official position that UN Police personnel are not immune from arrest and detention with regard to conduct outside their official functions. *Ibid.*, pp. 246–263; pp. 272–275.

80 *Ibid.*, pp. 69–114.

81 *Ibid.*, pp. 263–272.

does not sufficiently protect due process rights of the defendant, it is not legitimate to interpret the law in that way.⁸² At best, the UN's practice is confused. In some cases it has followed the law strictly, while in other cases, it mixed the two steps of immunity implementation. It is apparent that the confusion is not only at the field level but also at the Office of the Legal Affairs in the UN headquarters.⁸³ The Organization should avoid using immunity language when its actual concern is defendant's due process rights. It should be able to use human rights language and refuse handing-over of its personnel on that ground.⁸⁴ This is because the UN cannot perform against the rule of law, as it is inculcating rule of law values in the host State.

VII Prosecution

Following investigation, criminal misconduct shall be considered for prosecution. There are two main fora: in the host State and in the contributing State.⁸⁵

The host State is often not ready to prosecute UN personnel for various reasons. Some fragile host States may not have functional judiciary, or they may not have sufficient resources. It may be that host States do not see it as a priority to prosecute UN personnel. They may have misunderstandings about the scope of immunity. They may perceive prosecution of UN personnel as confronting the UN, and find it difficult to do so.⁸⁶ With regard to prosecution in the host State, it is at least clear that there is no jurisdictional barrier.⁸⁷ Therefore, it is advisable that capable host States should seek prosecution. Subsequently, the onus is on the UN's to provide legitimate reason for not handing over its personnel, should it have concerns regarding possible proceedings.⁸⁸

In relation to prosecution in the PCC, it is more complex than that in the host State. In the most likely scenario, evidence, the victim and witnesses are in the host State. There thus exists genuine difficulty of evidence collection and

82 *Ibid.*, pp. 231–272.

83 *Ibid.*, pp. 272–279.

84 *Ibid.*, pp. 272–279, 282–286.

85 *Ibid.*, pp. 188–191.

86 Françoise Hampson and Ai Kihara-Hunt, 'The Accountability of Personnel Associated with Peacekeeping Operations' in Chiyuki Aoi, Cedric De Coning and Ramesh Thakur (eds), *Unintended Consequences of Peacekeeping* (UNU 2007), p. 207.

87 Kihara-Hunt, pp. 191–202.

88 *Ibid.*, p. 348.

investigation.⁸⁹ In order to mitigate it, the UN should have a standing agreement with the PCC specifying each action to be taken by the PCC following an allegation, both for IPOs and FPUS. Currently, the standard Memorandum of Understanding (MoU) between the UN and States sending FPU personnel does provide information as to where investigation and prosecution responsibilities lie. The PCC is obliged to prosecute cases where the host State does not do so. Where this does not happen within ten working days, the UN is to commence its own investigation.⁹⁰ However, it still lacks precision, for example on who the domestic contact should be in the PCC on sexual crimes. It needs to be an individual's obligation to ensure following up on allegations in the PCC, and that needs to be written in the MoU.⁹¹ MoU should also lay out the PCC's obligation to provide information on follow-up action against individuals implicated in sexual crimes.⁹² Where that obligation is not delivered, there should be no further deployment of police personnel from that State.⁹³

On the UN's part, the UN is currently more responsive to requests of prosecution than proactive. The UN seeks prosecution actively only where the UN itself was the victim of fraud or theft. For other cases, it mainly considers whether or not to invoke immunity in relation to the alleged crime. Instead, it ought to seek active referral of criminal SEA cases to national courts in the PCC. The policy should be that the UN should seek prosecution as a rule, rather than treating contraventions as exceptional cases.⁹⁴

VIII Follow-Up

The research confirmed that the next stage of seeking accountability, the following up stage, is also flawed. Partly because of the difficulties identified above, accountability is often abandoned where there is no consistent follow-up. Follow-up should be coupled with disqualification of States who do not cooperate. That is, States are required to respond to the UN's request to

89 *Ibid.*, pp. 120–122; pp. 158–172.

90 UN, MoU FPU, Article 7 quarter.

91 Kihara-Hunt, pp. 182–183.

92 It stipulates the PCC's obligation to provide the UN 'with the findings of investigations conducted by its competent authorities'. UN, MoU FPU, Article 7 quarter, 7.19. However, it does not contain PCC's obligation to explain the reason in case proceedings are not initiated.

93 Kihara-Hunt, pp. 178–183.

94 *Ibid.*

provide information regarding their actions, in order to send more personnel for any UN Peace Operation. On the policy level, in 2016, the Security Council endorsed the Secretary-General's decision to replace all military and FPUs from a Troop/Police Contributing Country (T/PCC) that has failed to investigate SEA allegations against its personnel and/or to hold him/her accountable, and/or to report to the Secretary-General on the actions taken.⁹⁵ This is a significant step, and it is to be seen how stringently this policy will be implemented. In addition, the information on which States are cooperating and which States are not should be accessible to the public, so as to enable the public to function as an oversight mechanism.⁹⁶

IX Conclusion

This paper has provided recommendations to improve UN's actions in relation to SEA allegations committed by UN Police personnel, based on the author's research into the law and practice of individual criminal accountability of UN Police personnel. The central parts are seven-fold.

The first step is to employ the right people on the ground by checking their past involvement in crimes and violations of international law, and to provide appropriate training to selected individuals. This contributes to minimizing the risk of SEA incidents.⁹⁷

The second step is the systematic collection and compilation of information, and its central management. The UN should change its reactive nature in seeking information to proactively clarifying information and rumour. Once information is reported to one of the UN branches, offices or personnel, there must be a system that ensures no information can be left unattended. Reporting lines must be clear to everyone in the system, and where and what to report ought to be clear to victims and witnesses. Taking action against UN personnel and superiors for failure to act would help ensure that information is passed on and acted upon. All information shall be put together at a central place. OIOS is the recommended office to play this role, because it is the only office that is authorized with access to all available information within the Organization. Scattered information creates an opportunity for important information to be left unattended. It also prevents the UN and the public to understand the scale of the problem. In order to ensure accountability, all non-sensitive information

95 UNSC Res 2272 (11 March 2016) UN Doc S/Res/2272, op. para. 2.

96 *Ibid.*, pp. 341–352.

97 See above Section 2.

should be made public. The UN appears to be underestimating the important role that the public can play as a watchdog.⁹⁸

The third step is about protection. As with all other judicial and disciplinary proceedings, victims and witnesses are to be protected if the UN aims to address accountability. Working together with local networks including women's and children's organizations would be helpful in filling the protection gap. One important protection is for whistleblowers. UN employees have little trust in the Organization's internal disciplinary mechanisms, and that mistrust prevents reporting. Whistleblowers are facing pressure and retaliation from various actors. In order to protect them, action needs to be taken against those who condone misconduct, and those who do not actively seek addressing misconduct. Ethics Office, which is entrusted with this vital role, needs to be sufficiently empowered and resourced.⁹⁹

The fourth step is investigation. The central recommendation in this regard is to have an appropriate procedure in collecting evidence so that subsequent prosecution is possible. This requires professional investigators, appropriate procedures and systematic involvement of the State where prosecution is possible.¹⁰⁰

Legal clarification is the fifth step. Dividing SEA into criminal and non-criminal categories, clarifying that neither criminal jurisdiction nor immunity are major barriers to prosecution by willing States, and applying the immunity law stringently, are the three main recommendations. In this connection, where the UN has concerns about its accused personnel, it should be dealt with transparently as such, and not as an application of immunity, which does not exist in the first place.¹⁰¹

Following legal clarification, next comes prosecution. The central recommendation in the area of prosecution is to make it as easy as possible for willing States to prosecute. On the other side of the coin is the means to make the cost of not prosecuting higher than prosecuting. The UN should see it as its benefit to bring culprits to justice. Practical arrangements can be made, together with legal agreements to bind the UN and States, to increase the likelihood of prosecution.¹⁰²

The last step is following up on allegations. In this regard, the UN should tie the PCC's requirement of follow up with further deployment of personnel

98 See above Section 3.

99 See above Section 4.

100 See above Section 5.

101 See above Section 6.

102 See above Section 7.

from that State. By making information on cooperative and non-cooperative States public, the UN would be able to gain the public's pressure in ensuring accountability.¹⁰³

It is imperative that this issue be solved with the current wave following the CAR allegations. The UN operations are facing significant challenges, and its legitimacy and effectiveness is placed under scrutiny. SEA issues can be addressed better with a series of relatively small practical steps. Now is an opportunity for the UN to regain trust and legitimacy. Unaccounted SEA crimes are eroding trust in UN Peace Operations, which in a larger sense is compromising the Organization's functions.

¹⁰³ See above Section 8.