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# The UN Zero Tolerance Policy's Whereabouts: on the Discordance Between Politics and Law on the Internal-External Divide

Machiko Kanetake\*

Abstract

Sex scandals involving UN peacekeepers have ignited media attention since the late 1990s. In order to reclaim its reputation, the UN has committed itself to the Zero Tolerance policy embodied in the Secretary-General's Bulletin of 2003, which has been subject to detailed analysis. This paper's aim is to reconsider the policy's genesis and problems from the perspective of discordance between politics and law. I argue that the Zero Tolerance policy can be understood as the UN's attempt to resolve discordance between political and legal lines which separate the UN (internality) from non-UN elements (externality). The *political* boundary internalises broader conduct and tasks within the UN. The *legal* boundary, however, externalises much of the conduct and tasks that are internalised by the political line. The place of the Zero Tolerance policy is therefore to substantially remedy such 'discordance' between politics and law, by aligning the policies of externalities with those of the UN.

## Introduction

The gulf between the public's ideal concept of blue helmets and the reported incidents of sexual exploitation and abuse by UN peacekeepers<sup>1</sup> has garnered media coverage since the late 1990s.<sup>2</sup> The incidents involving those serving for the UN Mission (MONUC) in the

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\* Postdoctoral Researcher, University of Amsterdam; MA (Sheffield), LLM (London), Ph.D (Kyoto). This paper is based on the author's previous work: 'Whose Zero Tolerance Counts? Reassessing a Zero Tolerance Policy Against Sexual Exploitation and Abuse by UN Peacekeepers' (2010) 17 *International Peacekeeping* 200. A version of this paper was presented at the International Law Forum held at Kyoto University on 15 October 2011, and at the Workshop held at the ANU on 8-9 December 2011. The author thanks Róisín Burke, Hilary Charlesworth, Shotaro Hamamoto, Colin Keating, Bruce Oswald, Hironobu Sakai, and Mandira Sharma for their helpful comments.

<sup>1</sup> In this study, the terms 'peacekeeper' and 'peacekeeping personnel' are used interchangeably, embracing all personnel engaged in UN peacekeeping: see the third part of this paper for the categories of personnel included.

<sup>2</sup> See the Report of the Office of Internal Oversight Services, 'Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa', UN Doc. A/57/465, 11 October 2002; 'A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations', UN Doc. A/59/710, 24 March 2005 ('Zeid Report'), para. 3.

Democratic Republic of Congo (DRC) attracted particular controversy,<sup>3</sup> which has led to a series of painstaking UN internal investigations involving members of the national contingents.<sup>4</sup> While there are reports that some members of the UN Operation in the Congo (ONUC) were involved in prostitution in the 1960s,<sup>5</sup> the blue helmets' sexual misconduct drew international attention only in the 1990s. What has brought the misconduct to the surface was not only the sheer increase in the number of peacekeeping personnel and their misconduct, but also the development of the international media and human rights NGOs, which turned a spotlight on a gap between a positive idea about blue helmets and the downsides of UN peacekeeping operations.

As part of its efforts to reclaim its public reputation, the UN has committed itself to the Zero Tolerance policy embodied in the Secretary-General's Bulletin of 2003.<sup>6</sup> Detailed analyses of this Zero Tolerance policy have been conducted,<sup>7</sup> including feminist critiques that the simple portrayal of girls and women as the 'victims' of sex purchasing practice discounts, not only the girls' /women's autonomy, but also the wider social inequalities for women in their local communities, which sustain peacekeepers' sexual misconduct and keep the incidents underreported.<sup>8</sup> In this short paper, I will present a different perspective from which to reconsider the Zero Tolerance policy. I examine it in terms of *discordance* between *political* and *legal lines* which separate the UN (internality) from non-UN elements (externality), and argue that the UN's commitment to the policy should be understood as its efforts to remedy such discordance.

## I. The Zero Tolerance Policy

The Secretary-General's Bulletin in 2003 lays down extensive prohibitions regarding peacekeepers' sexual conduct. Under Section 1 of the Bulletin, any "abuse of a position of vulnerability" for sexual purposes or the physical intrusion of a sexual nature "under unequal...conditions" constitutes sexual exploitation or sexual abuse.<sup>9</sup> Sexual conduct between UN staff and those who receive their assistance would likely constitute a prohibited act, since the Bulletin regards it as being based on "inherently unequal power dynamics".<sup>10</sup> The Bulletin further lays down two specific prohibitions: sexual activity with children, "regardless of the age of majority or age of consent locally", and "[e]xchange of money, employment, goods or services for sex".<sup>11</sup> In other words, the Bulletin prohibits not only child prostitution but prostitution in general.

<sup>3</sup> E.g., By K. Holt, 'DR Congo's Shameful Sex Secret', *BBC News*, 3 June 2004, available at <<http://news.bbc.co.uk/2/hi/africa/3769469.stm>>; E. Wax, 'Congo's Desperate 'One-Dollar U.N. Girls'', *Washington Post*, 21 March 2005, p.A01.

<sup>4</sup> See, e.g., the OIOS reports cited in *infra* note 31.

<sup>5</sup> H. Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press 2000, p. 285, n. 69; Zeid Report, *supra* note 2, para. 3; UN Doc. S/PV.5191, 31 May 2005, p. 3 (statement of Prince Zeid Ra'ad Zeid Al-Husseini).

<sup>6</sup> Secretary-General's Bulletin, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc. ST/SGB/2003/13, 9 October 2003.

<sup>7</sup> E.g., R. Murphy, 'An Assessment of UN Efforts to Address Sexual Misconduct by Peacekeeping Personnel' *International Peacekeeping* 2006-13, pp. 531-546; Anthony J. Miller, 'Legal Aspects of Stopping Sexual Exploitation and Abuse in U.N. Peacekeeping Operations', *Cornell International Law Journal* 2006-39, pp. 71-96; A. Shotton, 'A Strategy to Address Sexual Exploitation and Abuse by United Nations Peacekeeping Personnel', *Cornell International Law Journal* 2006-39, pp. 97-108.

<sup>8</sup> D. Otto, 'Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies', in V. E. Munro and C. F. Stychin (eds.), *Sexuality and the Law: Feminist Engagements*, Abingdon: Routledge-Cavendish 2007, pp. 259-282.

<sup>9</sup> See 2003 Bulletin, *supra* note 6, sect. 1.

<sup>10</sup> *Idem*, sect. 3.2(d).

<sup>11</sup> *Idem*, sects. 3.2(b), (c).

It is difficult to see how such broadly defined sexual exploitation and abuse under the 2003 Bulletin “violate universally recognised international legal norms and standards”, as contested by the Bulletin. The 1979 Convention of the Elimination of All Forms of Discrimination against Women aims to suppress “exploitation of prostitution of women” in Article 6, but it does not claim prostitution *per se* as being exploitative.<sup>12</sup> The same holds for Article 34 of the 1989 Convention on the Rights of the Child, which envisages the prevention of “[t]he exploitative use of children in prostitution”, not of child prostitution itself.<sup>13</sup> Nor does the Bulletin’s prohibition necessarily entail criminal prosecution in a host state or one’s state of nationality. As the Bulletin acknowledges, the age of majority, or age of consent, varies according to localities. In the DRC, for instance, sexual relations with a child were considered criminal only if the child was less than 14 years of age until the country’s penal code was amended in August 2006 to raise that age to 18.<sup>14</sup> Furthermore, in many jurisdictions purchasing sex from prostitutes over the age of 18 does not constitute a crime.<sup>15</sup>

## II. The Internal-External Divide in Politics

The question then arises as to why the UN has committed to such an extensive prohibition of sexual misconduct. The adherence to the ‘rule of law’ may be one of the frequently invoked reasons for establishing and implementing the extensive prohibition of sexual conduct for UN peacekeepers. As the UN Secretary-General articulated, “if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law”, and, for such a reason, the 2003 Bulletin was issued.<sup>16</sup> It is true that the UN and its peacekeepers are required to respect the laws and regulations of the host state.<sup>17</sup> By absorbing certain elements of the local laws into the UN’s internal codes of conduct, and ensuring compliance with them, the UN can lead by example in the campaign for the rule of law. The 2003 Bulletin in fact refers to the possibility that allegations of sexual exploitation and sexual abuse may be referred to national authorities for criminal prosecution.<sup>18</sup>

Nevertheless, the ‘rule of law’ narrative does not have sufficient explanatory force as to why the UN prescribes such a broad prohibition under the 2003 Bulletin, and devoted its energy to the implementation of the Zero Tolerance. First of all, sexual exploitation and abuse are not, in principle, attributable to the UN as an organisation, as they constitute off-duty acts (or at least the UN would most likely claim they are). The UN does not bear any legal responsibility, perhaps save for employer liability, for its personnel’s sexual exploitation and abuse. The UN has long maintained that it has no legal or financial liability for off-duty acts of

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<sup>12</sup> Otto, *supra* note 8.

<sup>13</sup> 1989 Convention of the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Art. 34. Child prostitution is prohibited separately under the optional protocol: 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002), UN Doc. A/RES/54/263, 25 May 2000.

<sup>14</sup> UN Doc. A/61/841, 5 April 2007, para. 4.

<sup>15</sup> Zeid Report, *supra* note 2, para. 86. See also N. Quéniwet, ‘The Dissonance between the United Nations Zero-Tolerance Policy and the Criminalisation of Sexual Offences on the International Level’, *International Criminal Law Review* 2007-7, pp. 668-676 (comparing the Zero Tolerance policy and international criminal law norms).

<sup>16</sup> Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’, UN Doc. S/2004/616, 23 August 2004, para. 33.

<sup>17</sup> ‘Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries’, UN Doc. A/45/594, 9 October 1990, Annex (‘Model SOFA’), para. 6. Similarly, Secretary-General’s Bulletin, ‘Regulations for the United Nations Emergency Force’, UN Doc. ST/SGB/UNEF/1, 20 February 1957 (‘UNEF Regulations’), Regulation 29.

<sup>18</sup> 2003 Bulletin, *supra* note 6, section 5.

members of peacekeeping forces.<sup>19</sup> Furthermore, as was noted in the previous section, sexual exploitation and abuse as defined by the Bulletin do not necessarily constitute criminal conduct in a host state or one's state of nationality. If it were the observance of the principle of the rule of law that motivated the establishment of the UN's Zero Tolerance, we would have to wonder in what sense the UN translated the principle within the context of sexual exploitation and abuse.

Instead, a better narrative may be provided by considering the *political* boundary that determines the internality and externality of the UN. Sexual exploitation and abuse are often regarded by the local population and the media as part of the *UN's own problems*, and not necessarily those of a peacekeeper himself/herself or of contingent-contributing countries. For instance, a widely read Washington Post article in 2005 entitled "Congo's Desperate 'One-Dollar U.N. Girls'" reported the stories of local girls, whose poverty and social vulnerability led them to rely on sex for money and goods.<sup>20</sup> Local experts, the news reporter, UN officials, and victims have different ways of characterising, rejecting, and even tolerating peacekeeper's sexual misconduct. Yet despite their variance, their narrative largely treats the exploitative sexual practices as having occurred between local girls and 'UN peacekeepers', which absorbs the identity of individual soldiers and their contingent countries.

The elusiveness of individual and state-level problems is not simply due to the technical difficulty of identifying the soldiers and contingents that purchased sex from local girls. It is also due to the political sensitivity of identifying a specific contingent country in sex scandals, which preserves the characterisation by the mass media to internalise sexual exploitation and abuse into the UN's issue. Contingent-contributing countries have no strong incentive to politically associate a peacekeeper's misconduct with themselves. The UN itself cannot simply externalise the problems either, as it would be politically irresponsible behaviour for the Organisation to categorically claim that sexual misconduct is someone else's problem. It would have to proceed based upon a political reality which ascribes peacekeepers' misconduct to the UN and places the political burden on it to resolve them.

### III. The Internal-External Divide in Law

The *political* boundary thus internalises broader conduct and tasks within the UN. Sexual exploitation and abuse are often politically treated as part of the 'UN's own problems'. The *legal* boundary, however, externalises not only the conduct of sexual exploitation and abuse (in a sense that it is not attributable to the UN as an organisation),<sup>21</sup> but also many of the tasks necessary for the realisation of the Zero Tolerance policy against sexual exploitation and abuse.

#### III.1 Internality: Codes of Conduct and Receipts of Allegations

A mismatch between the political and legal boundaries arises from the fact that UN peacekeeping operations, while presenting themselves as one unified arm, are undertaken by very different categories of personnel: (a) UN staff, (b) UN volunteers, (c) consultants and individual contractors, and (d) military observers, (e) members of UN police (excluding the members of formed police units), (f) members of formed police units, and (g) members of national military contingents.

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<sup>19</sup> See Memorandum of the Director, Office for Field Operational and External Support Activities, *United Nations Juridical Yearbook* 1986, pp. 300-301.

<sup>20</sup> E. Wax, 'Congo's Desperate 'One-Dollar U.N. Girls'', *Washington Post*, 21 March 2005, p. A01.

<sup>21</sup> See *supra* note 19 and accompanying texts.

The UN has different levels of authority over these components. Among the five steps concerning the implementation of the Zero Tolerance policy—(i) the application of the codes of conduct, (ii) receiving allegations, (iii) investigations, (iv) disciplinary actions, and (v) criminal prosecution—the UN has authority at least over the first two steps. The Annex to this paper summarises the boundary of the UN's authority in implementing the UN's Zero Tolerance policy. Here I note a few key points.

First of all, following the recommendations by Prince Zeid's UN report entitled "A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations" (the so-called "Zeid Report") in 2005, the UN has achieved the universal application of the its codes of conduct by revising individual agreements with personnel and contingent-contributing states.<sup>22</sup> In contrast with members of national military contingents and formed police units, UN police and military observers are individually appointed by the UN (although their home governments are normally in charge of the member selection). They sign an 'undertaking' on appointment, whereby they agree to comply with administrative issuances and the two principal codes of conduct prepared by the Department of Peacekeeping Operations (DPKO) in 1996, namely, the "Ten Rules" and "We Are United Nations Peacekeepers".<sup>23</sup> The undertaking has since been revised to incorporate the standards of the 2003 Bulletin.<sup>24</sup> A similar revision was made with respect to the Conditions of Service for UN volunteers and the General Conditions for consultants and individual contractors.<sup>25</sup> For members of national military contingents and formed police units, the draft model memorandum of understanding (MOU) between the UN and national contingent contributors was revised in 2007 in order to incorporate the standards of the 2003 Bulletin, and lay down necessary procedures for non-compliance.<sup>26</sup>

The UN has also been the depository of allegations.<sup>27</sup> The allegations have been received by the Conduct and Discipline Unit (CDU) at the UN's Headquarters and its mission-based Teams (CDT), and by the Investigations Division of the Office of Internal Oversight Services (OIOS) within the UN Secretariat.<sup>28</sup> In 2003, some 50 allegations of sexual exploitation and

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<sup>22</sup> See Zeid Report, *supra* note 2, paras. 24-25; Report of the Special Committee on Peacekeeping Operations and its Working Group at the 2006 Substantive Session, UN Doc. A/60/19, 22 March 2006, para. 65. See Annex of this paper.

<sup>23</sup> DPKO, 'Ten Rules: Code of Personal Conduct for Blue Helmets', 1996; DPKO, 'We Are United Nations Peacekeepers', 1996, available at: <http://cdu.unlb.org/UNStandardsofConduct/CodeofConduct.aspx> (accessed on 24 October 2012).

<sup>24</sup> UN Doc. A/60/19, 22 March 2006, para. 65.

<sup>25</sup> 'Conditions of Service for International UN Volunteers', as last amended in September 2008, Appendix XVII, at: <http://www.unv.org/en/how-to-volunteer/cos.html> (accessed on 24 October 2012); 'General Conditions of Contracts for the Services of Consultants or Individual Contractors', UN Doc. ST/AI/1999/7/Amend.1, 15 March 2006, Annex.

<sup>26</sup> 'Revised Draft Model Memorandum of Understanding', UN Doc. A/61/19 (Part III), 12 June 2007, Annex ('Revised Model MOU'). The model MOU forms a part of the COE Manual: 'Manual on Policies and Procedures Concerning the Reimbursement and Control of Contingent-Owned Equipment of Troop/Police Contributors Participating in Peacekeeping Missions (COE Manual)', UN Doc. A/C.5/63/18, 29 January 2009 (2008 Edition), Chapter 9 (Memorandum of Understanding).

<sup>27</sup> Report of the Secretary-General, 'Comprehensive Report of Conduct and Discipline Including Full Justification of All Posts', UN Doc. A/62/758, 20 March 2008, para. 20. Previously, allegations were individually received by military, police and civilian units.

<sup>28</sup> UN Doc. A/RES/48/218 B, 12 August 1994; Secretary-General's Bulletin, 'Establishment of the Office of Internal Oversight Services', UN Doc. ST/SGB/273, 7 September 1994. For the establishment of the OIOS, see K. T. Paschke, 'Accountability and the Role of Internal Oversight in the United Nations', in Yassin El-Ayouty et. al. (eds.), *Government Ethics and Law Enforcement: Toward Global Guidelines*, Westport: Praeger 2000, pp. 9-10.

abuse were reported.<sup>29</sup> The number of allegations surged in 2005 (340) and 2006 (357), but decreased in 2007 (127), 2008 (83), 2009 (112), and 2010 (85).<sup>30</sup>

### III.2 Externality

#### III.2.1 Investigation Procedures

The *legal* boundary externalises the remaining implementation tasks despite the *political* expectation towards the UN. Among the aforementioned five steps concerning the implementation of the policy, the UN's legal authority, necessary for the latter three steps (namely, investigations, disciplinary actions, and criminal prosecution), is extremely limited, particularly with respect to the members of national military contingents.

At the initial stage following the revelation of sex scandals, the UN had actively exercised its investigatory power even against members of national contingents. For instance, in response to the allegations of sexual exploitation and abuse by MONUC personnel in Bunia in the Ituri region of the DRC, the OIOS dispatched a team of investigators in 2004 and 2006, respectively, which held a series of interviews with the members of national contingents and conducted line-ups for the purpose of substantiating the allegations.<sup>31</sup>

However, the revision of the model MOU in 2007 has effectively limited the investigatory role of the UN vis-à-vis members of national contingents.<sup>32</sup> Under the revised MOU, it is the sending government that assumes 'the primary responsibility' for investigating misconduct.<sup>33</sup> Field investigation is led by National Investigations Officers dispatched by the government. The UN only assumes modest roles, such as the provision of administrative and logistical support and the assistance to obtain cooperation from host state authorities.<sup>34</sup> Even if an allegation bears on serious misconduct, the UN's initiatives are circumscribed in the following two respects: one is to initiate a 'preliminary fact-finding inquiry', where it is necessary to preserve evidence until the government starts its own investigation;<sup>35</sup> and the other, presumably a more full-swing involvement, is to instigate an 'administrative investigation', where the government fails to notify within 10 days and thereby is considered to be unwilling or unable to conduct an investigation.<sup>36</sup> The new investigatory procedures have already been applied in relation to the existing contributors as well as to the

<sup>29</sup> Report of the Secretary-General, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc. A/59/782, 15 April 2005, para. 9, Annex I.

<sup>30</sup> Report of the Secretary-General, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc. A/60/861, 24 May 2006, Annex I; Report of the Secretary-General, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc. A/63/720, 17 February 2009, para. 7; Report of the Secretary-General, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc. A/64/669, 18 February 2010, para. 7; Report of the Secretary-General, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc. A/65/742, 18 February 2011, para. 8.

<sup>31</sup> OIOS, 'Investigation into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo', UN Doc. A/59/661, 5 January 2005; OIOS, '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', UN Doc. A/61/841, 5 April 2007.

<sup>32</sup> Report of the Office of Internal Oversight Services, UN Doc. A/63/302 (Part II) (23 February 2009), para. 9.

<sup>33</sup> Revised Model MOU, *supra* note 26, para. 3, Article 7 quater.

<sup>34</sup> *Idem*, Article 7 quater (4).

<sup>35</sup> *Idem*, Article 7 quater (2). Further, the preliminary fact-finding inquiry shall include a representative of the government.

<sup>36</sup> *Idem*, Article 7 quater (3)(a).

newcomers.<sup>37</sup>

The investigation procedure under the revised MOU is a welcome step forward, in that it institutionalises the involvement of contingent-contributing countries at the earlier stage, and thereby prevents the investigation phase from procedurally and politically being disconnected from the following disciplinary and criminal procedures. On the other hand, the new procedure renders it more difficult for the UN, not only to lead the investigation, but also to follow up its status.<sup>38</sup> In 2010, while 15 member states indicated their intention to conduct an investigation or to appoint an officer to carry out investigations in coordination with the UN, the results of the investigations have not fully been shared with the UN in a timely manner.<sup>39</sup> Insofar as members of national contingents are concerned, the revised MOU seems to have increased the externality sphere with respect to the implementation of the Zero Tolerance.

### III.2.2 Disciplinary and Criminal Procedures

The externality of tasks is more clear-cut when it comes to disciplinary and criminal procedures. While the UN retains ‘command authority’ in peacekeeping, such authority does not encompass disciplinary power. It is more precisely an operational command,<sup>40</sup> and narrower than the recognised usage of command authority in the military.<sup>41</sup> To uncouple disciplinary powers from the UN’s command authority runs counter to an axiom of the military organisation,<sup>42</sup> but it has been established<sup>43</sup> since the seminal practice of United Nations Emergency Force (UNEF).<sup>44</sup> The consequence of such uncoupling is evident when it comes to members of national contingents. Disciplinary measures against them are taken

<sup>37</sup> Report of the Office of Internal Oversight Services, UN Doc. A/63/302 (Part II), 23 February 2009, para. 9; Report of the Secretary-General, ‘Special Measures for Protection from Sexual Exploitation and Sexual Abuse’, UN Doc. A/62/890, 25 June 2008, para. 24.

<sup>38</sup> Until 2011, the Secretary-General’s annual reports on the sexual exploitation and sexual abuse contained the chart on the ‘status of investigation’: see, e.g., Report of the Secretary-General, ‘Special Measures for Protection from Sexual Exploitation and Sexual Abuse’, UN Doc. A/62/890, 25 June 2008, Annex V (‘Status of investigations conducted by the United Nations into allegations reported in 2007 involving personnel of the Department of Peacekeeping Operations’). However, the chart is *not included* in the 2011 report with respect to the allegations relating to peacekeepers: see Report of the Secretary-General, ‘Special Measures for Protection from Sexual Exploitation and Sexual Abuse’, UN Doc. A/65/742, 18 February 2011.

<sup>39</sup> See Report of the Secretary-General, ‘Special Measures for Protection from Sexual Exploitation and Sexual Abuse’, UN Doc. A/65/742, 18 February 2011, para. 13.

<sup>40</sup> It is noted that the DPKO’s guidelines have started to replace the term ‘operational command’ with ‘operational authority’ since 1995, presumably in order to avoid confusion generated by regarding UN ‘command’ through the lens of ordinary military usage: see DPKO, General Guidelines for Peacekeeping Operations (1995), paras. 60-61, at: <http://reliefweb.int/node/21454> (accessed on 24 October 2012). However, the term ‘operational command’ continues to appear in many other UN documents.

<sup>41</sup> See Report of the Secretary-General, ‘Command and Control of United Nations Peace-Keeping Operations’, UN Doc. A/49/681, 21 November 1994, para. 6.

<sup>42</sup> D. W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice*, London: Stevens & Sons 1964, pp. 343-344.

<sup>43</sup> See, e.g., ‘Draft Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to the United Nations Peace-keeping Operations’, UN Doc. A/46/185, 23 May 1991, Annex, para. 8.

<sup>44</sup> Secretary-General’s Bulletin, ‘Regulations for the United Nations Emergency Force’, UN Doc. ST/SGB/UNEF/1, 20 February 1957 (‘UNEF Regulations’), Regulation 13; ‘Text of Letter Dated 21 June 1957 from the Secretary-General to the States Providing Contingents’ (‘UNEF Troop-Contribution Agreement’), para. 6, reproduced in R. Higgins, *United Nations Peacekeeping 1946-47: Documents and Commentary, Vol. I (The Middle East)*, Oxford University Press 1969 pp. 326-328.

according to the laws and regulations of each participating state.<sup>45</sup> The same holds true for members of formed police units.<sup>46</sup> A boundary of UN measures against the members' serious misconduct is to repatriate them,<sup>47</sup> which is described as an 'administrative measure', as opposed to a disciplinary measure.<sup>48</sup> The repatriation of national contingent members is by no means an exceptional practice: on one occasion over 100 members of a Sri Lankan battalion serving with the UN Stabilization Mission in Haiti were repatriated on disciplinary grounds. By repatriation, the baton to implement the Zero Tolerance pledge is handed over to the contingent-contributing states from the UN.<sup>49</sup>

Of course, the UN retains disciplinary authority over UN staff,<sup>50</sup> albeit not as part of its command authority but in its capacity as their employer. Under the Staff Regulations, sexual exploitation and abuse constitute serious misconduct.<sup>51</sup> The corresponding measure is laid down in their Conditions of Service for UN volunteers, while a breach of standards of conduct by consultants and individual contractors is a ground for termination of contract by the UN.<sup>52</sup> Likewise, in theory, UN police and military observers dispatched on an individual basis reside within the reach of the UN's disciplinary authority. In contrast with UN staff and UN volunteers, however, the DPKO's Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers (2003) makes no provision for dismissal or summary dismissal, and instead envisages repatriation as a comparable measure.<sup>53</sup> The inapplicability of dismissal to UN police and military observers may be attributed to the fact that they are, after all, uniformed personnel, who continue to enrol in the police and military arms of their home countries.

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<sup>45</sup> Normally, the UN's codes of conduct are incorporated into military rules of each participating state to enable the state to take disciplinary actions against a breach of such UN codes. See R.C.R. Siekmann, *National Contingents in United Nations Peace-Keeping Forces*, Dordrecht: Martinus Nijhoff Publishers 1991, p. 134.

<sup>46</sup> See DPKO, 'Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers', UN Doc. DPKO/CPD/DDCPO/2003/001 and DPKO/MD/03/03/00994 (2003), available at: <http://cdu.unlb.org/Portals/0/PdfFiles/PolicyDocG.pdf> (accessed on 24 October 2012), para. 2, n.1.

<sup>47</sup> The procedure for repatriation is set out in the DPKO's directives: DPKO, 'Directives for Disciplinary Matters Involving Military Members of National Contingents', UN Doc. DPKO/MD/03/00993 (2003).

<sup>48</sup> Zeid Report, *supra* note 2, para. A.35.

<sup>49</sup> Contributing countries are expected to report about the action taken with regard to repatriated members: DPKO, 'Directives for Disciplinary Matters Involving Military Members of National Contingents', UN Doc. DPKO/MD/03/00993 (2003), para. 28. Repatriated personnel are banned from future UN peacekeeping: Report of the Secretary-General, 'Special Measures for Protection from Sexual Exploitation and Sexual Abuse', UN Doc. A/62/890, 25 June 2008, para. 9(a).

<sup>50</sup> See, e.g., Secretary-General's Bulletin, 'Staff Rules and Staff Regulations of the United Nations', UN Doc. ST/SGB/2011/1, 1 January 2011, Article X, and Chapter X.

<sup>51</sup> Secretary-General's Bulletin, 'Staff Rules and Staff Regulations of the United Nations', UN Doc. ST/SGB/2011/1, 1 January 2011, Article X, Regulation 10.1(b). Before the new system of administration of justice was implemented in July 2009, serious misconduct, including sexual exploitation and abuse, resulted in summary dismissal of UN staff: see Secretary-General's Bulletin, 'Staff Regulations', UN Doc. ST/SGB/2008/4, 1 January 2008, Regulation 10.2; Secretary-General's Bulletin, 'Staff Rules', UN Doc. ST/SGB/2002/1 (last amended by ST/SGB/2008/1), Rule 110.3. The summary dismissal was the most severe form of disciplinary measure imposed without prior submission to a Joint Disciplinary Committee: Staff Rules (2008), *idem*, Rule 110.4(b)(ii), (c). However, under the new system, effective as of 1 July 2009, the Joint Disciplinary Committees was abolished, and so was the category of summary dismissal. The Secretary-General imposes a disciplinary measure without the advice of the Committee.

<sup>52</sup> 'General Conditions of Contracts for the Services of Consultants or Individual Contractors', UN Doc. ST/AI/1999/7/Amend.1, 15 March 2006, Annex, Condition 2 (Standards of Conduct).

<sup>53</sup> DPKO, 'Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers', UN Doc. DPKO/CPD/DDCPO/2003/001 and DPKO/MD/03/03/00994 (2003), available at: <http://cdu.unlb.org/Portals/0/PdfFiles/PolicyDocG.pdf> (accessed on 24 October 2012).

The exclusive authority of the contributing states applies to criminal jurisdiction; at least so far as *military* members of national military contingents are concerned.<sup>54</sup> They enjoy immunities from the criminal jurisdiction of the host state, according to a status-of-forces agreement (SOFA) between the host state and the UN,<sup>55</sup> whether or not acts are performed in their official capacity.<sup>56</sup> While in the revised model MOU of 2007 the contributing state assures that it should exercise criminal as well as disciplinary jurisdiction over its national contingent members,<sup>57</sup> political stakes may be high for the UN to keep following up the cases and pressuring the much-needed contributors of contingents into taking necessary disciplinary and criminal procedures.

What is illustrated by the aforementioned analysis is therefore that legal authority of the UN to realise the Zero Tolerance policy is extremely restricted. The effective implementation of the Zero Tolerance policy relies heavily on the legal mechanisms and political willingness of externalities, especially those of contingent-contributing countries.

### **Conclusion: Remediating the Discordance**

Politics and law surrounding UN peacekeepers' sex scandals provide different accounts as to what constitute UN and non-UN elements. The *political* boundary internalises broader conduct and tasks within the UN. Sexual exploitation and abuse are often presented by the media as part of the UN's own problems, and not those of a peacekeeper himself/herself or of contingent-contributing countries. Due to the political sensitivity of sex scandals, the internal-external boundary popularly drawn in the media remains undisturbed both by contingent-contributing states, and by the UN itself. The broad prohibition of sexual conduct laid down by the 2003 Bulletin may have been the UN's response to the media-driven political characterisation of sexual conduct involving blue helmets.

The *legal* boundary, however, externalises much of the conduct and tasks that are internalised by the political line. Sexual exploitation and abuse are off-duty acts, and are not, in principle, attributable to the UN as an organisation. The major tasks necessary for the effective implementation of the Zero Tolerance policy are also external to the UN. Among the five steps concerning the implementation of the policy, namely, (i) the application of the codes of conduct, (ii) receiving allegations, (iii) investigations, (iv) disciplinary actions, and (v) criminal prosecution, the UN has authority over the first two steps. With respect to the latter three steps, however, the legal authority necessary for the implementation of the policy is virtually externalised, particularly for the members of national military contingents.

The discordance would not be problematic if either the political or legal line can be readily

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<sup>54</sup> UN Office of Legal Affairs, 'Letter to the Acting Chair of the Special Committee on Peacekeeping Operations, United Nations, Regarding Immunities of Civilian Police and Military Personnel', *United Nations Juridical Yearbook* 2004, p. 325. On the jurisdictional immunity, see further R. Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity', *Journal of Conflict & Security Law* 2011-16, pp. 63-104.

<sup>55</sup> Security Council resolutions have been utilised to ensure jurisdictional immunity in cases where the status-of-forces agreement cannot be concluded: e.g., UN Doc. S/RES/1626, 19 September 2005, para. 9 (UNMIL); UN Doc. S/RES/1706, 31 August 2006, para. 12(b) (UNMIS); UN Doc. S/RES/1769, 31 July 2007, para. 15(b) (UNAMID). In these resolutions, the Security Council, acting under Chapter VII, decides that the Model SOFA shall apply provisionally, pending the conclusion of formal agreement.

<sup>56</sup> Model SOFA, *supra* note 17, para. 47(b). It is noted that private acts of contingent members are subject to civil jurisdiction of the host state: *idem*, para. 49(b).

<sup>57</sup> Revised Model MOU, *supra* note 26, para. 3, Article 7 quinquies (1), (2). According to the MOU, if, as a result of investigation, an allegation of misconduct is well founded, the government shall ensure that the case is forwarded to its appropriate authorities for due action: *idem*, para. 3, Article 7 sexiens (1).

redrawn. However, as noted in Section II above, it is problematic for the UN to discharge its political burden towards sexual exploitation and abuse. To redraw the legal line is simply not feasible, as the UN cannot practically exercise disciplinary, much less criminal, jurisdiction over contingent members.

Overall, the only recourse available for the UN is to *substantially* remedy the discordance without changing the incumbent lines. It can do so by aligning the vector of the externalities with that of the UN; in particular, by aligning the policies of contingent-contributing countries with those of the UN. The development of the Zero Tolerance policy should be directed towards such policy-alignment of externalities, as an institutional attempt to resolve the discordance between politics and law.

### Annex: The Implementation of the Zero Tolerance Policy

==== An internal-external divide in *law* (see Section II of this paper)

Implementation Peacekeepers	i) Application of the Codes of Conduct	ii) Receiving Allegations	iii) Investigations	iv) Disciplinary Actions	v) Criminal Prosecution		
a) UN staff	SG's Bulletin (2003)	Received by CDU/CDT and OIOS	Led by the UN	The UN has disciplinary authority	Host states (subject to the UN's agreement <sup>i)</sup> )		
b) UN volunteers	The revision of the Conditions of Service						
c) Consultants and individual contractors	The revision of the General Conditions						
d) Military observers	The revision of 'undertaking'					The UN has limited disciplinary authority	Other member states (the draft Convention <sup>ii)</sup> )
e) Members of UN police (excluding (f) below)							
f) Members of formed police units	'undertaking'			MOU	Same as below <sup>iii)</sup>	Same as below <sup>iv)</sup>	Same as above <sup>v)</sup>
g) Members of national military contingents	The revision of MOU			Led by contingent-contributing states	Exclusive to contributing states	Exclusive to contributing states	

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<sup>i</sup> According to the model SOFA, the territorial government may launch the proceedings after the UN conducts any necessary supplementary inquiry and agrees upon the initiation of proceedings: see Model SOFA, *supra* note 16, para. 47(a); ‘Informal Summary of the Discussions of the Ad Hoc Committee on the Report of the Group of Legal Experts’, UN Doc. A/62/54, 2007, Annex, paras. 14-16.

<sup>ii</sup> Report of the Group of Legal Experts, ‘Ensuring the Accountability of United Nations Staff and Experts on Mission With Respect to Criminal Acts Committed in Peacekeeping Operations’, UN Doc. A/60/980, 16 August 2006, Annex III (Draft convention on the criminal accountability of United Nations officials and experts on mission).

<sup>iii</sup> In principle, the investigation procedure under the revised MOU applies to the members of formed police units insofar as they are part of ‘national contingents’. See, however, *infra* note iv.

<sup>iv</sup> The disciplinary authority for formed police units is by no means clear-cut. According to the DPKO’s Guidelines (2006), the disciplinary matters for formed police units are governed by the ‘Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers’. The Directives, however, apparently exclude ‘members of national formed police units’ from their scope. See DPKO, ‘Guidelines for Formed Police Units on Assignment with Peace Operations’, 8 May 2006, III-C (Disciplinary Matters), and Annex 11.

<sup>v</sup> It has however been discussed as to whether the status of formed police units should be reconsidered and treated the same as members of national military contingents. See Report of the Group of Legal Experts, ‘Ensuring the Accountability of United Nations Staff and Experts on Mission With Respect to Criminal Acts Committed in Peacekeeping Operations’, UN Doc. A/60/980, 16 August 2006, p. 9, n.8.