

SOUTH AFRICA

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RULES/GENERAL LAWS

<p style="text-align: center;">General</p>	<p>i. The Constitution, 1996 http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf</p> <p>ii. The Defence Act 1957, Act 44 of 1957, as amended http://www.dod.mil.za/documents/acts/defence%20act44of1957.pdf</p> <p>iii. The Defence Act 2002, Act 42 of 2002 http://www.dod.mil.za/documents/acts/new%20defence%20act%2042%20of%202002.pdf</p> <p>iv. The Military Discipline Supplementary Measures Act 1999, Act 16 of 1999 http://www.saflii.org/za/legis/num_act/mdsma1999475.pdf</p> <p>v. The First Schedule to The Defence Act 1957, Act 44 of 1957, as amended http://www.dod.mil.za/documents/acts/defence%20act44of1957.pdf</p> <p>Do you have a military justice system in your country?</p> <p>i. Yes. The military justice system of the South African National Defence Force (SANDF) functions is mandated by, functions within and is regulated by:</p> <ol style="list-style-type: none"> (1) The Constitution. (2) The Defence Act, 1957, as amended. (3) The Defence Act, 2002. (4) The Military Discipline Supplementary Measures Act, 1999. (5) The First Schedule to The Defence Act, 1957, as amended. (6) Rules of Procedure to the Military Discipline Supplementary Measures Act, 1999. (7) South African Criminal Law and Law of Evidence. (8) South African Common Law. <p>ii. The abovementioned sources also provide the legal parameters within which members of the SANDF execute their official duties. It further strives to regulate the military justice system by providing for unique offences, investigation procedures, military courts, court procedures, unique punishments and other non-judicial processes.</p> <p>iii. In terms of the Military Discipline Supplementary Measures Act (MDSMA) a Court of a (Senior) Military Judge (C(S)MJ) replaced the Court Martial system as it was declared unconstitutional.</p> <p>iv. Since the commencement of the RSA's participation in UN peacekeeping mission, the RSA has been conducting military trials in the mission area to ensure that justice is realised where the alleged offence has been committed. Accountability and transparency of the judicial process is further made visible to local population and the UN.</p> <p>v. A Legal Satellite Sub-office, comprising of an Officer in Command, a prosecutor, defence counsel and legal clerk, is part of the RSA's structure of deployed armed forces in the mission area for the administration of military justice.</p> <p>vi. Should the need arise for a military trial to be conducted, a (Senior) Military Judge will deploy to the mission area to preside over the military trial. The time it takes for a Judge to deploy to the mission area is subject to the UN's authorisation process time period.</p> <p>vii. The RSA military courts have jurisdiction to preside over Sexual Exploitation and Abuse (SEA) incidents. The RSA military courts have and will continue to adjudicate SEA cases in the mission area.</p>
<p style="text-align: center;">SEA: military offence?</p>	<p>i. The SEA offences are currently being tried in terms of:</p> <ol style="list-style-type: none"> (1) The Military Discipline Code (MDC), being the First Schedule to The Defence Act 1957, Act 44 of 1957, as amended. Although the MDC does not provide for a specific SEA offence, members are charged for SEA related offences, e.g. disobeying of base standing orders, curfew violations and conduct to the prejudice of military discipline and good order. (2) The Criminal Law (Sexual Offences and Related Matters) Amendment Act should the alleged SEA amount to a sexual offence as defined in the Act i.e. sexual assault, rape, sexual offences against a child, etc. <p>ii. SEA has been criminalised as a specific criminal offence in the Military Discipline Bill. The Bill has been finalised and the legislative enacting procedures are in process.</p> <p>Members are always on duty when deployed in the mission area. Members are deployed to execute specific tasks and are remunerated for being on stand-by. There are no "after hours" in the mission area. SANDF members are not allowed to be outside their bases without permission.</p>
	<p>Can a CO promulgate rules and policies, such as non-fraternisation, confinement to camp, etc? Yes, the Base Standing Orders issued by an OC addresses inter alia administrative and disciplinary aspects of e.g. non-fraternisation with the local population, restrictions on movement outside the base and leisure time utilisation (rest and recreation).</p> <p>How are UN rules on SEA implemented in the field?</p> <ol style="list-style-type: none"> i. All SANDF members identified for deployment to a UN mission are screened by the SANDF in compliance with the UN Human Resources Screening Policy in terms of previous or outstanding criminal cases, which includes Human Rights and International Humanitarian Law violations. ii. Deploying members receive robust SEA training during combat readiness and mission readiness training in compliance with UN SEA training requirements. The RSA has also elicited the assistance from the MONUSCO Conduct and Discipline Team (CDT) to present SEA lectures during pre-deployment mobilisation. iii. In mission the RSA has appointed a SEA focal point who conducts continuous SEA training to the SANDF peacekeepers in conjunction with CDT. iv. Standing Base Orders prohibits fraternisation with the local population. v. When a SEA allegation is received by the RSA, a National Investigation Officer (NIO) investigation is conducted.

Powers of the Commanding Officer (CO)	<p>What are the range of COs powers: administrative, disciplinary, criminal, investigative?</p> <p>The Constitution, 1996 prescribes that the SANDF is to be structured and managed as a disciplined military force. To manage and improve the discipline of his forces, an OC therefore has the following powers:</p> <p>i. Administrative power. The OC has the command authority to:</p> <p>(1) Issue Base Standing Orders addressing disciplinary aspects pertaining to the deployment.</p> <p>(2) Order corrective training of the SANDF peacekeeper(s) as a practical measure to immediately address disciplinary problems e.g. extra drill, physical training, uniform inspection, etc It does is not constitute punishment or formal disciplinary proceedings.</p> <p>(3) Repatriate a SANDF peacekeeper, subject to UN authority, to the RSA for ill-discipline.</p> <p>ii. Disciplinary power. The OC has trial jurisdiction to act as a presiding officer in a Commanding Officer's Disciplinary Hearing in terms of the MDSMA. The OC's trial jurisdiction is, however, limited to:</p> <p>(1) The accused being of the rank Private to Staff-Sergeant or equivalent rank;</p> <p>(2) The accused being charged with a military disciplinary offence in terms of the MDC, for which the prescribed punishment does not exceed one year imprisonment;</p> <p>(3) The accused waived his/her right to legal representation;</p> <p>(4) The accused pleading guilty to the charge preferred against him/her.</p> <p>(5) The accused voluntarily elected, in writing, to be tried by a CODH.</p> <p>iii. Criminal power. The OC has no trial jurisdiction over criminal offences.</p> <p>vi. Investigative power</p> <p>(1) The OC has command authority to institute the following investigations:</p> <p>aa. Board of Inquiry (BOI) in terms of of the Defence Act, 2002. It is a quasi-judicial procedure as provision is made for legal representation and certain rights of natural justice are applicable.</p> <p>ab. Officer Commanding (OC) Investigation. This is an administrative procedure and as such less formal than a BOI.</p> <p>(2) The military base Prosecutor and Military Police may also conduct investigations on instruction of the OC. However, these functionaries execute their investigative duties independently of and without interference from the OC. The OC him/herself may also be the subject of an investigation by these functionaries.</p>
INVESTIGATION	
Who can investigate?	<p>i. Prior to 2016, the RSA as a TCC, conducted investigations into allegations of SEA/Serious Misconduct by means of BOI or investigations by the military prosecutors deployed in the mission area. However, since 2015 and prior to the adoption of UNSCR Resolution 2272, the RSA sent NIOs Teams to the mission area to conduct investigations.</p> <p>ii. The pre-identified NIOs on standby comprise of Defence Legal Services Division (DLSA) and MP investigators, who then investigate the allegations.</p>
National Investigation Officer (NIO)	<p>i. Since the adoption of UNSCR Resolution 2272 the UN requires TCCs to embed (NIOs) in the deploying contingents to investigate SEA/Serious Misconduct speedily and effectively. However, when an allegation has been received directly from the Mission HQ or through a diplomatic note from the UN Headquarters (HQ), the RSA sends standby NIO Teams to the mission area as a matter of urgency, subject to the necessary operational and financial authority processes of the SANDF and the UN.</p> <p>ii. The reason for not embedding NIOs is that the RSA Contingent has in the past encountered that the investigators themselves had been implicated in allegations and therefore impartial NIOs are deployed.</p>
PROSECUTION	
Referral	<p>The NIO Investigation is referred to the Senior Prosecutor of the Operations Support Legal Satellite Office for a prosecution decision. Should the investigation present a prima facie case, the alleged offender will be charged.</p>
Who can charge?	<p>After the Senior Prosecutor determined that a prima facie case of SEA is present, the alleged offender's unit will be instructed to charge the member with SEA. Any person of higher rank or of an equal rank, but senior by virtue of appointment to the alleged offender, may charge the alleged offender for SEA. Military prosecution counsel will prosecute the matter in the military court.</p>
JUSTICE	
Military justice	<p>The military justice system of the South African National Defence Force (SANDF) functions is mandated by, functions within and is regulated by:</p> <p>(1) The Constitution.</p> <p>(2) The Defence Act, 1957, as amended.</p> <p>(3) The Defence Act, 2002.</p> <p>(4) The Military Discipline Supplementary Measures Act, 1999.</p> <p>(5) The First Schedule to The Defence Act, 1957, as amended.</p> <p>(6) Rules of Procedure to the Military Discipline Supplementary Measures Act, 1999.</p> <p>(7) South African Criminal Law and Law of Evidence.</p> <p>(8) South African Common Law.</p> <p>The abovementioned sources also provide the legal parameters within which members of the SANDF execute their official duties. It further strives to regulate the military justice system by providing for unique offences, investigation procedures, military courts, court procedures, unique punishments and other non-judicial processes.</p>
Deployable Court Martial?	<p>Since the commencement of the RSA's participation in UN peacekeeping mission, the RSA has been conducting military trials in the mission area to ensure that justice is realised where the alleged offence has been committed. Accountability and transparency of the judicial process is further made visible to local population and the UN.</p>
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