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**Overcoming boys-will-be-boys  
syndrome:  
Is prosecution of peacekeepers  
in the International Criminal  
Court for trafficking, sexual  
slavery and related crimes  
against women a possibility?**

Master thesis  
20 points

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# Contents

Summary	1
Acknowledgments	1
Abbreviations	2
1. Introduction	3
2. Facts and Situations	5
2.1 The Former Yugoslavia	5
2.1.1 IPTF involvement	6
2.1.2 SFOR Contractor Involvement	8
2.1.3 Kosovo- UNMIK and KFOR involvement	11
2.2 Africa and Asia	13
2.2.1 Somalia	13
2.2.2 Democratic Republic of the Congo	14
2.2.3 Eritrea	15
2.2.4 Liberia, Sierra Leone and Guinea	16
2.2.5 Cambodia and Mozambique	17
2.2.6 East Timor	18
2.3 Sketchy evidence and no follow-ups	18
3. Applicable Law, Jurisdiction, Immunity & the ICC	22
3.1 Standards and Rules for Peacekeepers	22
3.1.1 UNHCR	22
3.1.2 UNHCHR	22
3.1.3 Secretary-General's Bulletins	23
3.1.4 DPKO Guidelines and Rules	24
3.2 Humanitarian and human rights law obligations	26
3.2.1 Secretary-General's Bulletin	26
3.2.2 UN Convention	28
3.2.3 International Armed Conflict?	28
3.2.4 Applicability of Human Rights Law	31
3.2.5 <i>Aut dedere, aut judicare</i>	32
3.3 Jurisdiction	33
3.4 Immunity	36
3.5 How Would the ICC have Jurisdiction over Peacekeepers?	39
3.6 The ICC & Immunity	41
4. Substantive Law: The Crimes	45
4.1 Crimes against Humanity	45
4.1.1 Rape	45

<b>4.1.2 Sexual Slavery</b>	<b>50</b>
<b>4.1.3 Enforced Prostitution</b>	<b>54</b>
<b>4.1.4 Trafficking</b>	<b>54</b>
<b>4.1.5 Chapeau Elements</b>	<b>57</b>
<b>4.2 War Crimes</b>	<b>61</b>
<b>4.2.1 Rape, Sexual Slavery and Enforced Prostitution</b>	<b>61</b>
<b>4.2.2 Trafficking</b>	<b>61</b>
<b>4.2.3 Chapeau Elements</b>	<b>66</b>
<b>5. Conclusion</b>	<b>69</b>
<b>Bibliography</b>	<b>71</b>
<b>Table of Cases</b>	<b>85</b>

# Summary

While the international community would like to think it does not happen crimes are committed by peacekeepers. There is a growing prevalence of the crimes of trafficking, rape, sexual slavery and enforced prostitution being perpetrated by peacekeepers. These are all gender-specific crimes against women. They are also the crimes that most often remain unpunished, especially when committed by peacekeepers. This paper reveals the reality of the occurrences of these crimes, and the impunity being provided to the blue helmet perpetrators by relating events that have occurred on a global scale. It then examines whether, as a solution, peacekeepers can be prosecuted in the International Criminal Court for these crimes. Issues of jurisdiction, immunities, the applicable law, and Rome Statute substantive law definitions are addressed in order to determine whether the ICC is a viable option for the prosecution of peacekeepers for trafficking, rape, sexual slavery and enforced prostitution.

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# Abbreviations

ADF	Australian Defence Force
BOI	Board of Inquiry
CivPol	Civilian Police
DPKO	Department of Peacekeeping Operations
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
INTERFET	International Force for East Timor
IPTF	International Police Task Force
KFOR	NATO-led Kosovo Force
NATO	North Atlantic Treaty Organisation
NZDF	New Zealand Defence Force
OLA	Office of Legal Affairs
ONUC	United Nations Operation in the Congo
ONUMOZ	United Nations Operation in Mozambique
PKO	Peacekeeping Operation
Prep Com	Preparatory Commission of the ICC
SCSL	Special Court for Sierra Leone
SFOR	NATO-led Stabilisation Force
SOFA	Status of Force Agreement
SOMA	Status of Mission Agreement
UNAMET	United Nations in East Timor
UNAMSIL	United Nations Mission in Sierra Leone
UNHCR	United Nations High Commissioner for Refugees
UNIFEM	United Nations Development Fund for Women
UNMEE	United Nations Mission in Ethiopia & Eritrea
UNMIBH	United Nations Mission in Bosnia & Herzegovina
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMISSET	United Nations Mission of Support in East Timor
UNMO	United Nations Military Observer
UNOSOM II	United Nations Operation in Somalia II
UNPOL	United Nations Police

# 1 Introduction

The 1990s saw a dramatic increase in the number of peacekeeping operations (PKOs) throughout the world. Unfortunately, there has been a corresponding increase in the number of crimes committed by peacekeeping personnel. For the most part, these crimes have been kept quiet, but the past years have seen these crimes made public. In particular, the prevalence of crimes against women such as trafficking, rape, sexual slavery and enforced prostitution has come to light. Women are a particularly vulnerable group in situations of armed conflict and breakdown of societal structures. These crimes target women because of their gender. They are crimes that are usually not or cannot be committed against men. The lack of recognition of severity and regularity of these crimes is a direct reflection of the inequitable position of women throughout history. Gender-specific crimes do not necessarily have to contain a sexual element.<sup>1</sup> However, violence specifically targeting women is most often of a sexual nature, such as rape, forced pregnancy, forced sterilisation, sexual slavery and general sexual violence. Sexual violence is an invasion of fundamental intimacies, both physical and psychological. It is not only physically harmful, but is mentally and emotionally degrading. While there may be other motives, men perform these acts of violence ultimately as a method of manifesting their power over the victim.<sup>2</sup> Trafficking is not by definition a crime of sexual violence, but the majority of women are trafficked for the purposes of sexual slavery or enforced prostitution.

The shame of the commission of these crimes by peacekeepers is exacerbated by the fact that peacekeepers are supposed to be protecting civilians, especially those most vulnerable. The role of peacekeepers is “to help implement comprehensive peace agreements between protagonists in intra-State conflicts.”<sup>3</sup> Peacekeeping missions now run both prior to and subsequent to cease-fire agreements, and have taken on a much greater role in reconstructing societies. “Each peacekeeping operation has a specific set of mandated tasks, but all share certain common aims - to alleviate human suffering, and create conditions and build institutions for self-sustaining peace.”<sup>4</sup>

Peacekeeping is a way to help countries torn by conflict create conditions for sustainable peace. UN peacekeepers—soldiers and military officers, civilian police officers and civilian personnel from many countries—monitor and observe peace

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<sup>1</sup> Clarification of Term Gender at [www.iccwomen.org/resources/gender.htm](http://www.iccwomen.org/resources/gender.htm)

<sup>2</sup> It is recognised feminist theory that rape is tool of male power, including by Catherine MacKinnon and Andrea Dworkin. Robyn Rowland and Renate Klein, “Radical Feminism: History, Politics, Action”, in Bell and Klein (eds.), *Radically Speaking: Feminism Reclaimed*, North Melbourne: Spinifex Press, (1996), 9

<sup>3</sup> UN Peacekeeping, “How has peacekeeping evolved?”  
<http://www.un.org/Depts/dpko/dpko/faq/q2.htm>

<sup>4</sup> UN Peacekeeping, “The Mission of the Department of Peacekeeping Operations”  
<http://www.un.org/Depts/dpko/dpko/info/page3.htm>

processes that emerge in post-conflict situations and assist ex-combatants to implement the peace agreements they have signed. Such assistance comes in many forms, including confidence-building measures, power-sharing arrangements, electoral support, strengthening the rule of law, and economic and social development.<sup>5</sup>

Taking advantage of the women the peacekeepers are supposed to support and protect is a violation of everything that peacekeeping stands for. Peacekeepers committing these crimes have been escaping with impunity, returning to their home countries unpunished. Immunities attached to the peacekeepers create problems, as well as the question of who has jurisdiction over the personnel. This lack of accountability has led to many suggestions that peacekeepers be prosecuted in the International Criminal Court<sup>6</sup> (ICC) for these crimes. Unfortunately, the suggestion is not as simple as that. The issues relating to immunities and jurisdiction remain at hand, as do questions about whether crimes committed by peacekeepers would fall within the definitions of the crimes of the Rome Statute.<sup>7</sup>

This paper will discuss all these issues in order to determine whether prosecution of peacekeepers by the ICC is legally possible, and if it is, in reality, likely. Part 1 will detail the reality of the situation, and relate the stories of the real crimes committed by peacekeepers. The lack of accountability will be demonstrated. Part 2 will discuss the issues of jurisdiction (who has jurisdiction to prosecute the peacekeepers) and of immunities attached to peacekeeping personnel. Finally, Part 3 will examine whether a crime committed by a peacekeeper will actually satisfy the elements of crimes required under the Rome Statute, before a conclusion is made as to whether the prosecution is actually possible.

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<sup>5</sup> UN Peacekeeping, “What is peacekeeping?”  
<http://www.un.org/Depts/dpko/dpko/faq/q1.htm>

<sup>6</sup> <http://www.icc-cpi.int/>

<sup>7</sup> [www.icc-cpi.int-library-officialjournal-Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int-library-officialjournal-Rome_Statute_120704-EN.pdf)

## 2 Facts and Situations

### 2.1 The Former Yugoslavia

“As head of a peace-keeping mission which is 97 percent male, I cannot turn my back on [trafficking] and I cannot be so naïve to think that my staff are not visiting brothels which hold women in slavery.”<sup>8</sup>

One of the major problem areas relating to UN or NATO personnel involvement in trafficking and sexual slavery related offences has been the former Yugoslavia. Due to the fractured system following years of conflict, the Balkan region has become a hotbed for organised crime. Trafficking and prostitution of women is one of the biggest and most lucrative businesses in organised crime. The UN presence in the region has not succeeded in curbing this problem. On the contrary, there is evidence that the UN presence has in fact increased the demand for prostitutes in the area. The international community brings a great deal of money to an economically poor region.<sup>9</sup> Hundreds of brothels sprang up in the areas of Bosnia and Herzegovina, and Kosovo in anticipation of the arrival of the international forces. With an increase in numbers of brothels, the demand for women increased. Brothel owners purchase trafficked women, the majority coming from Moldova, Ukraine, Romania and Albania. The industry is fuelled by poor economies and high unemployment in these countries. The women are tricked by being promised jobs in Western European countries, in particular Italy. Many believe they will be given jobs as waitresses, hotel maids or dancers, and end up finding themselves sold repeatedly until they are finally purchased by brothel owners who keep them in sexual slavery to pay off the debt of their purchase price.

In Bosnia and Herzegovina, the problem is exacerbated by the involvement of UN personnel. Internationals are estimated to generate a significant part of the trafficking industry’s income and constitute 20-30% of the clientele in brothels.<sup>10</sup> The International Police Task Force (IPTF) members have been involved in trafficking-related offences. Many are clients of trafficked women held as forced prostitutes, and others purchase women themselves to keep as their own personal sex slaves. Purchase of a

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<sup>8</sup> Elizabeth Rehn, Special Representative of the Secretary-General to Bosnia & Herzegovina, speech to Council of Europe March 1999 in “Markets, migration & forced prostitution” by Madeleine Rees of UNHCR Sarajevo, Humanitarian Practice Network [www.odihpn.org/report.asp?ID=1954](http://www.odihpn.org/report.asp?ID=1954)

<sup>9</sup> Kristine Brubacher, founder of the UN Trafficking and Prostitution Unit in Julia Stuart, “Dark Side of Peacekeeping”, The Independent, London, 10 July 2003, [www.peacewomen.org/un/pkwatch/News/03/darksidepk.html](http://www.peacewomen.org/un/pkwatch/News/03/darksidepk.html)

<sup>10</sup> Amnesty International, “Kosovo: Trafficked women and girls have human rights”, Amnesty International Press Release, 6 May 2004, AI Index: EUR 70/012/2004 <http://web.amnesty.org/library/print/ENGEUR700122004> ; UN Wire, “UN official wants action against personnel involved with sex trade”, 10 February 2003, [www.unwire.org/unwire/20030210/31956\\_story.asp](http://www.unwire.org/unwire/20030210/31956_story.asp)



women also includes purchase of the woman's passport, so she has no freedom to flee.

### 2.1.1 IPTF involvement

On November 14, 2000, a raid was conducted in Prijedor by IPTF monitors with the assistance of SFOR personnel.<sup>11</sup> The raid resulted in freeing 34 women and girls who had been trafficked to Bosnia and Herzegovina for the purposes of forced prostitution. Many of the women identified IPTF monitors as their clients, and signed statements to this effect. In the end, eleven international officials were identified as frequent brothel clients or visitors. Nine of these used the brothel for sex, and the other two only to drink.<sup>12</sup> The IPTF monitors were found to have paid for sexual services both in the brothel and in the monitors' own homes. Only six monitors were sent home, for "exceeding the mandate" of IPTF (two Americans, two Spanish, and two British officers). In 2001, four IPTF officers (two Pakistani and two Fijian) were repatriated due to identification by trafficked victims as having been clients.<sup>13</sup> In 2001, a trafficked woman was hired to be a stripper for a birthday party. No action was ever taken in relation to this incident.<sup>14</sup> Even the deputy commissioner of the IPTF as well as one of the highest-ranking UN officials in Bosnia, were identified as clients at one of Bosnia's brothels.<sup>15</sup>

Although using the services of a prostitute (being a client) is not a criminal offence under the laws of either entity, the facilitation of prostitution and the running of brothels are illegal. IPTF officers, who through their work and training knew or should have known that the brothels contained trafficked women, violated the IPTF code of conduct and undermined law enforcement by paying for sexual services. More importantly, the presence of IPTF monitors in the clubs as clients discouraged trafficked women and girls from seeking safe haven in IPTF stations.<sup>16</sup>

By frequenting these brothels, the UN personnel are contributing to and funding the organised crime network that runs the trafficking and prostitution rings. Between 1999 and July 2003, 10 IPTF monitors were involved in disciplinary offences related to prostitution. Three were repatriated due to commission of direct offences, and the others were reprimanded or repatriated.<sup>17</sup>

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<sup>11</sup>Human Rights Watch, "Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution", Vol.14, No.9 (D), November 2002, p.49-50

<sup>12</sup> *Ibid*, p.50

<sup>13</sup> *Ibid*, p.51

<sup>14</sup> *Ibid*, p.52

<sup>15</sup> Magin McKenna, "Sins of the peacekeepers", Sunday Herald, 30 June 2002 [www.sundayherald.com/print25914](http://www.sundayherald.com/print25914)

<sup>16</sup> "Hopes Betrayed", *supra* note 11, p.49

<sup>17</sup> Stuart, *supra* note 9

Even worse is the evidence that shows that women were purchased from brothel owners by IPTF monitors. In more than one incident, monitors admitted to IPTF and UNMIBH superiors that they purchased women.<sup>18</sup> They claimed it was for the purpose of sending the women home. They did not face any disciplinary action at all. In 2001, an Argentinean monitor purchased a woman from a brothel, and after investigation was sent back to Argentina. It is claimed that he faced criminal charges upon his return to Argentina, but there is no proof to confirm this.<sup>19</sup>

IPTF human rights officer Kathryn Bolkovac dealt with the case of an American monitor who purchased a woman for 6000 Deutschmarks in Illidja, paying off her contract.<sup>20</sup> The woman was either Moldovan or Romanian. The monitor thought he was doing her a favour by buying her, but she ran away from him. An investigation was held, but the report was buried, and the American was talked into returning home and resigning in order not to cause embarrassment to DynCorp. DynCorp is the company that is contracted by the US Department of State for the provision of all US IPTF personnel.

UNMIBH did not conduct any follow up investigations once personnel were repatriated. There is no rule that ensured that reports of misconduct were sent home with repatriated personnel. In relation to American officials, once a monitor is repatriated, investigations tend to cease. A spokesman from the US State Department stated that “there has been a practice at the UN where individuals being investigated have the opportunity to suddenly leave the country, and then the UN tends to drop its investigation”.<sup>21</sup> Thus there is a gap in the jurisdictional system that does not ensure investigations or disciplinary action is taken against the international personnel, either by the UN or the sending state. Often the officers are taken from many different parts of the sending state, and this creates problems in terms of follow up disciplinary action upon repatriation to the state of origin.<sup>22</sup> The problem is that IPTF personnel are protected under UN immunity, unless this immunity is waived by the Secretary-General, which means that they cannot be prosecuted for these actions under the local law of Bosnia and Herzegovina. Investigations into these matters sometimes result in IPTF personnel being sent home but not prosecuted for their crimes. They are essentially obtaining impunity for these crimes against women. The policy of UNMIBH and the IPTF is that: “As regards subsequent action taken by sending state, it is up to the country concerned to initiate disciplinary action against the sanctioned police monitor”.<sup>23</sup> As a result of this, it is assumed that the sending state will take disciplinary action, but in reality this rarely occurs. This is despite the fact that the states are fully aware of what is happening. Unclassified United States Department of State memos show that the US government is aware of the purchasing of

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<sup>18</sup> “Hopes Betrayed”, *supra* note 11, p.52

<sup>19</sup> “Hopes Betrayed”, *supra* note 11, n.276

<sup>20</sup> “Hopes Betrayed”, *supra* note 11, p.53

<sup>21</sup> Bob Gifford, Subcommittee on International Operations and Human Rights, “The UN and the Sex slave Trade in Bosnia: Isolated Cases or Larger Problem in the UN System?” April 24, 2002, Serial No. 107-85 in “Hopes Betrayed”, *supra* note 11, 60

<sup>22</sup> “Hopes Betrayed”, *supra* note 11, p.61, n.337

<sup>23</sup> “Hopes Betrayed”, *supra* note 11, p.46 n.233

women and bribing of nightclub owners by IPTF officers.<sup>24</sup> They are prepared to state, “if [the topic is] raised” by the press, that “in rare cases like this, are prepared to seek prompt and proportionate disciplinary action against American personnel whose actions compound the problem”.<sup>25</sup> However there is no evidence of this action being taken.

People will say the UN is not practicing what it preaches. It is double standards, and it looks like Western imperialism. Brothel raids find UN police inside, and then no-one is prosecuted. Visiting brothels where women have been gang-raped into submission, into slavery, is not part of the UN’s mandate.<sup>26</sup>

## 2.1.2 SFOR Contractor Involvement

The prevalence of trafficking in the region can reach beyond borders and pervade other missions. UNMIBH was aware of an American SFOR (NATO-led Stabilisation Force) contractor who bribed two local Bosnian police officers for forged documents for a trafficked Moldovan woman. Neither of the police officers was reprimanded, and in fact one of the Bosnian police officers involved in receiving the bribe later served in East Timor as part of the Bosnian contingent to the UN mission. Upon his return from his service in East Timor, UNMIBH eventually had him and the other officer de-authorised.<sup>27</sup>

There has so far been no evidence of SFOR soldiers’ involvement in trafficking-related offences. However, US civilians contracted to SFOR, again provided by DynCorp, were not prohibited from visiting nightclubs. These contractors had much more freedom of movement in the Bosnia and Herzegovina area than peacekeepers themselves, and thus became more involved in the trafficking business. Several members of DynCorp, who lived off-base, purchased women from brothels and kept them in their homes.<sup>28</sup> When bored with the women, they would then sell them back. Four of the contractors denied the allegations, and there is no evidence of any further investigation into their cases. A fifth, Kevin Warner,

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<sup>24</sup> United States Department of State information memorandum, S/S No. 200020567, (2000), subject: Trafficking in Women in Bosnia- Recent Events [http://hrw.org/english/docs/2004/06/14/bosher8815\\_txt.htm](http://hrw.org/english/docs/2004/06/14/bosher8815_txt.htm); United States Department of State information memorandum, S/S No. 200020567, (December 2001), subject: Trafficking in women, turning a blind eye? [http://hrw.org/english/docs/2004/06/14/bosher8815\\_txt.htm](http://hrw.org/english/docs/2004/06/14/bosher8815_txt.htm)

<sup>25</sup> United States Department of State information memorandum, S/S No. 200020567, (November 2001), subject: US IPTF monitors implicated in trafficking in women case: accusation and disciplinary action [http://hrw.org/english/docs/2004/06/14/bosher8815\\_txt.htm](http://hrw.org/english/docs/2004/06/14/bosher8815_txt.htm)

<sup>26</sup> Madeleine Rees, UN head of human rights in Bosnia, in UN Wire, “UN official wants action” , *supra* note 10

<sup>27</sup> “Hopes Betrayed”, *supra* note 11, p.37. No evidence is given of any disciplinary action taken against the American involved in the event.

<sup>28</sup> US Army Criminal Investigation Division finding, “Agents Investigation Report”, ROI 0075-00-CID597-49891, “Hopes Betrayed”, *supra* note 11, p.62

admitted to purchasing an uzi and a Moldavian woman from a well-known Bosnian (prostitution) nightclub owner, Debeli (“fat boy”), for 1,600 Deutschmarks. He stated that the woman “lived with me as a housemate. She does not speak much English but knows that she could leave any time she wanted”.<sup>29</sup>

Warner was also in possession of a video, obtained from Debeli, of his boss, John Hirtz (site supervisor for DynCorp in the US military Comanche Base), having sex with two different women. In the second sexual encounter, the woman repeatedly says “no”, but Hirtz continues anyway.<sup>30</sup>

Although this was all investigated by the US Army Criminal Investigation Division (CID), the report does not show that the Moldavian woman in question was ever interviewed. Nor was there any inquiry into the second sexual encounter on the video which may very well have amounted to rape. Hirtz in fact admitted to CID that he had intercourse with the woman after she had said no, fully aware that the encounter was being videotaped.<sup>31</sup> Further allegations of the purchase of a woman by a DynCorp employee for 13,000 Deutschmarks were also not investigated.<sup>32</sup>

Warner’s case was rejected by the US Army as not being within the military’s jurisdiction: “it was deemed that the offence was committed by a civilian who is no longer subject to the [Uniform Code of Military Justice], there are no violations of federal criminal statutes with which the person can be charged, and no other Army interest exists”.<sup>33</sup> The US Army referred the case to the jurisdiction of the local police. However, due to the Dayton Agreement, the local police would not bring charges against Warner. The immunity of NATO personnel in Bosnia and Herzegovina (who are still considered to be part of a UN approved force) is covered by the Dayton Agreement, which accords exclusive jurisdiction to the sending state.<sup>34</sup> The police did not apply the Paragraphs 2 and 3 of the NATO Agreement between the Republic of Bosnia and Herzegovina and Croatia regarding the status of NATO and its personnel (Appendix B to Annex 1A).<sup>35</sup> Paragraph 2 delegates the immunities of the Convention on the Privileges and Immunities of the United Nations concerning experts on a mission to NATO personnel *mutatis mutandis*, and thus enables removal of immunity of contractors from local prosecution if the acts were committed outside the scope of the official duties. Paragraph 3 only applies the privileges and immunities “insofar as it is compatible with the entrusted tasks/mandate and shall refrain from activities not compatible with the nature of the Operation”. Jurisdiction or no, both Warner and Hirtz were quickly repatriated to the USA. After their repatriation, local Bosnian police and the IPTF found and interviewed the Moldovan woman that Warner had

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<sup>29</sup> “Hopes Betrayed”, *supra* note 11, p.63

<sup>30</sup> “Hopes Betrayed”, *supra* note 11, p.63

<sup>31</sup> Kelly Patricia O’Meara, “DynCorp Disgrace”, Insight on the News, 19 August 2003, [www.prisonplanet.com/dyncorp\\_disgrace.html](http://www.prisonplanet.com/dyncorp_disgrace.html)

<sup>32</sup> “Hopes Betrayed”, *supra* note 11, p.64

<sup>33</sup> “CID Investigation”, “Hopes Betrayed”, *supra* note 11, p.64

<sup>34</sup> Appendix B to Annex 1A of the Dayton Agreement <http://www.nato.int/ifor/gfa/gfa-ap1a.htm> or [http://www.ohr.int/dpa/default.asp?content\\_id=378](http://www.ohr.int/dpa/default.asp?content_id=378)

<sup>35</sup> O’Meara, *supra* note 31

purchased.<sup>36</sup> She stated that she lived with him like a prostitute; that he would give her gifts and money every day in exchange for sexual favours. Warner kept her passport, which he returned to her upon his departure. Like many trafficked victims, she had been promised a job as a waitress in Italy, but instead was sold many times between Moldova and Bosnia. No further action was ever taken in relation to Warner's or Hirtz's crimes, which would amount respectively to sexual slavery and rape.<sup>37</sup>

In 1999, DynCorp repatriated five personnel contracted to SFOR following allegations of the purchasing of women.<sup>38</sup> The men claimed that they purchased the women to save them from forced prostitution, with intentions of marriage. Their manager even defended the men, stating that it was for the purposes of freeing the women. However co-worker Ben Johnston stated that "a lot of people said you can buy a woman and how good it is to have a sex slave at home...they'd buy the women's passports and they owned them and would sell them to each other".<sup>39</sup> More than one co-worker owned girls "that couldn't have been more than 14 years old".<sup>40</sup> A fellow employee offered to purchase a woman for him, for 2-3,000 Deutschmarks. Johnston named eight DynCorp employees involved in the purchasing of women and girls between 1999 and 2000. He was subsequently fired due to "misconduct", discrediting the company and violating standards and conditions of employment. In 2002 he was awarded an undisclosed sum for wrongful termination.<sup>41</sup> In a similar situation, Kathryn Bolkovac was also fired for disclosing in an email the activities of UN personnel- later to be awarded \$US177000 after DynCorp dropped a court appeal against a finding of wrongful termination.<sup>42</sup>

In May 2000 an UNMIBH report on trafficking mentioned an SFOR contractor's involvement in the purchase of a woman, but did not mention the nationality or employer of the contractor. The same report revealed that in December 1999, Vlasenican local police found a Romanian and a Moldovan woman and girl (16 years old) locked in the apartment of an SFOR contractor. They said that they had been purchased and kept against their will for 7,000 Deutschmarks from a bar owner. NATO did not waive the Dayton Agreement immunity- all that happened was that the contractor lost his job and was repatriated.

None of the international personnel accused of trafficking-related crimes, including the purchase of a person for the purposes of sex slavery (long declared illegal), were prosecuted upon repatriation. As of October 2002, the US Department of Justice revealed that no cases had been

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<sup>36</sup> "Hopes Betrayed", *supra* note 11, p.65

<sup>37</sup> O'Meara, *supra* note 31

<sup>38</sup> "Hopes Betrayed", *supra* note 11, p.65

<sup>39</sup> *Ibid*; O'Meara, *supra* note 31

<sup>40</sup> O'Meara, *supra* note 31

<sup>41</sup> "Hopes Betrayed", *supra* note 11, p.66

<sup>42</sup> UN Wire, "Firm with new US Iraq contract drops Balkan sex case appeal", 5 May 2003, [www.unwire.org/unwire/20030505/33537\\_story.asp](http://www.unwire.org/unwire/20030505/33537_story.asp); Reuters, "UN whistleblower says fired for sex claims", 26 June 2002, [www.globalpolicy.org/security/peacekpg/general/2002/0626sex.htm](http://www.globalpolicy.org/security/peacekpg/general/2002/0626sex.htm); Stewart Payne, "Teenagers used for sex by UN in Bosnia", London Daily Telegraph, 25 April 2002, [www.peacewomen.org/un/pkwatch/News/02/teenagerbos.html](http://www.peacewomen.org/un/pkwatch/News/02/teenagerbos.html)

brought under the Military Extraterritorial Jurisdiction Act.<sup>43</sup> DynCorp confirmed this fact: “To our knowledge, no criminal action was instituted by either the US Army or authorities in either country with respect to the activities of the individuals”.<sup>44</sup>

### 2.1.3 Kosovo- UNMIK and KFOR involvement

Between 1999 and 2000 the international contingent in Kosovo constituted 80% of the clientele of women trafficked for forced prostitution. This percentage dropped to 40% at the end of 2000, and again to 30% by 2002. However, this 30% were generating about 80% of the industry’s income. The number has now in 2004 dropped to 20% of clientele.<sup>45</sup> There are at least 120 strip clubs alone in Kosovo. By 2004, more than 200 bars, restaurants & cafes were on the “off-limits” list to UNMIK & KFOR staff.<sup>46</sup> In one nightclub in Motrovica, a Kosovar girl was kept as a sex slave for two years. During this time, she served local clientele, but was also “delivered” to UN soldiers at the checkpoints and barracks to provide sexual services.<sup>47</sup>

Allegations arose in 2000 about two US police officers and one Romanian officer aiding a brothel owner in the trafficking of women.<sup>48</sup> The regional police unit had investigated, and then turned the investigation over to the Internal Investigation Department. It was reported that one of the US officers had been transporting trafficked women between Kosovo and Serbia using an UNMIK police car, while in uniform. The other US officer notified the brothel owner of police investigations & information relating to trafficking operations. The Romanian officer informed the brothel owner of his pending arrest, which enabled him to close the club before the police raid and escape prosecution. Another US officer was mentioned in the report. UNMIK announced in 2001 that two officers were repatriated for violating the Code of Conduct. The other two received only letters of reprimand. None faced criminal charges.

Criminal proceedings against UNMIK offenders are very rare. In a few cases, immunity has been waived, but only where the victim was under 14 years of age. In one such case, a waiver of immunity was not requested due to the inconsistent testimony of the 13 year old victim.<sup>49</sup> This was despite a wealth of evidence including blood drops and an admission by the officer of initiation of sexual conduct with the victim. The investigation was

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<sup>43</sup> “Hopes Betrayed”, *supra* note 11, p.67

<sup>44</sup> DynCorp letter, March 2002, *ibid*

<sup>45</sup> All above figures from: Amnesty International, “Kosovo (Serbia & Montenegro) ‘So does it mean we have the rights?’ Protecting the rights of women and girls trafficked for forced prostitution in Kosovo”, 6 May 2004, AI Index: EUR 70/010/2004 <http://web.amnesty.org/library/print/ENGEUR700102004> pp. 41-42

<sup>46</sup> ‘So does it mean we have the rights?’ *supra* note 45, p.7 & 42

<sup>47</sup> Jeta Xharra, “Investigative Report: Kosovo sex industry”, 5 August 2002, [www.peacewomen.org/un/pkwatch/News/02/kosovosex.html](http://www.peacewomen.org/un/pkwatch/News/02/kosovosex.html)

<sup>48</sup> ‘So does it mean we have the rights?’ *supra* note 45, pp.42-43

<sup>49</sup> *Ibid*, p.43

closed and the officer was sent home. Other cases showing links between UNMIK officers and trafficked women were also closed.<sup>50</sup>

In 2003 one UNMIK police commander was repatriated for unknown reasons related to prostitution.<sup>51</sup> In June of the same year, four men were arrested in relation to involvement in “a prostitution slavery conspiracy”.<sup>52</sup> One of these men was an UNMIK police officer from Pakistan, and was charged by an investigative judge with Obscene Behaviour and Failing to Perform Official Duties. The other three men (Albanians), however, faced much graver charges of obscene behaviour, rape and sexual intercourse with a minor under the age of 14, causing injuries, and neglectful treatment of minors. The immunity of the Pakistani officer was waived, and investigative proceedings were still continuing in Pristina in 2004. The outcome of the charges against the Albanians is not known.

In 2002 it was shown that German KFOR members were using trafficked women for the purposes of prostitution. One German officer stated that “the problem is that nobody considers the need of brothels in the German contingent. The Americans and the French and others, who however, have their army brothels. I am not trying to say that the prostitutes have to come over from America or France but the brothel can be rented for a certain period of time and stay under units’ control”.<sup>53</sup> Thus, without their own “sanctioned” brothels, a fact that is in itself shocking enough, the Germans are sneaking out of their base in Macedonia to visit brothels that use trafficked women.

The Russian KFOR contingent has also been found to have involvement with using trafficked women as well as actually trafficking women.<sup>54</sup> 2000 saw allegations of Russian soldiers trafficking in Moldovan and Ukrainian women to the Russian base in Kosovo Polje for sex work. They disguised the women in Russian army uniforms to sneak them in. Further Russian troops were found to be using trafficked women for sex, as well as providing trafficked women for sex for other officers. The Russian troops returned home in 2003, but there is no evidence of any disciplinary action being taken against any soldiers in relation to the trafficking of women. Nor was any action taken in September 2003 when 10 French KFOR soldiers were suspected of involvement in trafficking women for the purposes of other KFOR officers.

Details are vague about cases.<sup>55</sup> UNMIK Police Internal Affairs investigated 10 UN personnel in 2002, and in 2003 two investigations had been initiated against two UNMIK police officers and two KPS officers. Standards are high for proof- not even identification by a woman of an officer in an ID line-up is sufficient for action to be taken. Reports from the trafficking investigation unit state that: “several successful investigations were conducted during 2003 and personnel identified were relieved of duty,

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<sup>50</sup> *Ibid*

<sup>51</sup> *Ibid*, p.42

<sup>52</sup> *Ibid*, p.42-43

<sup>53</sup> *Ibid*, p.44

<sup>54</sup> *Ibid*, p.44-5

<sup>55</sup> *Ibid*, p.45-6



criminally charged, disciplined under parent codes of conduct or repatriated to their home country.” In 2002 and 2003 supposedly 10 of the total of more than 50 repatriated UNMIK officers were sent home for allegations related to trafficking. UNMIK cannot however confirm whether or not these officers were disciplined or charged upon return home.

There is also evidence of the NATO KFOR troops being involved in offences related to trafficking.<sup>56</sup> Between January 2002 and July 2003, between 22 and 27 officers were suspected of involvement in these kinds of offences; however there is no evidence of any disciplinary action or charges being taken.

The only concrete example of any action being taken related to rape of a girl is the case of American Staff Sergeant Frank J. Ronghi in 2000.<sup>57</sup> In a US military court held in Germany, he admitted to raping and murdering 11 year old ethnic Albanian Merita Shabiu while on peacekeeping duty in Kosovo. He took her to an abandoned apartment building, where he raped her, and then killed her to stop her screaming. A fellow peacekeeper assisted him in returning to retrieve and bury the girl’s body. Ronghi’s sentence, handed down by a panel of six officers, was life in prison without parole, as well as a reduction in military rank, forfeiture of all pay and allowances, and a dishonourable discharge. However, it is unlikely that this kind of action would have been taken had Ronghi not murdered the girl too. Even then, the murder was only revealed because Ronghi procured the help of a fellow soldier to clean up his mess.

## 2.2 Africa and Asia

### 2.2.1 Somalia

Many allegations have arisen of international troops violating human rights in Somalia, particularly Italians and Belgians. Allegations have been made that UN peacekeepers “frequently raped local women who ventured outside the refugee camps to collect firewood”<sup>58</sup> however no evidence exists of any investigations or disciplinary proceedings arising from these events.

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<sup>56</sup> *Ibid*, p.46-7

<sup>57</sup> CNN.com “Army sergeant sentenced to life without parole for murder of girl in Kosovo”, 1 August 2000, <http://edition.cnn.com/2000/LAW/08/01/kosovo.soldier.sentence.01/>. See also “Comrades testify against US soldier in Kosovo girl’s killing”, 18 February 2000, <http://edition.cnn.com/2000/WORLD/europe/02/18/kosovo.us.soldier/> & “Behavior of US troops under scrutiny in Kosovo”, 25 January 2000, <http://edition.cnn.com/2000/WORLD/europe/01/25/kosovo.investigation/> & George Boehmer, (AP) “Tragedy in Kosovo: Testimony of struggle, suffocation”, 12 April 2000 [www.peacewomen.org/un/pkwatch/News/pre01/tragedy.html](http://www.peacewomen.org/un/pkwatch/News/pre01/tragedy.html)

<sup>58</sup> Professor Gerard J DeGroot, “‘Wanted: A Few Good Women’: Gender stereotypes and their implications for peacekeeping”, 31 May 2002 [www.peacewomen.org/resources/Peacekeeping/AFewGoodWomen.html](http://www.peacewomen.org/resources/Peacekeeping/AFewGoodWomen.html)



Photographs were actually published in an Italian magazine of soldiers binding a Somali woman and then raping her with a flare gun.<sup>59</sup> In 1998, the Gallo Commission, commissioned by the Italian government to investigate allegations of human rights abuses by Italian troops in Somalia, released its second report.<sup>60</sup> This report deemed it “credible” that in June 1993 a soldier near one entry to Mogadishu had beaten a 20 year old Somali woman semi-conscious, following which four soldiers had gang raped her. It was also considered “credible” that in November 1993 another Somali woman was raped with a pistol flare at a check-point in North Mogadishu. The Commission found it to be “probably true” that members of a tank division had attempted to rape a Somali woman with a pistol flare at the same check-point in August 1993. By July 1998, various investigations were being carried out into acts of violence committed by Italian soldiers in Somalia, including the alleged rape of a Somali woman by soldiers at a check-point in Mogadishu.<sup>61</sup> It is unclear as to the number, nature and status of the criminal investigations or disciplinary proceedings relating to violations, including whether these relate to the rapes mentioned.<sup>62</sup> By January 1999, the Italian authorities stated that they were still investigating, with no criminal charges yet brought for rape.<sup>63</sup>

Several Belgian soldiers have been tried in military courts for the ill-treatment or killing of Somalis. Most of these were acquitted or received suspended sentences. It is not evident precisely what crimes they were prosecuted for.<sup>64</sup>

## 2.2.2 Democratic Republic of the Congo

Most recently allegations have arisen of human rights abuses by troops in the Congo.<sup>65</sup> Girls as young as 13 sell their bodies to UN peacekeepers in exchange for food, sneaking through the fence into the UN compound at night in order to feed themselves and their children.<sup>66</sup> The UN is even aware of the problem, with preliminary investigations revealing widespread sexual

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<sup>59</sup> Declan Walsh, “Peacekeeper Jailed for Porn Films”, 23 January 2003, [www.peacewomen.org/un/pkwatch/News/03/Irishpeacekeeper.html](http://www.peacewomen.org/un/pkwatch/News/03/Irishpeacekeeper.html); Lea Thompson, Dateline NBC, “Disturbing the peace” [www.freedomdomain.com/un/disturbpeace.html](http://www.freedomdomain.com/un/disturbpeace.html)

<sup>60</sup> *Italy: A briefing for the UN Committee against Torture*, Amnesty International 1 May 1999, AI Index: EUR 30/002/1999 <http://web.amnesty.org/library/print/ENGEUR300021999>, p.9-10

<sup>61</sup> Italy’s third periodic report to the UN Committee Against Torture, in *Italy: A briefing for the UN Committee against Torture*, *supra* note 60, p.10

<sup>62</sup> *Ibid*, p.11

<sup>63</sup> Thompson, *supra* note 59

<sup>64</sup> *Somalia: UN Troops accused of Torture*, Amnesty International Newsletter, 1 September 1997, AI Index: NWS 21/005/1997 <http://web.amnesty.org/library/print/ENGNEWS210051997>, p.1

<sup>65</sup> Kate Holt, “DR Congo’s shameful sex secret: Young refugees sell their bodies to UN Peacekeepers”, June 3, 2004, BBC <http://new.bbc.co.uk/go/pr/ft/-/2/hi/africa/3769469.stm> or [www.peacewomen.org/news/DRC/June04/secret.html](http://www.peacewomen.org/news/DRC/June04/secret.html)

<sup>66</sup> UN Wire, “UN Peacekeepers Sexually Abusing Girls in DRC Camp”, 25 May 2004, [www.unwire.org/News/328\\_426\\_24228.asp](http://www.unwire.org/News/328_426_24228.asp)

abuse<sup>67</sup>. An employee of the organisation managing the camp said it is a well-known problem: “There is nothing to stop them and the girls need food. It is best to keep quiet though. I am frightened that if I say something I may lose my job”.<sup>68</sup> Even the head of the UN in Bunia (the capital of the Ituri province), Dominique McAdams, has admitted that there is a problem: “It is pretty clear to me that sexual violence is taking place in the camp”.<sup>69</sup> However, as of June 2004, McAdams said that she has “requested evidence and proof on this matter, but I have not received anything from anyone”.<sup>70</sup> This is despite the fact that MONUC has a Code of Conduct specifically dealing with these issues.<sup>71</sup> The Code of Conduct prohibits “any act of sexual abuse and/or exploitation by members of the Civilian and Military components of MONUC”, and this behaviour “constitutes an act of serious misconduct”. A definition of sexual abuse and/or exploitation is provided, which includes “any exchange of money, employment, goods or services for sex, including sexual favours or other forms of humiliating, degrading or exploitive behaviour... [and] any sexual activity with a person under the age of 18”.

In May 2004 the UN announced that it would undertake an investigation into the allegations of 30 cases within the UN camp<sup>72</sup> relating to sexual abuse perpetrated by Uruguayan, Nepalese and Moroccan peacekeepers.<sup>73</sup> In May, only one case was completed, although UN spokesman Fred Eckhard refused to reveal the identity or nationality of the offender, who has been repatriated and will *supposedly* be prosecuted by his national authorities.<sup>74</sup>

### 2.2.3 Eritrea

In 2002, an Irish UNMEE peacekeeper was caught after having made pornographic films of an Eritrean woman.<sup>75</sup> The making of pornographic movies is illegal in Eritrea. He was repatriated to Ireland, where he was sentenced to 16 days’ detention, and was likely to be dismissed from the

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<sup>67</sup> Thalif Deen, “Politics: Cash Crunch, Sex Abuse Charges Hit UN Peacekeeping”, Inter Press Service News Agency, <http://ipsnews.net/interna.asp?idnews=23940>

<sup>68</sup> UN Wire, “UN Peacekeepers Sexually Abusing Girls”, *supra* note 66

<sup>69</sup> Holt, *supra* note 65

<sup>70</sup> *Ibid*

<sup>71</sup> MONUC Code of Conduct [www.monuc.org/Gender/monuc\\_code\\_of\\_conduct.aspx](http://www.monuc.org/Gender/monuc_code_of_conduct.aspx)

<sup>72</sup> UN Wire, “UN Probes 30 Sex Abuse Claims in DRC, Disciplines One” 27 May, 2004 [www.unwire.org/UNWire/20040527/449\\_24314.asp](http://www.unwire.org/UNWire/20040527/449_24314.asp) See also “UN looks into sex abuse claims”, 27 May, 2004, [www.news24.com/news24/Africa/News/0,,2-11-1447\\_1533341.00.html](http://www.news24.com/news24/Africa/News/0,,2-11-1447_1533341.00.html)

<sup>73</sup> William Wallis, “UN Staff in Congo Face Child Sex Claims”, 17 May, 2004, [www.peacewomen.org/un/pkwatch/News/04/sexclaims.html](http://www.peacewomen.org/un/pkwatch/News/04/sexclaims.html)

<sup>74</sup> UN Wire, “UN Probes”, *supra* note 72. See also “Member of UN Mission in DR of Congo Accused of Sexual Abuse Sent Home for Trial”, 26 May, 2004, [www.peacewomen.org/un/pkwatch/News/04/trial.html](http://www.peacewomen.org/un/pkwatch/News/04/trial.html)

<sup>75</sup> Walsh, *supra* note 59; Alex Last, “Porn scandal rocks Eritrean peace force”, 20 December 2002, <http://news.bbc.co.uk/1/hi/world/africa/2595003.stm>; Declan Walsh & Nicola Byrne, “UN Peacekeepers Criticised”, *The Scotsman*, 22 December 2002, [www.globalpolicy.org/security/peacekpg/general/2002/1223peace.htm](http://www.globalpolicy.org/security/peacekpg/general/2002/1223peace.htm)

armed forces. The charge was conduct prejudicial to good order and discipline. A statement from UNMEE declared that “the sexual or psychological exploitation of locals by UN staff or their representatives will never be tolerated”, and revealed that between 2001 and 2003, peacekeepers from Italy, Denmark and Slovakia were repatriated for having sex with underage children.<sup>76</sup> In 2001, the UN stated that it intended to investigate cases alleging that seven Danish peacekeepers had sexually abused a 13 year old Eritrean girl. The Danish government had investigated the incidences, but had found no evidence of abuse. However some of the soldiers were repatriated and some others were fined for minor offences.<sup>77</sup> These actions are but a mere slap on the wrist, but it begs the question that if no evidence of abuse was found, why were the soldiers reprimanded at all?

## 2.2.4 Liberia, Sierra Leone and Guinea

In 2002, UNHCR investigated charges of abuse of women and children by peacekeepers from nine countries, which were revealed in a report issued by UNHCR and Save the Children UK.<sup>78</sup> There is no evidence of any disciplinary action being taken over these abuses. The UN’s Office of Internal Oversight Services investigated 12 cases, but could not verify them. Out of another 43 cases investigated, only ten were substantiated.<sup>79</sup> One peacekeeper was repatriated for the rape of a 14 year old boy, but not criminally charged.

The UN Mission in Liberia (UNMIL) has a zero tolerance policy on sexual exploitation, in keeping with the policy of the whole UN. UNMIL has imposed a midnight curfew as well as banning personnel from attending certain nightspots.<sup>80</sup> The DPKO itself distributes basic training materials in relations to sexual exploitation, but the majority of sending states do not issue their own training on the subject. However sexual exploitation is still taking place: “people will offer peacekeepers their sister or daughter if it would get them a job”.<sup>81</sup> The investigation system is not transparent, and investigations often stall due to lack of evidence. The UN cannot follow up after a soldier is repatriated for misconduct. The Special Representative to the Secretary-General for Liberia (formerly for Bosnia and Herzegovina), Jacques Paul Klein acknowledged the problem with the UN immunity of soldiers: “I don’t have a direct chain of command to

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<sup>76</sup> Walsh, *supra* note 59

<sup>77</sup> UN Wire, “UN to investigate alleged sex abuse by peacekeepers”, 2 March 2001, [www.unwire.org/UNWire/20010302/13293\\_story.asp](http://www.unwire.org/UNWire/20010302/13293_story.asp)

<sup>78</sup> David Lewis, “UN Probes Reports of Sexual Abuse by Congo Staff”, 10 May 2004, [www.peacewomen.org/un/pkwatch/News/04/sexabuseCongo.html](http://www.peacewomen.org/un/pkwatch/News/04/sexabuseCongo.html); Thalif Deen, “L’ONU cible l’exploitation sexuelle par des soldats de la paix”, 1 August 2002, [www.peacewomen.org/un/pkwatch/News/02/pkoexploitation.html](http://www.peacewomen.org/un/pkwatch/News/02/pkoexploitation.html)

<sup>79</sup> Stuart, *supra* note 9

<sup>80</sup> Sarah Martin, “Sexual Exploitation in Liberia: Are the conditions ripe for another scandal?” Refugees International, 20 April 2004, [www.refugeesinternational.org/cgi-bin/ri/bulletin?bc=00812&spotlight=1](http://www.refugeesinternational.org/cgi-bin/ri/bulletin?bc=00812&spotlight=1)

<sup>81</sup> *Ibid*

contingents [of peacekeepers]. I send recommendations to DPKO but I don't know what happens when soldiers are sent home. It's very frustrating."<sup>82</sup>

A Nigerian peacekeeper allegedly raped a 16 year old girl in the Sierra Leone capital of Freetown in February 2001. UNAMSIL reported that investigations had been made but that the girl had dropped the charges. In March 2001, a 12 year old girl asked a Guinean peacekeeper for a ride to Freetown and was subsequently raped by the soldier.<sup>83</sup> The soldier was charged and taken to court, but the local police did not pursue the case, and the soldier was repatriated. It is not known if any disciplinary or prosecutorial action was taken upon his return to Guinea.

In 2003 in Joru, Sierra Leone a woman witnessed two UNAMSIL personnel raping a local woman in the back of their white UN truck.<sup>84</sup> The woman stated that "We took it to the police but they never came to ask us any questions. We're all a bit frightened of those UNAMSIL people now. We tell our girls never to get in a truck with them or the same thing might happen to them."<sup>85</sup> These peacekeepers were Ukrainian, and yet again, there is no evidence of any disciplinary or criminal charges being made against them.

## 2.2.5 Cambodia and Mozambique

A recently published book written by current and former UN employees, titled *Emergency Sex and Other Desperate Measures: A True Story From Hell on Earth*, reveals that Bulgarian peacekeepers in Cambodia were "drunk as sailors" and raped "vulnerable Cambodian women".<sup>86</sup> In 1997 some Canadian officers made allegations that other Canadian peacekeepers were involved in the operation of a prostitution ring and gun smuggling, but no evidence was found to support this, despite the fact that one soldier's girlfriend worked in the same building as the brothel.<sup>87</sup>

The number of prostitutes in Phnom Penh rose from 6000 to 20,000 during the Cambodian peacekeeping mission.<sup>88</sup> It was also found that the rise of prostitution of children in Cambodia increased between March 1992 and September 1993 with the presence of UN troops.<sup>89</sup> Likewise in Mozambique children aged between 12 and 18 were recruited by ONUMOZ soldiers for prostitution.<sup>90</sup> The soldiers were sent home, but no evidence exists of any disciplinary action being taken.

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<sup>82</sup> *Ibid*

<sup>83</sup> Human Rights Watch, "We'll Kill You If You Cry: Sexual Violence in the Sierra Leone Conflict", vol.15, No.1 (A), January 2003 [www.hrw.org](http://www.hrw.org) p.48; Stuart, *supra* note 9

<sup>84</sup> "We'll Kill You If You Cry" *supra* note 83, p.48; Stuart, *supra* note 9

<sup>85</sup> "We'll Kill You If You Cry", *supra* note 83 p.49

<sup>86</sup> Deen, "Cash crunch", *supra* note 67; See also UN Wire. "New Book Reveals Drug-Filled Sex Parties on UN Missions", 27 May 2004, [www.unwire.org/News/328\\_426\\_24320.asp](http://www.unwire.org/News/328_426_24320.asp)

<sup>87</sup> David Pugliese, "Abuse of Cambodians on UN mission is ignored", Ottawa Citizen, 29 August 1997 [www.peacewomen.org/un/pkwatch/News/pre01/Cambodians.html](http://www.peacewomen.org/un/pkwatch/News/pre01/Cambodians.html)

<sup>88</sup> DeGroot, *supra* note 58

<sup>89</sup> Deen, "L'ONU cible l'exploitation », *supra* note 78

<sup>90</sup> Deen, "L'ONU cible l'exploitation", *supra* note 78

## 2.2.6 East Timor

In 2001<sup>91</sup>, two Pakistani peacekeepers were repatriated after being found guilty of “inappropriate behaviour” with East Timorese women. What this behaviour was is not known. The UN made an inquiry later that year into alleged sexual misconduct by Jordanian peacekeepers. In a rare case that shows it is indeed possible for immunities to be lifted, the Transitional Administrator waived the immunity of a CivPol officer, probably Jordanian, who subsequently faced a rape charge, and was to be tried in Dili District Court.<sup>92</sup>

In 2003, allegations arose that the UN Mission of Support in East Timor (UNMISSET) had failed to investigate the trafficking and organised prostitution of women. UNPOL (UN Police) denied this, and declared that they had conducted successful raids on suspected establishments.<sup>93</sup>



## 2.3 Sketchy evidence and no follow-ups

It is evident that it is difficult to gain a true view of the real situation. The facts available are sketchy. Often abuses are merely mentioned in passing in reports and articles, as with the example of allegations of Canadian peacekeepers accused of rape, beatings and sexual abuse of a teenage handicapped girl<sup>95</sup> or random reports of UN investigations into sexual abuse

<sup>91</sup> ETAN (Reuters), “UN peacekeepers in East Timor face possible sex charges”, 3 August 2001 [www.etan.org/et2001c/august/01-4/03unpeac.htm](http://www.etan.org/et2001c/august/01-4/03unpeac.htm)

<sup>92</sup> ETAN (Reuters), “UN policeman charged with rape in East Timor”, 24 August 2001, [www.etan.org/et2001c/august/19-25/24unpolc.htm](http://www.etan.org/et2001c/august/19-25/24unpolc.htm)

<sup>93</sup> “UNMISSET rejects charges it failed to probe trafficking”, 3 July 2003, [www.unwire.org/UNWire/20030703/449\\_6185.asp](http://www.unwire.org/UNWire/20030703/449_6185.asp)

<sup>94</sup> “Where soldiers go, can abuse of women be far behind? This poster, advertising a T-shirt sold in East Timor, suggests that East Timorese women provide sexual services to PKF soldiers if they want to feel safe. La’o Hamutuk objects to the message this sends to both men and women in East Timor. (April 2001)” <http://www.etan.org/lh/news06.html>

<sup>95</sup> Walsh, *supra* note 59; Thompson, *supra* note 59. This author was not able to find any more substantial information on that case.

and black market activities by various UN contingents.<sup>96</sup> Accounts of abuses reach the media and NGOs but follow ups are near impossible due to lack of transparency in UN investigations and lack of investigations by the national states of the offenders. The UN's Board of Inquiry (BOI), in charge of investigations into all incidents occurring in the UN community, will merely recommend repatriation for disciplinary action for a peacekeeper if it deems there to be reasonable ground for a charge of serious misconduct. As is evident from the Italian investigations into abuses in Somalia, national investigations are not placing importance on crimes such as rape, with vague findings ("probably true") and no prosecutions. If any disciplinary proceedings are carried out, they are usually held in a military court or tribunal closed to the public.<sup>97</sup>

The accountability structure is far too loose. This is partly the fault of the UN, because it doesn't really know how to respond to these problems. In 2003, Madeleine Rees, human rights official in Bosnia confirmed that 24 IPTF monitors had been returned to their countries for misconduct, however admitted that peacekeepers commit these crimes:

because they can get away with it... No peacekeeper has been prosecuted. It's outrageous that they can act with impunity. The UN has no authority to punish offenders; all it can do is try to ensure that the Code of Conduct is enforced, and that means repatriating when they offend. Proper investigations should be held and a file prepared so the accused can contest the allegations, and if it is shown that there is a prima facie case it should go back to the peacekeepers' country for further investigation and a trial, or some form of disciplinary proceeding should take place. The other option would be for the member state to waive the immunity and do it there.<sup>98</sup>

Certainly, without accountable command structures in their sending states, peacekeeping personnel think they can get away with it. This situation can be exacerbated when the contributing personnel come from sending states where the rule of law is not particularly strong. Rees also said that "without an enforceable code of conduct, immunity often means impunity. We should look at ways of waiving that immunity."<sup>99</sup> The UN doesn't even follow the problem- there are no statistics or comprehensive, transparent reports available on crimes committed by peacekeepers.<sup>100</sup>

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<sup>96</sup> Alan Ferguson, "UN probes abuse claims at brothel in Bosnia", Toronto Star, 4 November 1993 [www.peacewomen.org/un/pkwatch/News/pre01/probes.html](http://www.peacewomen.org/un/pkwatch/News/pre01/probes.html) This article stated that a UN BOI was being conducted into allegations of sexual abuse that occurred in 1992 and 1993 by Canadian, New Zealand, French, Ukraine and African peacekeepers.

<sup>97</sup> Rehn, Elisabeth & Ellen Johnson Sirleaf, "Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women & Women's Role in Peace Building", UNIFEM (2000), [www.parliament.gov.za/pls/portal30/docs/FOLDER/PARLIAMENTARY\\_INFORMATION/PUBLICATIONS/UNIFEM/INDEX.HTM](http://www.parliament.gov.za/pls/portal30/docs/FOLDER/PARLIAMENTARY_INFORMATION/PUBLICATIONS/UNIFEM/INDEX.HTM), p.72

<sup>98</sup> Stuart, *supra* note 9

<sup>99</sup> UN Wire, "UN official wants action" *supra* note 10

<sup>100</sup> Thompson, *supra* note 59



Part of the problem is that recognition of trafficking and prostitution as a problem is a recent occurrence- especially given the predominance of men in the field (and the office) of peacekeeping. The increased presence of women throughout the DPKO has augmented awareness of exploitation and violations of women's human rights by peacekeepers. Yet participation numbers are low, with for example only 1.7% of peacekeepers being female in missions between 1989 and 1993.<sup>101</sup> Murder and torture are prosecuted as serious crimes<sup>102</sup>, but not crimes against women such as rape and trafficking. This is captured in the words of the Under Secretary-General for Peacekeeping, Jean-Marie Guehenno: "Traditionally we underestimated this issue, because we presumed that conflicts and peace have nothing to do with sex. This is not the case."<sup>103</sup> The former deputy commission of the IPTF in Bosnia stated that "When you have 2000 soldiers, mostly male, in a foreign country, problems with prostitution can be expected".<sup>104</sup> His matter-of-fact speech accepts and condones the use of prostitutes, and renders comments that there are "sanctioned" army brothels unfortunately highly believable.<sup>105</sup> He blatantly states that IPTF monitors should determine whether the women they are visiting are participating willingly in the sex trade- indicating that use of "willing" prostitutes is completely acceptable and appropriate. The Director of the NATO Balkan Task Force, Robert Serry, also made a similar statement that it was impossible to deny that troops used prostitutes.<sup>106</sup> Colonel Larson, a Danish NATO Colonel, excused the use of prostitutes, saying that the issue was "hard to end. Soldiers [are] under stress, away from [their] families at home, and cannot be confined to barracks for months and months".<sup>107</sup> "There is this whole 'boys-will-be-boys' attitude about men visiting brothels. There's a culture inside the UN where you can't criticise it. That goes all the way to the top."<sup>108</sup>

A major problem is also the politics of the issue. Anything involved with the UN has a very strong political element, on many levels.

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<sup>101</sup> DeGroot, *supra* note 58

<sup>102</sup> Such as the case of Ronghi. See also the case of Canadian Private Kyle Brown who was sentenced to five years in prison for the murder in 1993 of a Somali boy in Luann Lasalie, "Not all allegations about peacekeepers can be proved: Baril: 22 of 60 disciplined over role in Bosnia", 9 June 1998, [www.peacewomen.org/un/pkwatch/News/pre01/Baril.html](http://www.peacewomen.org/un/pkwatch/News/pre01/Baril.html) & Thompson, "Disturbing the peace". See also *Dishonoured Legacy: The Lessons of the Somalia Affair- Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Vols 1-6, Ottawa: Canadian Government Publishing, (1997). The Canadian Forces were completely restructured and many high level people were fired after an incident in Somalia in which 2 Somalis were shot (one killed), and another where a Somali was tortured and killed. There were other incidents too, and a huge investigation was made into the crimes and the disciplinary process, which was published in 6 volumes.

<sup>103</sup> Deen, "L'ONU cible l'exploitation sexuelle" (author's own translation), *supra* note 78

<sup>104</sup> UN Wire, "Sex worker issues unsurprising, former UN official says", 6 September 2001, [www.unwire.org/UNWire/20010906/17761\\_story.asp](http://www.unwire.org/UNWire/20010906/17761_story.asp)

<sup>105</sup> See above comment by German KFOR soldier about French & American army brothels. There is a long tradition of armies setting up their own brothels, as if this is an "acceptable" and "normal" party of war. See "Conquests: sex, rape, and exploitation in wartime", ch.6 in *War and Gender: How Gender Shapes the War System and Vice Versa* by Joshua S. Goldstein, Cambridge University Press: Cambridge, (2001), pp.332-402

<sup>106</sup> 'So does it mean we have the rights?' *supra* note 45, p.46

<sup>107</sup> *Ibid*

<sup>108</sup> Madeleine Rees in UN Wire, "UN Official wants action" *supra* note 10

The UN depends on sending states for funding, equipment and troops, and therefore is unwilling to antagonise these sending states. One disciplined and repatriated person could result in the loss of a whole troop for a mission due to political sensitivities. The contingent commanders are in charge of disciplinary actions, and they often take allegations and accusations personally, and feel their personnel are being targeted because of their nationality.<sup>109</sup> There is also a very high rotation rate of staff in these missions, and this creates an air of apathy on behalf of contingent commanders, who do not want to bother with the work to repatriate someone when their tour of duty ends soon anyway.<sup>110</sup>

Reputation is also a concern. Repatriation is considered more serious for soldiers and police than for civilians because the repatriation goes on their record, so contingent commanders are less willing to undertake disciplinary action against these personnel.<sup>111</sup> Civilians are recruited externally, and this enables them to return home and continue with their domestic job.<sup>112</sup>

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<sup>109</sup> Rod Rastan, former Chief of Special Response Unit of the Human Rights Office of the IPTF in Bosnia-Herzegovina, interview September 2004.

<sup>110</sup> *Ibid*

<sup>111</sup> *Ibid*

<sup>112</sup> This problem is linked to the broader question of inability to screen people for missions, particularly civilians.



# 3 Applicable Law, Jurisdiction, Immunity and the ICC

“We don’t get to touch them...”<sup>113</sup>

The first legal issues that arise when discussing whether UN and UN-affiliated personnel can be tried in the ICC for the gender-specific crimes relating to trafficking, sexual slavery and rape are those of applicable law, jurisdiction and immunity. Many questions become evident. What are the standards and rules set by the UN for peacekeeping personnel? Are peacekeeping personnel obliged to observe international humanitarian law? Under whose jurisdiction do these personnel fall? What is the scope of that jurisdiction? Do the personnel have immunity and if so can these immunities be waived?

## 3.1 Standards and Rules for Peacekeepers

### 3.1.1 UNHCR

The 1995 UNHCR Guidelines on Prevention and Response to Sexual Violence against Refugees mention that it does occur that officials may extort sex from asylum claimants in exchange for a positive determination, and that refugee women and girls may be approached by officials for sexual favours in exchange for assistance such as food. However nowhere in the guidelines is the issue raised of how to deal with the situation where the offender is a UN official.

### 3.1.2 UNHCHR

In 2002 the High Commissioner for Human Rights issued Recommended Principles and Guidelines on Human Rights and Human Trafficking.<sup>114</sup> While these guidelines are certainly not binding, being issued by the Economic and Social Council, guideline 10 is relevant, as it deals with the obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel. The guidelines outline what states and intergovernmental and non-governmental organisations should consider in relation to personnel and trafficking-related offences. States and organisations should guarantee comprehensive training programs addressing trafficking and behavioural standards/codes of conduct, as well as ensuring

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<sup>113</sup> The TPIU in Kosovo about French KFOR soldiers suspected of involvement in trafficking offences. ‘So does it mean that we have the rights?’ *supra* note 45, p.45

<sup>114</sup> E/2002/68/Add.1, 20 May 2002

that recruitment processes are transparent. It states that all violations should be reported, investigated and disciplined. However the guideline notably does not make any reference to transparency in relation to these investigatory proceedings. Lack of transparency in investigatory proceedings ensures information is not disseminated about these violations. This results in vague investigatory findings by states and organisations. It also enables the “boys will be boys” attitude to propagate a climate of continued immunity- and therefore impunity- where investigations are swept under the rug or simply given up on.

### 3.1.3 Secretary-General’s Bulletins

In 2003, Kofi Annan promulgated the Secretary-General’s Bulletin on Special measures for protection from sexual exploitation and sexual abuse.<sup>115</sup> This bulletin defines sexual exploitation in the following terms: “any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another”. Sexual abuse is defined as “the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions”.

Importantly, the bulletin recognises the aspect of the inequality of relationships involving peacekeepers with the local community. Even if a “willing” relationship evolves, it is sometimes difficult to view the relationship of one as equality. Women in these areas are usually poor, uneducated, unemployed, and vulnerable to a man that will provide them with support, both emotionally and financially. There is often no future to these relationships, as the peacekeeper will eventually return to his country of origin. This can make even a consensual relationship as unequal and abusive as the use of prostitutes by peacekeepers, and something that undermines “the credibility and integrity of the work of the United Nations”.<sup>116</sup> The Peacekeeping Handbook for Junior Ranks even warns against this situation: “Be forewarned of facing long sexual abstinence. Do not involve yourself in any sexual relationship, which may create long-lasting complications for you and others. Do not involve yourself with a sexual affair with any member of the local population.”<sup>117</sup> Unfortunately the Handbook does not touch upon the negative consequences that can arise from situations of involvement with local women. These may include the ostracism of the women after the peacekeepers leave due to their involvement with a peacekeeper;<sup>118</sup> and many children growing up

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<sup>115</sup> ST/SGC/2003/13, 9 October 2003

<sup>116</sup> Section 3, art.3.2(d)

<sup>117</sup> Rehn & Sirleaf, *supra* note 97, p.72

<sup>118</sup> A common legacy for the women in Cambodia that were taken as “wives” by UNTAC peacekeepers in the 1990s; Rehn & Sirleaf, *supra* note 97, p.71

fatherless after the departure of the international forces.<sup>119</sup> Many peacekeepers also contract HIV due to involvement with local women.<sup>120</sup>

The Secretary-General's bulletin applies to all UN staff, "including staff of separately administered organs and programmes of the UN".<sup>121</sup> The bulletin specifically prohibits forces conducting UN commanded operations from committing acts of sexual exploitation and sexual abuse.<sup>122</sup> These forces "have a particular duty of care towards women and children". This duty is linked to bulletin SG/SGB/1999/13 concerning the observance of international humanitarian law by UN forces (see below). However, despite the DPKO's statement that military personnel are expected to abide by these standards, the bulletin is a UN regulation, and therefore strictly speaking only applies to civilian personnel.<sup>123</sup>

Section 3 sets out the non-exhaustive details of the prohibition of sexual exploitation and sexual abuse. It declares that "Sexual exploitation and sexual abuse violate universally recognised international legal norms and standards and have always been unacceptable behaviour and prohibited conduct for United Nations staff. Such conduct is prohibited by the United Nations Staff Regulations and Rules."<sup>124</sup> The bulletin states that commission of the prohibited acts will lead to disciplinary measures, including summary dismissal, because they are acts of serious misconduct.<sup>125</sup> There is a blanket prohibition on sex with children under the age of 18, as well as exchanging money<sup>126</sup> for sex. Thus, use of prostitutes is prohibited by the Secretary-General's bulletin.

### 3.1.4 DPKO Guidelines and Rules

The DPKO has recently<sup>127</sup> issued a CD-Rom compilation of Guidance and Directives of Disciplinary Issues for All Categories of Personnel Serving in UN Peacekeeping and Other Field Missions. These revised and improved procedures on disciplinary matters were worked on for at least two years.<sup>128</sup> For uniformed personnel, this includes:

1. Code of Conduct and We are UN Peacekeepers pocket card
2. Secretary-General's Bulletin on International Humanitarian Law (1999)
3. Directives for Disciplinary Matters Involving Military Members of National Contingents

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<sup>119</sup> Peacekeepers fathered 6,600 children in Liberia between 1990 and 1998; Rehn & Sirleaf, *supra* note 97, p.71

<sup>120</sup> Rehn & Sirleaf, *supra* note 97, p.71

<sup>121</sup> Section 2, Art.2.1

<sup>122</sup> Section 2, Art.2.2

<sup>123</sup> See below for discussion on directives for uniformed personnel

<sup>124</sup> Section 3, art.3.1

<sup>125</sup> Section 3, art.3.2(a)

<sup>126</sup> Also prohibited is the exchange of employment, goods or services for sex- ie: using prostitutes is prohibited. Section 3, art.3.2(c)

<sup>127</sup> March 2004

<http://www.peacewomen.org/un/pkwatch/discipline/DPKODirectivescompilation.html>

<sup>128</sup> Report of the Secretary-General on women, peace and security S/2002/1154, 16 October 2002, para.45

4. Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers
5. Sexual Harassment Directives
6. Undertaking for UNMOs
7. Undertaking for CivPol
8. Public Information Guidelines For Allegations of Misconduct Committed by Personnel of United Nations Peacekeeping and Other Field Missions

For civilian personnel, this includes:

1. UN Charter
2. Staff Rules and Regulations
3. Revised Disciplinary Measures and Procedures (ST/AI/371) (1991)
4. Procedures for Dealing with Sexual Harassment (ST/AI/379) (1992)
5. Secretary-General's Bulletin on status, basic rights and duties of staff (2002)
6. Secretary-General's Bulletin on "Special measures for protection from sexual exploitation and sexual abuse (October 2003)

Expected standards of behaviour of UN staff are set out in the codes of conduct. Rule 4 of the Ten Rules Code of Personal Conduct for Blue Helmets prohibits the indulgence in "immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children". Both the Directives for Disciplinary Matters Involving Military Members of National Contingents<sup>129</sup> and the Directives for Disciplinary Matters Involving Civilian Police Officers and Military Observers<sup>130</sup> include sexual harassment, sexual abuse and exploitation of any individual, particularly children, and unlawful acts under acts constituting serious misconduct<sup>131</sup>. These references are brief and broad. There is no comprehensive definition provided of these terms, nor is there any link made to definitions provided elsewhere, such as in the Secretary-General's bulletin. No specific mention is made of trafficking or prostitution. Clarity on these issues is important, to certify that there is no confusion by DPKO personnel about what is unacceptable behaviour while on a peacekeeping mission, and also about what constitutes criminal behaviour.

It has also been previously mentioned in this paper that individual missions have designated "off-limits" areas, which may range from clubs, bars and restaurants to anywhere outside the military base. However, it is obvious that some personnel sneak into these areas, or even traffic women into the bases as a way of getting around the rules.<sup>132</sup> The designation of the off-limits areas must be clearly defined and disciplinary action for personnel caught in these areas strongly and effectively enforced.

In March 2004, the DPKO released a policy paper on "Human Trafficking and United Nations Peacekeeping".<sup>133</sup> This paper recognises peacekeeper involvement with trafficking, and that criticism has been

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<sup>129</sup> DPKO/MD/03/00993

<sup>130</sup> DPKO/CPD/DDCPO/2003/001 DPKO/MD/03/00994

<sup>131</sup> Part III Definitions

<sup>132</sup> See above, activities of Russian soldiers in Kosovo

<sup>133</sup> United Nations Peacekeeping, "Human Trafficking and United Nations Peacekeeping", DPKO Policy Paper (March 2004), <http://www.un.org/Depts/dpko/lessons/>

directed towards the UN for not taking the problem seriously. However, the paper seems to barely recognise the criminal aspect of trafficking. Instead, the department is more concerned about the reputation of the UN and the DPKO, and consistently emphasises the “perception crisis”:

The use of trafficking victims by peacekeepers for sexual and other services has been a source of major embarrassment and political damage to UN PKOs. Despite the fact that involvement is usually not widespread, the political and moral stigma attached to this behaviour can taint entire missions. This can leave missions exposed and vulnerable to attacks on their credibility with the community and key players in the peace process. Opponents of peace missions are increasingly aware that the issue can be effectively exploited to undermine the moral authority and political leverage of UN operations, especially in missions with governance and rule of law mandates.

The policy paper also refers to the support that trafficking gives to organised crime. These are of course very relevant points. However, the paper fails to recognise the fact that this behaviour is inherently criminal, and that there are victims of the crime. The DPKO is more worried about its own embarrassment than the fact that perpetrators are getting away with crimes.

## **3.2 Humanitarian and human rights law obligations**

The Codes of Conduct and Directives issued by the UN, or those issued by the sending states, impose expectations of appropriate and acceptable behaviour. However, these are not legally binding, and so it is important to examine what laws peacekeeping personnel are bound by. This issue is closely linked to jurisdiction, and depends upon the circumstances of the situation, and thus the classification and mandate of the peacekeeping operation.

### **3.2.1 Secretary-General’s Bulletin**

In August 1999, Kofi Annan released the Secretary-General’s Bulletin on Observance by United Nations Forces of International Humanitarian Law.<sup>134</sup> The bulletin applies to UN “forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions or in peacekeeping operations when the use of force is permitted in self-defence”.<sup>135</sup> The use of the term “forces” means that all forms of UN operations are covered by this bulletin, as the Secretary-

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<sup>134</sup> ST/SGB/1999/13, 6 August 1999

<sup>135</sup> Section 1, Art.1.1

General has not specified any type of operation. This means that the bulletin covers peacekeeping operations (eg: ONUC), and UN-controlled enforcement operations (eg: UNOSOM II).<sup>136</sup> The bulletin does not, however, cover UN-authorized enforcement operations that are not under UN command and control (such as SFOR and KFOR), although these operations usually operate with the application of international humanitarian law (eg: 1991 Operation Desert Storm).

The forces are obliged to respect the fundamental principles and rules of international humanitarian law whether or not a status of force agreement (SOFA) is in place.<sup>137</sup> Sections 5-9 of the bulletin outline the fundamental principles and rules of international humanitarian law that the forces are obliged to abide by. These principles include protection of the civilian population, rules relating to means and methods of combat (respecting the rule that the means and method of combat is not unlimited), treatment of civilians and persons hors de combat, treatment of detained persons, and protection of the wounded, the sick, and medical and relief personnel. Thus, peacekeeping forces are obliged to protect civilians, and this specifically includes a prohibition of violence to life or physical integrity, cruel treatment such as torture, rape, enforced prostitution, any form of sexual assault and humiliation and degrading treatment, and enslavement.

The ICRC has also confirmed that the fundamental principles and customary rules of international humanitarian law are applicable and obligatory for DPKO forces.<sup>138</sup> As the applicability of international humanitarian law is a question of *jus in bello*, once UN forces are involved in armed conflict, then international humanitarian law applies.<sup>139</sup> The rules of international humanitarian law are of course more extensive than just the fundamental principles and rules, as are found in the Geneva (and other) Conventions. The UN, however, is not a party to these Conventions. Thus, the broad application of the entirety of these treaties to the members of peacekeeping forces depends upon the troops' sending state and which treaties that state is a party to, as if that state were in any international armed conflict.<sup>140</sup> The reality of PKOs is that each contributing state has ratified different international instruments, and many also may have made specific reservations or declarations concerning the application of those instruments.

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<sup>136</sup> Adam Roberts & Richard Guelff, *Documents on the Laws of War*, 3<sup>rd</sup> ed., Oxford University Press: Oxford, (2000), pp.721-722

<sup>137</sup> Section 3

<sup>138</sup> Umesh Palwankar, "Applicability of international humanitarian law to United Nations peace-keeping forces", IRRC no.294, 30 June 1993, pp.227-240; FAQ: "Does humanitarian law apply to peace-keeping and peace-enforcement operations carried out by or under the auspices of the United Nations?", 31 October 2002; both available from [www.icrc.org](http://www.icrc.org). Other international bodies have also echoed this view: the International Law Association in 1966, and the Institute of International Law in 1971 and 1975; Roberts & Guelff, *supra* note 135, p.723

<sup>139</sup> ICRC, "Application of international humanitarian law and international human rights law to UN-mandated forces: Report on the Expert meeting on multinational peace operations", 11-12 December 2003, IRRC Vol.86, No.853, March 2004, p.208, [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/SZBHAZ/\\$file/IRRC\\_853\\_FD\\_Application.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/SZBHAZ/$file/IRRC_853_FD_Application.pdf)

<sup>140</sup> Palwankar, *supra* note 138; Roberts & Guelff, *supra* note 136, p.723

It is the responsibility of both the UN and the sending state to ensure adequate training about the rules and principles of international humanitarian law is provided for personnel. Fortunately, in practice, PKOs operating with the involvement of the U.S. (a large number of PKOs) have operated to the highest standard of the PKO contributing states.<sup>141</sup> This means that international humanitarian law is in fact applied and state practice alongside rules and international instruments indicates a general acceptance that UN forces are bound by international humanitarian law.<sup>142</sup>

### 3.2.2 UN Convention

Art.2 (2) of the 1994 UN Convention on the Safety of United Nations and Associated Personnel<sup>143</sup> states that the international law of armed conflict applies to enforcement actions authorised under Chapter VII “in which any of the personnel are engaged as combatants against organized armed forces”.

### 3.2.3 International Armed Conflict?

There is argument as to whether UN operations are considered to be international, even when restricted to the territory of a single state, and thus whether the rules of international humanitarian law relating to international armed conflicts apply. The UN has tended to take the position that it is not a party to a conflict or a “Power” under the Geneva Conventions because it is acting on behalf of the international community<sup>144</sup>. Nonetheless at the same time, they advocate the application of international humanitarian law. The most persuasive argument is that the involvement of the UN in itself renders the operation international<sup>145</sup>, especially as the operations are based on UN Security Council resolutions. This is supported by the wording of the model UN SOFA used as the basis for operation agreements.<sup>146</sup> Part VI states that “The functions of [the United Nations peace-keeping operation] are exclusively international and the personnel... shall regulate their conduct with the interests of the United Nations only in view”. The model agreement further states that the operation “shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel,” which includes the Geneva Conventions and the

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<sup>141</sup> Email from Major Mike Kelly, ADF, 11 August 2004. Email on file with author.

<sup>142</sup> Ray Murphy, “United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?” 14 *Criminal Law Forum*, p.154

<sup>143</sup> <http://www.un.org/law/cod/safety.htm>

<sup>144</sup> Murphy, *supra* note 142, p.174

<sup>145</sup> Experts are divided as to whether this is the case or whether internationalisation depends upon the status of other parties to the conflict; ICRC, “Application of international humanitarian law”, *supra* note 139, p.209, however more support the automatic internationalisation view Murphy, *supra* note 142, p.184

<sup>146</sup> “Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations” A/46/185, 23 May 1991

Additional Protocols.<sup>147</sup> Thus by use of the word “shall”, this binding agreement obliges operation personnel to abide by the rules and principles of international humanitarian law. However, the statement in the SOFA is vague and offers no definitions to guide peacekeeping personnel in this observation and respect of the principles and spirit. In this sense, the Secretary-General’s bulletin exists as an affirmation and clarification of the application of international humanitarian law to peacekeeping personnel.

The international status of the operations can also be confirmed by the fact that, even if state parties do not apply international humanitarian law to their contributing troops, they apply the law of military occupation<sup>148</sup>, as with the example of Australia’s involvement in the INTERFET operation in East Timor.<sup>149</sup> One of the limits of the rules of humanitarian law to non-international conflicts is that of non-occupation.<sup>150</sup> That is, a non-international conflict cannot by definition have occupied territories, as is demonstrated by the differences in provisions between the two Additional Protocols.<sup>151</sup>

However, the application of the law of military occupation raises another issue in itself as to which rules apply, and can be linked to individual states’ interpretation of the situation and the Secretary-General’s bulletin. It is also debatable whether the law of military occupation is appropriate and sufficient in UN operations. The law of military occupation comprises some of international humanitarian law, but not all of it, as occupation does not necessarily have to occur within the premise of armed conflict. Authors have argued whether the law of military occupation or international humanitarian law should be applied<sup>152</sup>, and states themselves have applied the two bodies of law individually in the same circumstances. Some argue that in a situation such as that of UNMIK, there is no choice but to use the term occupation and apply the relevant law. Others argue that international forces cannot be considered as occupying armies because they are not representing the special interests of one state party. It is also arguable that UN operations cannot be defined as occupation as such, even if they have effective control through administration.<sup>153</sup> This is because UN international administration is always seen as interim or transitory, and therefore is not a situation where the administrative power wants to or intends to retain power indefinitely.

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<sup>147</sup> Part X. The 1954 Hague Convention on the Protection of Cultural Property is also included.

<sup>148</sup> The law of military occupation is found in The Regulations of the Fourth Hague Convention of 1907, the Fourth Geneva Convention and the First Additional Protocol.

<sup>149</sup> Michael Kelly, Tim McCormack, Paul Muggleton & Bruce Oswald, “Legal aspects of Australia’s involvement in the International Force for East Timor” IRRC no.84, 31 March 2001, pp.101-139 at [www.icrc.org](http://www.icrc.org)

<sup>150</sup> Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War?* ICRC: Geneva, (1999), p.210

<sup>151</sup> Section III of Part IV of API deals with Treatment of Persons in the Power of a Party to the Conflict. There is no corresponding section in APII.

<sup>152</sup> Sylvain Vité, « L’applicabilité du droit international de l’occupation militaire aux activités des organisations internationales » IRRC, March 2004, Vol.86, NO.853, 31 March 2004, pp.19-20 at [www.icrc.org](http://www.icrc.org)

<sup>153</sup> *Ibid*, p.27



These conflicting arguments have arisen in practice, as can be seen in the example of the different applications of laws by the Australian and the New Zealand forces during the INTERFET operation.<sup>154</sup> The issue of jurisdiction is again relevant (see discussion on jurisdiction below), because in the end, the troops are subject to the jurisdiction of their sending state. While the Secretary-General's 1999 bulletin indicates that international humanitarian law and not military occupation law, is to apply, Australia has interpreted this differently. In relation to East Timor operations, the Australian Defence Force (ADF) decided that international humanitarian law did not apply to the situation, because Indonesia had given its consent to the presence of troops, and that there was no armed conflict between Indonesian and INTERFET troops. The ADF takes the strict view that the 1999 bulletin only applies to operations where the UN forces are party to an armed conflict. Thus, the law of military occupation was applied in East Timor, not *de jure* but as a framework of guiding principles.<sup>155</sup> International humanitarian and human rights laws were also applied, "where relevant, by way of guidelines".<sup>156</sup> The Australian troops were also constantly subject to Australian criminal law, no matter what international law applied. This law includes the *Criminal Code*, and other federal statutes that implement international humanitarian law conventions, such as the *Geneva Conventions Act of 1957*.

No matter what happens Australian law will always cover the troops either through the Defence Force Discipline Act (DFDA) or other legislation that purports to cover them. This law incorporates IHL... There are no holes when it comes to holding ADF members accountable. The law of occupation helps as a framework where it would not apply as a matter of law but you still have to have a basis for managing the relationship between deployed forces and a civilian population under their control. The authority for applying the law of occupation as a matter of policy where we have done this in East Timor and Iraq is by virtue of the Chapter VII mandate authorising the force to use all necessary means to achieve the objectives set out in the relevant resolutions.<sup>157</sup>

In contrast, the New Zealand Defence Force (NZDF) has a blanket policy to apply international humanitarian law in all operations in which it participates. This is based on the concept that in relation to UN operations it is difficult to determine a clear difference between situations where international humanitarian law should be employed, as an application of the Secretary-General's bulletin. It is indeed preferable that international humanitarian law is applied, as it is far more comprehensive and offers more protection and rights than the law of military occupation, and the line is so

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<sup>154</sup> Kelly et al, *supra* note 149

<sup>155</sup> The ADF also held its troops to be under this law in Somalia under UNSOM I; Vité, *supra* note 152 p.21

<sup>156</sup> Kelly et al, *supra* note 149

<sup>157</sup> Email from Major Mike Kelly, ADF, 11 August 2004. Email on file with author.

often blurred in UN operations, be they peacekeeping or peace enforcement. There is no guarantee of stability of a situation of peace, and should armed conflict break out anew, it may create issues as to which law is applicable if international humanitarian law is not already in force. The application of this law is therefore a practical necessity. In line with this practical necessity, as well as upholding the obligation to respect and ensure respect for the fundamental principles of international humanitarian law, while the attitude of the ADF as a whole demonstrates that, even though the official line is that the law of occupation is applied, international humanitarian law is comprehensively employed anyway through national legislation related to military discipline.

### 3.2.4 Applicability of Human Rights Law

Experts are undecided as to the applicability of human rights law.<sup>158</sup> Extra-territorial application of treaty laws is not an internationally accepted concept, and not all states are parties to all human rights treaties. The case law of the European Court of Human Rights and the UN Human Rights Committee indicates that effective control over a territory allows for extra-territorial application of human rights law. This principle could be followed by the UN multi-national forces when they have effective control over a territory, as this control often happens when interim international administrations are in place before a new local administration can be set up. Human rights law, however, is a body of law that is generally applicable all the time. While it should technically be applied constantly, there are some allowances for suspension of some- importantly, not all- human rights during times of emergency, which may include armed conflict. Thus, international humanitarian law is designed to fill in the gaps created in these situations of suspensions of rights. However, there are some human rights which are considered to be non-derogable, even in times of emergency, such as the prohibition of torture and the right to life.

The model SOFA states that the peacekeeping operation is a subsidiary organ of the UN and must abide by the duties of the UN. These duties include upholding the purposes. It is a fact that for UN troops to violate human rights would be to act contrary to the principles and purposes of the UN. The promotion and encouragement of respect for human rights is one of the main purposes of the UN, under art.1 of the UN Charter. The Universal Declaration of Human Rights is also considered to be the detailed representation of this purpose. Annex 11 of the Dayton Accord (the Bosnian peace agreement<sup>159</sup>) also states that “[t]he IPTF shall at all times act in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms, and shall respect, consistent with the IPTF's responsibilities, the laws and customs of the host country.” So, IPTF are explicitly to act within the boundaries of human rights law. However, this statement is vague and does

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<sup>158</sup> ICRC, “Application of international humanitarian law”, *supra* note 139, p.211-212

<sup>159</sup> <http://www.nato.int/ifor/gfa/gfa-an11.htm>

not clarify the extent of those boundaries. The words “internationally recognised” do not indicate whether the applicable law is that relating to non-derogable rights only, or whether all rights such as those laid out in the international bill of rights are applicable. These rights are certainly internationally recognised, but not necessarily all of them are recognised universally. The Dayton Accord goes on to obligate IPTF personnel to provide information to the Human Rights Commission, the ICTY or another appropriate organisation of all violations “of internationally recognized human rights or fundamental freedoms or of the role of law enforcement officials or forces in such violations”. However in reality the possibility of officers reporting violations relating to trafficking and enforced prostitution is made extremely difficult by the hush-hush attitude given to these crimes. The examples of the firing of DynCorp recruited personnel Kathryn Bolkovac and Ben Johnston demonstrate that in reality it is not so easy for those who wish to report these violations to do so.

### 3.2.5 *Aut dedere, aut judicare*

A particular obligation arises for states in relation to certain international crimes. This is the obligation *aut dedere, aut judicare*. States are under a duty to prosecute or extradite *jus cogens* crimes. Most treaties oblige *aut dedere, aut judicare*.

Support for the validity of the *aut dedere aut judicare* customary international duty for international crimes and hence, the duty to prosecute or extradite, is found in conventional international criminal law as evidenced by the treaty provisions containing obligations to prosecute or extradite...<sup>160</sup>

Obligations arise in relation to genocide (Genocide Convention<sup>161</sup>); grave breaches (Geneva Conventions<sup>162</sup> & Additional Protocols<sup>163</sup>); and torture (Convention Against Torture<sup>164</sup>).<sup>165</sup> The duty is also confirmed in General Assembly resolutions<sup>166</sup>.

The core crimes of int'l criminal law are those that are part of *jus cogens*, or peremptory norms of international law. *Jus cogens* rules definitely include genocide, slavery, crimes against humanity and war crimes. Thus, the core international criminal law crimes have become part of *jus cogens*, or peremptory norms of international law.

The major distinguishing feature of such rules is their relative indelibility. These are rules of

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<sup>160</sup> M. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers: Dordrecht, (1999), p.500

<sup>161</sup> Art.I

<sup>162</sup> GC I- art.49; GC II- art.50; GC III- art.129; GC IV- art.146

<sup>163</sup> Additional Protocols art.85(1); art.88

<sup>164</sup> Arts 4, 5, 7 & 8

<sup>165</sup> Obligations also arise under Art. IV of the Apartheid Convention

<sup>166</sup> GA Resolution 3074 (XXVIII) UN Doc A/9030 (3 December 1973); GA Resolution 2840 (XXVI) UN Doc A/8429 (1971)

customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.<sup>167</sup>

Bassiouni believes that crimes against humanity fall within this obligation. He asserts that “[t]his duty... has become a *civitas maxima* and a rule of customary international criminal law.”<sup>168</sup> If crimes against humanity were in the process of becoming customary international law in the Nuremberg Tribunal, as Cassese believes<sup>169</sup>, then they are certainly part of it by now, when developments since then such as the international tribunals are taken into account.

It is also well recognised that the obligation exists in relation to war crimes, particularly in reference to the explicit obligations in the Geneva Conventions and Additional Protocols, and also for Genocide, again from the Genocide Convention.

The legal literature discloses that the following international crimes rise to the level of *jus cogens*: aggression; genocide; crimes against humanity; war crimes; piracy; slavery & slave-related practices; and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*.<sup>170</sup>

Sources to support this include international *opinio juris*; treaty provisions and preambles; the number of ratifications of treaties outlawing these crimes; the statutes and pronouncements of the international criminal tribunals; and support by legal scholars.

### 3.3 Jurisdiction

Whilst the UN has operational command of peacekeeping personnel, it is, in the end, the sending state that retains disciplinary jurisdiction over their own peacekeepers, military or civilian. This is based on the fundamental international legal principle of state sovereignty. Thus the UN has responsibility for conduct, which means issuing codes of conduct, rules and bulletins, and training troops. Troops are supposed to be held accountable to these codes and standards of behaviour but discipline is the responsibility of the sending State and not the responsibility of the UN. Unfortunately this

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<sup>167</sup> Ian Brownlie, *Principles of Public International Law*, 6th ed, Oxford University Press: Oxford, (2003), p.488-489

<sup>168</sup> Bassiouni, *Crimes Against Humanity*, *supra* note 159, p.500, see also p.498

<sup>169</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press: Oxford, (2003), p.72

<sup>170</sup> Bassiouni, “The Sources & Content of Int’l Criminal Law: A Theoretical Framework” in Bassiouni, *International Criminal Law: Crimes, vol.1*, 2<sup>nd</sup> ed., Transnational Publishers, Inc: Ardsley, NY, (1999), p.41

has resulted in the system that we see today, with vague codes and standards and investigations rarely undertaken. Even if someone is repatriated by the UN, they are rarely disciplined by their national authorities as they should be. Even if a military disciplinary system has a clear distinction between minor disciplinary misconduct and major disciplinary misconduct or criminal misconduct, these crimes against women are treated as minor disciplinary misconduct if anything at all. As it is a male dominated field of work, the peacekeeping and military system has not placed importance on the crimes of trafficking and rape and these crimes have more often than not remained unpunished. “History has shown that contributing states are remiss in prosecuting their soldiers.”<sup>171</sup> This is despite the fact that the UN has stated several times that it has a zero-tolerance policy against trafficking and prostitution related offences- ie: that these offences will not be tolerated. Committees such as UNAMSIL’s Coordination Committee for the Prevention of Sexual Exploitation and Abuse are a good start, but do not offer a guarantee of discipline.

The model SOFA delineates jurisdiction in Part VIII: “[The Participating State] agrees to exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with [the United Nations peace-keeping operation].” This is a standard allocation of jurisdiction that exists throughout all UN operations.

The 1999 Secretary-General’s bulletin on observance on international humanitarian law also makes reference to the application of national law.<sup>172</sup> It confirms that the list of fundamental principles and rules as provided in the bulletin are not exhaustive, and that peacekeeping personnel will be always subject to “the national laws by which military personnel remain bound throughout the operation”. This allows for the application of the laws of whichever treaties a sending state is party to, for that sending state’s troops.

Likewise the Directives for Disciplinary Matters confirm the legal status of troops:

Military members of national contingents assigned to the military component of a United Nations peacekeeping or other field operation shall be subject to *the exclusive jurisdiction of their respective participating States* in respect of any criminal offences that may be committed by them *in the mission area.* (emphasis added)

The directives go on to describe the process of UN investigations- the preliminary investigation, then a Board of Inquiry (BOI) by the Office of Internal Oversight, followed by repatriation. Unfortunately, the BOI is considered to be a confidential, internal investigation, results of which will only be made known to the sending state’s government with UN permission.

The legal status of civilian police officers and military observers is somewhat different to that of military troops.

Civilian police officers and military observers are... subject to *the jurisdiction of the host*

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<sup>171</sup> Barbara Bedont, in Rehn & Sirleaf, *supra* note 97, p.72

<sup>172</sup> Section 2

*country/territory* in respect of any criminal offences that may be committed by them *in the host country* and any disputes/claims of a civil nature not related to the performance of their official functions (emphasis added).

The dissimilarity in wording between the two directives is quite distinct. Civilians and observers are considered experts performing missions, and not officials as the military troops are. The different jurisdiction is significant. CivPol and UNMOs are subject to the jurisdiction of the territory or state in which the offence is committed (notably for both criminal offences and civil claims), whereas the military troops are not subject to this jurisdiction. The military troops are subject to the *exclusive* jurisdiction of their sending state (in relation to criminal offences only). This would imply that even with a waiver of immunity a soldier could not be prosecuted in the host territory. However, as is demonstrated by the example of the pending prosecution in East Timor, this immunity can indeed be waived, giving jurisdiction to the host territory. The wording does not, however, exclude CivPol and UNMOs from the jurisdiction of their sending state, as the jurisdiction granted to the host state is not exclusive.

The territorial jurisdictions also have distinguishing attributes. As concerns military personnel, sending states may have exclusive jurisdiction, but only in relation to offences committed *within the mission area*. This may indicate a more restricted territorial application than that of the territorial jurisdiction given to the host state, which covers offences committed *in the host country*. The mission area may only be a partial area of the host country. Therefore this seems to indicate that an offence committed by a soldier within the host country but outside the mission area would fall within the jurisdiction of the host state. Again, however, in reality, jurisdiction is usually not granted to the host territory, and CivPol and UNMOs are still considered protected by their immunities. (See below for discussion on immunity.)

This is usually confirmed in the SOFAs. For example, Annex 11 to the Dayton Agreement, states that all “IPTF personnel shall remain subject to penalties and sanctions under applicable laws and regulations of the United Nations and other states.” This means that the IPTF (civilian police) are not subject to the laws of the host territory, although the Dayton Accord terms are not particularly clear. It is not specifically stated who has jurisdiction- it is merely indicated that the host state does not have jurisdiction, by assuming that the “usual” rules are followed of sending state jurisdiction rather than host state. The reference to NATO military personnel is much clearer. Appendix B of Annex 1A delegates *exclusive* jurisdiction to the sending state for any criminal or disciplinary offences which may be committed by nationals of the sending state in the Republic of Bosnia and Herzegovina.

The Secretary-General’s 2003 bulletin dealing with sexual exploitation and sexual abuse states that after a proper investigation, if evidence exists supporting such allegations, the cases *may* be referred to national authorities for criminal prosecution, after the Office of Legal

Affairs (OLA) has consented.<sup>173</sup> This is a vague statement that offers no concrete guidelines for these situations. It does not outline how much evidence is required to support allegations. The requirement of consent of the OLA creates another administrative step in the process that may simply hold up the referral to national authorities. The main weakness of this section is that it merely states that the cases “may” be referred to national authorities. There is thus no obligation at all stemming from this bulletin for UN investigators to refer the cases to national authorities- it is presented more as a choice, one which it is evident is rarely made in the affirmative. The negative choice is often made for “boys will be boys” reasons, but also for political reasons (the UN does not want to create scandal or antagonise mission contributors) and because missions are usually understaffed.<sup>174</sup>

The Military Directives paint a picture of the ideal situation of a follow-up to be made by the UN:

Although the responsibility to discipline military members of national contingents remains a national responsibility, the United Nations does have an interest in ensuring that justice is carried out. Following repatriation, the United Nations shall request information about the action taken with regard to repatriated military members of national contingents. If no response is received, periodic reminders will be sent to the concerned Permanent Mission from the Military Division of the Department of Peacekeeping Operations. If still no response is forthcoming, appropriate steps shall be taken to bring the matter to the attention of the Government concerned at the highest possible levels, to underscore the seriousness of the matter and to pursue it with a view to seeing that appropriate disciplinary steps are taken.

However, the ideal is far from reality: “You have to understand that once the UN sends these files to the individual countries, it is up to their governments to take action, and the UN is no longer in the picture”.<sup>175</sup> In reality it is unreasonable to expect an understaffed peacekeeping mission to follow-up on the violations while having to deal with work in the field, and even less likely that the main office staff will bother to follow-up an event that happened in the field.

### 3.4 Immunity

The biggest barrier to discipline and prosecution of international peacekeeping personnel for rape, prostitution-related and trafficking-related offences is immunity. Sections 20 and 23 of the Convention on the Privileges and Immunities of the United Nations grant immunities to

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<sup>173</sup> Section 5

<sup>174</sup> Rehn & Sirleaf, *supra* note 97, p.72

<sup>175</sup> UNMIBH spokesperson at UN joint press conference, July 26, 2001, Sarajevo in “Hopes Betrayed”, *supra* note 11, p.60

officials and experts respectively. The Convention also provides for the waiver of these immunities. The sending state can usually waive these immunities, and the Secretary-General is imbued with the power to waive immunities “in any case where, in his opinion, the immunity would impede the course of justice”. The immunities are only granted to officials and experts in the interests of the UN itself. Officials and experts are not to benefit personally from the immunities and privileges.

Military troops are considered UN officials, and civilians and observers are considered experts performing missions, so they fall respectively under Article V and Article VI of the Convention on Privileges and Immunities. The Directives for Disciplinary Matters for military troops offer more detail than the Convention itself:

They shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. They are, however, subject to the jurisdiction of the host country/territory in respect of any disputes/claims of a civil nature not related to the performance of their official functions.

CivPol and UNMOs are also granted immunity, which the Secretary-General can waive. Yet, again, a difference arises in the wording of the Directives for CivPol and UNMOs.

[T]hey enjoy *inter alia* immunity for the purposes of the official acts they perform. Civilian police officers and military observers are, however, subject to the jurisdiction of the host country/territory in respect of any criminal offences that may be committed by them in the host country and any disputes/claims of a civil nature not related to the performance of their official functions.

The realities of the immunities granted in the actual SOFAs may differ from these directives. The SOMA (Status of Mission Agreement) and SOFA for UNAMET and INTERFET respectively granted both military and civilian personnel immunity from Indonesian criminal and civil jurisdiction, and local criminal and civil jurisdiction.<sup>176</sup> There is no distinction made between official and expert, or between civil and criminal in the application of immunity. The two operations are considered as organs of the UN, and therefore fall under the Convention on Privileges and Immunities, which means that immunities should still be able to be waived by the Secretary-General for any offences committed.

Annex 11 of the Dayton Agreement, related to IPTF personnel in Bosnia and Herzegovina, ensures that

The Parties shall accord the IPTF Commissioner, IPTF personnel, and their families the privileges and immunities described in Sections 18 and 19 of the 1946 Convention on the Privileges and Immunities of the United Nations. In particular,

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<sup>176</sup> Kelly et al, *supra* note 149. After INTERFET, UNTAET took over, and it continued to enjoy *mutatis mutandis* the same privileges and immunities.



they shall enjoy inviolability, shall not be subject to any form of arrest or detention, and shall have absolute immunity from criminal jurisdiction.

NATO military personnel, however, are to be considered *mutatis mutandis* as experts on a mission under the 1946 Convention (and thus fall under s.23). Art.3 of Appendix B to Annex 1A states that, despite immunities, the laws of Bosnia and Herzegovina must still be respected, “insofar as it is compatible with the entrusted tasks/mandate and shall refrain from activities not compatible with the nature of the Operation”. This seems to indicate that immunities may not apply for activities performed outside of official duties, but it is not actually clear. These activities are prohibited, but the article does not mention whether immunity would be lifted in case of violations. It is to be assumed that waiver of immunity applies, given the applicability of the Convention on Privileges and Immunities, which provides for immunity waiver in that situation. Unfortunately, it is a rare occasion when immunity is waived, as demonstrated by the examples in Part 1 of this paper.

All the UN documentation, from the Directives to the Convention on Privileges and Immunities explicitly state that immunity is granted in relation to all acts performed in an official capacity. It should thus be the case that violations of international human rights and humanitarian law are considered to fall outside of the performance of official functions, and therefore immunity should not apply. This has been discussed in relation to the immunity of heads of state in court decisions such as *Pinochet*<sup>177</sup> and the *Arrest Warrant Case*.<sup>178</sup> While the immunity granted to heads of state is of a higher standard & further reaching than that granted to UN peacekeepers, it is evident that any limits on head of state immunity will likewise apply to peacekeeper immunity. Immunity *ratione materiae*, which applies to both high level and low level officials, can only be applied to acts performed in an official capacity. Therefore, acts done in a personal capacity are not covered by this immunity. Six of the seven judges in the *Pinochet* ruling found that there are certain crimes under international law to which immunity *ratione materiae* cannot be applied. One of the concepts that lie behind this reasoning is that these crimes are so abominable that they offend the whole of humankind, and thus they cannot possibly be considered part of official duties. Considering these crimes as part of official duties is to defeat the purpose of peacekeeping- that is, restoring peace and stopping these crimes. While *Pinochet* is not a decision that is binding on any international court or tribunal, it is a still a big step to recognising in a highest level court of law that immunity cannot be granted for certain international crimes, and setting standards relating to the limitations on immunity.

At any rate, the international precedent has been set for the removal of immunity for such serious international crimes as those that fall within

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<sup>177</sup> *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (Amnesty International and other intervening)* (No.3) [1999] 2 All E.R. 97 (HL) (*Pinochet*)

<sup>178</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002 (*Arrest Warrant Case*) <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>

the jurisdiction of the ICC. The Nuremberg Tribunal, the Tokyo Tribunal, the ICTY, the ICTR and the Special Court for Sierra Leone (SCSL) all dealt with or are dealing with the prosecution of officials, including heads of state<sup>179</sup>, for genocide, crimes against humanity and war crimes. Their official position was no bar to their prosecution, as provided for in the founding Charters and Statutes of each tribunal.

### 3.5 How Would the ICC have Jurisdiction over Peacekeepers?

ICC jurisdiction is based on the delegation of state sovereign jurisdiction. Jurisdiction is granted on the basis of one of the two reasons given in art.12<sup>180</sup>: that the crime was committed by a national of a state party to the Rome Statute, or that the crime was committed on the territory of a state party. Thus the peacekeeper will fall under the jurisdiction of the ICC if the host territory is a party to the ICC, or if the sending state is. Yet, as is demonstrated by the discussions of jurisdiction and immunity above, the host state does not always have jurisdiction. Therefore, it would appear that the ICC will only have jurisdiction over the peacekeeper if the sending state is a party to the Rome Statute.

However, it should be the case that the host state will also have jurisdiction, because immunities should be lifted in the case of international crimes such as trafficking, rape, enforced prostitution and sexual slavery. Territorial jurisdiction exists as a core element of statehood. Ordinarily a crime committed by a national of state A in the territory of state B is not within the jurisdiction of state A. State B has an obligation to inform state A of the situation of A's national, but no obligation to give state A jurisdiction. If reality is to echo UN law and guidelines (Conventions, Directive, bulletins, etc), immunity does not apply to these international crimes, because they are outside of official duties. Then the host territory, as the state of the *locus commissi delicti*, should be able to have jurisdiction over perpetrators of these crimes. The host state should be given the right to be assured that, if the offender is turned over to the sending state, disciplinary proceedings will be undertaken in good faith. If not, the host state should have the jurisdictional right to take disciplinary action, especially if the host state is actually willing to see disciplinary action taken against these offenders- rather than the lack of willingness that has been demonstrated time and again by sending states.

The bottom line is that immunity should not have to be waived in relation to these crimes, if they are considered to be outside official duties. The immunities simply should not exist. However, the reality shows that there is an unwillingness to apply this concept, and that the immunities still need to be lifted by the Secretary-General or the sending state. A major change needs to be made in this area. If the Secretary-General has issued a zero tolerance policy against crimes such as sexual slavery, rape, enforced

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<sup>179</sup> Such as Milosevic in the ICTY.

<sup>180</sup> Provided that the crimes also fit within the temporal jurisdiction of art.11

prostitution and trafficking, then there should be no issue about immunity. Reality needs to back up the words.

The delegation of jurisdiction is linked to the principle of complementarity. That is, the ICC can only undertake jurisdiction if a state party with jurisdiction is unwilling or unable to undertake its own investigation. A host state is likely to delegate jurisdiction based on being unable to deal with the situation, as often states that are host to peacekeeping operations are in a state of disrepair and have no infrastructure. This often means that local courts are not capable of functioning. In certain cases of international crimes, states are under an obligation to investigate and prosecute, so if they cannot or will not do so, the ICC can, and should do so.

Another way for the ICC to gain jurisdiction delegated from a state is through the concept of universal jurisdiction. While the ICC does not obtain jurisdiction through universal jurisdiction, if a state has jurisdiction via universal jurisdiction, that state can delegate its jurisdiction to the ICC. In comparison to treaty obligations *aut dedere, aut judicare*, customary law not set down in treaties is permissive, allowing universal jurisdiction but imposing no obligation. However

[s]ome commentators [incl. Bassiouni] go beyond the above view on permissive universal jurisdiction and argue with respect to some or all core crimes that such jurisdiction is mandatory at customary law, often adducing arguments of *jus cogens* and obligations *erga omnes* in support.<sup>181</sup>

Broomhall disagrees, believing there is only permissive universal jurisdiction.<sup>182</sup> Permissive universal jurisdiction relating to war crimes, crimes against humanity & genocide is granted by the Geneva Conventions, Hague Law, the Additional Protocols & statutes of criminal tribunals. Like Broomhall, Cassese recognises universal jurisdiction under particular treaties but does not believe that a customary law of universal jurisdiction exists that imposes an obligation upon states to prosecute or extradite violators of international criminal law.

“...[N]o general international principle may be relied upon to warrant the proposition that such an obligation has materialised in the international community. At most, one could argue that in those areas where treaties provide for such an obligation, a corresponding customary rule may have emerged or be in the process of crystallising.”<sup>183</sup>

It may seem that there is not enough support for the idea of obligatory universal jurisdiction to declare that this concept has crystallised in international law. However Cassese seems to be saying that customary law only emerges from treaty law. Cassese is consequently dismissing the contribution of state practice and other sources generally referred to, such as

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<sup>181</sup> Bruce Broomhall, *International Justice & the International Criminal Court: Between Sovereignty & the Rule of Law*, Oxford University Press: Oxford, (2003), p.111

<sup>182</sup> *Ibid*

<sup>183</sup> Antonio Cassese, *International Law*, Oxford University Press: Oxford, (2001), p.264

the ICC statute, the international criminal tribunals and UN Resolutions, both from the General Assembly and the Security Council. The attitude within the international community to the crimes within the ICC's jurisdiction has cemented itself over the past century, with a more unified front towards punishing the perpetrators of these crimes. These crimes are beyond the basic concept of illegality, and are deemed not just bad, but *malum in se*. The perpetrators are *hostis humani generi*. These crimes are crimes of *jus cogens* for the reason that they "affect the interests of the world community as a whole because they threaten the peace and security of human kind and because they can shock the conscience of humanity".<sup>184</sup> This was the view at the time of the Nuremberg Tribunal, and since then it can certainly be demonstrated to have crystallised obligatory universal jurisdiction into customary law. This is inherently captured in the preamble of the Rome Statute itself, which recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", and affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at a national level and by enhancing international cooperation".

Under mandatory universal jurisdiction, then a state would actually have an obligation to exercise that jurisdiction by prosecuting or transferring to the ICC. In the end, whether universal jurisdiction is permissive or obligatory, universal jurisdiction gives any state within whose territory an offender is taken into custody at least the ability (if not the obligation) to exercise jurisdiction to either prosecute the offender or to send the offender to the ICC.

Of course it must be then ascertained whether the crimes within the ICC's jurisdiction fall under universal jurisdiction. To fall within universal jurisdiction, the crimes must be contrary to a peremptory norm of international law so as to infringe a law of *jus cogens*.<sup>185</sup> As discussed above, these include genocide, war crimes and crimes against humanity. "It is now generally accepted that breaches of the laws of war, and especially of the Hague Convention of 1907 and the Geneva Conventions of 1949, may be punished by any state which obtains custody of persons suspected of responsibility."<sup>186</sup>

### 3.6 The ICC & Immunity

*Pinochet* confirmed that, if the statute or charter of any international tribunal provides for the removal of immunity for officials, then immunity cannot be claimed in that forum.<sup>187</sup> Art.27 of the Rome Statute ensures that the jurisdiction of the ICC applies to all persons, and that official capacity does

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<sup>184</sup> Bassiouni, "The Sources & Content of Int'l Criminal Law", *supra* note 170, p.42

<sup>185</sup> Lord Millett's dissenting opinion in *Pinochet* [1999] 2 WLR 825 at 911-12 cited in Brownlie, *supra* note 167, p.304

<sup>186</sup> Brownlie, *supra* note 167, p.303

<sup>187</sup> Lords Browne-Wilkinson at 114; Goff at 120-1; Hope at 47; and Phillips at 189

not exempt a person from criminal responsibility for the crimes under the statute of the ICC. Nor does official position constitute a ground for reduction of sentence. It is expressly articulated that: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.<sup>188</sup> Under art.27, official capacity is no bar to prosecution, and is in fact irrelevant. It may not even be used as a mitigating factor, and in fact, will probably be seen as an aggravating factor.<sup>189</sup> The words “official capacity” enable a broad application of art.27, without restricting the removal of immunity to only certain groups of officials, thus including officials of intergovernmental organisations such as the UN.<sup>190</sup> Any official position that may attract immunities is covered by this provision. This concept of bringing all perpetrators to justice for the commission of international crimes echoes the Preamble of the Rome Statute, which states that the Court is “determined to put an end to impunity for the perpetrators of these crimes”. The prosecution of officials has much support in the history of international criminal law, and has been seen in the tribunals at Nuremberg (art. VII) and Tokyo (art. VI), the trials held under Control Council Law No. 10 (art. 4), and the ICTY (art.7) and ICTR (art.6). Art.27 covers both immunity *ratione personae* and *ratione materiae*.

However, the problem is that art.27 ensures that immunity cannot be used by an offender once the offender is in the custody of the ICC, but does not deal with the issue of immunity obligations between state parties. This removal of immunity from the ICC’s jurisdiction does not mean that a state party also automatically has jurisdiction over these crimes without immunity concerns.

This problem is embodied in art. 98 of the Statute, which deals with cooperation with respect to waiver of immunity and consent to surrender, and must be considered in conjunction with art. 27. Art. 98(1) relates to issues of immunity:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of immunity.

Art.98 (2) relates to issues of consent to surrender:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under

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<sup>188</sup> Art.27 (2)

<sup>189</sup> Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Nomos Verlagsgesellschaft: Baden-Baden, (1999), p.511, margin 20

<sup>190</sup> Paola Gaeta, “Official Capacity and Immunities”, in Cassese, Gaeta & Jones, *The Rome Statute of the International Criminal Court*, Vol.I, Oxford University Press: Oxford, (2002), pp. 978 & 991

international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending state for the giving of consent for the surrender.

Art.98 does not detract from art.27. It is more of a limitation on the ability to apply art.27 under certain circumstances. Notably, art.98 does not apply to any immunities that may arise under national jurisdiction; only to obligations in international law relating to immunities. In both cases, it is the obligation of the Court to obtain the consent of the third State in order to acquire jurisdiction over the alleged perpetrator. In particular, art.98(2) was drafted “in recognition of the provisions of Status of Force agreements, where members of the armed forces of a third State may be present on the territory of the requested State”.<sup>191</sup>

However what is not clear is exactly who are the third States referred to in art.98. When referring to non-State parties, the usual terminology used in the Rome Statute is *non-State parties*. This would seem to indicate that *third State* refers to either non-State parties or State parties to the Rome Statute. Using this interpretation, a State (in actuality, the Court) within whose territory a peacekeeper committed a crime would have to obtain the consent of any sending State, no matter where the peacekeeper originated. Yet this interpretation would be contrary with the basic concept of State parties’ obligations under the Rome Statute. In ratifying the Rome Statute, State parties are already agreeing to the jurisdiction of the ICC over their own nationals. This ratification is the consent. Thus, the only sensible interpretation, based on the principle of effectiveness, (*ut res magis valeat quam pereat*) is that the Court need only request the consent of non-State parties.<sup>192</sup> Using this interpretation, a peacekeeper of State party who commits a crime on the territory of another State party (the territory of the PKO) will not be able to hide behind his or her immunities and privileges. However the immunities and privileges of a peacekeeper of a non-State party will still have to be waived.

The Rome Statute does not provide for the possibility for the Court to try a defendant *in absentia*. This means that the perpetrator must be delivered to the Court. A failure to apply art.98 correctly may result in an inability of the Court to apply art.27 and thus prosecute a perpetrator.<sup>193</sup> Thus, in these circumstances, if immunity is not waived by the sending non-State party, the ICC cannot obtain jurisdiction over an alleged perpetrator.

During the Third Session of the Assembly of State Parties, the Draft Relationship Agreement between the Court and the United Nations<sup>194</sup> was adopted by the State Parties to the Rome Statute.<sup>195</sup> Art.19 of the Relationship Agreement sets out the rules concerning UN privileges and immunities. In this article, the UN “undertakes to cooperate fully with the

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<sup>191</sup> Triffterer, *supra* note 189, p.1133, margin 8

<sup>192</sup> Gaeta, *supra* note 190, p. 994

<sup>193</sup> Triffterer, *supra* note 189, p.513, margin 25

<sup>194</sup> 8 January 2002, PCNICC/2001/1/Add.1

<sup>195</sup> 7 September 2004, Press release ASP2004.004/Corr.1.EN <http://www.icc-cpi.int/library/statesparties/ICC-ASP20040906.004-E.pdf>

Court and to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities” that may apply to individuals alleged to have committed a crime within the jurisdiction of the Court. So under this Relationship Agreement, the UN is obliged to lift any immunities for peacekeeping personnel who have committed crimes within the Court’s jurisdiction. It does of course remain to be seen whether reality will reflect the Agreement.

## 4 Substantive Law: the Crimes

Even if the circumstances exist to satisfy the preconditions for exercise of jurisdiction as stated in art.12 of the Rome Statute, it still remains to be examined whether a crime of trafficking, enforced prostitution, sexual slavery or rape committed by a peacekeeper would fall within the subject matter jurisdiction of the ICC. That is, would the crimes fall within the definitions of crimes against humanity, war crimes or genocide? The elements of crimes must be examined to determine this. The chapeau elements are of particular importance.

### 4.1 Crimes against Humanity

Crimes against humanity are found in art.7 of the Rome Statute. Expressly stated in art.7 (1) (g) are the crimes of “rape, sexual slavery, enforced prostitution... or any other form of sexual violence of comparable gravity”. Art.7 (1) (C) prohibits enslavement and art.7 (1) (d) prohibits deportation or forcible transfer of population. Art.7 (1) (k) offers a broader prohibition of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

For the purposes of this section, if a crime committed by a peacekeeper is specified within the jurisdiction of the ICC under crimes against humanity, there is no need to take into account which laws were applicable to the peacekeeper. If it is decided that the offender falls within the jurisdiction of the ICC as delegated by a state, then applicability of humanitarian law is irrelevant, as crimes against humanity under the ICC have no nexus to armed conflict. It remains only to see if the crime falls within the definition of crimes against humanity, and within the individual definition of the crime itself. The crimes of rape, sexual slavery and enforced prostitution are clearly expressly prohibited. The definitions of these are found in the Elements of Crimes paper prepared by the Preparatory Commission (Prep Com).<sup>196</sup>

#### 4.1.1 Rape

The definition of rape finalised by the Prep Com drew from many sources, including human rights treaties and reports of special rapporteurs, but was heavily influenced by the statutes of the ICTR and ICTY, and even more so by the jurisprudence of the two ad hoc tribunals. The trial and appeal chambers of the tribunals have comprehensively created an expansive international definition of rape that did not previously exist. Cases such as

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<sup>196</sup> PCNICC/2000/1/Add.2, 2 November 2000; Report of the Preparatory Commission for the International Criminal Court Addendum- Part II Finalized draft text of the Elements of Crimes [http://www.icc-cpi.int-library-officialjournal-Elements\\_of\\_Crimes\\_120704EN.pdf](http://www.icc-cpi.int-library-officialjournal-Elements_of_Crimes_120704EN.pdf)



*Akayesu*<sup>197</sup>, *Celebici*<sup>198</sup>, *Furundzija*<sup>199</sup>, *Kvočka et ors*<sup>200</sup> and *Foca*<sup>201</sup> have all dealt with sexual offences.

*Akayesu* was the first case to develop a definition, finding it necessary to do so because no standard definition existed in international law. The Chamber discussed rape as a crime against humanity.<sup>202</sup> The definition is quite extensive, as there was a desire to expand from the traditional domestic jurisdiction definition of non-consensual intercourse. This developed from the acceptance that rape might include “acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual”.<sup>203</sup> The Tribunal used the Chamber’s definition and expanded it slightly. There was agreement that rape is a form of aggression, but that it cannot be described in a “mechanical description of objects and body parts”.<sup>204</sup> The Tribunal found sexual violence, including rape as an invasion of a sexual nature, to be committed against a person in coercive circumstances. “Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion”.<sup>205</sup> Further noting the situation where the military Interahamwe were constantly present among the Tutsi women in the bureau communal, the Tribunal held that armed conflict is a situation that may render coercion intrinsic.

In the ICTY, the *Furundzija* Trial Chamber began its discussion of rape and sexual assaults in international law by reference to much of the standard international humanitarian law in existence.<sup>206</sup> This included Article 27 of the Fourth Geneva Convention; and various provisions of the two Additional Protocols of 1977. The Chamber also noted the prohibition of rape and inhuman treatment as war crimes under the Penal Code of the SFRY.<sup>207</sup> Customary international law was likewise addressed, including Article 44 of the Lieber Code prohibiting rape; and Article 46 of Hague Convention IV. Further mention was made of Control Council Law No.

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<sup>197</sup> *Prosecutor v Jean Paul Akayesu*, ICTR-96-4-1, 2 September 1998

<sup>198</sup> *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, IT-96-21-T, 16 November 1998

<sup>199</sup> *Prosecutor v Anto Furundzija* IT-95-17/1-T, 10 December 1998

<sup>200</sup> *Prosecutor v Miroslav Kvočka, Milojica Kos, Mlano Radic, Zoran Zigic & Dragoljub Prcac*, IT-98-30/1-T, 2 November 2001

<sup>201</sup> *Prosecutor v Kunarac, Kovac & Vukovic*, IT-96-23 & IT-96-23/1-A, Appeal Judgment 12 June 2002

<sup>202</sup> Under Article 3 of the ICTR Statute, crimes against humanity must be “committed as part of a widespread or systematic attack on a civilian population on national, political, ethnic, racial or religious grounds”. Rape falls under Article 3(g), as well as Article 4 which designates violations of common Article 3 of the Geneva Conventions.

<sup>203</sup> Para 686

<sup>204</sup> Paras 597 and 687

<sup>205</sup> Para 688

<sup>206</sup> Paras 165-168. The ICTY Statute explicitly prohibits the crime of rape, under Article 5 as a crime against humanity. The Chamber accepted rape as a grave breach of the Geneva Conventions, or as a violation of the laws or customs of war, able to be prosecuted under Article 3 of the ICTY Statute. Article 3 has a wide range, and covers outrages upon personal dignity including rape (see para 173). Article 4 of the Statute presents rape as an act of genocide. Article 5(i) of the Statute covers “other inhuman acts”, which is a very general term that may encompass sexual assault.

<sup>207</sup> Article 142

10<sup>208</sup>, the Tokyo Tribunal's convictions<sup>209</sup>, and the US case of *Yamashita*.<sup>210</sup> Taking all this into account, the Chamber determined that the prohibition of rape and sexual assaults has thus become a universal international law.<sup>211</sup>

However, the Chamber pointed out that no human rights instrument prohibits rape or sexual assault. There are implicit prohibitions contained in the ICCPR in the provisions protecting physical integrity.<sup>212</sup> The Chamber also briefly mentioned *Cyprus v Turkey* and *Aydin v Turkey* in a footnote.<sup>213</sup> In defining rape, the Trial Chamber utilised the unchallenged definition presented by the Prosecution, with the recognition that no definition exists in international law. The Pre-Trial Brief submitted by the Prosecution presented rape as a forcible act. That is, the rape would be

accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression.<sup>214</sup>

The act "includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis".<sup>215</sup> This definition is quite limited, considering the reference to the element of force. This issue was addressed later by the ICTY in the *Foca* case, where the Tribunal was to find that force is not an element *per se* of rape.<sup>216</sup>

The Chamber sought to expand the Prosecution's definition of rape by recognising the interpretation provided by the ICTR in *Akayesu*, which presented rape as a coercive crime that cannot be described in mechanical terminology.<sup>217</sup> This was also upheld by the ICTY in *Celebici*.<sup>218</sup> The Chamber still sought to define rape under the criminal law principle of specificity, the maxim of *nullum crimen sine lege stricta*. The fact that domestic jurisdictions take a strict stance against rape and sexual assault was important in recognising the universal prohibition of the crimes, yet the variety of domestic definitions did not provide one simple answer for the Chamber. Some jurisdictions have a very broad construction of the *actus reus* of rape.<sup>219</sup> Yet all jurisdictions specify force, coercion, threat or acting without the consent of the victim as an essential constituent of rape.<sup>220</sup>

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<sup>208</sup> Article 11(1)(c)

<sup>209</sup> Generals Toyoda and Matsui; former foreign minister Hirota. *The Prosecutors and the Peoples of the Asia-Pacific Region v Emperor Hirohito et al and the Government of Japan* Summary of Findings of the Women's International War Crimes Tribunal 2000, 12 December 2000 at [www1.jca.apc.org/vaww-net-japan/e\\_new/judgement.html](http://www1.jca.apc.org/vaww-net-japan/e_new/judgement.html)

<sup>210</sup> *Application of Yamashita*, 327 US 1 (1946)

<sup>211</sup> Para 168

<sup>212</sup> Article 7, that prohibits cruel, inhuman or degrading treatment.

<sup>213</sup> Para 170, ff 196. *Cyprus v Turkey* 4 EHRR 482; *Aydin v Turkey* ECHR 57/1996/676/866 Judgment of 25 September 1997

<sup>214</sup> Para 174

<sup>215</sup> Para 174

<sup>216</sup> Para 129 of *Foca*

<sup>217</sup> Para 176; Paras 597-598 of *Akayesu*

<sup>218</sup> Para 176; Para 479 of *Celebici*

<sup>219</sup> Including the Crimes Act (NSW) s.61(H)

<sup>220</sup> Eg: Article 242 of the Dutch Penal Code; Article 201 of the Austrian Penal Code; Articles 222-223 of the French Code Pénal

The Chamber differentiated between domestic jurisdictions' criminalisation of forced oral penetration as rape or sexual assault, but found that "such an extremely serious sexual outrage as forced oral penetration should be classified as rape".<sup>221</sup> Under the Tribunal's jurisdiction, forced oral sex is sexual assault as a war crime or crime against humanity. Categorising forced oral sex as rape rather than sexual assault does not adversely affect an accused in terms of sentencing, as "forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration".<sup>222</sup> In classifying forced oral penetration as rape, the Chamber was intending to broaden the definition of rape as part of the fundamental principal of protecting dignity.<sup>223</sup>

All acts of rape and sexual assault are an abuse on "the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating to the victim's dignity".<sup>224</sup> Therefore the Chamber saw the distinction between rape and sexual assault as an issue of relevance primarily for the purposes of sentencing.

Finally, the Chamber found that the commission, planning, ordering, instigating, or aiding and abetting rape and sexual assault are all prohibited acts under Article 7(1) of the Statute.<sup>225</sup> The objective elements of rape were stated as:

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>226</sup>

In *Kvočka* the Chamber discussed the definition of rape, as provided in *Akayesu*, *Furundzija*, *Celebici* and *Foca*.<sup>227</sup> Essentially, the *Foca* definition was accepted as the premium definition. This encompassed the *Akayesu* judgment's definition of "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive", and the *Furundzija* objective elements of sexual penetration. However, *Foca* rejected the restrictive notion of the requirement of force, rather opining that rape will be found "where such sexual penetration occurs without the consent of the victim". The Chamber conflated the *Celebici* decision that coercive conditions are inherent in situations of armed conflict, and the *Furundzija* decision that "any form of captivity vitiates consent". The *mens rea* of rape was determined to be that the perpetrator intended to sexually penetrate the victim with the knowledge that this act was without the consent of the victim. This definition formulated by the Chamber is thus quite comprehensive. It encompasses all of the most appropriate elements of

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<sup>221</sup> Para 183

<sup>222</sup> Para 184

<sup>223</sup> Para 184

<sup>224</sup> Para 186

<sup>225</sup> Para 187

<sup>226</sup> Para 185

<sup>227</sup> Paras 175-183. NB: *Foca* Trial Chamber, not appeal.

the previous ICTR and ICTY decisions- coercion, lack of consent, and sexual violation, without any mention of notions such as honour.

The Appellants argued that force or threat of force is an essential element of rape.<sup>228</sup> The Prosecutor (as the Respondent in the Appeal) referred to the Trial Chamber decision that any consent is nullified by force, threat of force or coercion, but that force is not an essential element of the crime.<sup>229</sup> The Chamber agreed with the Trial Chamber, and rejected the notion that resistance is necessary to prove rape. “The Appellant’s bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts”.<sup>230</sup> While force provides clear evidence that the act was non-consensual, “force is not an element *per se* of rape”.<sup>231</sup> Narrowing the focus of rape to situations only where force was used would allow perpetrators to evade conviction where force was not used.

In the *Foca* appeal, the Appeals Chamber found that most crimes that are war crimes or crimes against humanity are coercive crimes that render consent impossible.<sup>232</sup> Taking into account laws in certain domestic jurisdictions, the Chamber stressed the need to presume non-consent in a situation of power inequalities, such as detainees and their captors.<sup>233</sup> The most egregious element of the crimes was that the women were treated as the legitimate property of the soldiers. The rapes were multiple and regular. This fact also negates any possibility of consent. Circumstances of captivity mean a perpetrator could not assume intercourse was consensual.<sup>234</sup> Kovac argued that his relationship with witness FWS-87 was one of love, a statement that emphasises the gender gulf, demonstrating the difference between men’s views and women’s experiences. However the Appeal Chamber agreed with the Trial Chamber that it was “rather one of cruel opportunism on Kovac’s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old”.<sup>235</sup> This situation can be likened to the peacekeepers who “freed” trafficked women by purchasing them, only to keep them in their apartments.

The Prep Com finally concluded with the following elements of Article 7 (1) (g)-1 crime against humanity of rape:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the

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<sup>228</sup> Para 125

<sup>229</sup> Para 126

<sup>230</sup> Para 128

<sup>231</sup> Para 129

<sup>232</sup> Para 130

<sup>233</sup> State and federal laws of the United States prohibit sex between a prison guard and an inmate. This was recognised by the courts in *State of New Jersey v Martin*, 235 NJ Super. 47, 56, 561 A.2d, 631, 636 (1989), which acknowledged that unequal positions of power negate consent. The German Criminal Code also makes a criminal offence of sex with a prisoner; and sex by exploitation of a public office position.

<sup>234</sup> Para 218

<sup>235</sup> Para 280

victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

Aside from blatant rape such as the case of Frank Rhongi, it could be argued that the personnel who are clients of enforced prostitutes and sexual slaves are guilty of rape. These women are not providing sexual services of their own accord, and are often beaten and threatened with further violence by the brothel owners. It is far too well-known that many of these women are trafficked and held against their will in enforced prostitution and sexual slavery. If a peacekeeper uses a prostitute who is not a local (evident from the language differences), there is almost a 100% chance that the woman is trafficked. This situation could fall under “taking advantage of a coercive environment”, or could even be considered to be an invasion against a person incapable of giving genuine consent. While “it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity”, these women are incapable of giving genuine consent to the sexual activity when they are beaten and have guns held to their heads to make them work.

## 4.1.2 Sexual Slavery

Slavery and slave-like practices are crimes that were among the very first to be prohibited under *jus cogens* and peremptory norms of customary international law.<sup>236</sup> The prohibition began in the 19<sup>th</sup> Century, and had certainly obtained the status of *jus cogens* by the second half of the 20<sup>th</sup> Century.

The ad hoc tribunals have not made any convictions for sexual slavery as a crime in its own right. Statutes of both tribunals only refer to enslavement, and do not have sexual slavery as an express crime. However, sexual slavery has been incorporated into the definition of enslavement by the ICTY. In *Foca*, Kovac and Kunarac were convicted of the crime against humanity of enslavement based on acts of sexual slavery. Kovac kept young women in his apartment, where they were repeatedly raped, humiliated and degraded.<sup>237</sup> They were lent and sold to other men for sexual purposes<sup>238</sup>.

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<sup>236</sup> *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* ICJ Judgment of 5 February 1970 <http://www.icj-cij.org/icjwww/idecisions/isummaries/ibtsummary700205.htm>

<sup>237</sup> These crimes were also considered to be outrages upon personal dignity, because the women were repeatedly raped, humiliated and degraded while held in Kovac's apartment. The mental element required for this crime is that the perpetrator must be aware that their

Kunarac took women to a house, where he kept them for himself and other soldiers to rape them.<sup>239</sup> Vukovic also took women from the Sports Hall to a house to be raped and tortured by him and other soldiers.<sup>240</sup> He also raped some of the women in Kovac's apartment.<sup>241</sup> The ICTY Appeals Chamber found that enslavement does not have to be for the purposes of sexual acts, but rather is concerned with the exercise of power through ownership.<sup>242</sup> If the enslavement is based on sexual exploitation, this is a separate crime from the crime of rape.<sup>243</sup> This is a vital distinction for the Chamber to have made, as it provides jurisprudential authority for the separation of and recognition of the range of crimes that are committed against women. Further, although the duration of the enslavement was determined not to be an element of the crime, it was found that the longer the period of enslavement, the more serious the offence.<sup>244</sup> The Chamber considered the length of time of enslavement to be an aggravating factor in sentencing.<sup>245</sup>

In examining the definition of enslavement, the Appeals Chamber agreed with the Trial Chamber that the 1926 Slavery Convention<sup>246</sup> provides the base definition, which has "evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership".<sup>247</sup> There is no exhaustive list of these contemporary forms of slavery, but they may include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".<sup>248</sup>

The Appellants contended that "lack of resistance or the absence of a clear or constant lack of consent during the entire time of the detention can be interpreted as a sign of consent".<sup>249</sup> This was categorically rejected by the Appeals Chamber, and did not even see lack of consent as an element of the crime due to the concept of ownership essential to the crime. The mental element relates to the perpetrator, with the *mens rea* consisting of the

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treatment of the victim, (either by act or omission), could be perceived by the victim as humiliating or degrading. That is, the perpetrator need not know the actual consequences of his behaviour, just the possible consequences. The subjective test is whether the victim was humiliated or degraded. However, a victim will experience different levels of humiliation or degradation, depending on their own sensitivity. Thus, an objective test is also applied; that is, would the reasonable person be outraged (humiliated, degraded, etc)? The difficulty of this test is that there is no neutral standard that can be applied to crimes that occur only against women. The test for these crimes really should be the objective woman, considering the gender-specificity of the crimes.

<sup>238</sup> Para 159

<sup>239</sup> Para 207

<sup>240</sup> Para 300-303. Vukovic was convicted of rape as a war crime and crimes against humanity.

<sup>241</sup> Para 302

<sup>242</sup> Para 122

<sup>243</sup> Para 186

<sup>244</sup> Para 121

<sup>245</sup> Para 356

<sup>246</sup> <http://www.unhchr.ch/html/menu3/b/f2sc.htm> see art.1

<sup>247</sup> Para 117

<sup>248</sup> Para 119

<sup>249</sup> Para 120

“intentional exercise of a power attaching to the right of ownership. It is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts”.<sup>250</sup> It must be noted, however, that in relation to the ICC, despite the Special Rapporteur declaring sexual slavery to be a form of slavery and not a separate crime<sup>251</sup>, this last aspect cannot be applied to the crime of sexual slavery. Given the specific wording of the Rome Statute expressly providing for sexual slavery as a crime within itself, the purpose of the enslavement is to use the person for sexual acts.

Finally, the Appeals Chamber cited the Nuremberg case of *Pohl*, in which it was found that “slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint... There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.”<sup>252</sup> This is particularly relevant in relation to those peacekeepers that purchase women, such as the IPTF and SFOR cases revealed in part 1 of this paper, especially for those men that claim the women were free even though they were still required to provide sexual services to their international purchaser.

More precise definitions of sexual slavery are to be found in the reports of the special rapporteur on contemporary forms of slavery. The 1998<sup>253</sup> and 2000 reports of Gay McDougall on systematic rape, sexual slavery and slavery-like practices during armed conflict confirm that the “critical elements in the definition of slavery are limitations on autonomy and on the power to decide matters relating to one’s sexual activity and bodily integrity”. It is emphasised that:

The term “sexual” is used in this report as an adjective to describe a form of slavery, not to denote a separate crime. In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm. The legal effect of *jus cogens* is that slavery, as well as crimes against humanity, genocide and torture, are prohibited at all times and in all places... Sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors... Clearly there can be no distinction which implies that slavery for the purposes of physical labour is a *jus cogens* crime, whereas slavery for the purposes of rape and sexual abuse is not...

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<sup>250</sup> Para 122

<sup>251</sup> See below

<sup>252</sup> Para 123. *US v Oswald Pohl and Others*, Judgement of 3 November 1947.

<sup>253</sup> E/CN.4/Sub.2/1998/13, 22 June 1998 and E/CN.4/Sub.2/2000/21, 6 June 2000

The ICC Article 7 (1) (g)-2 crime against humanity of sexual slavery<sup>254</sup> elements are that:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>255</sup>
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

Clearly the behaviour of the IPTF and SFOR personnel in purchasing women and their passports and then using these women for sex falls within this definition of sexual slavery. These men defended themselves by declaring that the women were free to leave if they so wished to and that they had in fact purchased the women to secure their freedom. However a woman who has been purchased and whose purchaser holds her passport is by principle deprived of her liberty. She has been treated like chattel, like property. This is exacerbated in a situation where she does not speak the language of her purchaser, so it is highly unlikely that she comprehends that she is “free”, such as the case of Kevin Warner. If she does not have access to her own passport, then she is certainly not free. Emerging from a system where she has been bought and sold, how is a woman to know that a peacekeeper who has purchased her is any different to any of her other purchasers? This is proven by the evidence that these women did not freely leave the apartments in a day-to-day lifestyle sense. The women only fled the slavery by running away, or when their captor left the country and returned their passport. There are no guidelines or precedents as to whether the test of slavery is subjective or objective, but an appropriate standard would be like the tests applied to the crime of outrages upon person dignity. That is, to use the subjective opinion of the person held in slavery rather than that of the captor, and temper this with the objective view of whether the reasonable person would view the situation as enslavement. The captor’s intentions may not translate into the reality that the woman experiences. Likewise, how a man perceives a situation is often very different to how a woman perceives the same circumstances.

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<sup>254</sup> This heading is footnoted: Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

<sup>255</sup> The footnote to this sub-article states that: It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.



### 4.1.3 Enforced Prostitution

Article 7 (1) (g)-3 Crime against humanity of enforced prostitution elements:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

Looking at the examples of the real stories from part 1, it is unlikely that any of these would fall under the definition of enforced prostitution. There is a possibility that the activities of the Russian KFOR soldiers may do so, but evidence would be required that they obtained pecuniary or other advantages from the other soldiers that used the women provided by the Russian soldiers for sexual services.

However it may be possible that peacekeeping personnel could be found guilty of enforced prostitution through an indirect channel. Instead of stopping the prostitution (which is actually part of their job), the peacekeepers are in fact encouraging it in their role as clients, as is evidenced by the figures provided in part 1 that show the growth of the industry due to the presence of international forces. This possibility would only be under limited circumstances, as technically being a client does not fall within the definition of prohibited activities. According to the definition, it would only be if the peacekeeper obtained or expected to obtain pecuniary or other advantage. While using the services of a prostitute is against UN regulations, it is not illegal under international law or under the majority of domestic legal systems.<sup>256</sup> It is unfortunately always the woman who is targeted, fined, sometimes jailed and always stigmatised.<sup>257</sup>

### 4.1.4 Trafficking

What is more controversial is whether all aspect of trafficking can be considered to fall within one of the crimes prohibited under art.7. The crime

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<sup>256</sup> Sweden has now legalised prostitution, but made it illegal to be a client. This places the emphasis on the male client & removes the stigma from the female as the prostitute.

<sup>257</sup> Even the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others only prohibits prostitution and pimping/brothel running, but not being a client. This Convention entered into force in 1951 but has only 74 state parties.

of trafficking is not specifically referred to in the Rome Statute. However, it is specifically mentioned in the footnote to the first element of crime of sexual slavery. Other than being prosecuted as sexual slavery, trafficking could possibly fall under the heads of forcible transfer of population or of inhumane acts intentionally causing great suffering.

Trafficking is recognised as an international crime in many international treaties, including the 1922 International Convention for the Suppression of the Traffic in Women and Children, the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (the Palermo Protocol).<sup>258</sup> Trafficking in persons is defined in art.3 (a) of the Palermo Protocol:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Trafficking is so inherently linked to sexual slavery, and given that trafficking is specifically stated in the elements of crimes as an arm of sexual slavery, this is certainly the most obvious choice for prosecution of traffickers. Unfortunately taking this stance detracts from the severity of trafficking as a crime within itself, but without an express provision against trafficking in the Rome Statute, this may be one of the only choices for prosecution of trafficking.

Looking at the activities detailed in Part 1, it can certainly be seen that many of those peacekeepers engaged in trafficking as defined in the Palermo Protocol. Undeniably the Russian KFOR soldiers did this, as they manifestly disguised women for the purposes of transporting them into Kosovo for the deliberate provision of sexual services. The US soldiers who transported women between Kosovo and Serbia also unashamedly trafficked. It can be argued that those peacekeepers that purchased women also engaged in trafficking. This group would fall under the “harbouring or receipt of persons... by means of... the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation”. In these cases, the exploitation would be sexual slavery, even if for their own purposes. It is only because these women are trafficked that the men are able to buy them as sexual slaves. Thus the link to sexual slavery is made, showing how trafficking is

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<sup>258</sup> A/RES/55/25

an inherent element of sexual slavery, and Art. 7 (1) (g)- 2 would be used as a means for prosecuting trafficking in the ICC.

However, it is difficult to envisage how the Court could justify applying the crime of sexual slavery to traffickers who play a more intermediate role in the process. It is not necessarily certain that, for example, the first person to transport a trafficking victim can be said to cause such person to engage in one or more acts of a sexual nature. The mere act of transportation may not satisfy this element, depending on how well the chain of causation is demonstrated. Nor may the element of ownership be demonstrated. Sometimes girls go willingly with the initial transporter/s, because the girls are given promises of jobs in more affluent countries. This is an attractive proposition that many are willing to undertake. Thus the initial contact and/or transporter/s are engaging in trafficking, but not necessarily sexual slavery because the element of ownership is not satisfied.

Thus, another option is deportation or forcible transfer of population. Article 7 (1) (d) Crime against humanity of deportation or forcible transfer of population elements are:

1. The perpetrator deported or forcibly transferred,<sup>259</sup> without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

If the activities of the Russian KFOR soldiers are considered, they would certainly fit under this definition. The women were brought into Kosovo from Moldova and the Ukraine, where they were previously lawfully present. It could certainly not be argued that the soldiers were not aware of the lawfulness of the women's presence in Moldova and the Ukraine.

The situation of the peacekeepers purchasing women from brothels is less clear cut. The presence of the women in the brothels was not lawful to begin with, and therefore element 2 is not satisfied. Elements 2 and 3 of the crime of forcible transfer of population seem to limit the application that this article may have to the crime of trafficking. Often women are bought and sold at many different points on their journey to the brothel that may be their final destination. This would mean that only the first part of the journey when the women are taken from their home territory would fall within the prohibited activities of Art. 7 (1) (d). On each subsequent leg of

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<sup>259</sup> “Deported or forcibly transferred” is interchangeable with “forcibly displaced”. The ICTY stated that “both deportation and forcible transfer relate to involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet the two are not synonymous in customary international law. Deportation presumes transfer beyond State border, whereas forcible transfer relates to displacement within a State.” *Prosecutor v Krstic* IT-98-33-T, 2 August 2001, Para. 521.

the journey, the women are no longer lawfully present in the area, and thus element 2 is not satisfied and the article cannot be applied.

The final option for the prosecution of trafficking as a crime against humanity is to turn to Article 7 (1) (k) crime against humanity of other inhumane acts, the elements of which are:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.

Trafficking undoubtedly inflicts great suffering upon its victims, as well as serious injury to physical and mental health. The victims are taken away from their family, kept in unhealthy conditions<sup>260</sup>, usually under violence or threat of violence. They are forced to provide sexual services without their consent, an act which is humiliating, harmful and often life-threatening.<sup>261</sup> Even without taking the sexual slavery and enforced prostitution into account, the actual trafficking experience inflicts suffering and injury. Women are often raped on the journey. They are bought and sold many times over, often kept in dark rooms, their naked bodies are subject to inspection by potential buyers, and they are frequently beaten and abused. The whole concept of trafficking is an inhumane act. These trafficking rings are more often than not sophisticated networks run by organised crime groups.<sup>262</sup> It is highly unlikely that anyone involved is not aware of the factual circumstances establishing the character of the act; after all, each person makes money from their sale or transfer of a woman. Thus, all the elements for art.7 (1) (k) are satisfied, and trafficking could be prosecuted in the ICC as a crime against humanity of other inhumane acts.

### 4.1.5 Chapeau Elements

To be classified as a crime against humanity, all crimes must satisfy particular common criteria, referred to as the chapeau elements:

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<sup>260</sup> Often the women are only provided with flimsy dresses, even in freezing conditions. They may only get 4-5 hours sleep before they are forced to clean the brothels and then begin work again. Often the food supplied to the women is insufficient to provide adequate nourishment. ‘So does it mean we have the rights?’ *supra* note 45 (Facts such as this can be found in any report on the trafficking, enforced prostitution and sexual slavery of women, as this is the reality in any territory where this occurs.)

<sup>261</sup> Many of these women are forced to have sex without condoms as the brothel owners get paid more for it. Subsequently, many women contract STDs including HIV/AIDS.

<sup>262</sup> Eg: UNICEF’s report “Trafficking in Human Beings in South-eastern Europe” 15 August 2000, [www.unicef.org/evaldatabase/CEE\\_CIS\\_2000\\_Trafficking.pdf](http://www.unicef.org/evaldatabase/CEE_CIS_2000_Trafficking.pdf) (Again, this information can be found in any report on trafficking.)

1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
2. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Thus, even if a crime complies with the elements of crimes for rape, sexual slavery, enforced prostitution and trafficking as discussed above, the crime will not be considered a crime against humanity unless these chapeau elements are satisfied. In the case of peacekeepers committing these crimes, it will be very difficult to show that these common elements are satisfied, particularly the first one.

The first common element is the most important; that the conduct was committed as part of a widespread or systematic attack directed against a civilian population. “It is now well established that the requirement that the acts be directed against a civilian “population” can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts”.<sup>263</sup> This does not exclude one act from qualifying as a crime against humanity, provided it is committed as part of a widespread or systematic attack. According to this element, the isolated act of Frank Ronghi in raping and murdering a girl in Kosovo would not be considered a crime against humanity, because at the time there was no widespread or systematic attack on the civilian population. “Thus the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population.”<sup>264</sup> The distinct concept of the crime is to exclude isolated and random incidents- which, in reality, crimes committed by peacekeepers are. “Civilian population” is intended to mean non-combatants.<sup>265</sup>

It would appear that the only way a crime committed by a peacekeeper could qualify as a crime against humanity would be if the operation was being conducted before peace had been brought to the territory in question. If groups were still conducting widespread or systematic attacks against the civilian population, then the behaviour of a peacekeeper could be seen as part of that attack, and in this situation it would be impossible to argue that the peacekeeper was not aware of the existence of the widespread or systematic attack, given that the purpose of peacekeeping operation would be to stop the attack. It is often the case that crimes against humanity are committed in circumstances amounting to armed conflict. Armed conflict is often the situation that PKOs are delegated to bring an end to. Armed conflict is considered to be evidence of a

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<sup>263</sup> *Tadic* IT-94-1 “*Prijedor*” (Trial Chamber), 7 May 1997, Sect.VI.D.2.(b).ii.a <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>

<sup>264</sup> *Tadic*, Sect.VI.D.2.(b).ii

<sup>265</sup> Margaret McAuliffe deGuzman, “The Road from Rome: The Developing Law of Crimes Against Humanity”, *Human Rights Quarterly* 22 (2000) 361. See also Dixon in Triffterer, *supra* note 189, p.129, margin 13

widespread or systematic attack on the civilian population, but it is generally accepted in customary international law that no nexus to armed conflict is required.<sup>266</sup> Echoing customary law, crimes against humanity under the Rome Statute do not require a nexus to armed conflict, and so can be committed in times of peace.<sup>267</sup>

The question could be raised as to whether the peacekeeping personnel would be guilty of aiding and abetting enforced prostitution and sexual slavery as crimes against humanity for their constant use of prostitutes. The use of prostitutes by PKO personnel can be considered widespread; a fact supported by the figures and stories in Part 1. However this argument would be a far stretch, and certainly difficult to establish. The use of prostitutes itself would have to be considered the widespread attack on a civilian population. In this case the civilian population would be the women who are trafficked and used for forced prostitution and sexual slavery. The term “population” does not refer to the entire population. Rather, “the “population” element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity”.<sup>268</sup>

Crimes against humanity go beyond the basic concept of being widespread or systematic. The principle of crimes against humanity is that they are so horrific that they shock all of humanity- hence the title of this category of crime. Crimes against humanity are “only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind”.<sup>269</sup> The Elements of Crimes paper states that “crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole.” This sets a very high standard, and the Court is not likely to judge lightly on crimes that carry such a heavy disgrace and penalty as these do. In fact, art.17(1)(d) allows for a case to be declared inadmissible if it “is not of sufficient gravity to justify further action by the Court”. It is unlikely that the Court would consider the use of prostitutes to be a crime so shocking to the international community and to humanity itself, especially given the fact that prostitution is legal in many countries. The acts of holding a woman in sexual slavery and rape would be viewed as being so shocking to humanity, as evidenced by the fact that these crimes are expressly prohibited in the Statute, yet they still need to qualify as an act part of a systematic or widespread attack. In the end, the odds weigh against the likelihood of one of the crimes of enforced prostitution, rape and sexual slavery as committed by a peacekeeper satisfying the high standards of the elements of crimes against humanity.

If the examples given in Part 1 are used, these crimes could not be considered crimes against humanity because there is no association with a

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<sup>266</sup> McAuliffe deGuzman, *supra* note 265, pp.355-360. See also *Tadic* case.

<sup>267</sup> Of course, this does seem to be a contradictory statement, as “peace” could not really exist in the circumstances of a widespread or systematic attack on the civilian population.

<sup>268</sup> *Tadic*, Sect.VI.D.2.(b).ii

<sup>269</sup> *Tadic*, Sect.VI.D.2.(b).ii., citing the United Nations War Crimes Commission

widespread or systematic attack. According to the Elements of Crimes paper, the widespread or systematic attack must be carried out:

pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.

Thus, contrary to Bassiouni’s argument that State action or policy is an essential characteristic of crimes against humanity<sup>270</sup>, under ICC jurisdiction State or governmental organisation is not necessary. The wording of the Elements of Crimes allows for the attack to be formulated by a non-state organisation, extending the reach of the ICC beyond State actors. This is much more comprehensive, as it is not always a State action or policy, but rather that of a group of rebels or revolutionaries that conducts attacks on the civilian population.

The final question is whether trafficking as an inhumane act could be considered a crime against humanity in the regard of being widespread or systematic. The targeted civilian group in this case would be women, and in particular women from poor and vulnerable backgrounds. The prevalence of trafficking in some areas is quite phenomenal, especially in an area such as South-eastern Europe. Trafficking is indeed a systematic occurrence, run by organised crime groups. It is an organisational policy actively promoted and encouraged by organised crime factions. It has become a widespread problem, with hundreds of women falling victims to traffickers, duped by false promises of a better life in Western European countries. The PKOs are very aware of the problem, and in fact have developed special departments and programs dedicated to fighting trafficking.<sup>271</sup> The perpetrator of crimes against humanity merely has to have knowledge of the existence of a wider attack, of the broader context in which his crime occurs.<sup>272</sup> There is no requirement of a specific intent for their actions to form part of that widespread or systematic attack or to contribute to the attack’s objectives, nor is there a requirement of knowledge of the policy behind the attack.<sup>273</sup> If proven that they had knowledge of the trafficking problem in the area, or should have had knowledge, the Russian KFOR soldiers contributed to a wider attack on women from poor regions of South-eastern Europe. It would be very difficult to argue that they had no knowledge of a severe trafficking problem in the region, given the publicity surrounding the crisis within and without the UN organisation itself. Trafficking is also likely to be seen as shocking enough to qualify as a crime

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<sup>270</sup> Bassiouni, *supra* note 160, pp.236 & 529

<sup>271</sup> UNICEF “Trafficking in Human Beings in South-eastern Europe”. See also report by UNICEF, UNOHCHR & ODIHR, “Trafficking in Human Beings in South-eastern Europe: Current Situation and Responses to Trafficking in Human Beings” [www.unhchr.ch/women/trafficking.pdf](http://www.unhchr.ch/women/trafficking.pdf) and report of the Secretary-General, “Trafficking in women and girls”, 22 August 2000, A/55/[www.un.org/womenwatch.daw/followup/trafficking.html](http://www.un.org/womenwatch.daw/followup/trafficking.html)

<sup>272</sup> *Tadic*, para 656

<sup>273</sup> McAuliffe deGuzman, *supra* note 265, pp.379-380, 389

against humanity. It would be a difficult argument to make, but a possible one, that trafficking falls within the Rome Statute definition of a crime against humanity.

## 4.2 War Crimes

Art.8 of the Rome Statute covers war crimes. It is an extensive and detailed provision, divided into applications for international and non-international armed conflicts. The main nexus of war crimes is that with armed conflict.

### 4.2.1 Rape, Sexual Slavery and Enforced Prostitution

The crimes of rape, sexual slavery and enforced prostitution are expressly included as war crimes under the Rome Statute, both in international (art. 8 (b) (xxii)) and non-international armed conflicts (art. 8 (e) (vi)). The references to these crimes are identical whether prohibited in an international or non-international armed conflict.<sup>274</sup> The definitions provided in the Elements of Crimes paper are identical to those as discussed above under crimes against humanity.

### 4.2.2 Trafficking

The discussion above on trafficking as sexual slavery applies equally to trafficking as a war crime (art. 8 (2) (b) (xxii)). However as a war crime, it would also be possible to consider the prosecution of trafficking under outrages upon personal dignity, in particular humiliating and degrading treatment (art. 8 (b) (xxi) as a serious violation of the laws and customs applicable in international armed conflict), inhuman treatment (art. 8 (a) (ii)), wilfully causing great suffering or serious injury to body or health (art. 8 (a) (iii)), and unlawful deportation or transfer (art. 8 (a) (vii)).<sup>275</sup>

In the case of an armed conflict of a non-international character, the applicable provisions are art. 8 (c) (i), which prohibits violence to life and person, in particular... cruel treatment, and the art. 8 (c) (ii) prohibition of outrages upon personal dignity, in particular humiliating and degrading

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<sup>274</sup> However, in the same articles, the prohibition of “any other form of sexual violence” differs. In the case of international armed conflicts, sexual violence is prohibited if it also constitutes a grave breach of the Geneva Conventions (art.8 (b) (xxii)). In a non-international armed conflict, sexual violence is prohibited if it also constitutes a serious violation of common art. 3 of the Geneva Conventions (art.8 (e) (vi)).

<sup>275</sup> There is another similar provision to deportation and forcible transfer of population, however under war crimes it is limited to transfers relating to the Occupying Power’s own population, and the population of the occupied territory, and thus does not apply to the concept of trafficking. If the law of Occupation is applied, as by the Australian Defence Force, the wording of the provision (art. 8 (b) (viii)) is too limited to include trafficking from outside the occupied territory into that territory.



treatment (as a serious violation of common art. 3 of the Geneva Conventions). However, as PKOs are considered to be part of international armed conflict, only the relevant international armed conflict provisions will be considered.

The notions relating to trafficking being outrages upon personal dignity and wilfully causing great suffering or serious injury are similar to those of other inhumane acts under crimes against humanity. The elements of outrages upon personal dignity are:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.<sup>276</sup>
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

In *Foca*, the ICTY Trial Chamber found that the victims were repeatedly raped, humiliated and degraded while held in Kovac's apartment. The mental element required for this crime is that the perpetrator must be aware that their treatment of the victim, (either by act or omission), *could* be perceived by the victim as humiliating or degrading. That is, the perpetrator need not know the actual consequences of his behaviour, just the possible consequences. This is confirmed in the Elements of Crimes paper, which states that the perpetrator does not have to be aware of the actual existence of the humiliation or degradation. A subjective test is applied, as to whether the victim felt humiliated or degraded. However, the results of this test will differ, depending on the sensitivity levels of each victim. Thus an objective test was applied by the ICTY; that is, whether the reasonable person be outraged (humiliated, degraded, etc). The difficulty of this test is that there is no neutral standard that can be applied to crimes against women. While trafficking can occur to men, the trafficking being considered in this paper is the trafficking of women for the purposes of sexual slavery and enforced prostitution. The experience of trafficking will be perceived completely differently by the women who are trafficked than by her trafficker (who may be male or female). The test for these specific crimes against women really should be the objective woman, considering the gender-specificity of the crimes. However, in considering trafficking, the humiliation and degradation (forced nudity, rape, being treated as a slave, being treated like property) of the victim caused by trafficking is evident.

The *actus reus* of the crime of outrages upon personal dignity was defined by the Prep Com as the humiliation, degradation or violation of dignity of a person. In *Aleksovski*, the ICTY held that:

An outrage upon personal dignity within art.3 of the Statute is a species of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the genus.

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<sup>276</sup> For this crime, "persons" can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality... an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged.<sup>277</sup>

In its brief for the *Foca* case, the Prosecution stated that “the safeguarding of personal dignity was intended to be flexible enough to encompass any act or omission that degrades, humiliates, or attacks the integrity of the victim, including sexual integrity.”<sup>278</sup>

In *Aleksovski*, the Tribunal addressed the seriousness of the conduct required:

The seriousness of an act and its consequences may arise either from the nature of the act per se or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of art.3 of the Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed.<sup>279</sup>

There is no way that trafficking could not be found to be an outrage upon personal dignity, given the humiliation and degradation of the crime. Likewise, the seriousness of the crime is undeniable, especially the aspect of selling people like property. It is a crime run by a network of people, thus obtaining a more conspiratorial aspect.

Inhuman treatment as a war crime has also been discussed in the ad hoc Tribunals, where it was decided that inhuman treatment has to be serious pain or suffering, but the ICC has gone further & stated that it must be severe pain or suffering. It is differentiated from torture by the purposive aspect of the crime. The crimes of torture or inhuman treatment are derived directly from the Geneva Conventions.<sup>280</sup> In fact, the ICTY has held that “in order to determine the essence of the offence of inhuman treatment, the terminology must be placed within the context of the relevant provisions of the Geneva Conventions & Additional Protocols.”<sup>281</sup> In *Celebici*, the ICTY also found that “humane treatment is the cornerstone of all four Conventions, and is defined in the negative in relation to a general, non-exhaustive catalogue of deplorable acts which are inconsistent with it, these constituting inhuman treatment”.<sup>282</sup> The Tribunal further held that:

Inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate & not accidental, which causes

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<sup>277</sup> *Prosecutor v Zlatko Aleksovski* IT-95-14/1-T, at para 56

<sup>278</sup> IT-96-23-PT, p.319

<sup>279</sup> Para 57

<sup>280</sup> Common Article 3

<sup>281</sup> *Celebici*, Para 520

<sup>282</sup> Para 532

serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The plain & ordinary meaning of the term inhuman treatment in the Geneva Conventions confirms this approach & clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' in the Convention fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principles of humanity, constitute examples of actions that can be characterised as inhuman treatment.<sup>283</sup>

The Geneva Conventions provide that all protected persons must be treated with humanity, and inhuman treatment is treatment contrary to this. The Commentary on the Geneva Conventions states that:

It could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant protected persons... a protection which will preserve their human dignity and prevent them being brought down to the level of animals. That leads to the conclusion that by "inhuman treatment" the Convention does not mean only physical injury or injury to health.<sup>284</sup>

The Commentary goes on to say that:

Certain measures, for example, which might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment.<sup>285</sup>

The crimes that are the focus of this paper can hardly be considered to be consistent with the principles of humanity. Indeed, trafficking, enforced prostitution and sexual slavery fit in with the exact example given in the Geneva Conventions Commentary, as these are acts which cut these women off from the outside world including their families, and cause grave injury to their dignity. Indeed, in the case of *Eichmann*, enslavement & deportation was considered to be degrading & a cause of inhuman suffering & torture.<sup>286</sup>

When considering trafficking, the suffering of the victim is evident (poor health, abuse, mental anguish), as is the serious injury (malnutrition, rape, abuse).

One difference found in these provisions is the use of the word "wilfully" in the provision prohibiting great suffering or serious injury. This

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<sup>283</sup> Para 543

<sup>284</sup> Jean S. Pictet (ed), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva: ICRC, (1958), p.598. See also Commentaries on the Geneva Conventions II and III.

<sup>285</sup> *Ibid*

<sup>286</sup> *Eichmann*, 36 ILR 1 at 340

embodies the concept of a special criminal intent. That is, the perpetrator must intend to bring about great suffering, or serious injury to body or health. A trafficker who abuses and enslaves a trafficking victim cannot deny that they did not intend to bring about great suffering or serious injury to the victim. Even if the perpetrator “merely” transported the victim without the infliction of physical abuse, echoing the established framework of international law, recklessness, or *dolus eventualis*, must be considered. This concept arises when someone performs an action despite awareness of the likely consequences of this action. Given the circumstances of trafficking- women are usually abducted, forced at gunpoint, hidden in the boot of a car, and kept locked in rooms at different points during their voyage- it would be unlikely that a trafficker could argue that they were not aware of the likely consequences of their conduct. In particular, a peacekeeper would be well aware of the consequences. After all, the whole point of trafficking is to exploit the victim.<sup>287</sup> The Russian KFOR soldiers trafficked women with the specific purpose of using them for sexual slavery, which would evidently bring about great suffering to these women. The US and Romanian UNMIK officers who assisted a brothel owner in the trafficking of women were unmistakably familiar with the brothel, and thus aware of the circumstances that were waiting for these trafficked women- suffering, and injury to body and health.

It may also be sufficient to argue gross or culpable negligence (*culpa gravis*).<sup>288</sup> This would mean that the perpetrator is certain that the prohibited consequence will not occur, despite being aware of the risk involved by the conduct. In *Blaskic*, the ICTY held that “... the *mens rea* constituting all the violations of art.2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence”.<sup>289</sup> This could be applied in the case when a person contends that they were just “giving a lift” to a friend, or in the case of command responsibility where a superior should have known of the commission of these war crimes by his/her subordinates. Thus, even with the additional burden of proving intent, or at a minimum, recklessness, trafficking would certainly fit within the boundaries of art. 8 (a) (iii). Likewise, trafficking would fall under art. 8 (b) (xxi). However, it would be much more preferable to see trafficking prosecuted as a grave breach, which would cement the status of trafficking as one of the most serious international crimes.

Another way trafficking could be prosecuted as a grave breach is under art. 8 (a) (vii), which uses the direct interpretation of art.147 of Geneva Convention IV in conjunction with art.49 of the same Convention. The element of crimes paper defines the parameters of the crime as:

1. The perpetrator deported or transferred one or more persons to another State or to another location.

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<sup>287</sup> UNIFEM, “Issue Brief on Trafficking”, [www.WomenWarPeace.org](http://www.WomenWarPeace.org)

<sup>288</sup> Cassese, *International Criminal Law*, supra note 169, p.58

<sup>289</sup> *Prosecutor v Tihomir Blaskic* IT-95-14-T, Para 152

2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.

This provision is somewhat broader than the similar provision under crimes against humanity, in that there is no requirement that the trafficked person be lawfully within the territory from which they are moved. This will enable prosecution of traffickers at any stage of the trafficking process, and not just those who remove the woman from her lawful territory.

Trafficking committed as a grave breach under art. 8 (b) (iii) & (vii) would have to be perpetrated against a person protected under the Geneva Conventions. Trafficked women are civilians, or non-combatants, and thus would fall within the category of protected persons. This fact would undoubtedly be evident to the traffickers.

### 4.2.3 Chapeau Elements

Like crimes against humanity, war crimes contain two chapeau elements:

1. The conduct took place in the context of and was associated with an international armed conflict/ an armed conflict not of an international character.
2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The first important difference to be determined is whether the conflict was international or internal in character, to ascertain which crime a soldier can be charged with<sup>290</sup>. As discussed in Part 2, opinion swings towards the fact that peacekeeping involvement renders any conflict international, and this paper will follow that interpretation. In the Appeals Chamber judgment of *Tadic*, the ICTY agreed with this principle, stating that “an armed conflict is international if it takes place between two states. In addition, in case of an internal armed conflict... it may become international... if (i) another state intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state.”<sup>291</sup> The fact that peacekeeping troops are considered to be subject to the laws of international humanitarian law substantiates this opinion. War crimes committed under the Rome Statute in an international armed conflict are deemed to be either grave breaches of the Geneva Conventions or other serious violations of the laws and customs applicable in international armed conflict. No matter what the mandate of the PKO, these are the laws that the

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<sup>290</sup> This difference between types of armed conflict is a considerable and unnecessary distinction made in the Rome Statute. For a discussion, see Cassese, *International Criminal Law*, *supra* note 169, p.61

<sup>291</sup> *Tadic*, IT-94-1-A, Para 84

PKOs are subject to, as dealt with in Part 2.<sup>292</sup> This is supported by the fact that when a peacekeeper is disciplined or charged of a crime in his/her home country, the disciplinary action is taken in a military court or tribunal and not a civilian court. Therefore, States view the crimes as within military domain, and therefore war crimes.<sup>293</sup>

In *Celebici*, the ICTY stated that “it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict”.<sup>294</sup> The Chamber went on to emphasise that:

it is not necessary that a crime ‘be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict.’<sup>295</sup>

The ICTR has held that

the term nexus should not be understood as something vague & indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually. No test, therefore, can be defined *in abstracto*. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists.<sup>296</sup>

If the words of the ICTR are to be followed, then it would be more difficult to prove trafficking as a war crime. However, this is too restrictive a definition to apply automatically when assessing the circumstances of the crime. In *Delalic*, the ICTY offers a different interpretation that still allows for a nexus with the armed conflict, yet does not require the crimes to be strictly a part of the armed conflict. The ICC has adopted a definition closer to that of the ICTY rather the more restrictive view of the ICTR. The Prep Com used the words ‘in the context of’ in the elements to follow the concept that “international humanitarian law applies from the initiation of... armed conflicts & extends beyond the cessation of hostilities until a general conclusion of peace is reached.”<sup>297</sup> A peacekeeping mission is always conducted in the context of armed conflict, even if it is after the cessation of hostilities. Therefore these crimes will fall within the realm of war crimes even when actual circumstances do not amount to hostilities.

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<sup>292</sup> It must be remembered that the soldiers are always subject to customary international humanitarian law.

<sup>293</sup> For example, the Australian Defence Forces are always subject to the Criminal Code Act, which contains war crimes, crimes against humanity and genocide. Crimes conducted by the ADF within Australia are dealt with under different legislation and regulations.

<sup>294</sup> Para 193

<sup>295</sup> Para 196

<sup>296</sup> *Prosecutor v Clement Kayishema and Obed Ruzindana* ICTR-95-1-T, paras 185-8

<sup>297</sup> *Tadic*, Appeals Chamber, IT-94-1-AR72, para 70

It is more than simple to reveal the link between armed conflict and trafficking, rape, enforced prostitution and sexual slavery. This is especially so given the fact that the presence of peacekeeper increases the demand for sex workers, and that the peacekeepers would not be engaging in these crimes if they were not in these unstable situations of conflict:

Trafficking and sexual slavery are inextricably linked to conflict. Armed conflict increases the risk of women being trafficked across international border to be used in forced labour schemes that often include sexual slavery and/or forced prostitution. Trafficking has flourished in environments created by the breakdown of law and order, police functions and border controls during conflict, combined with globalisation's free markets and open borders. As well, criminal networks involved in the arms or drug trades often expand their business to include trafficking in persons.<sup>298</sup>

A perfect example of this is the case of Kevin Warner, who purchased a woman and a gun in the same "deal".

The situations in which peacekeepers are found are ones of instability, in territories with little or no law and order infrastructure, caused by armed conflict. It is well noted that the economic desperation of the regions, which particularly affects women, creates a breeding ground for trafficking and forced prostitution. It is precisely because of this context of armed conflict that they are able to engage in trafficking and sexual slavery.

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<sup>298</sup> UNIFEM, "Issue Brief on Trafficking", *supra* note 287.

## 5 Conclusion

As is evident, there are many issues that arise when considering whether peacekeepers can be prosecuted in the ICC for the crimes against women of trafficking, sexual slavery, enforced prostitution and rape. There are substantial difficulties in the ICC obtaining jurisdiction in the first place, due to the immunities granted to peacekeeping personnel. These immunities are granted to both UN personnel and UN-affiliated personnel. While immunities may differ between military and civilian personnel, in reality the immunities are applied in a consistent standard. Local authorities do not heed the differences in the immunities, such as those found in the Directives for Disciplinary Matters, and are in reality probably unaware of these differences that may enable them to obtain jurisdiction over civilian police officers and military observers. Local authorities in regions where peacekeeping missions are in operation, and even those in surrounding regions should be educated about the precise application of these immunities. It should be made clear which laws are applicable.

Regulations, bulletins, guidelines, agreements and conventions all allow for the waiver of these immunities. Should these immunities be waived, then the ICC can obtain jurisdiction over peacekeepers suspected of committing these atrocities. The stories told in this paper show that the waiver of immunities is entirely possible. However in reality, these immunities are rarely waived. Out of all the cases of sexual slavery, rape, trafficking and enforced prostitution mentioned in this paper, only two resulted in criminal prosecution (the CivPol officer in East Timor and Frank Rhongi in Kosovo). Notably, these were both for rape. None of the cases of trafficking, sexual slavery and enforced prostitution resulted in effective disciplinary or criminal action. The cases of violations of women's rights have largely gone ignored, swept under the rug as unimportant, subsidiary to crimes committed against men. It is only through the advancement of women's rights that the norms of war are being challenged, that attention is being brought to these crimes and pressure is being placed on States and organisations to ensure accountability. Unfortunately it is a slow process to obtain complete and assured accountability. To change the mechanics of the system, a metamorphosis of attitudes is required. The unwillingness of governments to admit to atrocities committed or to compensate women for these atrocities despite public recognition of the commission of these crimes shows that much more work must be done before a comprehensive change in attitude will occur.<sup>299</sup> The ad hoc criminal tribunals have been an excellent start to prosecuting crimes against women, and the hard work and pressure of women's rights groups<sup>300</sup> resulted in the inclusion of a

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<sup>299</sup> Such as is the case with the Tokyo Women's Tribunal

<sup>300</sup> The Women's Caucus for Gender Justice in the International Criminal Court. The Women's Caucus was one of many NGOs to participate in the negotiations of the ICC Statute. Others include: Amnesty International, Human Rights Watch, Federation Internationale des Lignes des Droits de l'Homme, the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, and the World Federalist Movement. See [www.iccnw.org](http://www.iccnw.org)



prohibition of these crimes in the Rome Statute of the ICC. This shows the effect that pressure from the public and NGOs can have. Consistent pressure from NGOs and the public as a whole will ensure that IGOs and States are continuously aware that this behaviour is unacceptable, and that if they want to be freed of this pressure they must maintain unfailing practice of waiving immunities for peacekeepers who commit these crimes. Hopefully the newly adopted Relationship Agreement between the UN and the ICC will result in lifting of immunities by the UN according to its obligations in the Relationship Agreement.

Yet even if immunities are waived and the ICC acquires jurisdiction, the elements of the crimes themselves under the Rome Statute must be satisfied. This does not seem entirely possible, particularly in relation to the chapeau elements, and to trafficking, which is not expressly prohibited by the provisions of the Rome Statute itself. It is highly unlikely that a peacekeeper will ever be prosecuted for a crime against humanity, given the high requirement in the chapeau elements of the crime being a part of a widespread or systematic attack. A peacekeeper being convicted of a war crime is much more likely, and entirely possible. This will in the end depend upon the attitude of the Court in considering the circumstances of a peacekeeping mission as “in the context of” armed conflict. Given that international humanitarian law is applicable to peacekeeping personnel, it is highly improbable that the Court would not consider the crimes of peacekeeping personnel to be war crimes. Thus, rape, trafficking and sexual slavery would easily be considered to be a war crime. More difficulty would arise in relation to enforced prostitution, and would depend entirely upon the circumstances of the crime itself and whether the elements of pecuniary or other advantage were satisfied.

In the end, legally, it seems very, very difficult that peacekeepers can be prosecuted by the ICC for these crimes. The issues of immunity and jurisdiction are rife with political issues, and few of the crimes themselves fall within the subject jurisdiction of the ICC. Perhaps most importantly, it is in reality unlikely that the Chief Prosecutor of the ICC will take steps to prosecute peacekeepers.<sup>301</sup> His agenda prioritises prosecuting the big fish- the leaders of regimes committing genocide, crimes against humanity and war crimes on a massive scale. Mr Moreno-Ocampo places more emphasis on cooperating with nation states and encouraging and educating them to prosecute these peacekeepers on a national level than on seeing these offenders in the ICC.

Thus, despite many suggestions that the ICC should fill the lacuna created by unwilling nation states and a messy UN accountability system, the ICC should not be looked to as a real solution for the prosecution of peacekeepers for the crimes against women of sexual slavery, trafficking, rape and enforced prostitution. Instead, it must be up to the UN to come up with a vastly improved disciplinary system, and to the individual states to not shy away from taking action in these situations.

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<sup>301</sup> Interview with Chief Prosecutor Luis Moreno-Ocampo, 26 September 2004

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