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Criminal Prosecution of UN Peacekeepers: When Defenders of Peace Incite Further Conflict Through Their Own Misconduct

Shayna Ann Giles

Baker, Donelson, Bearman, Caldwell & Berkowitz

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CRIMINAL PROSECUTION OF UN PEACEKEEPERS: WHEN DEFENDERS OF PEACE INCITE FURTHER CONFLICT THROUGH THEIR OWN MISCONDUCT

SHAYNA ANN GILES*

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I. INTRODUCTION

“Sometimes when I’m alone with my baby, I think about killing him. He reminds me of the man who raped me.”¹

1. Kevin Sieff, *Members of a U.N. Peacekeeping Force in the Central African Republic Allegedly Turned to Sexual Predation, Betraying Their Duty to Protect*, WASH. POST (Feb. 27, 2016), <http://www.washingtonpost.com/sf/world/>

A Burundian soldier dragged this 14-year old girl into his barracks and raped her in Bangui, Central African Republic (CAR), leaving her pregnant with the baby boy of whom she speaks.² The Burundian soldier will likely never be prosecuted for his crime. This girl's story is shocking on its own, but, unfortunately, her situation is not unique.³ Since the United Nations (UN) peacekeeping mission in CAR began in 2014, its employees have been formally accused of sexually abusing or exploiting forty-two local civilians, the majority being underage girls.⁴

Furthermore, the controversy over inappropriate sexual exploits by UN peacekeepers is not limited to the CAR.⁵ A United Nations-appointed external panel reported, "In the absence of concrete action to address wrongdoing by the very persons sent to protect vulnerable populations, the credibility of the UN and peacekeeping operations are in jeopardy."⁶ The international community should demand that peacekeepers be included under the jurisdiction of the International Criminal Court (ICC) to correct the deficiency in criminal prosecutions of UN peacekeepers.

The current system to punish UN peacekeeper misconduct relies on the national governments of troop-contributing countries to domestically prosecute the troops they contributed.⁷ Although the

2016/02/27/peacekeepers/?utm_term=.79788f4a011e.

2. *Id.*

3. E.g., Human Rights Watch, *Central African Republic: Ugandan Troops Harm Women, Girls*, (May 15, 2017), <https://www.hrw.org/news/2017/05/15/central-african-republic-ugandan-troops-harm-women-girls>; United Nations News Centre, *Central African Republic: UN Completes Investigations into Allegations of Sexual Abuse by Peacekeepers*, (Dec. 5, 2016), <http://www.un.org/apps/news/story.asp?NewsID=55722#.WVTxd4WcGU>.

4. Sieff, *supra* note 1.

5. See United Nations Office of International Oversight Services, *Evaluation of the Enforcement and Remedial Assistance Efforts for Sexual Exploitation and Abuse by the United Nations and Related Personnel in Peacekeeping Operations*, 4, U.N. Doc. IED-15-001 (May 5, 2015) <https://oios.un.org/page?slug=evaluation-report> (noting similar instances of abuses by U.N. missions in Haiti, South Sudan, and Liberia).

6. See Kambiz Foroohar, *Bloomberg: The UN Peacekeepers Rape Scandal Gets Worse*, GOVERNMENT ACCOUNTABILITY PROJECT, June 17, 2017), <https://whistleblower.org/multimedia/bloomberg-un-peacekeepers-rape-scandal-gets-worse>.

7. United Nations Office of International Oversight Services, *supra* note 5;

United Nations can repatriate UN peacekeepers and ban them from participating in future UN missions, member states currently retain exclusive jurisdiction over peacekeepers for civil and criminal liability.⁸ Thus, member states retain discretion as to whether or not they prosecute their peacekeepers for violating the law of armed conflict and international humanitarian law.⁹

Very few countries actually prosecute their peacekeepers, but countries that pursue prosecution generally utilize domestic military tribunals.¹⁰ Incorporating UN peacekeepers into the jurisdiction of the ICC would establish one, constant body with jurisdiction over peacekeeper crimes. This solution would allow national governments to retain primary jurisdiction over the prosecution of peacekeepers, while also creating a backup mechanism to prosecute UN peacekeepers when their countries of origin fail to do so.

First, this article will discuss the development of the United Nations and its peacekeeping function, as well as the various problems that have arisen from this increasingly vital branch of the United Nations. Second, this article will examine how the United Nations handles peacekeeper misconduct and compare that with the treatment of peacekeeper misconduct by individual countries and the North Atlantic Treaty Organization (NATO). Third, this article will argue that the international community should incorporate UN peacekeepers into the jurisdiction of the ICC as the best solution to overcome the failure to hold UN peacekeepers criminally liable for

Róisín Burke, *Central African Republic Peacekeeper Sexual Crimes, Institutional Failings: Addressing the Accountability Gap*, 14 N.Z. J. PUB. & INT'L L. 97, 111 (2016).

8. United Nations, *Disciplinary Processes*, (last visited July 10, 2017), <https://conduct.unmissions.org/enforcement-disciplinary>.

9. *Id.*

10. See CARLA FERSTMAN, CRIMINALIZING SEXUAL EXPLOITATION AND ABUSE BY PEACEKEEPERS 9-10 (United States Institute of Peace 2013), <https://www.usip.org/sites/default/files/SR335-Criminalizing%20Sexual%20Exploitation%20and%20Abuse%20by%20Peacekeepers.pdf> (highlighting how domestic courts often try peacekeepers for established crimes that do not match the actual crimes that occurred); United Nations, *Criminal Accountability of United Nations Officials, Experts on Mission Critical to Organization's Credibility, Legal Committee Stresses in Debate*, U.N. Doc. GA/L/3485 (Oct. 22, 2014) [hereinafter UN Criminal Accountability], <https://www.un.org/press/en/2014/gal3485.doc.htm>.

their misconduct.

II. WITH GREAT POWER COMES GREAT RESPONSIBILITY: THE DEVELOPMENT OF THE UNITED NATIONS AND UN PEACEKEEPING

The United Nations was created as an international body to maintain international peace and security.¹¹ As the role of the United Nations has evolved, so has its role in international peacekeeping. Although peacekeeping is not explicitly provided for in the UN Charter, it has become one of the main tools used by the UN Security Council.¹² UN peacekeeping has become such an important tool that the United Nations has even established the UN Department of Peacekeeping to operate and manage peacekeeping missions.¹³

The constantly changing nature of conflict intensifies the complexities of peacekeeping.¹⁴ Moreover, the United Nations has been heavily criticized for its failure to act against peacekeeper misconduct.¹⁵ Initially, the concerns over peacekeeper misconduct stemmed from the excessive use of force,¹⁶ particularly on civilian populations during UN missions.¹⁷ More recently, the controversy

11. William K. Lietzau & Joseph A. Reptilian Jr., *History and Development of the International Law of Military Operations*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 14, 19 (Terry D. Gill & Dieter Fleck eds., 2d ed. 2015). <https://www.un.org/press/en/2014/gal3485.doc.htm>.

12. UNITED NATIONS DEPT' OF PEACEKEEPING OPERATIONS, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPALS AND GUIDELINES 13 (2008), http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf.

13. Michael Bothe, *Peacekeeping*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 1181, 1183-84 (Bruno Simma et al. eds., 3d ed. 2012); United Nations, *Department of Peacekeeping Operations*, <http://www.un.org/en/peacekeeping/about/dpko> (last visited July 11, 2017) [hereinafter United Nations Peacekeeping].

14. Lietzau & Rutigaliano, *supra* note 11, at 19.

15. See Thomas W. Jacobson, *U.N. Peacekeeping: Few Successes, Many Failures, Inherent Flaws*, INT'L DIPL. & PUB. POL'Y, LLC 3-5 (2012), http://www.idppcenter.com/UN_Peacekeeping_Failures.pdf ("No failure did more to damage the standing and credibility of United Nations peacekeeping in the 1990s than its reluctance to distinguish victim from aggressor.").

16. See Siobhán Wills, *Continuing Impunity of Peacekeepers: The Need for Convention*, 4 J. INT'L HUMANITARIAN LEGAL STUD. 47, 49-50 (2013).

17. U.N. Secretary-General, *Statement Attributable to the Spokesman for the Secretary-General on the UN Inquiry on the Violent Demonstration of 27 January*

surrounding UN peacekeepers has shifted to acts of sexual misconduct by UN peacekeepers.¹⁸

The role of peacekeepers is often ambiguous, and determining who has jurisdiction to prosecute their illegal actions can be a challenge. However, troop-sending countries have jurisdiction to prosecute the troops they contribute to UN missions. Moreover, the nature of the crimes committed by UN peacekeepers indicates that the peacekeepers are also subject to the law of armed conflict.¹⁹

A. THE UNITED NATIONS AND THE SECURITY COUNCIL

The term “United Nations” first appeared on January 1, 1942 when representatives from the twenty six nations at war with the Axis powers in World War II met in Washington D.C. to sign the Declaration of the United Nations endorsing the Atlanta Charter.²⁰ This agreement established a pledge by those nations to use their full resources against the Axis powers and to not make a separate peace.²¹ At the Quebec Conference in August 1943, the American and British secretaries of state agreed to draft a declaration proposing the creation of an international organization.²²

In August to September 1944, U.S., British, Soviet, and Chinese representatives met at Dumbarton Oaks in Washington D.C. to draft the charter for this international organization based on the principle

2015 in *Gao, Mali*, (Apr. 2, 2015) [hereinafter Secretary-General Statement on Gao], <https://www.un.org/sg/en/content/sg/statement/2015-04-02/statement-attributable-spokesman-secretary-general-un-inquiry> (discussing the unauthorized and excessive force utilized against civilian protestors during the UN Mission in Mali).

18. Amnesty International, *Mandated to Protect, Equipped to Succeed? Strengthening Peacekeeping in Central African Republic*, 10 (2016) [https://www.amnesty.org/en/documents/afr19/3263/2016/en/\(listing multiple reports of UN peacekeepers' part of the mission in the Central African Republic\)](https://www.amnesty.org/en/documents/afr19/3263/2016/en/(listing%20multiple%20reports%20of%20UN%20peacekeepers%20part%20of%20the%20mission%20in%20the%20Central%20African%20Republic)).

19. Tristan Ferraro, *The Applicability and Application of International Humanitarian Law to Multinational Forces*, 95 INT'L REV. OF THE RED CROSS 561, 606-607 (2014).

20. Office of the Historian, *The Formation of the United Nations, 1945*, DEP'T OF STATE (last visited July 11, 2017), <https://history.state.gov/milestones/1937-1945/un>.

21. *Id.*

22. *Id.*

of collective security.²³ The details were finalized at the Yalta Conference in 1945.²⁴ In April to June 1945, representatives from fifty nations met in San Francisco and completed the Charter of the United Nations.²⁵

The ultimate goal of the UN Charter is to maintain international peace and security.²⁶ The UN Charter forbids the use of force between nations and requires member states to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”²⁷ The UN Charter also protects the sovereignty of all member states.²⁸ For example, the Charter declares, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²⁹

The United Nations consists of a General Assembly of all member states and a Security Council with five permanent members and six non-permanent members.³⁰ To act on all matters other than procedural matters, the UN Charter requires the affirmative vote of nine members of the Security Council, including the concurring votes of the permanent members.³¹

B. THE RISE OF THE UN PEACEKEEPING FUNCTION

The idea of international peacekeeping began under the League of Nations, the predecessor of the United Nations.³² Specifically, peacekeeping authority stemmed from Article 16 of the Covenant of the League of Nations, which provided for military enforcement

23. *Id.*

24. *Id.*

25. *Id.*

26. Lietzau & Rutigaliano, *supra* note 11, at 19.

27. U.N. Charter art. 2, ¶ 3; Lietzau & Rutigaliano, *supra* note 11, at 19.

28. *See* Lietzau & Rutigaliano, *supra* note 11, at 19.

29. U.N. Charter art. 2, ¶ 4.

30. Office of the Historian, *supra* note 20.

31. Lietzau & Rutigaliano, *supra* note 11, at 21. Permanent Members of the Security Council, referred to as the P-5, include: China, France, Russia, the United Kingdom, and the United States. *Id.*

32. *See* Bothe, *supra* note 13, at 1176.

measures.³³ Even from the early days of the United Nations, “military elements were used as tools to maintain or restore peace.”³⁴ UN peacekeeping efforts are described as “international uses of the military instrument, but with a mission and authority that is limited in nature.”³⁵

Typically, UN peacekeeping engages the “use of military observers and lightly armed monitors who are responsible to monitor, report, and provide a confidence-building presence in support of ceasefires and limited peace agreements.”³⁶ However, there is still quite a bit of variety in peacekeeping missions and the legal authority to use force within those missions.³⁷

Peacekeeping is not explicitly provided for in the UN Charter but has nonetheless become one of the main tools of the United Nations, particularly the Security Council.³⁸ Although peacekeeping operations have traditionally been associated with Chapter VI of the UN Charter, the legal basis for peacekeeping is derived from Chapters VI, VII, and VIII of the UN Charter.³⁹

Chapter VI allows the Security Council to call upon parties to settle any dispute that is likely to endanger international peace and security.⁴⁰ Chapter VII gives the Security Council the authority to decide what measures should be taken “to maintain or restore international peace and security when it is threatened.”⁴¹ Under Chapter VIII, the Security Council can utilize regional arrangements

33. *Id.* (noting that only three operations involving military components were planned or executed under the League of Nations, and none of them constituted enforcement action within the meaning of that provision).

34. *See id.*

35. Lietzau & Rutigaliano, *supra* note 11, at 21.

36. *Id.*

37. *Id.*

38. United Nations Dep't of Peacekeeping Operations, *supra* note 12, at 13.

39. *Id.* The Security Council does not need to refer to a specific chapter of the Charter when passing a resolution authorizing the deployment of UN peacekeeping operations. *Id.* The Security Council has never invoked Chapter VI but has adopted the practice of invoking Chapter VII when authorizing the deployment of UN peacekeepers into volatile situations. *Id.*

40. U.N. Charter art. 33-38.

41. U.N. Charter art. 39-51.

or agencies for enforcement action under its authority.⁴²

In order to establish UN peacekeeping operations, there must be a “complex legal transaction.”⁴³ The basis for a UN peacekeeping operation is found in a decision, known as a resolution, by the Security Council.⁴⁴ A Security Council resolution can be preceded, or followed, by action of the General Assembly, specifically an agreement between and/or with the parties to a conflict.⁴⁵ The Security Council has the authority to impose a peacekeeping operation in any country by a binding resolution, but the agreement of parties involved is sought because peacekeeping is supposed to be a consent-based instrument.⁴⁶

In 1992, the United Nations officially established the UN Department of Peacekeeping Operations (DPKO).⁴⁷ However, the DPKO traces its roots back to 1948 with the creation of the first UN peacekeeping operations – UN Truce Supervision Organization (UNTSO) and UN Military Observer Group in India and Pakistan (UNMOGIP).⁴⁸ Peacekeeping operations were managed through the UN Office of Special Political Affairs until the late 1980s.⁴⁹ The DPKO was formally created when Boutros Boutros-Ghali took office as Secretary-General of the United Nations.⁵⁰

42. U.N. Charter art. 52-54.

43. Bothe, *supra* note 13, at 1183.

44. *Id.*

45. *Id.*

46. *Id.*

47. See United Nations Peacekeeping, *supra* note 13 (providing political and executive direction to UN Peacekeeping operations around the world and integrating the efforts of UN governmental and non-governmental entities in the context of peacekeeping operations).

48. See United Nations Peacekeeping, *supra* note 13; see also United Nations Military Observer Group in India and Pakistan, *UNMOGIP Background*, <http://www.un.org/en/peacekeeping/missions/unmogip/background.shtml> (last visited July 26, 2017) (explaining that the UNMOGIP was established in 1948 to investigate and mediate the dispute between India and Pakistan over Kashmir); United Nations Truce Supervision Organization, *UNTSO Background*, <http://www.un.org/en/peacekeeping/missions/untso/background.shtml> (last visited July 26, 2017) (explaining that the UNTSO was established in 1948 to act as a group of military observers in the Middle East in response to the conflicts there).

49. *Id.*

50. *Id.*

The job of the DPKO is to handle the overall operation and management of peacekeeping.⁵¹ The DPKO “provides political and executive direction to UN Peacekeeping operations around the world and maintains contact with the Security Council, troop and financial contributors, and parties to the conflict in the implementation of Security Council mandates.”⁵² After the Cold War, the DPKO expanded its operations from a strictly military model to a multifaceted approach that allows for a more comprehensive focus on sustainable peace.⁵³

A peacekeeping operation is formed in the following steps: (1) appointment of the command structure and the members of the civilian component by the Secretary-General; (2) an agreement between the UN and a state contributing troops by which national military units are transferred and placed under UN authority.⁵⁴ There have been seventy-one peacekeeping missions since 1948, and sixteen of those operations are currently active.⁵⁵

The cost of peacekeeping is often criticized as being too high; the UN peacekeeping budget is around \$8 billion each year.⁵⁶ This

51. Bothe, *supra* note 13, at 1183-84.

52. United Nations Peacekeeping, *supra* note 13.

53. See Lietzau & Rutigaliano, *supra* note 11, at 21 (noting the DPKO shifted its approach from a strictly military model to an approach that focused on other peacekeeping functions such as building table institutions of governance, human rights monitoring, and demobilization and reintegration of former combatants among other functions).

54. Bothe, *supra* note 13, at 1184.

55. United Nations, *Peacekeeping Fact Sheet*, (last updated May 31, 2017) [hereinafter *Peacekeeping Fact Sheet*], <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml> (conducting currently active operations MINURSO in Western Sahara since April 1991; MINUSCA in Central African Republic since April 2014; MINUSMA in Mali since April 2013; MINUSTAH in Haiti since June 2004; MONUSCO in the Democratic Republic of the Congo since July 2010; UNAMID in Darfur since July 2007; UNDOF in Syria since June 1974; UNIFICYP in Cyprus since March 1964; UNIFIL in Lebanon since March 1978; UNISFA in Abyei, Sudan since June 2011; UNMISS in South Sudan since July 2011; UNOCI in Cote d’Ivoire since April 2004; UNMIK in Kosovo since 1999; UNMIL in Liberia since September 2003; UNMOGIP in India and Pakistan since January 1949; UNTSO in the Middle East since May 1949).

56. Better World Campaign, *UN Peacekeeping 101*, <https://betterworldcampaign.org/un-peacekeeping/un-peacekeeping-101/> (last visited July 16, 2017); United Nations, *Financing Peacekeeping*,

budget finances fourteen of the sixteen UN peacekeeping operations and supports logistics for the African Union Mission in Somalia (AMISOM).⁵⁷ The budget also funds support, technology, and logistics for all peace operations through global service centers.⁵⁸

The United States is by far the biggest contributor to the UN peacekeeping budget contributing about twenty-nine percent of the budget in 2016.⁵⁹ The next highest contributor, China, only gave funding for about ten percent of the UN peacekeeping budget.⁶⁰

C. CONTROVERSY SURROUNDING UN PEACEKEEPING

Peacekeeping has always been complex, and the changing nature of conflict has only made peacekeeping more difficult.⁶¹ The United Nations has been repeatedly criticized over the years for its failure to act against peacekeeper misconduct.⁶² An external panel appointed by the Secretary-General has even referred to the UN's handling of allegations of peacekeeper misconduct as "a gross institutional failure."⁶³

Controversy surrounding UN peacekeeping began with major concerns over the use of force by UN peacekeepers in conflict situations,⁶⁴ or in some cases the failure to use force when it arguably

<http://www.un.org/en/peacekeeping/operations/financing.shtml> (last visited July 10, 2017) [hereinafter *Financing Peacekeeping*]. For comparison, the UN peacekeeping budget is less than one half percent of world military expenditures, which was estimated at about \$1,747 billion in 2013. *Id.*

57. *Financing Peacekeeping*, *supra* note 56.

58. *Id.*

59. *Id.* (displaying country contributions to the UN peacekeeping budget for 2016: (1) United States 28.57%, (2) China 10.29%, (3) Japan 9.68%, (4) Germany 6.39%, (5) France 6.31%, (6) United Kingdom 5.80%, (7) Russian Federation 4.01%, (8) Italy 3.75%, (9) Canada 2.92%, and (10) Spain 2.44%).

60. *Financing Peacekeeping*, *supra* note 56.

61. Lietzau & Rutigaliano, *supra* note 11, at 22.

62. Foroohar, *supra* note 6.

63. For example, the United Nations has recently been under fire for ignoring rape scandals in the Central African Republic. *Id.*

64. See Somini Sengupta, *Inquiry Finds 'Excessive Force' by U.N. Officers in Mali Killings*, N.Y. TIMES (Apr. 2, 2015), <https://www.nytimes.com/2015/04/03/world/africa/inquiry-finds-excessive-force-by-un-officers-in-mali-killings.html> (discussing a United Nations inquiry into UN officers after peacekeepers in Mali killed three civilians and wounded four others and inappropriate excessive force was found).

would have been appropriate.⁶⁵ However, more recently, the use of force dilemma has been overshadowed by the increase in sexual misconduct by peacekeepers.⁶⁶ Nonetheless, these issues go hand-in-hand because both use of force and sexual misconduct create a question regarding whether peacekeepers cause more harm than good.⁶⁷

1. Use of Force

The Security Council authorizes the use of force by member states.⁶⁸ But in the post-Cold War era, the use of force with or without Security Council authorization became more prevalent.⁶⁹ Some UN member states do not support the use of any force by peacekeepers, some think that peacekeepers should use most types of force, and others fall somewhere in the middle.⁷⁰

The overuse of force by UN peacekeepers on certain missions caused a lot of backlash.⁷¹ For instance, in Somalia, a US-led UN humanitarian operation developed into a gory battle against a powerful warlord.⁷² Moreover, during the peacekeeping mission in

65. E.g., Human Rights Watch, *DR Congo: Army, UN Failed to Stop Massacre*, (July 2, 2014, 8:01 PM) [hereinafter Human Rights Watch DR Congo], <https://www.hrw.org/news/2014/07/02/dr-congo-army-un-failed-stop-massacre> (highlighting the failure of the United Nations, DRC military, and MONUSCO in responding to a massacre in the DRC when peacekeepers were aware of the massacre, had the resources to provide support to civilians, and did not respond).

66. E.g., Joshua Berlinger, Holly Yan, & Richard Roth, *U.N. Peacekeepers Accused of Raping Civilians*, CNN (Apr. 6, 2016, 4:42 PM), <http://www.cnn.com/2016/04/06/africa/united-nations-peacekeepers-sexual-abuse/index.html> (reporting that United Nations Peacekeepers in the Central African Republic have plagued the country by sexually abusing civilians and noting that more than 100 allegations of sexual abuse had been made).

67. See A.B. Fetherston, *UN Peacekeepers and Cultures of Violence*, CULTURAL SURVIVAL Q. MAG., March 1995, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/un-peacekeepers-and-cultures-violence>.

68. RALPH ZACKLIN, *THE UNITED NATIONS SECRETARIAT AND THE USE OF FORCE IN A UNIPOLAR WORLD 2* (2010).

69. *Id.*

70. See Chris McGreal, *What's the Point of Peacekeepers When They Don't Keep the Peace?*, GUARDIAN (Sept. 17, 2015), <https://www.theguardian.com/world/2015/sep/17/un-united-nations-peacekeepers-rwanda-bosnia>.

71. *See id.*

72. *See id.*

Sierra Leone, Nigerian forces allegedly committed a variety of international crimes for which they have never been tried.⁷³ After these missions, the United Nations was overly cautious in allowing its peacekeepers to use any type of force, creating even more controversy surrounding peacekeepers.⁷⁴

In the 1990s particularly, the UN's failure to use force caused serious criticism for lack of action.⁷⁵ For example, on the first day of the genocide in Rwanda in 1994, hundreds of Tutsis sought refuge in a school guarded by ninety UN peacekeepers from Belgium armed with a machine gun at the entrance and with a UN flag flying over the school.⁷⁶ Some days later, despite warnings of the imminent genocide, peacekeepers were ordered to abandon the school to escort foreigners to the airport and out of Rwanda.⁷⁷ Within hours, the two thousand people who sought refuge at the school were murdered.⁷⁸

Similarly, in Bosnia, the initial deployment of the United Nations Protection Force (UNPROFOR) included no military units; it was composed entirely of military observers.⁷⁹ Subsequently, merely one year after the tragedy in Rwanda, Dutch peacekeepers failed to stop the massacres of eight thousand Muslim men in Srebrenica, which was supposed to be a UN safe area.⁸⁰ The incident in Srebrenica was later labeled as the most infamous mass murder by the Serbs in Bosnia.⁸¹

2. *Sexual Misconduct*

The use of force issue within UN peacekeeping forces has evolved

73. GEERT-JAN ALEXANDER KNOOPS, *THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW* 11 (2004).

74. See Barney Henderson, *What Have Been the Successes and Failures of UN Peacekeeping Missions?*, TELEGRAPH (Sept. 28, 2015, 8:00 PM), <http://www.telegraph.co.uk/news/worldnews/europe/bosnia/11729436/Srebrenica-20-years-on-What-have-been-the-successes-and-failures-of-UN-peacekeeping-missions.html>.

75. See *id.*

76. McGreal, *supra* note 70.

77. *Id.*

78. *Id.*

79. Zacklin, *supra* note 68, at 46.

80. McGreal, *supra* note 70.

81. *Id.*

into a much bigger issue of sexual assault as allegations of sexual assault have become more common than claims of unjustified force.⁸² The persistent accusations of rape and sexual exploitations by peacekeepers are becoming more frequent in an overwhelming number of UN operations.⁸³ The United Nations has even developed a name for the accidental children of UN troops; they call them “peacekeeper babies.”⁸⁴

Since the 1990s, sexual exploitation and abuse by UN peacekeepers and personnel has been reported from peacekeeping missions in Bosnia and Herzegovina, Cambodia, the Democratic Republic of the Congo, East Timor, Haiti, Liberia, Sierra Leone, and South Sudan, although this list is not exclusive.⁸⁵ Troops implicated in the abuse have been from Pakistan, Bangladesh, Sri Lanka, Uganda, Burundi, the Republic of Congo, the Democratic Republic of the Congo, and more.⁸⁶

In 2016, 103 allegations of sexual exploitation and abuse were reported in UN field missions.⁸⁷ Less than fifty percent of those allegations stemmed from incidents occurring before 2016.⁸⁸ This number of allegations is notably higher than the previous six years of recorded allegations.⁸⁹ Moreover, the number of military

82. See Azad Essa, *UN Peacekeepers Hit by New Allegations of Sex Abuse*, AL JAZEERA (July 10, 2017), <http://www.aljazeera.com/news/2017/07/peacekeepers-hit-allegations-sex-abuse-170701133655238.html> (reporting on 55 new allegations of sexual abuse by UN Peacekeepers around the world from January to July of 2017).

83. See *Panel to Review UN Response to Alleged Central African Republic Sex Abuse*, GUARDIAN (June 22, 2015) [hereinafter *Guardian UN Response*], <https://www.theguardian.com/world/2015/jun/22/panel-to-review-un-response-to-alleged-central-african-republic-sex-abuse>.

84. Sieff, *supra* note 1.

85. Human Rights Watch, *UN: Stop Sexual Abuse by Peacekeepers*, (Mar. 4, 2016, 12:02 PM) [hereinafter *Human Rights Watch Stop Sexual Abuse*], <https://www.hrw.org/news/2016/03/04/un-stop-sexual-abuse-peacekeepers>.

86. *Id.*

87. United Nations, *Peacekeeping Initiatives in Action Addressing Sexual Exploitation and Abuse* (March 2017) [hereinafter *UN Initiatives in Action*], https://conduct.unmissions.org/sites/default/files/factsheet_v._8_march_2017.pdf.

88. *Id.*

89. See Chart of UN Sexual Exploitation and Abuse, <https://conduct.unmissions.org/sea-overview> (last visited Apr. 30, 2017) [hereinafter *UN Sexual Abuse Chart*].

perpetrators, as opposed to civilian, police, or unknown perpetrators, was higher in 2016 than it has been in the past decade.⁹⁰ Interestingly, as the number of allegations of sexual exploitation and abuse has increased, the number of allegations of other misconduct has decreased.⁹¹

D. JURISDICTION OVER UN PEACEKEEPERS

International jurisdiction over UN peacekeepers is currently somewhat ambiguous. On August 6, 1994, the Secretary-General released a bulletin that stated, “In case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.”⁹² However, the bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or the members’ status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.⁹³

The Convention on the Safety of United Nations and Associated Personnel does not technically apply to a UN operation “authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”⁹⁴ Nonetheless, most, if not all, UN operations are classified as peacekeeping operations, not peace enforcement operations, though the line between the two is often extremely blurred.⁹⁵

90. *See id.* (noting that, of the 103 allegations in 2016, seventy-three were committed by military perpetrators, twenty-three by civilians, and seven by local police).

91. *See id.*

92. U.N. Secretariat, *Secretary-General’s Bulletin - Observance by United Nations Forces of International Humanitarian Law*, § 4, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) [hereinafter Secretary-General’s Bulletin 1999].

93. *Id.* § 1.2.

94. Convention on the Safety of United Nations and Associated Personnel art. 2, ¶ 2, Dec. 9, 1994, 2051 U.N.T.S. 363 [hereinafter Convention on UN Personnel Safety].

95. *See* United Nations, *Peace and Security*, <http://www.un.org/en/peacekeeping/operations/peace.shtml> (last visited July 8, 2017) [hereinafter United

Peace enforcement involves the use of “a range of coercive measures, including the use of military force.”⁹⁶ Peace enforcement requires explicit authorization from the Security Council.⁹⁷ Meanwhile, in principle, peacekeeping operations are “deployed to support the implementation of a ceasefire or peace agreement.”⁹⁸ But peacekeeping operations often play an active role in peacemaking efforts and early peacebuilding activities.⁹⁹

Peacekeeping operations today are multidimensional to “facilitate the political process, protect civilians, assist in the disarmament, demobilization and reintegration of former combatants; support the organization of elections, protect and promote human rights and assist in restoring the rule of law.”¹⁰⁰ UN peacekeepers “may use force to defend themselves, their mandate, and civilians, particularly in situations where the State is unable to provide security and maintain public order.”¹⁰¹

Despite its attempt to distinguish between the various roles in peace missions, the United Nations admits that “the boundaries between conflict prevention, peacemaking, peacekeeping, peacebuilding, and peace enforcement have become increasingly blurred.”¹⁰² Moreover, views on the use of force have evolved significantly since the 1990s when this somewhat arbitrary distinction between peace enforcement and peacekeeping operations was created.¹⁰³ Nowadays, allowing the use of force in peacekeeping operations is more of a norm,¹⁰⁴ and, in effect, most peacekeeping

Nations Peace and Security] (clarifying that most peace operations are not limited to one type of activity causing the boundaries between conflict prevention, peacemaking, peacebuilding, and peace enforcement to be blurred).

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* (discussing how, often times, peacekeeping requires a more active role beyond maintaining a ceasefire because of the tense political climate or the need to protect civilians while moving for disarmament).

100. United Nations Peace and Security, *supra* note 95.

101. *Id.*

102. *Id.*

103. *See* Alex Whiting, *Peacekeeping: A Brief Guide*, THOMSON REUTERS FOUND. (Sept. 21, 2013, 1:00 PM), <http://news.trust.org/item/20130919155317-qsnfr/>.

104. *See* James Sloan, *The Use of Offensive Force in U.N. Peacekeeping: A*

operations contain elements of peace enforcement operations, even if they continue to be called peacekeeping operations.¹⁰⁵

Furthermore, in 2008, the General Assembly adopted a resolution encouraging criminal accountability of United Nations officials and experts on missions.¹⁰⁶ The resolution emphasizes “the need to enhance international cooperation to ensure the criminal accountability of United Nations officials and experts on mission” and further highlights “the need for the United Nations and its Member States to urgently take strong and effective steps to ensure criminal accountability of United Nations officials and experts on mission in the interest of justice.”¹⁰⁷

Although the 2008 resolution focuses primarily on encouraging states to hold UN peacekeepers criminally liable instead of calling for an international solution, this resolution indicates that, despite earlier statements by UN bodies regarding peacekeeper immunity, the United Nations recognizes the importance of holding peacekeepers criminally liable for their misconduct while participating in UN peacekeeping missions.¹⁰⁸

Under appropriate circumstances, UN peacekeepers can be subject to the law of armed conflict.¹⁰⁹ Nonetheless, distinguishing between peace enforcement and peacekeeping operations is nearly impossible. Accordingly, an argument against criminal liability for peacekeepers based on the nature of the relevant operation will likely crumble under international scrutiny. Thus, a peacekeeper’s actions do fall

Cycle of Boom and Bust?, 30 HASTINGS INT’L & COMP. L. REV. 385, 391-93 (2007).

105. *See id.* (discussing elements peacekeeping operations and peace enforcement operations share such as the requirement to sometimes use force to maintain or achieve peace).

106. G.A. Res. 63/119 ¶ 2 (2009).

107. *Id.*

108. U.N. Secretary-General, Remarks to the Security Council addressing the situation in the Central African Republic (Aug. 13, 2015) [hereinafter Secretary-General Remarks], <https://www.un.org/sg/en/content/sg/statement/2015-08-13/secretary-generals-remarks-security-council-consultations-situation>.

109. *See* Knoops, *supra* note 73, at 11 (demonstrating that past controversies around the actions of peacekeeping forces, like ECOMOG peacekeepers in Sierra Leone, illustrate the necessity of prosecuting international peacekeepers for international crimes).

under the law of armed conflict if there is an ongoing conflict.

III. UN PEACEKEEPER MISCONDUCT: A COMPARISON OF PROSECUTION MECHANISMS FOR PEACEKEEPERS WITHIN THE UNITED NATIONS, INDIVIDUAL COUNTRIES, AND NATO

Currently, the United Nations can only punish peacekeeper misconduct through an internal disciplinary system.¹¹⁰ This system allows for the individual to be repatriated and banned from future participation in peacekeeping operations.¹¹¹ However, the troops contributed by member states remain under the exclusive jurisdiction of their national government.¹¹² Thus, any criminal or civil accountability for peacekeeper misconduct must occur at the domestic level.¹¹³

If a country prosecutes its troops for misconduct while serving as a UN peacekeeper, the prosecution typically occurs in a military tribunal.¹¹⁴ However, because of the nature of these domestic military tribunals, each country deals with the misconduct differently, and often the treatment of these cases is inconsistent from case to case.¹¹⁵

110. United Nations, *Addressing Sexual Exploitation and Abuse* <https://conduct.unmissions.org/enforcement-disciplinary> (last visited July 10, 2017) [hereinafter UN Addressing Sexual Exploitation] (stating that when allegations of misconduct have been investigated and substantiated an internal department, the Office of Human Resources Management, takes over decisions concerning disciplinary measures).

111. United Nations, *supra* note 8.

112. United Nations, *Investigations*, <https://conduct.unmissions.org/enforcement-investigations> (last visited July 8, 2017) [hereinafter UN Investigations].

113. United Nations, *supra* note 8.

114. Ferstman, *supra* note 10.

115. Compare Edward Wong, *Sergeant Is Sentenced to 8 Years in Abuse Case*, N.Y. TIMES (Oct. 22, 2004), <http://www.nytimes.com/2004/10/22/world/middleeast/sergeant-is-sentenced-to-8-years-in-abuse-case.html?mcubz=1>; with Center for Economic and Policy Research, *Reduced Charges Against Uruguayan Minustah Troops Latest Example of Lack of U.N. Accountability*, (Sept. 4, 2012), <http://cepr.net/blogs/haiti-relief-and-reconstruction-watch/reduced-charges-against-uruguayan-minustah-troops-latest-example-of-lack-of-un-accountability> (illustrating how the United States sentenced Staff Sgt. Ivan L. Frederick II to eight years in prison for the abuses he enacted at the Abu Graib prison but a court in Haiti gave a lesser sentence for four Uruguayan peacekeepers

Interestingly, NATO has taken a proactive stance on troop problems, and as of 2015, there were no known allegations of sexual misconduct against NATO peacekeepers.¹¹⁶

A. THE CURRENT UN SYSTEM DISCIPLINES UN PEACEKEEPERS BUT RELIES ON TROOP-CONTRIBUTING COUNTRIES TO PROSECUTE DOMESTICALLY FOR CRIMINAL LIABILITY

The United Nations has a system in place to pursue reports of peacekeeper misconduct. In fact, the United Nations dedicates an entire portion of its website to conduct in UN field missions.¹¹⁷ But the current system relies on the participation of the troop-contributing country; diminishing the likelihood of holding UN peacekeepers accountable for their misconduct. The United Nations separates the different parts of the process into four pieces: (1) complaint, (2) investigation, (3) disciplinary processes, and (4) accountability.¹¹⁸

People can file complaints to bring possible misconduct to the attention of the United Nations¹¹⁹ Once the United Nations receives information about possible misconduct it begins an investigation.¹²⁰ However, members of military contingents utilized in UN operations, such as the troops contributed by member states, stay under the exclusive jurisdiction of their national government.¹²¹ As a result, the responsibility of investigating an allegation of misconduct and proceeding with subsequent disciplinary action remains with the

who committed a similar act of violence).

116. DEPARTMENT OF STATE OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, STOPPING HUMAN TRAFFICKING, SEXUAL EXPLOITATION, AND ABUSE BY INTERNATIONAL PEACEKEEPERS (June 2007), <https://2009-2017.state.gov/j/tip/rls/tiprpt/2007/86207.html>.

117. United Nations, *Conduct in U.N. Field Missions*, <https://conduct.unmissions.org/> (last visited July 8, 2017).

118. United Nations, *Enforcement*, <https://conduct.unmissions.org/enforcement> (last visited July 8, 2017).

119. United Nations, *Complaints*, <https://conduct.unmissions.org/enforcement-complaints> (last visited July 8, 2017) [hereinafter UN Complaints] (explaining that anyone can report the misconduct of UN personnel to the UN Office for Internal Oversight Services).

120. *Id.*

121. *Id.*

troop-contributing country.¹²²

Some troop-contributing countries choose to investigate allegations of sexual exploitation and abuse in collaboration with the UN Office of Internal Oversight Services (OIOS).¹²³ Irrespective of a troop-contributing country's failure to investigate allegations of misconduct involving its personnel, the United Nations' conducts its own investigation on the matter.¹²⁴ If the possible misconduct is serious and involves one or more members of a military contingent, the UN usually refers the matter to the Permanent Mission of the country in question and requests that the government appoint a national investigation officer to look into the allegations.¹²⁵

Countries must report back to the UN on the result of the investigation and on any actions taken.¹²⁶ Because the troop-contributing countries retain jurisdiction over their troops, disciplinary sanctions and any other judicial actions, including criminal or civil accountability, are similarly the responsibility of the national jurisdiction of the individual involved.¹²⁷ The United Nations can, however, repatriate the individuals concerned on disciplinary grounds and ban them from future participation in peacekeeping operations.¹²⁸ However, the United Nations itself cannot hold the individuals criminally liable.¹²⁹

Some tribunals have attempted to specifically address the issue of misconduct by peacekeepers, but the narrow scope of each tribunal significantly limits who can be prosecuted under the tribunal system.¹³⁰ For example, the jurisdiction of the International Criminal

122. *Id.*

123. *Id.*

124. *Id.*

125. UN Complaints, *supra* note 119 (“Since July 2016, troop-contributing countries are required to include national investigation officers within their contingents to ensure that investigations start in a timely manner.”).

126. *Id.*

127. United Nations, *supra* note 8.

128. *Id.*

129. *Id.*

130. See WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 603 (2006) (explaining tribunals have been given very limited scope due to the specific jurisdiction of each tribunal).

Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) exposed peacekeepers to individual liability under international criminal law, particularly liability for war crimes potentially committed by peacekeepers.¹³¹ The ICTY prosecutor conducted investigations of war crimes purportedly committed by Dutch peacekeepers as part of the United Nations Protection Force (UNPROFOR) in Yugoslavia, but the charges were dismissed and no peacekeeper was ever indicted.¹³²

Another tribunal, the Special Court for Sierra Leone (SCSL), which was established in 2000, went a different direction.¹³³ The SCSL essentially applies the prosecution system already in place to this tribunal specifically.¹³⁴ However, the current UN system was not actually in place at the time the SCSL was established. In the Statute of the Special Court for Sierra Leone, the tribunal specifically gives the sending State primary jurisdiction over “any transgressions by peacekeepers and related personnel present in Sierra Leone.”¹³⁵

The Statute does, however, permit the Court to exercise jurisdiction over peacekeepers if: (1) the sending State is unwilling or legitimately unable to investigate or prosecute, and (2) the Security Council gives authorization.¹³⁶ This provision in the SCSL statute challenges the internationalized criminal law system established in Sierra Leone because it creates no obligation to ensure domestic prosecution of the international crimes potentially committed by peacekeepers in Sierra Leone.¹³⁷

Moreover, it effectively exempts jurisdiction of peacekeepers but

131. See KNOOPS, *supra* note 73, at 24 (providing examples of the effectiveness of each tribunal while also exposing the limited jurisdictions).

132. KNOOPS, *supra* note 73, at 24.

133. Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone, Sierra Leone-U.N., Apr. 12, 2002, 2178 U.N.T.S. 38342 [hereinafter Special Court for Sierra Leone Agreement].

134. Statute of the Special Court for Sierra Leone, annex, Agreement, Sierra Leone-U.N., art. 1, ¶ 1, Apr. 12, 2002, 2178 U.N.T.S. 38342 [hereinafter Statute of the SCSL].

135. Statute of the SCSL, art. 1, ¶ 2.

136. Statute of the SCSL, art. 1, ¶ 3 (creating jurisdiction almost identical to the jurisdiction of the ICC).

137. KNOOPS, *supra* note 73, at 4.

then allows it with approval from the Security Council.¹³⁸ Nonetheless, the Secretary-General stated that the United Nations¹³⁹ would not apply that amnesty to genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.¹⁴⁰ This implies that peacekeepers should be prosecuted for committing these crimes.¹⁴¹

In addition, rape is relatively established as an international crime.¹⁴² Based on the ad hoc tribunals' treatment of rape as a crime, rape can be prosecuted as genocide, a war crime, and a crime against humanity.¹⁴³ Rape first received treatment as a violation of international humanitarian law after World War II, but the most important development in establishing rape as an international crime came with the ICTY and ICTR.¹⁴⁴ The tribunals were forced to create their own definitions of rape because there was no international definition at their inception.¹⁴⁵ Consequently, the tribunals' decisions

138. *Id.*

139. *Id.*

140. U.N. Secretary General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leona, ¶ 22, U.N. Doc. S/2000/915 (Oct. 4, 2000).

141. KNOOPS, *supra* note 73, at 5.

142. See Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 227-31 (2007) (documenting the development of international law concerning rape as a specific crime).

143. *Id.* at 229.

144. *Id.*

145. *Id.*; see Press Release, Mechanism for International Criminal Tribunals, Historic Judgement Finds Akayesu Guilty of Genocide, U.N. Press Release (Sept. 2, 1998), <http://unictr.unmict.org/en/news/historic-judgement-finds-akayesu-guilty-genocide> (defining rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” with broad allowance for acts that fall under sexual violence and noting that “coercive circumstance[s] did not need to be evidenced by a show of physical force”); Press Release, International Criminal Tribunal for the former Yugoslavia, Furundzija Case: The Judgement of the Trial Chamber Anto Furundzija found guilty on both charges and sentenced to 10 years in prison, U.N. Press Release JL/PIU/372-E (Dec. 10, 1998), <http://www.icty.org/en/press/furundzija-case-judgement-trial-chamber-anto-furundzija-found-guilty-both-charges-and> (defining rape as “the sexual penetration . . . either of the vagina or anus of the victim by the penis of the perpetrator, or any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator, where such penetration is effected by coercion or force or threat of force against the victim or a third person”).

ultimately established the specific elements for the crime of rape in international law.¹⁴⁶

B. TROOP-CONTRIBUTING COUNTRIES USUALLY INVOKE
DOMESTIC MILITARY TRIBUNALS TO PROSECUTE MISCONDUCT BY
THE PEACEKEEPERS THEY CONTRIBUTED

Because of the nature of the current UN system to address peacekeeper misconduct, troop-contributing countries are responsible for prosecuting their troops in order to hold them criminally liable for their illegal acts.¹⁴⁷ If the countries do prosecute their peacekeepers, they generally use military tribunals.¹⁴⁸ This section outlines instances of misconduct by peacekeepers from Canada, Belgium, and the Democratic Republic of the Congo (DRC) that were prosecuted or are currently being prosecuted in domestic military tribunals. This section also addresses how the United States deals with misconduct within its troops that are assisting with peace operations.

One particularly famous example of peacekeeper misconduct is the group of Canadian officers who tortured to death a sixteen-year old Somali civilian in the early 1990s.¹⁴⁹ Another instance from Somalia are the Belgian peacekeepers that held a Somali boy over a fire.¹⁵⁰ More recently, UN peacekeepers from the DRC are accused of raping or sexually exploiting at least eight women and girls in the CAR.¹⁵¹ Moreover, despite accusations of misconduct, U.S. troops

146. Ellis, *supra* note 142, at 229, 231.

147. United Nations, *supra* note 8.

148. Marten Zwanenburg, *The Statute for an International Criminal Court and the United States: Peacekeepers Under Fire?*, EUROPEAN J. INT'L L. 124, 128 (1999), <http://www.ejil.org/pdfs/10/1/569.pdf>.

149. Kakule Kalwahali, *The Crimes Committed by UN Peacekeepers in Africa: A Reflection of Jurisdictional and Accountability Issues* 223-24 (Feb. 2013) (unpublished L.L.D. thesis, University of South Africa) (on file with author) (examining the cases against Canadian soldiers involved in the torturing a Somali teenager to death in 1993 and the subsequent appeals of those cases).

150. *Photos Reveal Belgian Paratroopers' Abuse in Somalia*, CNN (Apr. 17, 1997, 4:58 PM), <http://edition.cnn.com/WORLD/9704/17/belgium.somalia/>.

151. Dionne Searcey, *U.N. Peacekeepers Accused of Rape in Central African Republic*, N.Y. TIMES, (Feb. 4, 2016), <https://www.nytimes.com/2016/02/05/world/africa/united-nations-peacekeepers-central-african-republic.html>.

are rarely, if ever, prosecuted for violating international humanitarian law.¹⁵²

1. Canada

Canada has previously investigated and prosecuted its peacekeepers for misconduct. However, the results do not instill confidence in the UN's decision to only allow domestic criminal prosecution of peacekeepers, particularly with respect to sentencing.¹⁵³ The most infamous instance of misconduct by Canadian peacekeepers is from the United Task Force Somalia ("UNITAF") mission in 1993; Canadian soldiers were accused of torturing to death a sixteen-year-old unarmed Somali civilian named Shidane Arone.¹⁵⁴

A number of Canadian officers were charged in connection with the torture and murder of Arone.¹⁵⁵ Although Master Corporal Matchee, the main torturer, was charged, he was found unfit to stand trial.¹⁵⁶ Matchee was largely responsible for brutally beating Arone to

152. See Jeffrey F. Addicott & William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 154-55 (1993) (asserting that cases, where U.S. troops violate IHL are rare, but not nonexistent, and when they do occur, these violations "represent[] a horrible scar on the credibility of the American military, as well as the civilized democracy it protects"); Mike Corder, Robert Burns & Matthew Lee, *ICC prosecutors: U.S. forces may have committed war crimes*, MIL. TIMES, Nov. 15, 2016, <http://www.militarytimes.com/news/pentagon-congress/2016/11/16/icc-prosecutors-u-s-forces-may-have-committed-war-crimes/> (showing accusations of war crimes committed by U.S. troops is an ongoing issue, but for the ICC's prosecution to move forward domestic investigations need to have been inadequate).

153. Kalwahali, *supra* note 149, at 222-46 (criticizing the trials and lack of sufficiently appropriate punishments for Canadian peacekeepers involved in the death of Shidane Arone).

154. KNOOPS, *supra* note 73, at 20-21 ("Italy and Belgium also initiated criminal inquiries into the conduct of their peacekeeping personnel in Somalia . . . in *Ministère Public et Centre pour L'égalité des Chances et la lutte contre le racisme v. C. and B.*").

155. Clyde H. Farnsworth, *The Killing of a Somali Jars Canada*, N.Y. TIMES, (Feb. 11, 1996), <http://www.nytimes.com/1996/02/11/world/the-killing-of-a-somali-jars-canada.html>.

156. Kalwahali, *supra* note 149, at 229.

death,¹⁵⁷ though Trooper Brown participated in the torture as well.¹⁵⁸ Sergeant Boland was present during some of the abuse and did nothing to stop it.¹⁵⁹ Private Brocklebank knew that Arone was being tortured and briefly stood outside the bunker while Arone was tortured inside.¹⁶⁰ Major Seward issued an order that infiltrators into the camp should be captured and abused,¹⁶¹ and Lieutenant Sox disseminated that information.¹⁶²

Trooper Kyle Brown was present during a large portion of Arone's beating, took photos of Matchee beating Arone, and posed for a photo with the victim.¹⁶³ He also admitted to punching Arone once in the jaw and kicking him twice in the leg.¹⁶⁴ Brown was charged with the torture and murder of Arone.¹⁶⁵ He was found guilty of torture and manslaughter.¹⁶⁶ The court's decision was affirmed on appeal.¹⁶⁷ Brown was convicted in March 1994; his appeal to the Court Martial Appeal was dismissed in January 1995; his leave to appeal to the Supreme Court of Canada was denied in June 1995; and yet Brown was eligible for parole as soon as November 1995.¹⁶⁸

Sergeant Boland arrived later in the evening to relieve Matchee, who had already begun torturing Arone.¹⁶⁹ At that point, Arone's ankles and wrists were bound and he had a baton stuck through his elbows behind his back.¹⁷⁰ Boland watched some of the abuse but did nothing to stop it.¹⁷¹ Boland was charged with torture and negligently performing a military duty; he plead guilty to the charge of negligence and not guilty to torture.¹⁷² The torture charge was

157. *Id.* at 228-29.

158. *Id.* at 229.

159. *Id.* at 232.

160. *Id.* at 223.

161. *Id.* at 239.

162. Kalwahali, *supra* note 149, at 235.

163. *Id.* at 229.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 230-31.

168. Kalwahali, *supra* note 149, at 230-31.

169. *Id.* at 232.

170. *Id.* at 233.

171. *Id.*

172. *Id.*

eventually dropped.¹⁷³ Boland was originally sentenced to ninety days of incarceration, but the appellate court held that it was an inadequate amount of time and increased his sentence to one year.¹⁷⁴

Private Brocklebank was arrested for aiding and abetting the torture of Arone.¹⁷⁵ Matchee ordered Private Brocklebank to hand over his pistol, which Matchee took inside the bunker and held to Arone's head while Brown photographed him; Brocklebank did not resist the order to hand over his pistol or protest the torture.¹⁷⁶ The Court Martial Appeal Court of Canada affirmed the lower court's decision to acquit Brocklebank of all charges.¹⁷⁷

173. *Id.*

174. Kalwahali, *supra* note 149, at 233.

175. Siobhán Wills, *The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 10 HUM. RTS. BRIEF 26, 29 (2003), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1407&context=hrbrief>.

176. Kalwahali, *supra* note 149, at 223.

177. Wills, *supra* note 175, at 29. *See* RAY MURPHY, UN PEACEKEEPING IN LEBANON, SOMALIA, AND KOSOVO 273 (2007). The issue in the Brocklebank case was the applicability of the Canadian Unit Guide to the Geneva Conventions, which imposes a duty on Canadian forces to protect civilians in the custody of Canadian forces, regardless of whether the civilians are in that member's custody. The court ultimately decided that because there was no declaration of war or armed conflict in Somalia and because the Canadian forces were partaking in a peacekeeping mission (as opposed to a peace enforcement mission) as part of UNITAF, they were not engaged in armed conflict. *Id.* at 273-74. As a result, the court determined that Brocklebank had no legal obligation to ensure the safety of Arone because neither the Geneva Conventions nor Additional Protocol II applied to Canadian forces in Somalia or to any peacekeeping operation. *Id.* at 274. However, this judgment is flawed for a variety of reasons. *Id.* First, the judgment refers to UNITAF as a peacekeeping mission when, in fact, UNITAF was created by the Security Council as a peace enforcement mission to replace UNISOM I. *Id.* Further, the Security Council resolution that created UNITAF specifically condemned all violations of humanitarian law committed in Somalia. *Id.* Moreover, the court's determination that the situation in Somalia was not an armed conflict was unfounded; the court looked at no evidence of the death toll or anything else before choosing to declare that the turmoil in Somalia was not an armed conflict. *Id.* Additionally, the Canadian government does not have the authority to make a decision that essentially exempts Canadian forces from the application of humanitarian law if it applies under international law. *Id.* Lastly, the Brocklebank opinion is highly criticized for being based, at least partly, on the wrong provisions of the Fourth Geneva Convention and Protocols. *Id.* at 274-75. The Brocklebank decision is the most famous of the court opinions resulting from

Major Anthony Seward issued orders that infiltrators into the Canadian camp were to be captured and abused.¹⁷⁸ He was charged with having unlawfully caused bodily harm to Arone contrary to Section 130 of the National Defense Act and Section 269 of the Criminal Code of Canada.¹⁷⁹ He was also charged with having negligently performed a military duty imposed on him contrary to Section 124 of the National Defense Act because of his instructions about abusing prisoners and his failure to exercise proper command over his subordinates.¹⁸⁰ Seward was found guilty for violating the Criminal Code of Canada, and sentenced to three months' imprisonment and dismissal from service.¹⁸¹

Lieutenant Sox was tried at a General Court Martial in Canada on three charges.¹⁸² Sox was a commander in Somalia and communicated the information that any prisoners captured as a result of a forthcoming patrol could be abused.¹⁸³ He was found not guilty of unlawfully causing bodily harm to Arone, but he was found guilty of failing to exercise proper command over his subordinates.¹⁸⁴ The court granted a stay of proceedings with regards to the third charge and never lifted it.¹⁸⁵ Sox was eventually sentenced to a reduction of rank and a severe reprimand.¹⁸⁶

2. Belgium

In 1993, members of Belgium's elite paratrooper unit served as

Arone's torture and murder.

178. Kalwahali, *supra* note 149, at 239.

179. *Id.*

180. *Id.*

181. *Id.* at 239-40.

182. *Id.* at 235.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*; see generally GOV'T OF CAN., MILITARY JUSTICE AT THE SUMMARY TRIAL LEVEL 14-9, ¶ 40 (ver. 2.2, 2011), http://www.forces.gc.ca/assets/FORCES_Internet/docs/en/jag/manual-mil-jus-summary-trial-level.pdf ("The punishment of a severe reprimand . . . [is] intended to stand out as a blemish on the career record of the offender. . . . A severe reprimand is higher on the scale of punishments than a reprimand. They are both higher on the scale of punishments than fines and minor punishments. They are not subject to automatic removal from the member's conduct sheet after one year.").

peacekeepers in the United Nations' "Operation Restore Hope" mission in Somalia.¹⁸⁷ Photos came out shortly afterwards showing two of the Belgian paratroopers holding a Somali boy over an open fire, allegedly "roasting" him until he was severely burned.¹⁸⁸ A Belgian military tribunal prosecuted those peacekeepers for assault and battery in the incident, but they were acquitted.¹⁸⁹ Moreover, thirteen additional paratroopers were put on trial for other abuses in Somalia, including torture, killings, and the mock-execution of children.¹⁹⁰ Most of them were also acquitted.¹⁹¹

3. Democratic Republic of the Congo

According to Human Rights Watch,¹⁹² UN peacekeepers from the Democratic Republic of the Congo and stationed in the CAR raped or sexually exploited at least eight women and girls in the fall of 2016.¹⁹³ One of the women, a fourteen-year-old girl, said she was only released because she managed to scream while two soldiers held her down.¹⁹⁴

The contingent of peacekeepers from the DRC accused of sexual violence in the CAR was repatriated at the end of February 2016 for

187. *Photos Reveal Belgian Paratroopers' Abuse in Somalia*, *supra* note 150.

188. *Id.*

189. KNOOPS, *supra* note 73, at 23. See also Rosa Freedman, *Why do peacekeepers have immunity in sex abuse cases?*, CNN (May 25, 2015, 8:51 AM), <http://www.cnn.com/2015/05/22/opinions/freedman-un-peacekeepers-immunity/> (revealing French troops have also been implicated in sex abuse claims from the CAR, but they were not peacekeeping troops and no French soldiers have been charged with anything as a result of those claims).

190. *Photos Reveal Belgian Paratroopers' Abuse in Somalia*, *supra* note 150.

191. *Id.*; see also Wills, *supra* note 175, at 30 (indicating the Belgian military court came to a similar conclusion as the Canadian military court with regards to the inapplicability of the Geneva Conventions and Additional Protocol II to peacekeeping operations).

192. HUMAN RIGHTS WATCH, <https://www.hrw.org/about> (last visited July 6, 2017). Human Rights Watch is a well-respected non-profit, non-governmental human rights organization. *Id.*

193. Searcey, *supra* note 151 (noting there was some initial confusion over whether the soldiers were from the Democratic Republic of the Congo or the Republic of Congo because each victim said she believed the suspects were from either the Democratic Republic of the Congo or the Republic of Congo).

194. *Id.*

failing to meet UN standards for equipment and preparedness.¹⁹⁵ As for criminal liability, so far, a tribunal in the DRC began trying three Congolese peacekeepers for sex abuse crimes, and there will likely be more to follow.¹⁹⁶ Unfortunately, these proceedings were adjourned in June 2016 to explore ways of interviewing the victims.¹⁹⁷

The three Congolese peacekeepers are the first to be prosecuted due to peacekeeping misconduct from this mission.¹⁹⁸ They appeared before a military tribunal in Ndolo, a prison north of the capital of Kinshasa.¹⁹⁹ Two of the soldiers were accused of raping minors, while the third was charged with attempted rape.²⁰⁰ All three pleaded not guilty.²⁰¹ The Congolese peacekeepers are being tried in groups of three.²⁰²

The trial for these Congolese peacekeepers in the DRC is good progress towards holding peacekeepers accountable for their inappropriate actions in the CAR.²⁰³ But this is merely one piece of a much larger problem. A total of twenty-one Congolese peacekeepers are accused of sexual abuse in CAR,²⁰⁴ and the three who began trial

195. HUMAN RIGHTS WATCH, CENTRAL AFRICAN REPUBLIC COUNTRY SUMMARY 4 (2017) [hereinafter CAR COUNTRY SUMMARY], <https://www.hrw.org/world-report/2017/country-chapters/central-african-republic> (facing the repatriated DRC troops were numerous other allegations, including sexual exploitation and abuse).

196. *UN peacekeepers go on trial for CAR sex abuse*, AL JAZEERA (Apr. 05, 2016, 12:03 PM), <http://www.aljazeera.com/news/2016/04/peacekeepers-trial-sex-abuse-car-160405040318812.html>.

197. CAR COUNTRY SUMMARY, *supra* note 195, at 4.

198. *UN peacekeepers go on trial for CAR sex abuse*, *supra* note 196.

199. *Central African Republic abuse: UN troops tried in DR Congo*, BBC (Apr. 5, 2016), <http://www.bbc.com/news/world-africa-35968296>.

200. *Id.*

201. *UN peacekeepers go on trial for CAR sex abuse*, *supra* note 196.

202. *Central African Republic abuse: UN troops tried in DR Congo*, *supra* note 199.

203. *Id.*; cf. Aaron Ross, *South African court to try misconduct against peacekeepers in Congo*, REUTERS, (Mar. 11, 2016), <http://www.reuters.com/article/us-congodemocratic-safrica-peacekeeping-idUSKCN0WD1SV> (highlighting a South African military court in the DRC that is currently prosecuting thirty-two South African peacekeepers accused of misconduct).

204. *Central African Republic abuse: UN troops tried in DR Congo*, *supra* note 199.

in the spring of 2016 are the only Congolese peacekeepers that have been put on trial for their actions thus far.²⁰⁵

4. United States

The United States has enacted the Uniform Code of Military Justice (UCMJ), which is essentially a disciplinary system for the armed services.²⁰⁶ The UCMJ “ensures that the rights of a defendant are strenuously checked by various levels of command throughout the prosecution of the crime.”²⁰⁷ But the United States is criticized for not applying the UCMJ when its troops are accused of violating international humanitarian law.²⁰⁸

The United States is different than most countries in that it does not give troops to the United Nations for peacekeeping; it primarily provides funding to the United Nations for peacekeeping operations.²⁰⁹ However, the United States does send troops to help

205. *Id.*; see also *Central African Republic: Murder by Peacekeepers*, HUM. RTS. WATCH (June 7, 2016, 12:00 AM), <https://www.hrw.org/news/2016/06/07/central-african-republic-murder-peacekeepers> (announcing shortly after these trials the results of an investigation indicating that soldiers from the Republic of Congo killed at least eighteen people, including women and children, between December 2013 and June 2015 while they were serving as peacekeepers in the CAR; noting that no peacekeepers from the Republic of Congo have been tried for crimes related to the rapes also associated with DRC peacekeepers or for these murders).

206. Uniform Code of Military Justice § 2, 10 U.S.C. §§ 801-946 (2012).

207. Trevor J. Orsinger, *A Military Law Primer: How the Uniform Code of Military Justice is a Model for the Treatment of Defendants in Criminal Cases*, 19 J. DUPAGE COUNTY B. ASS'N, Apr. 2007, <http://www.dcba.org/mpage/vol190407art3>.

208. See, e.g., Comm. Against Torture, Concluding observations on the third to fifth periodic reports of United States of America, ¶ 30, U.N. Doc. CAT/C/USA/CO/3-5 (2014) (stating concerns about the sexual violence and rape in the U.S. military and instructing the U.S. to protect complainants and witnesses from acts of retaliation); *Embattled: Retaliation against Sexual Assault Survivors in the U.S. Military*, HUM. RTS. WATCH (May 28, 2015), <https://www.hrw.org/report/2015/05/18/embattled/retaliation-against-sexual-assault-survivors-us-military> (reporting that the military’s criminal code, the Uniform Code of Military Justice, prohibits retaliation against victims of sexual assault while incidents of retaliation remain high).

209. Brett D. Schaefer, *United Nations Peacekeeping Flaws and Abuses: The U.S. Must Demand Reform*, BACKGROUNDERS, no. 3131, Aug. 2, 2016, at 1, <https://report.heritage.org/bg3131>.

with peacekeeping efforts. Those troops, sometimes called U.S. peacekeepers, were initially given immunity from the jurisdiction of the ICC.²¹⁰

Moreover, even when U.S. troops do not have immunity, they are generally not prosecuted domestically or internationally for violations of the law of armed conflict or international humanitarian law.²¹¹ For example, allegations have surfaced that U.S. soldiers committed war crimes in Afghanistan, and although the ICC prosecutor signaled that a full investigation is likely, currently no such investigation has occurred.²¹²

C. NATO HAS NOT YET ENCOUNTERED PEACEKEEPER MISCONDUCT WITHIN ITS RANKS

NATO's peacekeeping efforts are more recent than the United Nations. NATO's first peacekeeping operation began in 1995, and it has continued participating in peacekeeping operations ever since.²¹³ NATO peacekeepers were informally accused of misconduct in Yugoslavia.²¹⁴ However, the ICTY prosecutor chose not to investigate NATO for the alleged war crimes as a result of NATO's intervention in Yugoslavia, even though the ICTY likely had proper jurisdiction to do so.²¹⁵

NATO attempts to deal with troop problems prospectively and

210. Felicity Barringer, *U.N. Renews U.S. Peacekeepers' Exemption From Prosecution*, N.Y. TIMES, (June 13, 2003), <http://www.nytimes.com/2003/06/13/world/un-renews-us-peacekeepers-exemption-from-prosecution.html>.

211. Somini Sengupta & Marlise Simons, *U.S. Forces May Have Committed War Crimes in Afghanistan, Prosecutor Says*, N.Y. TIMES, (Nov. 14, 2016), https://www.nytimes.com/2016/11/15/world/asia/united-states-torture-afghanistan-international-criminal-court.html?_r=0.

212. *Id.*

213. *20 years since NATO's first major peacekeeping operation*, NATO (Dec. 20, 2015), http://www.nato.int/cps/en/natohq/news_126141.htm.

214. Anne-Sophie Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?*, 24 BERKELEY J. INT'L L. 610, 611-12 (2006).

215. *Id.* at 611 (considering an assessment of the NATO military campaign, the Prosecutor, Carla del Ponte, conceded NATO made mistakes but did not deliberately target civilians or unlawful military targets).

administratively.²¹⁶ NATO would likely mirror the UN system and rely on domestic courts of troop-contributing countries to investigate and, if necessary, to prosecute misconduct by its peacekeepers. Other than the unsubstantiated allegations from the conflict in Yugoslavia, NATO has mostly stayed out of the controversy surrounding peacekeeper misconduct.²¹⁷ Nonetheless, NATO has implemented policies to try to prevent sexual misconduct by its peacekeepers.²¹⁸ As of 2015, there were no known allegations of sexual misconduct against NATO peacekeepers.²¹⁹

IV. THE INTERNATIONAL COMMUNITY SHOULD INTEGRATE UN PEACEKEEPERS INTO THE JURISDICTION OF THE ICC TO ADDRESS THE OVERWHELMING FAILURE TO IMPOSE CRIMINAL LIABILITY FOR UN PEACEKEEPER MISCONDUCT

Of the potential solutions to increase prosecution of UN peacekeepers for their misconduct, the best solution is to incorporate UN peacekeepers into the jurisdiction of the ICC. The crimes

216. *Warsaw Summit Communiqué*, NATO (July 9, 2016), http://www.nato.int/cps/en/natohq/official_texts_133169.htm?selectedLocale=en (announcing a more “robust” policy and enhanced preventative training to prevent grave violations against children, including sexual violence, in armed conflict situations where there are NATO-led operations and missions).

217. See Michael Fleshman, *Tough UN line on peacekeeper abuses*, AFRICARENEWAL (April 2005), <http://www.un.org/africarenewal/magazine/april-2005/tough-un-line-peacekeeper-abuses> (discussing how a formal investigation revealed insufficient evidence to substantiate allegations of misconduct by UN and NATO peacekeepers in the former Yugoslavia).

218. Keith J. Allred, *Peacekeepers and Prostitutes: How Deployed Forces Fuel the Demand for Trafficked Women and New Hope for Stopping It*, 33 ARMED FORCES & SOC'Y 5, 5 (Oct. 2006), http://www.operationspaix.net/DATA/DOCUMENT/5507~v~Peacekeepers_and_Prostitutes_How_Deployed_Forces_Fuel_the_Demand_for_Trafficked_Women_and_New_Hope_for_Stopping_It.pdf. See generally *Women, Peace and Security: NATO, UNSCR 1325 and related Resolutions*, NATO (Dec. 6, 2016, 3:38 PM), http://www.nato.int/cps/en/natohq/official_texts_133169.htm?selectedLocale=en.

219. Off. to Monitor & Combat Trafficking in Persons, *Stopping Human Trafficking, Sexual Exploitation, and Abuse by International Peacekeepers*, U.S. DEP'T OF STATE, (June 12, 2007), <https://2009-2017.state.gov/j/tip/rls/tiprpt/2007/86207.htm>.

committed by UN peacekeepers already fall under the jurisdiction of the ICC. Additionally, the complementary jurisdiction of the ICC would preserve initial national jurisdiction over peacekeeper misconduct, while also establishing a secondary body with jurisdiction to prosecute these crimes in the event that the applicable national government does not.

Thus, the ICC is the most logical mechanism to ensure prosecution of UN peacekeepers. Integrating peacekeepers within the jurisdiction of ad hoc and hybrid tribunals, though efficient in theory, would not account for all the peacekeeper misconduct that occurs in conflict situations where a tribunal is not created. Ideally, the international community would establish a new court system solely to prosecute UN peacekeeper misconduct, but the political and logistical components make this solution nearly impossible to execute in the foreseeable future.

A. INCORPORATING UN PEACEKEEPERS INTO THE JURISDICTION OF THE ICC IS THE MOST APPROPRIATE SOLUTION TO IMMEDIATELY ESTABLISH INTERNATIONAL CRIMINAL LIABILITY FOR PEACEKEEPER MISCONDUCT

The most logical and realistic solution to increase criminal prosecution of peacekeeper misconduct is to incorporate UN peacekeepers into the jurisdiction of the ICC. Peacekeeper misconduct already falls within the jurisdiction of the ICC because of the nature of the crimes involved. Moreover, the ICC's role as a court with complementary jurisdiction to national courts means that giving the ICC jurisdiction over UN peacekeepers would not take away national jurisdiction but merely supplement national jurisdiction if countries fail to prosecute peacekeeper misconduct domestically.

Furthermore, integrating peacekeepers into the ICC jurisdiction would allow for the prosecution of peacekeepers in a more neutral setting than domestic courts. It would also explicitly impose individual criminal liability on UN peacekeepers as the result of misconduct in the line of duty, something that is currently lacking. Of course, this solution still has its flaws, but it is likely the best option at this point in time. Using a system that is already in place,

even if it is not a perfect system, creates some sense of security that justice will, in fact, be served.

The drafters of the Rome Statute did not intend to exclude UN peacekeepers from ICC jurisdiction.²²⁰ The original draft of the Rome Statute, which established the ICC, contained a provision granting immunity from ICC jurisdiction to peacekeepers, but the drafters removed it before the final draft of the statute was proposed.²²¹

The initial proposal made in preparation for the Rome Conference in 1998, gave immunity to “persons who have carried out acts ordered by the Security Council or in accordance with a mandate issued by it.”²²² This would most definitely have applied to peacekeepers. However, because the drafters of the Rome Statute unequivocally chose to remove that provision, they clearly did not intend for peacekeepers to be exempt from the jurisdiction of the ICC.²²³

1. The Crimes Committed by UN Peacekeepers Already Fall Within the ICC's Jurisdiction

The crimes committed by UN peacekeepers already fall within the jurisdiction of the ICC. The ICC currently prosecutes the following crimes committed on or after July 1, 2002: genocide, war crimes, and crimes against humanity.²²⁴ The ICC might soon also have discretion to prosecute crimes of aggression.²²⁵ Sexual misconduct, particularly rape, can be categorized as genocide, a war crime, and a crime against humanity, depending on the circumstances.²²⁶

220. KNOOPS, *supra* note 73, at 3.

221. *Id.* (“[T]he absolute exemption of United Nations peacekeepers received widespread criticism both as to the substance and concept, which resulted in its deletion.”).

222. *Id.*

223. *Id.*

224. *How the Court works*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess> (lasted visited Aug. 29, 2017).

225. *Id.* *Crimes of aggression are not under ICC jurisdiction yet. Id.*

226. Ellis, *supra* note 143, at 229 (indicating that while the 1949 Geneva Convention Relative to the Treatment of Prisoners was the first “modern-day international instrument to establish protections against rape for women,” it was

Rape is clearly prohibited by the law of armed conflict.²²⁷ After the mass rapes that occurred in Rwanda and in Bosnia, rape has been considered a crime that, depending on the situation, can be tried as genocide.²²⁸ Rape can even be an *actus reus* of genocide because of its use as a “tool of war.”²²⁹ Although rape is not explicitly enumerated as a grave breach, it has been interpreted as such and thus qualifies as a war crime.²³⁰ Furthermore, rape is not specifically included as a crime against humanity, but, in the same way that rape has been interpreted as a type of genocide and war crime, rape has been recognized as a crime against humanity.²³¹

In the Akayesu judgment, the ICTR categorized rape as a “form of aggression.”²³² This decision might give the ICC capability to try people for sexual misconduct as a crime of aggression, even though the ICTR’s definition is in the context of crimes against humanity specifically.²³³ Although sexual misconduct by peacekeepers does not explicitly fall under the ICTR’s definition, depending on the circumstances of the misconduct, a UN peacekeeper may still be held criminally liable for sexual misconduct under this particular crime of aggression definition.

The ICC is intended to exert jurisdiction over only “the most serious crimes of international concern,” which, according to some

the international crimes tribunals for the former Yugoslavia and Rwanda that significantly advanced prosecuting rape as a “genocide, a war crime, and a crime against humanity”).

227. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L L. 350, 357 (2003).

228. *Id.* at 350-52.

229. *Id.* at 352.

230. *Id.* at 357-60 (noting the four Geneva Conventions forming the core of humanitarian law do not enumerate rape as a “grave breach” or war crime and explaining “grave breaches” and war crimes are subject to universal jurisdiction where “persons committing, or ordering to be committed, any of the grave breaches of the Conventions shall be subject to penal sanctions”).

231. *Id.*

232. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 597 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

233. *Id.* (holding that, in order to be a crime of aggression, the sexual act must be part of a widespread system of attack on a civilian population on catalogued discriminatory grounds).

critics, exempts crimes committed by UN peacekeepers.²³⁴ However, actions by UN peacekeepers, such as rape and torture, which take advantage of civilians, should be and increasingly are a serious concern for the international community.

Although the circumstances under which UN peacekeeper misconduct occurs may differ from what is typically within ICC jurisdiction, the crimes are often quite similar. Thus, even though the crimes committed by peacekeepers are not necessarily committed on the same scale as the other criminal acts typically prosecuted by the ICC, because of the position of authority of peacekeepers and the vulnerable position of the civilians against which these crimes are committed, UN peacekeeper misconduct is arguably no less severe than the other crimes that fall under the ICC's authority.

*2. The ICC's Complementary Jurisdiction Creates the Best
Compromise to Supplement National Jurisdiction in order to Ensure
Criminal Liability for Peacekeeper Misconduct*

The ICC has jurisdiction in a situation where genocide, crimes against humanity, or war crimes were committed on or after July 1, 2002.²³⁵ Additionally, the crimes must be committed by a state party national, committed in the territory of a state party, or committed in a state that has accepted the jurisdiction of the ICC.²³⁶ Alternatively, the ICC has jurisdiction if the crimes are referred to the ICC Prosecutor by the Security Council via a resolution under Chapter VII of the UN Charter.²³⁷

The ICC is meant to operate on the principle of complementarity to national jurisdictions, which means that the ICC is not a replacement to national jurisdictions.²³⁸ Essentially, the ICC serves as a prosecutorial alternative when countries fail to prosecute their own criminals. This system would be no different if UN peacekeepers were integrated into the ICC's jurisdiction. The ICC would become

234. Michael Gibson, *Military Justice in Operational Settings, Peacekeeping Missions and Situations of Transitional Justice*, in *MILITARY JUSTICE IN THE MODERN AGE* 381, 393 (Alison Duxbury & Matthew Groves eds., 2016).

235. *How the Court works*, *supra* note 224.

236. *Id.*

237. *Id.*

238. Gibson, *supra* note 234, at 393.

an alternate justice system for the prosecution of peacekeeper misconduct when countries fail to prosecute within their domestic court system.

Giving the ICC authority to prosecute peacekeepers would preserve the rights of the troop-contributing states.²³⁹ At the same time, it would establish an alternative back-up plan if the troop-contributing states choose not to prosecute their own peacekeepers for these crimes. This way the ICC would continue to respect national jurisdiction while also serving as a safety net to ensure that UN peacekeepers are, in fact, being prosecuted for their wrongful acts.

Thus, what do we do with peacekeepers from countries that are members of the United Nations but are not parties to the Rome Statute? The ICC can assert jurisdiction if the Security Council refers the applicable crimes to the ICC Prosecutor. Accordingly, whether or not the peacekeepers who have committed inappropriate acts are from a country that is party to the Rome Statute is irrelevant as long as the Security Council recognizes the criminal conduct and makes this referral.

B. INTEGRATING PEACEKEEPERS WITHIN THE JURISDICTION OF AD HOC OR HYBRID TRIBUNALS AS A SOLUTION FOR CRIMINAL ACCOUNTABILITY WOULD CREATE MORE PROBLEMS THAN SOLUTIONS

Another logical solution to resolving the lack of criminal accountability for UN peacekeepers would be to integrate them within the jurisdiction of ad hoc or hybrid tribunals. This has already been done for a few tribunals, although no peacekeepers were tried under this jurisdiction. For example, the ICTY and ICTR exposed peacekeepers to individual criminal liability under international law, but neither tribunal indicted any peacekeepers, despite investigations into peacekeeper misconduct.²⁴⁰

However, this system would be significantly flawed because it

239. *Id.* (preserving the states' rights because of the nature of ICC jurisdiction, in that it allows countries with proper jurisdiction to have primary jurisdiction before the ICC interferes either due to inability to prosecute or blatant inaction).

240. KNOOPS, *supra* note 73, at 24.

would create a lot of jurisdictional problems. These jurisdictional concerns would be particularly challenging for the hybrid tribunals. Although hybrid tribunals apply a combination of domestic and international law, they tend to apply more domestic law, which could create difficulties for the prosecution of UN peacekeepers. This application of domestic law prevents consistency in prosecution and sentencing as evidenced by previous domestic tribunals.

Moreover, what would the international community do for conflict situations that do not end up with tribunals? Would peacekeepers that committed crimes in those jurisdictions escape prosecution because no tribunal was created to prosecute criminals within the conflict itself? This solution might work to prosecute peacekeeper misconduct in conflict situations that call for the creation of tribunals. Yet, it leaves a huge gap for all the conflicts that do not warrant entire tribunals, but where peacekeepers acted inappropriately.

C. THE CREATION OF A NEW COURT SYSTEM TO ADDRESS UN PEACEKEEPER MISCONDUCT SPECIFICALLY WOULD BE IMPRACTICAL AT THIS TIME

Another possible solution to ensure criminal liability for UN peacekeepers is to create a new court system with jurisdiction over peacekeeper misconduct. Realistically, however, this system would create more questions than answers. Would this be a court within the United Nations? Would it be a permanent court? If it were not a permanent court, how would it be decided when the court would convene? Who would decide when the court would convene? Would the court be under the control of the Security Council?

This solution is probably too complicated, at least right now, to be a viable option. Not only are the logistics impossible to determine, but also the political component alone would likely prevent this type of court from ever becoming a reality. The United Nations nor its member states want to get involved in criminal liability for peacekeepers because some critics argue that peacekeeping extends the power of the Security Council too much already. Allowing the United Nations to prosecute peacekeepers would extend that power even further.

V. CONCLUSION

The United Nations seeks to maintain international peace and security, and one of the primary methods that it does this through is peacekeeping operations. However, the increase in peacekeeper misconduct, particularly sexual misconduct, during UN missions has created growing concerns over the effectiveness of peacekeeping operations.²⁴¹ Moreover, the failure to prosecute UN peacekeeper misconduct leaves civilians with little faith in the United Nations' ability to aptly monitor and solve conflict situations. In order to assuage these concerns and ensure justice for the victims of peacekeeper misconduct, the international community should integrate UN peacekeepers into the jurisdiction of the ICC.

241. Margaret Besheer, *Sexual Abuse Allegations Against UN Peacekeepers on the Rise*, VOICE OF AM. NEWS: AFRICA, (July 12, 2017, 3:24 PM), <https://www.voanews.com/a/sexual-abuse-allegations-against-united-nations-peacekeepers-on-rise/3220263.html>.

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