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

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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. 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),
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. 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. 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.

Furthermore, the controversy over inappropriate sexual exploits by UN peacekeepers is not limited to the CAR. 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.” 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


2. Id.


domestically prosecute the troops they contributed.\textsuperscript{7} Although the 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.\textsuperscript{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.\textsuperscript{9}

Very few countries actually prosecute their peacekeepers, but countries that pursue prosecution generally utilize domestic military tribunals.\textsuperscript{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


\textsuperscript{9} Id.

peacekeepers into the jurisdiction of the ICC as the best solution to overcome the failure to hold UN peacekeepers criminally liable for 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. 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. 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.

The constantly changing nature of conflict intensifies the complexities of peacekeeping. Moreover, the United Nations has been heavily criticized for its failure to act against peacekeeper misconduct. Initially, the concerns over peacekeeper misconduct stemmed from the excessive use of force, particularly on civilian

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


populations during UN missions. More recently, the controversy surrounding UN peacekeepers has shifted to acts of sexual misconduct by UN peacekeepers.

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.

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. This agreement established a pledge by those nations to use their full resources against the Axis powers and to not make a separate peace. 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.

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 of collective security.\textsuperscript{23} The details were finalized at the Yalta Conference in 1945.\textsuperscript{24} In April to June 1945, representatives from fifty nations met in San Francisco and completed the Charter of the United Nations.\textsuperscript{25}

The ultimate goal of the UN Charter is to maintain international peace and security.\textsuperscript{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.”\textsuperscript{27} The UN Charter also protects the sovereignty of all member states.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{32} Specifically,

\begin{itemize}
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Lietzau & Rutigaliano, supra note 11, at 19.
\item \textsuperscript{27} U.N. Charter art. 2, ¶ 3; Lietzau & Rutigaliano, supra note 11, at 19.
\item \textsuperscript{28} See Lietzau & Rutigaliano, supra note 11, at 19.
\item \textsuperscript{29} U.N. Charter art. 2, ¶ 4.
\item \textsuperscript{30} Office of the Historian, supra note 20.
\item \textsuperscript{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.
\item \textsuperscript{32} See Bothe, supra note 13, at 1176.
\end{itemize}
peacekeeping authority stemmed from Article 16 of the Covenant of the League of Nations, which provided for military enforcement 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

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.
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.
Chapter VIII, the Security Council can utilize regional arrangements 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).
49. Id.
50. Id.
The job of the DPKO is to handle the overall operation and management of peacekeeping. 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.” 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.

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. There have been seventy-one peacekeeping missions since 1948, and sixteen of those operations are currently active.

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

51. Bothe, supra note 13, at 1183-84.
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.
budget finances fourteen of the sixteen UN peacekeeping operations and supports logistics for the African Union Mission in Somalia (AMISOM).\textsuperscript{57} The budget also funds support, technology, and logistics for all peace operations through global service centers.\textsuperscript{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.\textsuperscript{59} The next highest contributor, China, only gave funding for about ten percent of the UN peacekeeping budget.\textsuperscript{60}

C. CONTROVERSY SURROUNDING UN PEACEKEEPING

Peacekeeping has always been complex, and the changing nature of conflict has only made peacekeeping more difficult.\textsuperscript{61} The United Nations has been repeatedly criticized over the years for its failure to act against peacekeeper misconduct.\textsuperscript{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.”\textsuperscript{63}

Controversy surrounding UN peacekeeping began with major concerns over the use of force by UN peacekeepers in conflict situations,\textsuperscript{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. \textit{Id.}

57. Financing Peacekeeping, \textit{supra} note 56.
58. \textit{Id.}
59. \textit{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, \textit{supra} note 56.
61. Lietzau & Rutigaliano, \textit{supra} note 11, at 22.
63. \textit{Id.} For example, the United Nations has recently been under fire for ignoring rape scandals in the Central African Republic. \textit{Id.}
would have been appropriate. However, more recently, the use of force dilemma has been overshadowed by the increase in sexual misconduct by peacekeepers. 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.

1. Use of Force

The Security Council authorizes the use of force by member states. But in the post-Cold War era, the use of force with or without Security Council authorization became more prevalent. 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.

The overuse of force by UN peacekeepers on certain missions caused a lot of backlash. For instance, in Somalia, a US-led UN humanitarian operation developed into a gory battle against a

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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).


69. Id.


71. See id.
powerful warlord. Moreover, during the peacekeeping mission in Sierra Leone, Nigerian forces allegedly committed a variety of international crimes for which they have never been tried. 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.

In the 1990s particularly, the UN’s failure to use force caused serious criticism for lack of action. 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. 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. Within hours, the two thousand people who sought refuge at the school were murdered.

Similarly, in Bosnia, the initial deployment of the United Nations Protection Force (UNPROFOR) included no military units; it was composed entirely of military observers. 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. The incident in Srebrenica was later labeled as the most infamous mass murder by the Serbs in Bosnia.

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72. See id.
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.
2. Sexual Misconduct

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

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. 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.

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

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84. Sieff, supra note 1.
86. Id.
88. Id.
recorded allegations. Moreover, the number of military perpetrators, as opposed to civilian, police, or unknown perpetrators, was higher in 2016 than it has been in the past decade. Interestingly, as the number of allegations of sexual exploitation and abuse has increased, the number of allegations of other misconduct has decreased.

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.” 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.

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.” Nonetheless, most, if not all, UN operations are classified as peacekeeping operations.

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].
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.
93. Id. § 1.2.
operations, not peace enforcement operations, though the line between the two is often extremely blurred.  

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

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.” 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.”

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.” Moreover, views on the use of force have evolved significantly since the 1990s when this somewhat arbitrary distinction between peace enforcement and peacekeeping operations

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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.
was created. 103 Nowadays, allowing the use of force in peacekeeping operations is more of a norm,104 and, in effect, most peacekeeping 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

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103. See Alex Whiting, Peacekeeping: A Brief Guide, THOMSON REUTERS FOUND. (Sept. 21, 2013, 1:00 PM), http://news.trust.org/item/20130919155317-qsnfr/.
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).
107. Id.
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
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 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* [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, *Investigations* [hereinafter UN Investigations].

\(^{112}\) Ferstman, *supra* note 10.

\(^{113}\) Compare Edward Wong, *Sergeant Is Sentenced to 8 Years in Abuse Case*,
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 Nations. 119 Once the United Nations receives

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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 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

120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. United Nations, 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.
128. Id.
129. Id.
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. For example, the jurisdiction of the International Criminal 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. 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.

Another tribunal, the Special Court for Sierra Leone (SCSL), which was established in 2000, went a different direction. The SCSL essentially applies the prosecution system already in place to this tribunal specifically. 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.”

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. This provision in the SCSL

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).
131. See Knops, supra note 73, at 24 (providing examples of the effectiveness of each tribunal while also exposing the limited jurisdictions).
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
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.\(^\text{137}\)

Moreover, it effectively exempts jurisdiction of peacekeepers but then allows it with approval from the Security Council.\(^\text{138}\) Nonetheless, the Secretary-General stated that the United Nations \(^\text{139}\) would not apply that amnesty to genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.\(^\text{140}\) This implies that peacekeepers should be prosecuted for committing these crimes.\(^\text{141}\)

In addition, rape is relatively established as an international crime.\(^\text{142}\) 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.\(^\text{143}\) 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.\(^\text{144}\) The tribunals were forced to create their own definitions of rape because there was no international definition at their inception.\(^\text{145}\) Consequently, the tribunals’ decisions
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

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”).

146. Ellis, supra note 142, at 229, 231.
fire. More recently, UN peacekeepers from the DRC are accused of raping or sexually exploiting at least eight women and girls in the CAR. Moreover, despite accusations of misconduct, U.S. troops are rarely, if ever, prosecuted for violating international humanitarian law.

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. 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.

A number of Canadian officers were charged in connection with

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.”).
the torture and murder of Arone.\textsuperscript{155} Although Master Corporal Matchee, the main torturer, was charged, he was found unfit to stand trial.\textsuperscript{156} Matchee was largely responsible for brutally beating Arone to death,\textsuperscript{157} though Trooper Brown participated in the torture as well.\textsuperscript{158} Sergeant Boland was present during some of the abuse and did nothing to stop it.\textsuperscript{159} Private Brocklebank knew that Arone was being tortured and briefly stood outside the bunker while Arone was tortured inside.\textsuperscript{160} Major Seward issued an order that infiltrators into the camp should be captured and abused,\textsuperscript{161} and Lieutenant Sox disseminated that information.\textsuperscript{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.\textsuperscript{163} He also admitted to punching Arone once in the jaw and kicking him twice in the leg.\textsuperscript{164} Brown was charged with the torture and murder of Arone.\textsuperscript{165} He was found guilty of torture and manslaughter.\textsuperscript{166} The court’s decision was affirmed on appeal.\textsuperscript{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.\textsuperscript{168}

Sergeant Boland arrived later in the evening to relieve Matchee, who had already begun torturing Arone.\textsuperscript{169} At that point, Arone’s ankles and wrists were bound and he had a baton stuck through his


\textsuperscript{156} Kalwahali, \textit{supra} note 149, at 229.

\textsuperscript{157} \textit{Id.} at 228-29.

\textsuperscript{158} \textit{Id.} at 229.

\textsuperscript{159} \textit{Id.} at 232.

\textsuperscript{160} \textit{Id.} at 223.

\textsuperscript{161} \textit{Id.} at 239.

\textsuperscript{162} Kalwahali, \textit{supra} note 149, at 235.

\textsuperscript{163} \textit{Id.} at 229.

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Id.} at 230-31.

\textsuperscript{168} Kalwahali, \textit{supra} note 149, at 230-31.

\textsuperscript{169} \textit{Id.} at 232.
elbows behind his back. Boland watched some of the abuse but did nothing to stop it. Boland was charged with torture and negligently performing a military duty; he plead guilty to the charge of negligence and not guilty to torture. The torture charge was eventually dropped. 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.

Private Brocklebank was arrested for aiding and abetting the torture of Arone. 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. The Court Martial Appeal Court of Canada affirmed the lower court’s decision to acquit Brocklebank of all charges.

170. Id. at 233.
171. Id.
172. Id.
173. Id.
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 Brockelbank 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
Major Anthony Seward issued orders that infiltrators into the Canadian camp were to be captured and abused. 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. 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. Seward was found guilty for violating the Criminal Code of Canada, and sentenced to three months’ imprisonment and dismissal from service.

Lieutenant Sox was tried at a General Court Martial in Canada on three charges. Sox was a commander in Somalia and communicated the information that any prisoners captured as a result of a forthcoming patrol could be abused. 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. The court granted a stay of proceedings with regards to the third charge and never lifted it. Sox was eventually sentenced to a reduction of rank and a severe reprimand.

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. 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. Lastly, the Brocklebank opinion is highly criticized for being based, at least partly, on the wrong provisions of the Fourth Geneva Convention and Protocols. The Brocklebank decision is the most famous of the court opinions resulting from 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.
2. Belgium

In 1993, members of Belgium’s elite paratrooper unit served as peacekeepers in the United Nations’ “Operation Restore Hope” mission in Somalia. 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. A Belgian military tribunal prosecuted those peacekeepers for assault and battery in the incident, but they were acquitted. Moreover, thirteen additional paratroopers were put on trial for other abuses in Somalia, including torture, killings, and the mock-execution of children. Most of them were also acquitted.

3. Democratic Republic of the Congo

According to Human Rights Watch, 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. One of the women, a fourteen-year-old girl, said she was 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.”).

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).
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).
only released because she managed to scream while two soldiers held her down.\textsuperscript{194}

The contingent of peacekeepers from the DRC accused of sexual violence in the CAR was repatriated at the end of February 2016 for failing to meet UN standards for equipment and preparedness.\textsuperscript{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.\textsuperscript{196} Unfortunately, these proceedings were adjourned in June 2016 to explore ways of interviewing the victims.\textsuperscript{197}

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

The trial for these Congolese peacekeepers in the DRC is good progress towards holding peacekeepers accountable for their inappropriate actions in the CAR.\textsuperscript{203} But this is merely one piece of a

\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textsc{Human Rights Watch, Central African Republic Country Summary 4 (2017)} [hereinafter \textsc{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).
\textsuperscript{197} \textsc{CAR Country Summary, supra} note 195, at 4.
\textsuperscript{198} \textit{UN peacekeepers go on trial for CAR sex abuse, supra} note 196.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{UN peacekeepers go on trial for CAR sex abuse, supra} note 196.
\textsuperscript{202} \textit{Central African Republic abuse: UN troops tried in DR Congo, supra} note 199.
\textsuperscript{203} \textit{Id.; cf.} Aaron Ross, \textit{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
much larger problem. A total of twenty-one Congolese peacekeepers are accused of sexual abuse in CAR, and the three who began trial in the spring of 2016 are the only Congolese peacekeepers that have been put on trial for their actions thus far.

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. The UCMJ “ensures that the rights of a defendant are strenuously checked by various levels of command throughout the prosecution of the crime.” But the United States is criticized for not applying the UCMJ when its troops are accused of violating international humanitarian law.

The United States is different than most countries in that it does not give troops to the United Nations for peacekeeping; it primarily

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204. Central African Republic abuse: UN troops tried in DR Congo, supra note 199.
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).
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).
provides funding to the United Nations for peacekeeping operations. However, the United States does send troops to help with peacekeeping efforts. Those troops, sometimes called U.S. peacekeepers, were initially given immunity from the jurisdiction of the ICC.

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. 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.

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. NATO peacekeepers were informally accused of misconduct in Yugoslavia. 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

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212. Id.
NATO attempts to deal with troop problems prospectively and administratively. 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. Nonetheless, NATO has implemented policies to try to prevent sexual misconduct by its peacekeepers. As of 2015, there were no known allegations of sexual misconduct against NATO peacekeepers.

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

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).

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).


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 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. 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.

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.” 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.

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. The ICC might soon also have discretion to prosecute crimes of aggression. Sexual misconduct, particularly

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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.
225. Id. Crimes of aggression are not under ICC jurisdiction yet. Id.
rape, can be categorized as genocide, a war crime, and a crime
against humanity, depending on the circumstances.226

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

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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
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”).


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

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).
aggression definition.

The ICC is intended to exert jurisdiction over only “the most serious crimes of international concern,” which, according to some critics, exempts crimes committed by UN peacekeepers. 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. 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. 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.

The ICC is meant to operate on the principle of complementarity to national jurisdictions, which means that the ICC is not a

235. How the Court works, supra note 224.
236. Id.
237. Id.
replacement to national jurisdictions. 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 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. 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

238. Gibson, supra note 234, at 393.
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).
peacekeepers to individual criminal liability under international law, but neither tribunal indicted any peacekeepers, despite investigations into peacekeeper misconduct.\textsuperscript{240}

However, this system would be significantly flawed because it 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.

\textbf{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

\textsuperscript{240} KNOOPS, \textit{supra} note 73, at 24.
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.